

Merchant Cash & Capital, LLC v South Jersey Speed LLC
2018 NY Slip Op 30395(U)
January 31, 2018
Supreme Court, Nassau County
Docket Number: 604673/16
Judge: Anna Anzalone
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SUPREME COURT - STATE OF NEW YORK

PRESENT: *Honorable Anna R. Anzalone*
Justice of the Supreme Court

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MERCHANT CASH AND CAPITAL, LLC,

TRIAL/IAS, PART 20
NASSAU COUNTY

Plaintiff,

Index No. 604673/16

- against -

Motion Seq. No.:5

SOUTH JERSEY SPEED LLC d/b/a CAR
AND AUDIO OF SOUTH JERSEY and
RONALD MAKINO,

Defendants.

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The following papers read on this motion:

Notice of Motion	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion by Plaintiff for an Order of this Court, pursuant to CPLR 3212,
granting summary judgment against the Defendants, is determined as hereinafter
provided.

This action arises out of a Merchant Agreement and corresponding
addendum (Agreement), dated November 11, 2015 (see Plaintiff's exhibit F)
whereby Plaintiff, MERCHANT CASH AND CAPITAL, LLC ("MCC")
purchased from corporate defendant, SOUTH JERSEY SPEED LLC d/b/a CAR

AND AUDIO OF SOUTH JERSEY (“SJS”), a percentage of the proceeds of each future sale until a certain sum had been paid. For the purchase price of \$19,800, MCC purchased \$25,344 of SJS’ future receivables. The Agreement was personally guaranteed by individual Defendant RONALD MAKINO, President of SJS.

MCC alleges that, after entering the agreement and paying the purchase price, SJS breached its obligation under the Agreement while continuing to generate sales proceeds on or about May 24, 2016. MCC further alleges that SJS had made payments totaling \$17,458.44 under the Agreement, leaving a balance of \$7,885.56. MCC filed the Summons and Complaint on June 23, 2016 (see Plaintiff’s exhibit B). The Defendants filed an Answer on July 25, 2016 (see Plaintiff’s exhibit C).

By Order of this Court dated December 13, 2016, the Plaintiff’s motion to dismiss the Defendants’ affirmative defenses was granted (see Plaintiff’s exhibit D). The Defendants’ motion to reargue was denied by Order dated May 24, 2017 (*Id.*).

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v. New York*

Univ. Med. Ctr., 64 N.Y.2d 851 [1985], see also *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], see also *Zuckerman v. City of New York*, *supra*). However, bald, conclusory assertions or speculation and “[a] shadowy semblance of an issue” are insufficient to defeat summary judgment (*Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439 [2016]).

In order to maintain a cause of action alleging breach of contract, the Plaintiff must establish (1) formation of a contract between the Plaintiff and the Defendants, (2) performance by the Plaintiff, (3) the Defendants’ failure to perform, and (4) resulting damages (see *Davy v. JP Morgan Chase & Co.*, 123 A.D.3d 870 [2d Dept. 2014]; see also *Brualdi v. Iberia*, 79 A.D.3d 959 [2d Dept. 2010]).

In support of this motion, Plaintiff submits, *inter alia*, the Agreement and the affidavit of Joseph Boninfante, the Vice President of Collections for MCC.

In his affidavit, Mr. Boninfante states that, pursuant to the Agreement, MCC fulfilled its obligations, including payment of the \$19,800 purchase price, adding

that the Defendants confirmed receipt of the purchase price. Mr. Boninfante further states that, on or about May 24, 2016, the Defendants breached the Agreement by diverting funds away from the designated deposit account, thus preventing Plaintiff from collecting, while Defendants continued to generate sales proceeds. Mr. Boninfante claims that, following this breach, the Defendants continued to earn receivables in excess of \$63,713.00, which would have been enough to pay the outstanding balance at the percentage designated in the Agreement. Mr. Boninfante concludes that the Defendants' breach has caused damages in the amount of \$7,885.56, plus interest and fees.

The evidence sufficiently establishes the Plaintiff's *prima facie* entitlement to judgment as a matter of law (*see Winegrad v. New York Univ. Med. Ctr., supra*). Plaintiff has demonstrated that it performed under the Agreement and that the Defendants breached the Agreement, causing damages. Accordingly, the burden shifts to the Defendants to come forward with evidence to overcome the Plaintiff's submissions by demonstrating a triable issue of fact (*see Alvarez v. Prospect Hosp., supra*).

In opposition, the Defendants offer, *inter alia*, the affidavit of Ronald Makino. The Defendants admit in their Answer that they entered into the Agreement and that Plaintiff performed by paying the purchase price. Further, the

Defendants fail to dispute that they breached the Agreement or that their breach caused the Plaintiff damages.

The Defendants focus instead on the Agreement's reconciliation provision, which provides for adjustments to be made to the daily payment amount pursuant to fluctuations in the Defendants' revenues. The Defendants argue that the reconciliation provision was structured in such a way that any adjustment would require a cumbersome, timely process, forcing them to continue paying the daily payment amount while awaiting the adjustment, even if they are not making any sales. The Defendants argue that this reconciliation provision is unenforceable, as it prevents the parties from ever actually adjusting the daily payment amount.

Contrary to the Defendants' contentions, Mr. Makino states in his affidavit that "[j]ust before my business went totally under, MCC had gratuitously reduced my daily payment to \$100." Here, Mr. Makino indicates that some procedure existed, aside from the burdensome process articulated by the Defendants, which allowed for an adjustment of the daily payment amount. Further, the Defendants make no claim that they actually requested an adjustment to the daily payment amount, or that their receivables had dropped such that an adjustment was even needed. Nor do they allege that ceasing payment was the result of a business failure, for which Plaintiff carried the risk and therefore would not have been a

breach of the Agreement. These potential, conditional constraints in seeking an adjustment do not negate the reconciliation provision and are insufficient to raise an issue of fact (*see Rapid Capital Fin., LLC v. Natures Mkt. Corp.*, 57 Misc. 3d 979 [Sup. Co. Westchester Co. October 11, 2017]).


Accordingly, it is hereby

ORDERED, that the Plaintiff's motion, pursuant to CPLR 3212, for summary judgment is **GRANTED**.

This shall constitute the Decision and Order of this Court.

DATED: January 31, 2018

ENTER:


Hon. Anna R. Anzalone, JSC

ENTERED
FEB 08 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE