

Strategic Funding Source, Inc. v Gill Inv. Group, LLC
2018 NY Slip Op 32149(U)
August 31, 2018
Supreme Court, New York County
Docket Number: 159168/15
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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STRATEGIC FUNDING SOURCE, INC.,

Plaintiff

Index No. 159168/15

v

DECISION AND ORDER

GILL INVESTMENT GROUP, LLC, d/b/a NOELIA
ITALIAN KITCHEN and KAISER GILL, a/k/a
KAISER MAHMOOD GILL,

MOT SEQ 001

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover for breach of an agreement for the purchase of receivables, the plaintiff moves pursuant to CPLR 3212 for summary judgment on the complaint. The defendants oppose the motion insofar as it seeks relief against the individual defendant, Kaiser Gill, but expressly do not oppose the motion insofar as it seeks relief against the corporate defendant, Gill Investment Group, LLC (GIG).

The motion is granted to the extent that the plaintiff is awarded summary judgment against GIG on the first cause of action, which is to recover for breach of contract, against Gill on the third cause of action, which is to enforce his guaranty, and on the issue of liability against both defendants on the fourth cause of action, which is to recover contractual

attorneys' fees, and the motion is otherwise denied.

II. BACKGROUND

This action arises from GIG's alleged failure to pay its obligations under a contract for the purchase of its receivables, and Gill's failure to satisfy GIG's obligation thereunder pursuant to his personal guarantee.

In support of its motion, the plaintiff submits a copy of the pleadings, an attorney's affirmation, and the affidavit of David Wolfson, its vice president of risk management and asset recovery, who asserts that he has knowledge of the plaintiff's business, corporate records, and billing practices. The plaintiff also submits the agreement referable to its purchase of GIG's receivables, dated June 17, 2015, which includes a personal guaranty signed by Gill, a demand letter, and a merchant statement.

In his affidavit, Wolfson avers that the plaintiff purchased future receivables from GIG for \$120,000.00, in consideration of GIG's promise to repay it the sum of \$148,800.00 in future receivables, and to make regular daily payments from a bank account to satisfy that obligation. He asserts that GIG paid the plaintiff only \$8,325.57, and ceased making payments in or about August 10, 2015, leaving an aggregate unpaid obligation of \$140,474.43, plus interest from the date of breach. Wolfson also

points out that the agreement permits the plaintiff to recover a \$2,500.00 default fee and \$5,000.00 processor fee in the event of a default. Wolfson explains that, in its demand letter, the plaintiff thus demanded that GIG pay the total of \$147,974.43 by August 20, 2015, and that failure to pay by that date would result in litigation. Wolfson identifies the guaranty executed by Gill, which unconditionally guaranteed payment of all of GIG's obligations under the agreement, including any obligation to pay attorneys' fees if the plaintiff resorted to legal action to enforce the agreement.

III. DISCUSSION

A. First Cause of Action--Breach of Contract Against GIG

The plaintiff's proof establishes, prima facie, its entitlement to judgment as a matter of law on the first cause of action, which is to recover for breach of contract against GIG, by showing that there was the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). Since the defendants do not oppose the motion insofar as it seeks relief against GIG, they have failed to raise a triable issue of fact in this regard, and summary judgment must be awarded to the plaintiff on the first cause of action.

B. Second Cause of Action--Account Stated Against GIG

The second cause of action seeks to recover on an account stated. The plaintiff, however, has not provided the court with proof that GIG received and retained any statements of account, billing, or invoices without objection within a reasonable time, and paid portion of the indebtedness pursuant to those account statements. See Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1st Dept 2004); Shea & Gould v Burr, 194 AD2d 369 (1st Dept. 1993). In fact, it submits no proof whatsoever that it delivered such statements of account to the defendants. Hence, that branch of the motion which is for summary judgment on the second cause of action must be denied, regardless of the sufficiency of the defendants' opposition papers.

C. Third Cause of Action--Enforcement of Guaranty Against Gill

The plaintiff also demonstrates, prima facie, that the terms of the subject guaranty is clear, unambiguous, absolute, and unconditional. "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1st Dept. 1991).

Contrary to the defendants' contention, their submissions fail to raise a triable issue of fact as to whether Gill's unconditional guarantee was modified by language set forth in e-mail correspondence exchanged prior to the execution of the agreement.

In the first instance, copies of these email messages are attached to an unnotarized statement by Gill, which is insufficient to authenticate them. Although a declarant may employ an affirmation in lieu of an affidavit if he or she has religious objections to swearing an oath (see Slavenburg Corp. v Opus Apparel, 53 NY2d 799 [1981]), the affirmation must still be notarized. See id.; Diaz v Tumbiolo, 111 AD3d 877 (2nd Dept. 2013); People v Eisenstadt, 48 Misc. 3d 56 (App. Term, 9th & 10th Jud. Dists. 2015); CPLR 2300.

Even were the court to consider Gill's statement and the email exchange, they would fail to raise a triable issue of fact. Two weeks prior to the execution of the contract, Gill suggested that the guarantee be amended to add the following: "Guarantor, Kaiser Gill, is not guaranteeing payment should the business dissolve or is terminated in the normal course of business and through no affirmative action of Kaiser Gill." Although Wolfson initially told Gill that such an amendment would be "okay," and that he would have the writing modified accordingly, Wolfson changed his mind before the final agreement was executed,

primarily on the ground that the proposed language was vague. He thereafter indicated that he would not accede to any changes. Gill later executed the unmodified, unconditional guarantee, which was set forth in an agreement that contained a merger clause. The parol evidence rule bars Gill from contradicting or altering the terms of the written agreement by reference to the email exchange, particularly in light of that clause. See MPEG LA, L.L.C. v Toshiba Am. Info. Sys., Inc., 161 AD3d 426 (1st Dept. 2018); Dogwood Residential, LLC v Stable 49, Ltd., 159 AD3d 490 (1st Dept. 2018).

D. Fourth Cause of Action--Attorneys' Fees

The plaintiff has also demonstrated its prima facie entitlement to judgment as a matter of law on the issue of liability on the fourth cause of action, which seeks an award of attorney's fees, since it has shown that it is prevailing in this action and that the subject agreement contains an unambiguous provision allowing it to recover such fees under these circumstances. See Dee Cee Assoc. LLC v 44 Beehan Corp., 148 AD3d 636 (1st Dept. 2017).

The defendants failed to raise a triable issue of fact on the substantive causes of action, and make no argument as to whether the plaintiff is entitled to fees. Hence, summary judgment on the issue of liability on the fourth cause of action

must be awarded to the plaintiff, with the amount of attorneys' fees to be recovered determined by a referee.

E. Interest

The plaintiff is entitled to interest from August 20, 2015, the date by which it demanded that payment be made. See CPLR 5001.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment on the first cause of action, which is to recover against the defendant Gill Investment Group, LLC, d/b/a Noelia Italian Kitchen for breach of contract, on the third cause of action, which is to recover against the defendant Kaiser Gill, a/k/a Kaiser Mahmood Gill, on a personal guaranty, and on the issue of liability on the fourth cause of action against both of the defendants, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment:

(a) in favor of the plaintiff, Strategic Funding Source, Inc., and against the defendant Gill Investment Group, LLC, d/b/a Noelia Italian Kitchen, on the first cause of action in the sum

of \$147,974.43, plus statutory prejudgment interest from August 20, 2015, and (b) in favor of the plaintiff, Strategic Funding Source, Inc., and against the defendant Kaiser Gill, a/k/a Kaiser Mahmood Gill, on the third cause of action in the sum of \$147,974.43, plus statutory prejudgment interest from August 20, 2015, with the liability of these defendants to be joint and several; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for an award of contractual attorneys' fees; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of

this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of the costs and attorneys' fees it incurred within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further.

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a])

(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

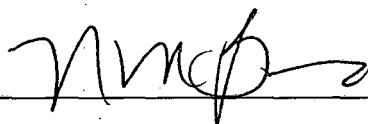
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiff may enter an amended judgment adding the award of attorneys fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendants within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

Dated: August 31, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON