

**Merchant Cash and Capital, LLC v Novo Interiors,  
LLC**

2019 NY Slip Op 30835(U)

March 21, 2019

Supreme Court, New York County

Docket Number: 651567/2017

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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MERCHANT CASH AND CAPITAL, LLC,

Plaintiff,

- v -

NOVO INTERIORS, LLC, IAN DEFONZE, ANGEL VALDEZ

Defendant.

INDEX NO. 651567/2017

MOTION DATE 01/09/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for JUDGMENT - SUMMARY

In this action to recover damages for breach of contract, breach of a personal guaranty, and for contractual attorneys' fees, the plaintiff moves for summary judgment on the complaint pursuant to CPLR 3212 and to strike the affirmative defenses of the defendants as inadequately plead pursuant to CPLR 3014. No opposition is submitted. The motion is granted to the extent that the court awards summary judgment on the plaintiff's first, second, third, and fourth causes of action, which are to recover for breach of contract and breach of a personal guaranty, and for contractual attorneys' fees, the matter is referred to a referee to hear and report on the issue of the appropriate award of attorneys' fees, and the branch of the motion seeking to strike the defendants' affirmative defenses is denied as academic.

This action arises from the failure of the defendant Novo Interiors, LLC (Novo), to pay its obligations under a contract for the purchase of receivables, and the failure of the defendants Ian DeFonze and Angel Valdez to satisfy Novo's obligation thereunder pursuant to personal guaranty agreements signed by DeFonze and Valdez. The plaintiff alleges that it entered into an agreement for the purchase of future receivables with Novo, whereby it agreed to pay \$197,208.00 to Novo for receivables in the amount of \$270,174.96. In conjunction with entry into the agreement, the parties entered into a letter agreement which provided that the daily payment amount owed by Novo would be \$1,072.13. The plaintiff further states that personal guaranties were executed by DeFonze and Valdez, whereby DeFonze and Valdez unconditionally guaranteed the performance of Novo's obligations under the subject agreements. The plaintiff states that on March 8, 2017, after making some payments under the agreements, Novo refused to remit its daily payment and has continued to do so, leaving an outstanding balance due and owing to the plaintiff of \$201,027.50.

It is well settled that the proponent of a motion for summary judgment is entitled to that relief upon a prima facie showing, by proof in admissible form, that there are no triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets

this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of its motion, the plaintiff submits, *inter alia*, the complaint, an affidavit of Doreen Hoffman, an employee of the plaintiff's collecting agent, and copies of the receivables sale agreement, letter modification agreement, and guaranties signed by the defendants. The plaintiff's proof establishes, prima facie, its entitlement to judgment as a matter of law on the first and second causes of action, which are to recover for breach of contract against Novo, 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 (1<sup>st</sup> Dept. 2009). Since the defendants do not oppose the motion, they have failed to raise a triable issue of fact in opposition to the plaintiff's showing, and summary judgment must be awarded to the plaintiff on the first and second causes of action.

The plaintiff also demonstrates, prima facie, that the terms of the subject guaranty are 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 (1<sup>st</sup> Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1<sup>st</sup> Dept. 1991). Since the defendants do not oppose the motion, no triable issue of fact has been made as to the enforceability of the guaranty. Accordingly, summary judgment on the third cause of action is granted.

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 (1<sup>st</sup> Dept. 2017). Since the plaintiff does not submit proof of the amount to which it is entitled, the issue is referred to a referee to hear and report.

Accordingly, it is,

ORDERED that the plaintiff's motion for summary judgment on the complaint is granted, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk shall enter a judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of \$201,027.50, with statutory interest from March 8, 2017; 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 reasonable attorneys' fees and costs under the subject agreement; 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](mailto: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/supctmanh](http://www.nycourts.gov/supctmanh) 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 for the 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 attorneys' fees within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of the 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 this order.

This constitutes the Decision and Order of the court.

3/21/2019  
DATE

  
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NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

**HON. NANCY M. BANNON**