Funding Strategy Partners, LLC v AG Equip. Direct, LLC
2019 NY Slip Op 31234(U)
April 12, 2019
Supreme Court, New York County
Docket Number: 655479/2018
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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FUNDING STRATEGY PARTNERS, LLC,

Plaintiff,

-against-

AG EQUIPMENT DIRECT, LLC and BRANDON TURLINGTON,

Defendants,

----------X

Index No.: 655479/2018

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Plaintiff Funding Strategy Partners, LLC moves, pursuant to CPLR 3215, for a default judgment against defendants AG Equipment Direct, LLC (AG) and Brandon Turlington. The motion is unopposed. For the reasons that follow, plaintiff's motion is granted in part.

This case arises from a contract titled "Revenue Purchasing Agreement" and dated January 10, 2017 (the Contract, Dkt. 3) between (1) plaintiff, a New York LLC located in Pennsylvania, (2) defendant AG, a North Carolina LLC and (3) Brandon Turlington, a North Carolina resident, as AG's guarantor of certain obligations. Under the Contract, plaintiff paid a purchase price of $1.25 million in exchange for certain of AG's revenues, accounts and accounts receivable (Revenue), up to a maximum limit of $1,690,650 (Recovery Amount) (Contract at 2 ¶¶ 1-2). Of the purchase price, $156,250 was to be placed in reserve and remitted to AG "when the Recovery Amount has been paid in full" (*id.* at 2 ¶ 3). The Contract requires AG to make monthly payments of $80,300 "from the Revenue, or in the event of a shortage in the Revenue, from [AG[1]] … until

[1] This court expresses no opinion on whether this purported revenue purchasing agreement with recourse obligations is a "loan" subject to criminal usury laws (*see e.g*, *Clever Ideas, Inc. v 999 Restaurant Corp.*, 2007 NY Slip Op 33496(U) [Sup Ct NY County 2007]). Under New York law, the affirmative defense of usury is waived by a defaulting defendant (*see Power Up Lending Grp., Ltd. v Cardinal Res., Inc.*, 160 AD3d 674, 675–76 [2nd Dept 2018]).

the Recovery Amount is paid in full" (*id.* at 2 ¶ 5 [emphasis added]; *id.* at 11). Amounts not paid within a five-day grace period accrue interest at a monthly rate of 1.5% from the due date until paid in full (*id.* at 2-3 ¶ 5). The Contract further specified plaintiff was "entitled to recover from [AG] any and all reasonable costs and attorney's fees" in enforcing its rights under the Contract (*id.* at 8 ¶ 36). It also required AG to submit monthly sales reports and other documentation to plaintiff (*id.* at 8 ¶ 38). Turlington "unconditionally guarantee[d] payment of the Recovery Amount, as well as all costs of collection, including but not limited to, attorney's fees" (Contract at 7 ¶ 32).

On the same date that the Contract was executed, the parties also entered into a contract titled "Security Agreement" (with the Contract, Agreements) made effective as of November 9, 2016 (Dkt. 2 [Security Agreement] at 17). Both Agreements granted plaintiff a security interest in all of AG's accounts receivable, property and accounts (the Collateral) as collateral against AG's default on its obligations under the Contract (Security Agreement at 2; Contract at 3). Under the Contract, AG agreed not to encumber the Collateral until plaintiff received the entire Recovery Amount upon pain of a "penalty" of $5,000 per occurrence, "notwithstanding any other rights and remedies" (Contract at 3 ¶ 9).[2] Failure to pay under the Contract is an event of default allowing plaintiff to accelerate the maturity of such obligations against AG (Security Agreement at 9-10).

AG expressly consented to jurisdiction of the Supreme Court of the State of New York, New York County (Security Agreement at 14, 17).[3] Both Agreements require application of New York law to disputes (Contract at 8; Security Agreement at 13-14).

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[2] Unenforceability of a penalty is an affirmative defense on which defendant bears the burden to show readily ascertainable damages at time of contract or conspicuous disproportionality to foreseeable losses (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 379-80 [2005]).

[3] Turlington "personally guaranteed" the Security Agreement on unstated terms. Lack of personal jurisdiction (e.g., over Turlington [*see e.g.*, *First Nat. Bank & Tr. Co. v Wilson*, 171 AD2d 616,

Plaintiff commenced this action by summons and verified complaint filed November 2, 2018 (Dkt. 1). Plaintiff pleads the following causes of action, which are described and numbered as they are set forth in the complaint: (1) breach of contract against AG; (2) legal fees against AG; (3) breach of guaranty against Turlington; and (4) legal fees against Turlington. Service of process on AG and Turlington was effected by personal service in accordance with New York Limited Liability Company Law § 304(d) by hand delivery to Turlington on November 14, 2018 (Dkt. 20 [Affidavits of Service and Affidavits of Conformity]).[4] Plaintiff now moves for default judgments on the first and third causes of action against AG and Turlington, respectively, awarding plaintiff $942,801.50 with interest at 1.5% per month from October 20, 2018, plus $10,000 and, on the second and fourth causes of action, a hearing on attorney's fees for which AG and Turlington, respectively, are liable.

In support of its motion for a default judgment, plaintiff proffers its complaint (VC), which was verified by its managing member, Chris Amazeen (Dkt. 1), an affidavit from Amazeen (Dkt. 22) and an affidavit from its attorney, Robert Strassberg (Dkt. 14). Plaintiff also submits UCC-1 financing statements dated December 6, 2017 and October 17, 2018 to show that AG encumbered the Collateral on two separate occasions, in violation of the Contract and the Security Agreement (Amazeen Aff. ¶ 4; Dkt. 24 and 25 [financing statements]). Amazeen attested, based on his personal knowledge and his review of corporate records, that plaintiff transferred $1,093,750 to AG or for AG's benefit and held $156,250 in reserve (Amazeen Aff. ¶ 3; *see also* Dkt. 23 [bank

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618 [1st Dept 1991]) is an affirmative defense that is generally waived pursuant to CPLR 3211(e) unless timely raised in a motion to dismiss or responsive pleading.

[4] The North Carolina Secretary of State website Business Entity Search website (*available at* https://www.sosnc.gov/online_services/search) identifies Turlington as AG's registered agent and sole member. Plaintiff, through its attorney, additionally mailed the summons and complaint to AG and Turlington on November 15, 2018 (Dkt. 21 [Affirmations of Additional Mailing]). Such service by mail was effective upon AG pursuant to the Security Agreement (Dkt. 2 at 14 ¶ 24).

records]). Between February 20, 2017 and July 20, 2018, AG paid $704,898 to plaintiff, but failed to provide the monthly financial reports required under the Contract (VC ¶¶ 16, 21-22; Dkt. 26 [schedule]). By letter dated September 19, 2018, plaintiff demanded an accelerated payment of $1,099,052, consisting of $985,752.00 in principal, $113,299.50 in interest, and a $0.50 rounding error (VC ¶ 31; Dkt. 4 at 2 [9/19/2018 letter]; Strassberg Aff. at 5; Amazeen Aff. ¶ 5; Dkt. 26 [calculation as of Sept. 20, 2018]).[5] Plaintiff, however, overstated the amount of interest owed by $47.52.[6] Upon filing suit, plaintiff applied the $156,250 reserve to principal and interest owed, leaving only principal outstanding[7] (Amazeen Aff. ¶ 3; *see* Dkt. 26 [schedule]).

To succeed on a motion for a default judgment, the plaintiff must submit proof of (1) service of process, (2) the facts constituting the claim and (3) the default (CPLR 3215[a]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]; *see Whittemore v Yeo*, 117 AD3d 544, 545 [1st Dept 2014]). A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability" (*Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] ["defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable

[5] While the Contract specifies a payment deadline of the "first business Monday of every month" (Dkt. 3 at 2 ¶ 5), plaintiff's motion papers afford a more liberal "Final Due Date," the 20th of each month (*see* Dkt. 26 [schedule]).

[6] On May 20, 2017, AG paid $80,498 when only $80,300 was then-owed under the Contract (VC ¶ 16). Plaintiff credited the $198 surplus toward payment of the Recovery Amount. However, plaintiff failed to credit the surplus toward the "deficiency" calculation for monthly interest beginning in June 2017 (*compare* Dkt. 26 *with* Dkt. 9). Accordingly, the court will deduct $47.52 from the requested award ($198 × 1.5% monthly interest × 16 months = $47.52).

[7] $985,752 principal + $113,299.50 interest - $156,250 reserve = $942,801.50 principal.

inferences that flow from them"]). The defaulting defendant does not, however, admit the plaintiff's conclusion as to damages (*see Rokina*, 63 NY2d at 730; CPLR 3215).

Plaintiff carried its burden, on this motion for a default judgment, to prove defendants' breach of the Agreements and plaintiff's entitlement to an award of $942,753.98[8] plus interest against Turlington and AG, plus $10,000 against AG. Plaintiff failed to establish Turlington's ***personal*** liability for (1) contractual interest and (2) the $10,000 recoverable under paragraph nine of the Contract (*see Pollina v Blatt*, 262 AD2d 384, 385 [2d Dept 1999] ["A guarantee is a separate undertaking and may impose lesser or greater collateral responsibility on the guarantor"], citing *American Trading Co. v Fish*, 42 NY2d 20, 26 [1977]). Plaintiff is entitled to judgment against AG and Turlington, jointly and severally, for owed principal plus ***statutory*** interest, and against ***only AG*** for the amount by which contractual interest exceeds the statutory interest.

In lieu of inquest on the issue of reasonable attorney's fees, the court will direct plaintiff to submit proof of its attorney's fees within two weeks or else waive its claim to attorney's fees. Once the court determines the amount of reasonable attorney's fees (or fees are waived), it will direct the clerk to enter a single judgment for amounts owed under the Agreements. Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is granted in part; and it is further

ORDERED that within 14 days of the entry of this order on NYSCEF, plaintiff shall e-file and, that same day, send to defendants, by registered or certified mail and by first-class mail, a letter to the court not to exceed five pages setting forth its claimed attorney's fees, explaining why such fees are reasonable and attaching documentary proof thereof, along with a copy of this order with notice of entry; and it is further

[8] $942,801.50 requested award − $47.52 overstated interest = $942,753.98.

ORDERED that if plaintiff seeks attorney's fees, defendants may properly oppose them in an e-filed letter (AG must oppose through counsel) within 20 days of the e-filing of plaintiff's submission; and it is further

ORDERED that if plaintiff fails to e-file its letter and an affidavit of service and to email a copy of the submission along with the e-filing confirmation to ekimmel@nycourts.gov within 14 days of entry of this order on NYSCEF, plaintiff shall be deemed to have waived its claims for attorney's fees and the clerk will be directed to enter judgment in accordance with this decision and order; and it is further

ORDERED that if plaintiff wishes to waive attorney's fees and have judgment entered immediately in accordance with this decision and order, counsel must e-file a letter setting forth plaintiff's desire to have judgment entered without further proceedings and must mail it to defendants by registered or certified mail and first-class mail along with a copy of this order with notice of entry and e-file proof of service. Counsel must email the letter, proof of service and e-filing confirmations to ekimmel@nycourts.gov; it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the defendants by registered or certified mail and by first class mail no later than 14 days of entry of this order on NYSCEF and shall efile proof of service within three days thereafter.

Dated: April 19, 2019

ENTER:

Hon. Jennifer G. Schecter, J.S.C.