

FC Marketplace LLC v Queen Jane Day Spa Inc.

2019 NY Slip Op 31699(U)

June 17, 2019

Supreme Court, New York County

Docket Number: 151753/2018

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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FC MARKETPLACE LLC
Plaintiff,

- v -

QUEEN JANE DAY SPA INC. AND MAN JING LIU,
Defendant.

INDEX NO. 151753/2018
MOTION DATE 10/11/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - SUMMARY.

For the reasons set forth below and on the record (6/17/19), FC Marketplace LLC's (FC Marketplace) motion for summary judgment is denied with leave to renew.

RELEVANT FACTS

Reference is made to a certain agreement titled Commercial Promissory Note (the Note) dated September 2, 2015 and executed by Queen Jane Day Spa (Queen Jane Spa) as borrower in favor of FC Marketplace as lender in the original principal amount of \$100,000 (NYSCEF Doc. No. 13). The Note was signed by Man Jing Liu as "Owner" and required Queen Jane Spa to make monthly payments in the amount of \$3,282.88, commencing October 2015 and for 36 months each consecutive month thereafter.

Reference is also made to a certain Continuing Guaranty (the Guaranty), dated September 2, 2015 and executed by Ms. Liu, that personally guaranteed all of Queen Jane Spa's obligations in connection with the Note up to the sum of \$118,183.68 for "Obligations" and "all costs, attorneys' fees and expenses of Lender arising out of the

enforcement of obligations and all indemnity liabilities of Guarantor under this Guaranty” (the **Guaranteed Liability Amount**) (NYSCEF Doc. No. 13).

Queen Jane Spa allegedly defaulted on its obligations under the Note in May of 2017 by virtue of its failure to remit the required payment when due. To that end plaintiff submits an affidavit from John Potter, the In-House Recovery Manager of Funding Circle USA, Inc., the sole member and owner of FC Marketplace (NYSCED Doc. No. 12). Mr. Potter attests that:

15. On or about May 8, 2017, [Queen Jane Spa] defaulted under the Note and Security Agreement by virtue of its failure to remit the required payments pursuant to the terms thereunder, and the Guarantor defaulted under the Guaranty for her failure to cure same pursuant to the terms of the Guaranty.
16. By virtue of the foregoing, the Defendants are liable to the Plaintiff, on unconditional instruments for the payment of money only as follows: as of May 25, 2017, the principal amount of \$59,645.83, plus pre-judgment statutory interest at 9% from May 8, 2017, the date of default, continuing to accrue to the date of entry of judgment, plus late charges together with all of the Plaintiff's reasonable attorneys' fees, other charges, and the costs and expenses of a result, FC Marketplace claims it is owed \$59,645.83, plus interest and late charges, together with all reasonable attorneys' fees and costs.

(*id.*, Potter Aff., ¶¶ 15-16).

STANDARD ON SUMMARY JUDGMENT

Summary judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212[b]). The burden is initially on the movant to make a *prima facie* showing of

entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a *prima facie* showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the showing has been made, the burden of going forward with the proof shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact, which requires a trial (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

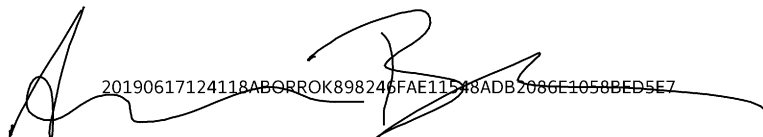
DISCUSSION

FC Marketplace refers to an affidavit of Chad Johnson dated 9/13/2018 (Grossman Affirm., ¶ 3, NYSCEF Doc. No. 14; Ptf. Supp. Memo of Law, p. 2, NYSCEF Doc. No. 18). It is not attached and there is no such affidavit. The affidavit submitted in support of the motion to dismiss is from Mr. Potter (and dated 9/13/2018), which FC Marketplace tries to incorporate in the reply papers. It is not appropriate. Mr. Johnson did verify the complaint. However, he verified the complaint on February 6, 2018.

In addition, and equally importantly, summary judgment simply is not appropriate here as there is a material issue of fact as to whether the defendants signed the loan documents, which they deny doing (Liu Aff., NYSCEF Doc. No. 26, ¶¶ 2-7). As concerns Mr. Potter's affidavit, his knowledge is based solely on the review of the records as FC Marketplace's recovery manager. He is not familiar with the actual signing of the documents and does not address Ms. Liu's claim that she never signed the documents at

issue and FC Marketplace does not address Ms. Liu's allegations in its reply (*see* NYSCEF Doc. No. 30).

Accordingly, FC Marketplace, LLC's motion for summary judgment is denied, without prejudice to renewal at a later date.



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6/17/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE