

**Retail Capital LLC v Red Entertainment Talent &
Media LLC**

2019 NY Slip Op 33116(U)

October 16, 2019

Supreme Court, New York County

Docket Number: 656996/2017

Judge: Melissa A. Crane

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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: MELISSA A. CRANE
Justice
~~HON. MELISSA CRANE~~

PART 15

RETAIL CAPITAL LLC d/b/a CREDIBLY,

INDEX NO. 656996/2017
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- v -

RED ENTERTAINMENT TALENT & MEDIA
LLC d/b/a RED ENTERTAINMENT AGENCY,
and CARLOS FERNANDEZ,

The following papers, numbered _ to _ were read on this motion to/for _____.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is

Plaintiff, Retail Capital LLC d/b/a Credibly (“plaintiff” or “Retail Capital”), moves (i) for summary judgment against defendants Red Entertainment Talent & Media LLC, d/b/a Red Entertainment Agency, and Carlos Gonzalez (collectively as, “defendants”) pursuant to CPLR 3212; and (ii) to strike defendants’ answer and preclude defendant from offering evidence at trial pursuant to CPLR 3126; and (iii) to strike defendants’ affirmative defenses pursuant to CPLR 3211.

On November 17, 2017, plaintiff commenced this action by filing a Summons and Complaint. On November 21, 2017, plaintiff served a copy of the summons and complaint on defendant Red Entertainment Talent & Media LLC d/b/a Red Entertainment Agency (“Red Entertainment”). Red Entertainment failed to Answer. Subsequently, on November 12, 2018 plaintiff moved (i) for default judgment against Red Entertainment; (ii) to amend the summons and complaint to correct individual defendant’s name from “Carlos Gonzalez” to “Carlos

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING
REASON(S):

Fernandez;” and (iii) to extend time to serve Carlos Fernandez with the summons and complaint. The parties resolved plaintiff’s default motion (motion sequence 001), pursuant to a stipulation, dated December 6, 2018. Specifically, defendants accepted service of the summons complaint and extended defendants’ time to answer until January 11, 2019. The parties also agreed to amend the summons and complaint to correct defendant Carlos Gonzalez’s name in the caption, and in the complaint itself, to read “Carlos Fernandez.”

On January 11, 2019, defendants filed an Answer with affirmative defenses. The court issued an order dated January 31, 2019 that memorialized the parties’ stipulation resolving motion sequence 001 (*see* NYSCEF doc no 24). In its order, the court directed the parties to appear for a preliminary conference on February 27, 2019 at 9:30 a.m. On February 27, 2019, the parties appeared for the preliminary conference and the court set deadlines to complete discovery. The court set the Note of Issue date as July 2, 2019 and wrote that the “parties should meet and confer and then contact the court immediately thereafter” should discovery disputes arise. On March 20, 2019, plaintiff served document demands, interrogatories, and a notice of deposition on defendants. Defendants did not respond to plaintiff’s demands.

Defendants then failed to appear at the court conference scheduled for May 21, 2019. Following the conference, the court issued a non-appearance order that scheduled another compliance conference for July 16, 2019 at 10:00 a.m. The court stated in its order “that with regard to any named parties that fail to appear at that conference, a default judgment may be granted against them and/or their claims may be dismissed, pursuant to 22 NYCRR 202.27” (NYSCEF doc no 33). The court directed plaintiff to serve defendants with the non-appearance order.

On July 16, 2019, defendants appeared at the conference. Plaintiff noted that defendants still ~~had~~ ^{had} failed to produce any responsive documents. No document production occurred

between the preliminary conference on February 27, 2019 and July 16, 2019. In an order dated July 16, 2019, the court directed plaintiff to file a file its Note of Issue on or before July 17, 2019 and set September 17, 2019 as the date to file post note of issue motions (*see* NYSCEF edoc no 40). Plaintiff filed its Note of Issue that same day, on July 16, 2019.

Subsequently, the court granted defense counsel's motion to be relieved on July 30, 2019. The court did not set a future conference date because plaintiff had filed its Note of Issue. To the court's knowledge, defendants still have not provided any discovery to plaintiff, or appeared for a deposition. Defendants also did not oppose this motion. Therefore, the court strikes defendant's Answer and affirmative defenses.

The court also grants plaintiff's unopposed motion for summary judgment pursuant to CPLR 3212. Plaintiff demonstrates *prima facie* that the parties entered into a written receivables agreement where plaintiff purchased \$44,933.00 of Red Entertainment's receivables for the sum of \$34,000.00. In consideration for the purchase price, Red Entertainment sold 18.03% (the "specified percentage") of Red Entertainment's sales proceeds until Red Entertainment remitted to plaintiff a total of \$44,933.00 from its sales. Defendant Fernandez signed a personal guaranty. Red Entertainment remitted to plaintiff the specified percentage of its receivables through October 11, 2017, but then defaulted under the agreement. Pursuant to Sections 1.11 and 3.2 of the agreement, plaintiff seeks to recover an amount equal to the purchase price less the sum of all remittances that Red Entertainment made. Accordingly, the court grants plaintiff summary judgment.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment and to strike the Answer and affirmative defenses of defendants is granted without opposition; and it is further

ORDERED that the court strikes defendants' Answer and affirmative defenses; and it is further

ORDERED that the court awards plaintiff summary judgment against the defendants; it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff in the sum of \$46,560.51, with interest at the statutory rate of 9% from October 12, 2017 until entry of judgment, together with fees associated with the agreement in the amount of \$3,397.51, plus costs and disbursements, as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the court directs the clerk to award attorney's fees in the amount of \$5,250.00.

DATED: 10-16-, 2019


MELISSA A. CRANE, J.S.C.
HON. MELISSA A. CRANE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER SUBMIT ORDER
 FIDUCIARY APPOINTMENT