Essex Cement Co., LLC v X-Treme Ready Mix, Inc.
2020 NY Slip Op 30770(U)
March 11, 2020
Supreme Court, New York County
Docket Number: 655507/2018
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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ESSEX CEMENT COMPANY, LLC,

Plaintiff,

- v -

X-TREME READY MIX, INC.,MICHAEL FALCO

Defendant.

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INDEX NO. 655507/2018

MOTION DATE 12/10/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents and for the reasons set forth on the record (3/10/2020), Essex Cement Company, LLC (**Essex**)'s motion for summary judgment is granted solely to the extent of its first (account stated), second (breach of contract), and fourth (breach of the Original Guaranty, hereinafter defined) causes of action, but is otherwise denied.

The Relevant Facts and Circumstances

Reference is made to an Application for Business Credit and Agreement, dated July 10, 2014 (NYSCEF Doc. No. 17, Exh. 1; the **Agreement**), by and between X-Treme Ready Mix, Inc. (**X-Treme**) as applicant and Essex Cement Company LLC, Separation Technologies LLC, and all its subsidiaries and affiliates, whereby Essex extended terms of credit to X-Treme for goods sold and delivered to X-Treme.

Pursuant to Paragraph 3 of the Agreement, X-Treme agreed to certain terms of payment:

> 3. **PAYMENT TERMS** – ***If this Credit Application is accepted, Applicant agrees to pay in full the invoice price of all purchases now or hereafter made from Titan promptly when due according to the terms set forth on each invoice.*** If the total invoice price is not paid in full on or before the due date, Applicant agrees to pay a late payment charge on the unpaid delinquent balance, including amounts post judgment, which will prevail over the statutory rate, calculated at the rate of the lesser of: (a) one and one-half percent (1½%) per month specifically, or (b) the highest rate allowed by law. If Applicant should fail to fulfill any of its obligation under this Agreement, or if Titan, in good faith deems itself insecure because the prospect of payment is impaired, or the prospect of performance of any provision of the Agreement is impaired, or if a default occurs for any other reason provided in this Agreement then Titan, at its option and without notice, may declare the entire unpaid balance owed by Applicant under this Agreement to be immediately due and payable, or terminate the credit privileges of Applicant under this Agreement, including refusing to sell further materials to Applicant unless the unpaid balance is paid in full or both. Should it become necessary to place this account for collection, suit or other legal proceedings, (1) (We), the undersigned, agree to pay all costs and expenses of collection suit or other legal action, including reasonable attorney fees, and if necessary appellate attorney fees. Applicant hereby waives any and all privileges and rights which (I) (We) may have, under law relating to venue, and waive the right to trial by jury, and further, (1) (We), the undersigned, agree that any legal action brought for collection of past-due accounts and/or action arising from this Agreement, may be brought in a court of competent jurisdiction in the Borough of Manhattan, City, County and State of New York, City Of Newark, New Jersey, City of Norfolk, Virginia, Broward or Palm Beach County, Florida. The choice of venue of these options shall be in the sole discretion of Titan.
>
> (*Id.* [emphasis added]).

Paragraphs 1 and 11 of the Agreement also provided for a personal guaranty by the signee of the Agreement in an individual capacity:

> 1. **BINDING AGREEMENT** – The Agreement shall be between Applicant and Essex Cement Company LLC, Separation Technologies LLC, and ALL subsidiary and affiliated corporations, companies, partnerships, and joint ventures (hereinafter referred to as Titan). In the event of litigation, suit will be brought against Applicant by the Titan entity from which purchases were made. This Agreement shall inure to the benefit of the successors and assigns of Titan, and shall be binding upon Applicant's heirs, legatees, devisees, personal representatives, successors and assigns. As used herein, the term ***"Applicant" shall include the guarantors, such that the person(s) signing on the first***

> ***page hereof agree to personally see payment of the debt as provided in paragraph 11 below, and all other terms and conditions contained herein.***
>
> ...
>
> 11. **PERSONAL GUARANTY** – ***In consideration of Titan extending credit for value received, (1) (We), by signing on the front page hereof, jointly and severally, in an individual capacity, and not as an agent for the Applicant described hereinabove, hereby personally and unconditionally guaranty the payment of any balance that may become due Titan***, including all attorney's fees and court costs, elaborated in the terms and conditions hereinabove, and hereby incorporate by reference, all of the above terms and conditions. (1) (We), the undersigned, hereby specifically agree that Titan may initiate a lawsuit against the undersigned in (my) (our) individual capacity, without joining or contemporaneously suing the entity named on the first page hereof described above. ***This is a continuing guaranty, unless terminated in writing, via certified mail, received at the Regional Office of Titan in Richmond, Virginia to the attention of the Director of Credit. It is understood that said termination shall be prospective in effect only, and that this guaranty shall remain in effect with regard to any balances incurred prior to the date of termination. It is also understood that revocation of the guaranty may, in Titan's sole discretion, result in termination of further credit privileges.***
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> (*Id.*; the **Original Guaranty** [emphasis added]).

On the first page of the Agreement, the box entitled "Printed Name of Signer [Applicant]:" is filled in with the handwritten name "Michael Falco" (*id.*).

Reference is also made to a Continuing Guaranty (the **Continuing Guaranty**; the Original Guaranty, together with the Continuing Guaranty, hereinafter, collectively the **Guaranties**), dated July 29, 2014 (NYSCEF Doc. No. 17, Exh. 3), by and between Michael Falco as guarantor in favor of Essex Cement Company LLC and Separation Technologies LLC, pursuant to which Mr. Falco guaranteed all indebtedness incurred by X-Treme under the Agreement:

> In consideration of Essex Cement Company LLC and Separation Technologies LLC which includes ALL subsidiary corporations, partnerships, and joint ventures of Titan America LLC (hereinafter referred to as Titan), at my request, giving or extending terms of credit to **X-TREME READY MIX** hereinafter called debtor, ***[Michael Falco] hereby give[s] this Continuing Guaranty to Titan, its transferees or assigns, for the payment in***

> ***full of an indebtedness, direct or contingent, of said debtor to said Titan, plus all interest, attorneys' fees, costs of court and charges of whatsoever nature and kind, whether due or to become due and whether now existing or hereinafter arising.***
>
> (*Id.* [emphasis added]).

In his affidavit in opposition to this motion, Mr. Falco explains that after Essex and X-Treme started to do business on a regular basis, Essex's sales representative, Michael Ciallella, provided him with the Continuing Guaranty which he refused to sign (NYSCEF Doc. No. 28, ¶ 3). Mr. Falco asserts that Mr. Ciallella advised of the need to obtain management's approval to continue doing business with X-Treme without a personal guaranty, and later advised that Mr. Falco did not need to provide " a continuing personal guarantee on X-Treme Ready Mix Inc's future orders with Essex Cement Company LLC, because he took care of it" (*id.*). Mr. Falco ultimately alleges that his signature on the Continuing Guaranty was forged (*id.*, ¶ 4).

From February 1, 2018 to July 29, 2018, Essex sold and delivered goods to X-Treme as reflected by 120 invoices totaling $600,483.02 (NYSCEF Doc. No. 19; the **Invoices**). The Invoices provided that payment was due on the last day of the next full month following the invoice date (*id.*). Essex did not receive any payment pursuant to the Invoices and by letter, dated October 18, 2018, Essex made a written demand upon X-Treme and Mr. Falco "for the sum of $600,483.02 for receipt no later than October 31, 2018" (NYSCEF Doc. No. 17, Exh. 2). When no payment was received, Essex sued X-Treme and Mr. Falco (collectively, the **Defendants**) for (1) an account stated as against Essex, (2) breach of contract as against Essex, (3) unjust enrichment as against Essex, and (4) breach of the Guaranties (NYSCEF Doc. No. 1; the **Complaint**).

At oral argument, the defendant withdrew his opposition to the granting of summary judgment as to the first, second and fourth of action to the extent of the execution of the Original Guaranty but disputed "the time period in which it covers."

Discussion

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

A. First Cause of Action (Account Stated)

Inasmuch as during oral argument, Defendants' counsel withdrew opposition to the branch of Essex's motion for summary judgment on the first cause of action for an account stated against X-Treme, Essex is entitled to summary judgment for an account stated in the sum of $600,483.02 as against X-Treme.

B. Second Cause of Action (Breach of Contract)

Inasmuch as, during oral argument, Defendant's counsel also withdrew its opposition to the branch of Essex's motion seeking summary judgment for breach of contract as against E-Xtreme, Essex is entitled to summary judgment on its second cause of action for breach of contract as against X-Treme in the sum of $600,483.02.

C. Third Cause of Action (Unjust Enrichment)

As Essex's claim for breach of contract is granted against X-Treme above, the branch of its motion for summary judgment on its claim of unjust enrichment against X-Treme is denied because the existence of the Agreement precludes recovery in quasi contract for claims that arise from the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]).

D. Fourth Cause of Action (Breach of the Continuing Guaranty)

Essex also seeks to impose personal liability on Mr. Falco for breach of the Original Guaranty under the Agreement. In his opposition papers, Mr. Falco admits that he signed the Agreement and denies that he signed the Continuing Guaranty. During oral argument, Mr. Falco admitted liability for amounts due under the Original Guaranty, but disputed the "time period" of his liability exposure. In addition, at oral argument, Mr. Falco asserted that the Original Guaranty was "revoked" by Essex. The argument however fails.

The Original Guaranty provides that it is "a continuing guaranty, unless terminated in writing, via certified mail, received at the Regional Office of Titan in Richmond, Virginia to the attention of the Director of Credit" (NYSCEF Doc. No. 29, ¶ 11). Critically, it is undisputed that Mr. Falco did not avail himself of the provision to revoke the Original Guaranty. Further, there is no evidence that Essex ever intended to revoke the Original Guaranty – and it defies logic that they would have. If Essex was not satisfied with the Original Guaranty, revocation was not necessary and creditors don't revoke guaranties. They merely decide not to ship additional goods if they

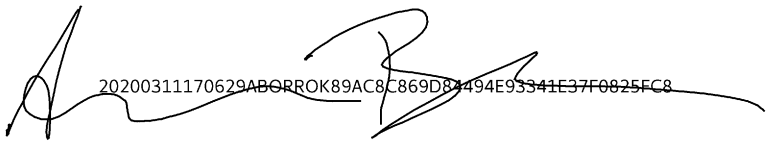
are unsatisfied with guaranty (credit) supporting the contract party's obligations. Put another way, even taking Mr. Falco's testimony that the Continuing Guaranty was a forgery as true, sending the Continuing Guaranty to him, was at best an offer of novation by Essex which if he did not sign it as he alleges, was a rejection of the novation in which case the Original Guaranty would have continued. In other words, even if Mr. Falco did not sign the Continuing Guaranty as he attests, the Original Guaranty would remain in full force and effect and he remains liable. To wit, under these circumstances, the Original Guaranty was in effect throughout the parties' relationship and Mr. Falco's signature on the Agreement bound him to "personally and unconditionally guaranty the payment of any balance that may become due [Essex], including all attorney's fees and court costs" (*id.*, ¶ 3). Accordingly, Essex is entitled to summary judgment for breach of the Original Guaranty as against Mr. Falco for $600,483.02.

For the avoidance of doubt, the Defendants' affirmative defenses that Essex erroneously calculated (i) the amount of goods delivered and (ii) the amounts paid by the Defendants are dismissed in light of Essex's successful claim for an account stated.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted solely to the extent of its first cause of action for an account stated, second cause of action for breach of contract, and the fourth cause of action for breach of the Original Guaranty and otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Essex Cement Company, LLC against Defendants X-Treme Ready Mix, Inc. and Michael Falco in the amount of $600,483.02, plus statutory interest of 9% per annum from the date of entry of judgment, plus costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. The Plaintiff shall have execution thereof.



3/11/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE