

Strategic Funding Source, Inc. v Gill Inv. Group, LLC
2020 NY Slip Op 31090(U)
April 28, 2020
Supreme Court, New York County
Docket Number: 159168/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

STRATEGIC FUNDING SOURCE, INC., Plaintiff, - v - GILL INVESTMENT GROUP, LLC, and KAISER GILL Defendants. INDEX NO. 159168/2015 MOTION DATE 05/22/2019 MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 45, 46, 48, 52, 53, 67, 68, 84, 85, 86 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 were read on this motion to/for REARGUMENT/RECONSIDERATION.

This is an action for breach of contract and to recover for breach of a personal guaranty of an agreement for the purchase of receivables. By an order dated August 31, 2018, this court granted the plaintiff's motion for summary judgment (MOT SEQ 001), inter alia, against defendant Kaiser Gill (Gill), individually, on the third cause of action for liability on his personal guaranty an on the fourth cause of action to recover contractual attorneys' fees. Gill now moves pursuant to CPLR 2221(d) for leave to reargue the portion of the court's August 31, 2018 order, which granted summary judgment against Gill, individually, with regard to the third cause of action concerning his liability for his personal guarantee of the agreement and the fourth cause of action for contractual attorneys' fees (MOT SEQ 003).1 Gill also moves for summary judgment, prior to the commencement of discovery, to dismiss the third and fourth causes of action in the complaint to the extent that they seek liability against him under his personal guaranty and for contractual attorneys' fees (MOT SEQ 002). Both motions are opposed. Gill's motion for leave to reargue (MOT SEQ 003) is granted and, upon reargument, the portions of

1 The defendants do not seek reargument of the portions of MOT SEQ 001 that granted summary judgment against defendant Gill Investment Group LLC on the first cause of action for breach of the agreement.

plaintiff's motion for summary judgment as against Gill are denied. Gill's motion for summary judgment (MOT SEQ 002) is also denied.

This action arose from defendant Gill Investment Group LLC's (GIG) failure to pay its obligations under a contract for the purchase of its receivables. On October 27, 2016, the plaintiff filed MOT SEQ 001 seeking summary judgment on the complaint, including on the third and fourth causes of action on the personal guarantee executed by Gill and the attorneys' fees due thereunder. In support of that motion, the plaintiff submitted a copy of the pleadings, an attorney's affirmation, and the affidavit of David Wolfson, the plaintiff's vice president of risk management and asset recovery, who asserted that he has knowledge of the plaintiff's business, corporate records, and billing practices. The plaintiff also submitted the agreement referable to its purchase of GIG's receivables, dated June 17, 2015, the personal guaranty signed by Gill, a demand letter, and a merchant statement.

In his affidavit, Wolfson averred that the plaintiff purchased future receivables from GIG for \$120,000.00, in consideration of GIG's promise to repay it the sum of \$148,800.00 in future receivables, and to make regular daily payments from a bank account to satisfy that obligation. He asserted that GIG paid the plaintiff only \$8,325.57, and ceased making payments in or about August 10, 2015, leaving an aggregate unpaid obligation of \$140,474.43, plus interest from the date of breach. Wolfson also pointed out that the agreement permitted the plaintiff to recover a \$2,500.00 default fee and \$5,000.00 processor fee in the event of a default. Wolfson explained that, in its demand letter, the plaintiff demanded that GIG pay the total of \$147,974.43 by August 20, 2015, and that failure to pay by that date would result in litigation. Wolfson identified the guarantee executed by Gill, which Wolfson claimed unconditionally guaranteed payment of all of GIG's obligations under the agreement, including any obligation to pay attorneys' fees if the plaintiff resorted to legal action to enforce the agreement.

By an order dated August 31, 2018, the court granted the plaintiff's motion for summary judgment as against GIG for breach of its contract and granted the plaintiff summary judgment against defendant Gill on the third cause of action for breach of his guarantee and awarded the plaintiff attorneys' fees under their contract. In holding defendant Gill personally liable under the personal guarantee, the court held that the guarantee was clear, unambiguous, absolute, and unconditional, and that the guarantee did not contain the limiting language that

“Guarantor, Kaiser Gill, is not guaranteeing payment should the business dissolve or is terminated in the normal course of business and through no affirmative action of Kaiser Gill.”

Leave to reargue may be granted where the movant demonstrates overlooked or misapprehended any facts or relevant law presented to it in the prior motion. See CPLR 2221(d)(2); William P. Pahl Equip Corp. v Kassis, 182 AD2d 22 (1st Dept. 1992). On his motion for reargument of the court’s August 31, 2018 order granting summary judgment against him, Gill correctly points out that the court overlooked the fact that the guarantee submitted by the plaintiff did, in fact, contain the language that “Guarantor, Kaiser Gill, is not guaranteeing payment should the business dissolve or is terminated in the normal course of business and through no affirmative action of Kaiser Gill.” Because of the court overlooked this fact, Gill’s motion seeking reargument of the portions of MOT SEQ 001 that granted summary judgment against him is granted.

Turning to the substance of the plaintiff’s original summary judgment motion as against Gill and Gill’s summary judgment motion seeking to dismiss the complaint, the movant on a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form. See Zuckerman v City of New York, 49 NY2d 557 (1980). The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012). In deciding a summary judgment motion, the court must be mindful that summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted where there is any doubt about the issue. See Bronx-Lebanon Hospital Ctr. v Mount Eden Ctr., 161 AD2d 480 (1st Dept. 1990). Here, neither party has met its *prima facie* burden of eliminating material triable issues of fact.

Fundamentally, there are triable issues of fact, *inter alia*, as to why the restaurant ceased operating, and whether the plaintiff is entitled to summary judgment on the guarantee against Gill. The plaintiff’s original summary judgment motion contains emails clarifying that Gill would not be liable under the guarantee if his restaurant went out of business because of “unsustainable declining revenues.” However, the plaintiff’s original motion for summary judgment fails to establish that his restaurant did not go out of business due to unsustainable declining revenues. Hence, on reargument, the original summary judgment is denied as against

Gill. Similarly, in Gill's summary judgment motion he submits an affidavit merely stating that "I tried my best to keep the restaurant running, but unfortunately business was slow and I was forced to close" the restaurant. Gill does not state that he closed the business because there were unsustainable declining revenues. Thus, Gill's liability under the guarantee remains a triable issue of fact.

Accordingly, it is hereby,

ORDERED that, the defendant Kaiser Gill's motion for leave to reargue this court's August 31, 2018 decision and order (MOT SEQ 003) is granted and, upon reargument, the plaintiff's motion for summary judgment (MOT SEQ 001) is denied as against Kaiser Gill only; and it is further,

ORDERED that defendant Kaiser Gill's motion for summary judgment (MOT SEQ 002) is denied; and it is further,

ORDERED that the parties shall appear for a preliminary/settlement conference on August 27, 2020 at 2:15 p.m.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>4/28/2020</u>				<u>NANCY M. BANNON, J.S.C.</u>	
DATE					
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	