

Emerald Interest LLC. v Dart Seasonal Prods. Inc.

2020 NY Slip Op 31459(U)

May 22, 2020

Supreme Court, New York County

Docket Number: 153019/2019

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

EMERALD INTEREST LLC.,

Plaintiff,

- v -

DART SEASONAL PRODUCTS INC., MSPA USA LLC, KLIA
PROPERTIES LLC, BARRY WACHSLER AND DAVID
WACHSLER,

Defendants.

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INDEX NO. 153019/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 58, 59, 61, 64, 65, 69, 72

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff's motion for summary judgment and to strike defendants' affirmative defenses is granted in part.

Background

This action arises out of a series of loan and security agreements entered into by the parties starting on March 24, 2015. Plaintiff contends that it gave defendants a line of credit of up to \$5 million and \$3 million remains outstanding. Plaintiff argues that defendants defaulted under the terms of the agreement by failing to provide plaintiff with a June 30, 2018 financial statement and to deliver cash proceeds as collateral to plaintiff. Plaintiff points out that it monitored defendants' receivables because defendants have a seasonal business- defendant Dart sells snow removal products, such as salt.

Plaintiff moves for summary judgment and insists it established its prima facie burden by producing the agreements and an affidavit claiming that defendants failed to comply with certain

obligations. Plaintiff contends that defendants provided a “borrowing base certificate” to plaintiff on February 4, 2019 that showed that nearly \$3.8 million of the account receivables were identified as an “Other Adjustment”; plaintiff concludes that this decreased the amount of collateral and constituted a breach of the agreement.

Plaintiff claims that there is \$3,246,707.12 plus interest due and seeks summary judgment against all defendants including the guarantors. It maintains that each guaranty contained a broad waiver of potential defenses or counterclaims and that courts routinely enforce these provisions. With respect to the affirmative defenses, plaintiff contends that they are meritless.

In opposition, the Vice President of defendants Dart Seasonal Products Inc. and MSPA USA LLC, Barry Wachsler (also a defendant) contends that he was not satisfied with plaintiff’s transparency and attitude towards his business. He claims that plaintiff wanted to know everything about his operations and made him explain each and every debit. Mr. Wachsler acknowledges that the agreement required him to send all receivables to plaintiff and he points out that he never actually paid plaintiff with respect to this loan because plaintiff would “pay themselves” from the receivables sent by Dart.

Mr. Wachsler contends that he sent plaintiff an opt-out notice under the terms of the loan agreement on January 19, 2018. He claims that after receiving the opt-out, plaintiff used unfair practices to rack up fees to get back at him for not renewing the loan. Mr. Wachsler complains that plaintiff discounted one of his inventory salt warehouses because it was not on site at Dart’s facility, something they had never done before. He wants discovery to explore the ways in which plaintiff purportedly overcharged defendants. Mr. Wachsler emphasizes that plaintiff waived the need for financial statements because he was giving plaintiff greater detail in the borrower base

certificates and that proof of this is not in his possession. He observes that plaintiff failed to explain how it arrived at the amount of damages it seeks.

Defendants also argue that summary judgment is inappropriate because no discovery has taken place and the parties need to explore who breached the agreement first, how much is owed, how much of the outstanding balance is offset by plaintiff's alleged mischaracterization of what constitutes inventory, whether plaintiff properly imposed overdraft fees and penalties, whether plaintiff waived their financial statement requirement, acted in bad faith or diverted funds.

In reply, plaintiff claims that defendants failed to articulate what discovery is necessary from plaintiff that could raise an issue of fact. Plaintiff asserts it did not waive any rights under the loan and security agreement and points to a no-waiver clause in the parties' agreement. It maintains that raising a conclusory assertion that discovery is necessary is not sufficient to defeat the instant motion.

Discussion

“The proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

Plaintiff alleges five specific defaults under the terms of the various loan documents: (1) diverting a portion of the collateral to either themselves or third parties, (2) failing to meet

certain financial covenants for the period ending February 4, 2019, (3) failing to give plaintiff financial statements, (4) failing to satisfy other reporting requirements and (5) pledging their assets to a third-party (NYSCEF Doc. No. 34, ¶ 20).

Although Mr. Wachslar raises numerous concerns with how plaintiff did business, he does not sufficiently address the alleged defaults. He complains about plaintiff's attitude but that is not a defense to a breach. For instance, he asserts that plaintiff claims "that Dart did not give [plaintiff] a financial statement, one they continuously waived for months and months, and now used that to declare breach" (NYSCEF Doc. No. 58, ¶ 19). But the agreement says otherwise.

Paragraph 12.1(b) of the agreement states, in part, that one type of breach is "any representation or warranty made or deemed made in or in connection with the Agreement or any other Credit Document. . . or any representation, warranty, statement or information contained in any report, certificate, financial statement or other instrument or agreement furnished in connection with or pursuant to this Agreement" (NYSCEF Doc. No. 61, ¶ 12.1[b]). 12.1(c) provides that "any Credit Party (other than Lender) shall fail or neglect to perform, keep or observe any term, covenant or agreement contained in this Agreement or in any other Credit Document" (*id.* ¶ 12.1[c]).

And paragraph 13.1 clearly provides that "No failure to exercise and no delay in exercising, on the part of the Lender any right, remedy, power or privilege under this Agreement or any other Credit Documents shall operate as a waiver thereof" (*id.* ¶ 13.1). The agreement also states that any waiver must be in writing and signed by plaintiff (*id.* ¶ 13.2).

Despite defendants' objections, they do not deny that they breached the agreement by, at the very least, failing to send financial statements as alleged by plaintiff. In fact, Mr. Wachslar argues that "Dart simply did not have their financial statement ready and was upfront to

[plaintiff] about this” (NYSCEF Doc. No. 58, ¶ 20). And although defendants argue that discovery is necessary, the agreement makes clear that a waiver of this obligation would be in writing. Presumably, that written waiver or communications about it would be in defendants’ possession. Yet, the Court observes that defendants did not attach a single communication, email, document or exhibit in support of their claims that they should be excused from their purported breaches of the agreement. Mr. Wachslar referenced that Dart was giving plaintiff “borrower base certificates, which describes the state of the business in much greater detail than a six-month financial statement” but did not attach any of these records (*id.*). Those forms were not attached either.

In the record before this Court, there are loan documents and an affidavit from plaintiff explaining what the breach(es) were and an affidavit from defendants objecting to the way plaintiff enforced the terms of the agreement. While the Court recognizes that defendants are upset with the way plaintiff acted in connection with these loan agreements, that does not raise an issue of fact. Defendants did not adequately explain why the Court should overlook its breach of the loan. Certainly, discovery might provide more insight into the dynamic between the parties, but the fact is that plaintiff established its prima facie burden for summary judgment. Discovery, for discovery’s sake, is not enough to rebut the papers submitted by plaintiff.

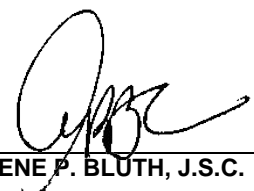
The Court grants the motion for summary judgment on liability but finds that there must be a trial as to damages (defendants may, of course, appear and defend). The affidavit from plaintiff states that “The amount due and owing on the Loans as of July 31, 2019 is the amount of \$3,246,707.12 plus interest at the Default rate from said date to the date of entry of judgment, plus, pursuant to the Loan Documents, reasonable attorneys’ fees, costs and expenses” (NYSCEF Doc. No. 34, ¶ 25). No document or exhibit is referenced to explain to the Court how

this number was calculated. It was plaintiff's burden to justify the amount it seeks and it did not satisfy this obligation.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted to the extent that plaintiff is granted summary judgment on liability against all defendants and it shall file a note of issue for a trial on damages and legal fees on or before September 8, 2020 and the affirmative defenses asserted by defendants are severed and dismissed.

05/22/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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