

Quicksilver Capital, LLC v Tea at the Ctr., Inc.
2020 NY Slip Op 32735(U)
August 20, 2020
Supreme Court, Kings County
Docket Number: 526391/2019
Judge: Debra Silber
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This opinion is uncorrected and not selected for official publication.

X

Plaintiff,

-against-

Defendants.

x

DECISION/ORDER

Index No. 526391/2019

Motion Seq. No. 002

Date Submitted: 07/30/2020

Papers

NYSCEF Doc.

Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed... 1, 3, 4, 8, 11-13

Affirmation in Opposition, Affidavits, and Exhibits Annexed.....

Reply Affirmation.....

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff's unopposed motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied. This application was made previously and was denied by order dated March 5, 2020 for improper service. Then, the court closed due to the Covid-19 Pandemic, and time was extended by the Governor in an Executive Order, so plaintiff had more time to re-serve the papers. Plaintiff has re-served the papers, but the motion still cannot be granted. There are two independent reasons for denial of the motion. First, the papers were "short served" and second, plaintiff fails to make a prima facie case for the relief requested.

The notice of motion and accompanying papers was served on July 8, 2020

(NYSCEF 12 [entity defendant]) and July 10, 2020 (NYSCEF 13 [individual defendant by nail and mail service]), with a return date thereon of July 22, 2020. The notice of motion states that opposition papers "are required to be served on the undersigned ten days before the return date," which would be by July 12, 2020.

Plaintiff has failed to comply with the requirement in CPLR 3213 that states " [t]he summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The **minimum** time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service" (emphasis added). Here, as the corporate defendant was served by delivery to a "manager", the corporation is allowed twenty (20) days to appear, and the individual defendant, served pursuant to CPLR 308(4), is allowed thirty (30) days to appear after such service is complete. Neither defendant was given the required time to respond. The motion must therefore be denied (see *National Bank of Canada v Skydell*, 181 AD2d 645 [1st Dept 1992]; *Ross Bicycles v Citibank*, 149 AD2d 330 [1st Dept 1989]). However, this failure is not jurisdictional, and thus the action does not need to be dismissed.

With regard to the substance of the motion, an affidavit from a person who identifies himself as "a debt collector" is generally insufficient to support a motion for a default judgment, as it is considered hearsay. In an application pursuant to CPLR 3213, there is no complaint, thus the supporting affidavit must be sufficient in the absence of a verified complaint. Here, it is alleged that defendant corporation sold its right to future receivables in exchange for cash, an agreement guaranteed by the individual

defendant, and that after making some payments, defaulted. A copy of the agreement and a copy of a ledger are annexed to the affidavit, both generated by plaintiff, not the affiant. The affiant here states (E-file Doc. 3) he is President of StreetWide Asset Recovery Group, Inc., and "I am fully familiar with all the facts and circumstances herein based on my firm's familiarity with Plaintiff's business practice and based on review of the files maintained for this matter." This does not satisfy the requirement that there be an affidavit from someone with personal knowledge. There is no affidavit from the plaintiff. Since the affiant neither has personal knowledge of the facts (such as the payment by plaintiff of the sum claimed, or the default by the defendant), nor can he attest to the genuineness or authenticity of the documents, plaintiff has not made out its prima facie case. When an affiant relies on attached document, he or she must establish an adequate evidentiary basis for them. Simply annexing documents, without proper evidentiary foundation, is inadequate (see *Higen Assoc. v Serge El. Co.*, 190 AD2d 712 [2d Dept 1993]. A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (see CPLR 4518; *Bank of NY Mellon v Gordon*, 171 AD3d 197, 199 [2d Dept 2019]). "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (see *Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650, 652 [2d Dept 2016]; *Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1331 [2d Dept 2009]). Therefore, even though defendants did not appear in opposition to this motion, it would have to be denied even if it was not denied for short service.

"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 eliminate any material issues of fact from the case ... Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Narcisco v Ford Motor Co.*, 137 AD2d 508 [2d Dept 1988]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the notice of motion, the summons and the papers upon which it relies are hereby converted to a summons and complaint pursuant to CPLR 3213; and it is further

ORDERED that defendants shall have thirty (30) days to move or answer the complaint after service of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: August 20, 2020

ENTER :



Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER
JSC