

All-Ways Forwarding of N.Y. Inc. v USF Collections, Inc.
2021 NY Slip Op 31039(U)
March 23, 2021
Supreme Court, New York County
Docket Number: 650810/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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INDEX NO. 650810/2020

ALL-WAYS FORWARDING OF N.Y. INC.,

MOTION DATE 1/25/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

USF COLLECTIONS INC., RANJIT KHANNA

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

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

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by filing a Summons and Complaint on February 5, 2020, seeking to recover for defendants' alleged breaches of an indemnity agreement related the importation of goods. On March 16, 2020, defendants interposed an answer. On September 8th, 2020, USF Collections Inc, filed a voluntary petition under Chapter 11, Subchapter V, of the United States Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York under case number 20-12085. Plaintiff now moves for partial summary judgment against defendant, Ranjit Khanna.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) aff'd 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for

summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

The elements necessary to show a breach of contract are: 1) the existence of a contract, 2) Plaintiff's performance under the contract, 3) the Defendant's breach of that contract and 4) damages. *J.P. Morgan Chase v. J.H Elec. Of New York*, 69 A.D.3d 802, 803 (2d Dep't 2010); *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

In support of its motion, plaintiff submits the affidavit of Elimelech A. Schonfeld, an authorized representative of plaintiff, All-Ways Forwarding of N.Y., Inc. ("All-Ways"), together with the relevant Bill of Lading Conditions, Bills of Lading, Indemnity Agreements and Statement of Accounts, which establish as follows: All-Ways is an international freight forwarder, customs broker, transportation and logistics service provider. Defendant USF Collections Inc. ("USF") is an international apparel company. Between August 13, 2019 and November 1, 2019 USF ordered a total of 3144 cartons of apparel ("Merchandise") from the following suppliers: Jiangsu Soho International Group, Bill of Lading number HES19080064A representing 310 cartons; Knitwear Enterprises Bill of Lading numbers CFI6738119 and CFI6765719 representing 1238 and 84 cartons respectively; Crown Apparel Knitwear Enterprises Bill of Lading numbers CFI6765619

representing 660 cartons and; Ayyoub Apparels Bill of Lading numbers CFI6814419 and CFI6989919 representing 555 and 297 cartons respectively. All-Ways, at USF's request, acted as freights forwarder, non-vessel operating common carrier, and/or customs house broker for the Merchandise and a holds general lien for freight and all charges pursuant to All-Ways' standard terms and conditions of service which were acknowledged as received and understood by USF. On December 11, 2019 and December 18, 2019, All-Ways, USF and Khanna entered into Indemnification Agreements (the "Indemnity Agreements") in connection with each of the Bills of Lading, USF and Khanna, jointly and severally, as a condition precedent to and in consideration of All-Ways releasing the Merchandise without the full set of shipping documents, agreed to defend, protect, release and hold All-Ways harmless in connection with same and with the contractual provision that USF would provide the shipping documents within three (3) calendar days of All-Ways' written demand. All-Ways released the Merchandise to USF pursuant to the Indemnity Agreements, however USF and Khanna failed to deliver the Original Bills of Lading and/or duly authorized and authenticated TELEX releases from the Suppliers of the Merchandise as provided for at section 1 of the Indemnity Agreements. USF and Khanna further breached sections 3 and 3(a) by failing to pay All-Ways charges and invoices. As a result, All-Ways became liable for the monies which USF owed to the Suppliers for the total amount of \$324,289.83 and USF and Khanna remain indebted to All-Ways for shipping services in the sum of \$222,689.98. As such, plaintiff has established a *prima facie* entitlement to judgment.

Plaintiff objects to this Court's consideration of defendant's opposition papers as same were untimely served however as all parties have had the opportunity to fully brief the instant motion and as the delay was *de minimis*, the Court, in its discretion, will consider said opposition papers.

In opposition, defendant submits the affidavit of defendant, Ranjit Khanna, together with a Bill of Lading, invoices, copies of various emails between the parties, and an \$8,000.00 payment to Ayyoub Apparels on May 21, 2020.

Defendant's first argues that summary judgment is premature based upon USF's bankruptcy filing and Khanna's position as a mere guarantor of the relevant debts. However, as discussed in *Milliken & Co. v. Stewart*, 182 A.D.2d 385, 386 (1st Dept. 1992), plaintiff is not prevented from proceeding against the non-bankrupt individual defendant guarantor by the bankruptcy stay. While the Bankruptcy proceeding may result in amounts being paid to plaintiff which would act as a setoff of the amounts owed by Khanna, both defendants are jointly and severally liable for all of the debts at issue.

Defendant further argues that plaintiff is reaching beyond the four corners of the indemnity agreements and attempting to hold Mr. Khanna responsible for Invoices completely unrelated to the small subset of charges with respect to which he gave his guarantee. Defendant's affidavit specifically states "I understood that I was personally guaranteeing only those charges related to the goods which Plaintiff released as listed in the table at paragraph 9 of the Complaint, because this is what Plaintiff required as a condition of releasing only those specific goods." Said argument is contradicted by the plain text of the Indemnity Agreements, which provides: "that (1) Importer and Principal jointly and severally, promise to pay, and the Principal does hereby personally guaranty the payment of, all of All-Ways' charges and invoices for all past, present and future shipments inclusive of all present and future open telexes, and released shipments against open telexes and/or open invoices."

Defendant further argues that plaintiff is seeking indemnification for liabilities which have not been paid to shippers by plaintiff, but that defendants' alleged acts and omissions have only

“resulted in litigation and/or threatened litigation overseas.” Defendant also raises issues of fact as to whether defendant has partially paid some of the invoices that are the subject of this action. As such, defendant has raised an issue of fact as to the amount of damages, only. Defendant fails to raise an issue of fact on the issue of liability, having failed to dispute that defendant breached Sections 1, 2, 3 and 5 of the Indemnity Agreements by failing to deliver Original Bills of Lading, failing to indemnify All-Ways and failing to pay All-Ways’ invoices.

It appearing to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff’s motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that plaintiff’s motion for summary judgment is granted as against defendant, Ranjit Khanna on the issue of liability and that the sole issues for trial are those of damages and attorney’s fees; and it is further

ORDERED that the parties shall proceed with discovery on the issue of damages.

3/23/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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