

**Pay-O-Matic Check Cashing Corp. v Prime NYC
Group, Corp.**

2021 NY Slip Op 31207(U)

April 9, 2021

Supreme Court, New York County

Docket Number: 652175/2019

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

PAY-O-MATIC CHECK CASHING CORP.,

Plaintiff,

- v -

PRIME NYC GROUP, CORP.,

Defendant.

-----X

PRIME NYC GROUP, CORP.

Plaintiff,

-against-

SWEET DREAM BROOKLYN, LLC.

Defendant.

-----X

INDEX NO. 652175/2019
MOTION DATE 11/30/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

Third-Party
Index No. 595922/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion (Seq. No. 003) by plaintiff, Pay-O-Matic Check Cashing Corp., for summary judgment against defendant, Prime NYC Group Corp., is denied.

Background

Plaintiff alleges, briefly put, the following. Plaintiff owns and operates check-cashing locations in New York. Defendant issued a check (number 3391, "the Check," NYSCEF Doc. 5), dated August 8, 2018, from its CitiBank, N.A. account in the amount of \$26,400.00 to Sweet Dream Brooklyn ("the Payee"). The Payee "further endorsed and tendered the negotiable instrument in question" to plaintiff. The financial institution (presumably Citibank, N.A.) returned the Check to plaintiff with the "Return Reason" listed as "Stop Payment" (NYSCEF Doc. 5). Plaintiff requested that defendant reimburse plaintiff; defendant refused. (NYSCEF Documents 3 and 49.)

Meanwhile, defendant alleges, briefly put, the following. The Payee (owned by Anton Ilyushchanka) failed to perform on a construction project for which the Check was intended as payment. Defendant learned that an individual was attempting to cash the Check and called

Citibank to stop payment on the Check. As defendant was in the process of cancelling the Check, “an unnamed individual went to a different, nearby cash-checking store” that plaintiff operated and apparently “then proceeded to supposedly endorse and tender” the Check to plaintiff. (NYSCEF Doc. 14.)

Motion Seq. No. 001

On or about April 12, 2019, by summons with notice, plaintiff commenced the instant action, seeking summary judgment in lieu of complaint against defendant. Plaintiff asserts that the Check complies with NY UCC § 3-104, pursuant to which, a “a check is a negotiable instrument” if it

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(NYSCEF Documents 1-3.)

By Decision and Order dated September 27, 2019 in Motion Seq. No. 001, this Court denied plaintiff’s motion, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant on the ground that there existed various disputed issues of fact, among which were the following: (1) “whether a person authorized by [the Payee] to negotiate the check properly signed [the Check] over to plaintiff, rendering plaintiff a holder in due course”; and (2) “whether [the Check] was suspect on its face such that plaintiff should have been on notice that it could not be a holder in due course.” This Court also stated that the case could proceed as a conventional action. (NYSCEF Doc. 20.)

Motion Seq. No. 002

Defendant commenced a third-party action against the payee (NYSCEF Doc. 38). On January 9, 2020, defendant moved, essentially, for a default judgment on causes of action for breach of contract and money had and received, against the Payee in the amount of \$26,400.00, plus interest thereon, plus costs matter (NYSCEF Doc. 36).

By Decision and Order dated February 18, 2020 in Motion Seq. No. 002, this Court granted, without opposition, defendant’s motion for a default judgment against the Payee, as to liability only (NYSCEF Doc. 44).

On August 28, 2020, plaintiff filed a Note of Issue (NYSCEF Doc. 47).

Motion Seq. No. 003 (The Instant Motion)

Plaintiff now moves (Seq. No. 003), (1), pursuant to CPLR 3212, for summary judgment in its favor and against defendant; (2) pursuant to NY UCC §§ 3-302, 403, for a judgment against defendant in the amount of \$26,400.00, plus interest thereon at the statutory rate of 9% from August 08, 2018, the date of breach; (3) pursuant to NY General Obligations Law § 5-328(3), for a judgment against defendant in the amount of \$20.00; and (4) for costs and disbursements (NYSCEF Doc. 48).

Plaintiff asserts that the disputed issues of fact that this Court noted in its September 27, 2019 Decision and Order in Motion Seq. 001 have been resolved during discovery, which concluded on March 5, 2020. Plaintiff further claims the following: (1), pursuant to UCC § 3-104, the Check is a negotiable instrument; (2), pursuant to UCC § 3-403(2)(a), the individual who signed the Check is personally liable to plaintiff; (3), pursuant to UCC §§ 3-302, plaintiff is a “holder in due course” of the Check, as the documents e-filed as NYSCEF Doc. 52 allegedly confirm; (4), pursuant to UCC § 3-303, plaintiff purchased the Check for value, thus establishing a simple contract; and (5) plaintiff was not on notice that the Check was overdue and/or dishonored. (NYSCEF Doc. 49.)

Defendant opposes the instant motion, asserting, inter alia, the following: (1) plaintiff fails to submit an affidavit from an individual with personal knowledge of the facts to support its argument that plaintiff was a “holder in due course” of the Check because Anton Ilyushchanka signed the Check and was authorized to negotiate checks on the Payee’s behalf; (2) the documents that plaintiff submits as exhibits are improper, as they seem “*at best, to be business records of [plaintiff]*”, the foundation for which has not been established by testimony of any custodian [of plaintiff]”; and (3) those documents e-filed as exhibits fail to establish that Anton Ilyushchanka negotiated the Check on August 15, 2018 (NYSCEF Doc. 58.)

To date, plaintiff has not replied to defendant’s opposition.

Discussion of Motion Seq. No. 003 (The Instant Motion)

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept. 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

This Court permits serial motions for summary judgment, but only if the movant introduces new facts, by an individual with personal knowledge, that resolve prior disputed issue(s) of fact. See Hakim v Hakim, 179 AD3d 423, 423 (1st Dept. 2020). Plaintiff has failed to meet this requirement in its instant, second, motion for summary judgment against defendant, as plaintiff’s supporting documents do not resolve the disputed issues of fact that this Court identified in its September 27, 2019 Decision and Order in Motion Seq. No. 001 (NYSCEF Doc. 20).

Plaintiff attempts to support its second request for summary judgment against defendant by submitting an October 27, 2020 affirmation from John Boulos, Esq., an attorney who does not claim to have personal knowledge of the facts of the instant matter (NYSCEF Doc. 49). See Puritan Ins. Co. v Continental Cas. Co., 195 AD2d 291, 292 (1st Dept. 1993) (affirming denial of motion for summary judgment in which “the only evidence proffered by [movant] Continental in support of its summary judgment motion is an affirmation by its attorney, made without personal knowledge of the facts, which has no probative value on a summary judgment motion.”).

Additionally, the corporate documents that plaintiff submits as exhibits to the instant motion (NYSCEF Doc. 51) are ambiguous and do not establish, inter alia, that Anton Ilyushchanka was authorized to negotiate the Check on the Payee’s behalf. Further, plaintiff has failed to submit an affidavit from one of its custodians to explain the relevance of the subject corporate documents to the instant matter and the subject disputed issues of fact.

This Court sympathizes with plaintiff, which was “burned” by the bad acts of one or more others. However, as this Court sees the matter, plaintiff was simply too trusting of the Payee, thus invoking that ancient legal maxim, “Know your endorser.” Rather than trust the Payee, which, as a matter of fact, apparently was not entitled to the money, plaintiff should have checked with defendant before accepting the Check. On the other hand, defendant violated another ancient legal maxim, “Never sign a check you do not intend to pay.”

This Court has considered plaintiff’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion (Seq. No. 003) by plaintiff, Pay-O-Matic Check Cashing Corp., for summary judgment against defendant, Prime NYC Group Corp., is denied.

Given the sum in dispute and the thorny factual issues, this Court strongly encourages all parties to consider attempting to settle this case with or without this Court’s assistance. In the former instance, an email to this Court (AEANGORON@NYCOURTS.GOV) with a copy to the Court’s Principal Law Clerk (ARGREENF@NYCOURTS.GOV) and all parties, will get the ball rolling.

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4/9/2021
DATE

ARTHUR F. ENGORON, J.S.C.

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