

CFG Merchant Solutions, LLC v Bullsmyth Holdings, LLC
2021 NY Slip Op 31897(U)
June 2, 2021
Supreme Court, New York County
Docket Number: 655287/2020
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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CFG MERCHANT SOLUTIONS, LLC,	INDEX NO. <u>655287/2020</u>
Plaintiff,	MOTION DATE <u>12/24/2020, 01/04/2021</u>
- v -	MOTION SEQ. NO. <u>001 002</u>

BULLSMYTH HOLDINGS, LLC DBA BULLSMYTH
HOLDINGS, BRANDON SMITH, JONATHAN BARRETT

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 22, 23, 26, 28, 30, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - MONEY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 24, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL

Upon the foregoing documents, (1) the instant motion (Seq. No. 001) by plaintiff, CFG Merchant Solutions, LLC, pursuant to CPLR 3215, for a default judgment against defendants, Bullsmyth Holdings, LLC d/b/a Bullsmyth Holdings, Brandon Smith, and Jonathon Barrett, is granted; and (2) the instant motion (Seq. No. 002) by defendants Bullsmyth Holdings, LLC d/b/a Bullsmyth Holdings and Jonathon Barrett to dismiss the instant complaint is denied.

Background

The First Agreement

On or about December 4, 2019, plaintiff, CFG Merchant Solutions, LLC, and defendant Bullsmyth Holdings, LLC d/b/a Bullsmyth Holdings ("Bullsmyth," a Georgia company) entered into a Purchase and Sale of Future Receivables ("the First Agreement," NYSCEF Doc. 7), pursuant to which plaintiff purchased all rights to Bullsmyth's future accounts-receivable, which had a face value of \$242,350.00 ("the First Purchased Amount") for a purchase price of \$185,000.00 ("the First Purchase Price"). According to the First Agreement, Bullsmyth would pay plaintiff via 15% of Bullsmyth's daily revenue until the First Purchased Amount was fully paid. Defendant Brandon Smith and Jonathon Barrett ("the Guarantors") guaranteed any and all amounts that Bullsmyth would owe to plaintiff in the event that Bullsmyth defaulted on the First Agreement. Bullsmyth paid \$89,810.00 on the First Agreement. (NYSCEF Documents 1 and 21.)

By February 28, 2020, Bullsmyth breached the First Agreement by, inter alia, blocking plaintiff's access to the bank account ("the Bank Account") from which Bullsmyth had

authorized plaintiff to withdraw the subject daily receivables and/or by depositing the subject receivables into a different bank account. Plaintiff asserts that Bullsmyth owes \$162,737.00, plus interest, costs, disbursements, and attorney's fees, arising out of the following: (1) the \$152,540.00 balance; (2) a \$7,627.00 "Default Fee"; (3) a \$2,500.00 "Stopped Payment Fee"; and (4) a \$70.00 "Not Sufficient Funds" fee. Defendants are jointly and severally liable for said amounts. (NYSCEF Doc. 1.)

The Second Agreement

On or about January 3, 2020, plaintiff and Bullsmyth entered into another Purchase and Sale of Future Receivables ("the Second Agreement," NYSCEF Doc. 8), pursuant to which plaintiff purchased all rights to Bullsmyth's future accounts-receivable, which had a face value of \$121,175.00 ("the Second Purchase Amount") for a purchase price of \$92,500.00 ("the Second Purchase Price"). Pursuant to the Second Agreement, Bullsmyth would pay plaintiff via 15% of Bullsmyth's daily revenue until the Second Purchased Amount was fully paid. The Guarantor guaranteed any and all amounts that Bullsmyth would owe to plaintiff in the event that Bullsmyth defaulted on the Second Agreement. Bullsmyth did not pay any amount of the Second Agreement. (NYSCEF Doc. 1.)

By February 28, 2020, Bullsmyth breached the Second Agreement by, inter alia, blocking plaintiff's access to the Bank Account from which Bullsmyth had authorized plaintiff to withdraw the subject daily receivables and/or by depositing the subject receivables into a different bank account. Plaintiff asserts that Bullsmyth owes \$129,803.75, plus interest, costs, disbursements, and attorney's fees, arising out of the following: (1) the \$121,175.00 balance; (2) a \$6,058.75 default fee; (3) a \$2,500.00 "Stopped Payment Fee"; and (4) a \$70.00 "Not Sufficient Funds" fee. Defendants are jointly and severally liable for said amounts. (NYSCEF Doc. 1.)

The Instant Action

On October 13, 2020, plaintiff commenced the instant action, seeking a judgment (1) on the first cause of action, for breach of the First Agreement, as against Bullsmyth, in the amount of \$162,737.00, plus interest, costs, disbursements, and attorney's fees; (2) on the second cause of action, for breach of the Guaranty on the First Agreement, as against the Guarantors, in the amount of \$162,737.00, plus interest, costs, disbursements, and attorney's fees; (3) on the third cause of action, for breach of the Second Agreement, as against Bullsmyth, in the amount of \$129,803.75, plus interest, costs, disbursements, and attorney's fees; (4) on the fourth cause of action, for breach of the Guaranty of the Second Agreement, as against the Guarantors, in the amount of \$129,803.75, plus interest, costs, disbursements, and attorney's fees; and (5) on the fifth cause of action, against all defendants, for contractual attorney's fees (NYSCEF Doc. 1).

Plaintiff's Instant Motion for a Default Judgment (Seq. No. 001)

Plaintiff now moves (Seq. No. 001), pursuant to CPLR 3215, for a default judgment against defendants, jointly and severally, in the combined amount of \$292,540.75, plus interest thereon from February 28, 2020 plus costs and disbursements arising from (1) \$162,737.00 for breach of the First Agreement; and (2) \$129,803.75 for breach of the Second Agreement (NYSCEF Doc. 4).

Defendants oppose that motion, asserting, essentially, that plaintiff improperly served defendants and thus does not have personal jurisdiction over defendants in the instant matter (NYSCEF Doc. 41).

Defendants Bullsmyth and Barrett's Instant Motion to Dismiss (Seq. No. 002)

Defendants Bullsmyth and Jonathon Barrett now jointly move, pursuant to CPLR 3211(a)(8), to dismiss the instant complaint on the ground of lack of personal jurisdiction over said defendants due to improper service (NYSCEF Doc. 15). Defendant Jonathon Barrett asserts, inter alia, the following: (1) co-defendant Bullsmyth is not authorized to do business in New York; (2) he and co-defendant Brandon Smith reside in Georgia; and (3) he and co-defendant Brandon Smith did not sign documents, accept funds, and/or execute the subject transactions in or in connection with New York (NYSCEF Doc. 16).

Service Upon Defendant Bullsmyth

On November 10, 2020, plaintiff "posted" the instant summons and complaint on Bullsmyth, and on November 13, 2020, plaintiff mailed a copy of the instant summons and complaint to Bullsmyth (NYSCEF Doc. 3). Bullsmyth and defendant Jonathon Barrett assert that those affidavits of service contain various defects, as, inter alia, (1) they name the incorrect court; (2) they "use a California Jurat swearing under the laws of the State of California" and are "signed by a Georgia Notary Public"; (3) they lack the Certificate of Conformity that New York courts require; (4) their envelope fails to indicate that an attorney sent it and fails to state "Personal and Confidential" on the exterior; and (5) the address that plaintiff served is defendant Jonathon Barrett's personal residence rather than Bullsmyth's offices (NYSCEF Doc. 21, at 4).

In opposition, plaintiff asserts that it attempted to personally serve Bullsmyth at his business address, but said address was vacant, which a neighbor apparently confirmed to plaintiff's process server. (NYSCEF Documents 34 and 38.)

Service Upon Defendant Jonathon Barrett

On November 10, 2020 plaintiff affixed the instant summons and complaint to defendant Jonathon Barrett's door but apparently failed to follow up with the required mailing pursuant to CPLR 308(4) (NYSCEF Doc. 2). Bullsmyth and defendant Jonathon Barrett assert that the affidavit of service contains various defects, as it, inter alia, (1) names the incorrect court; (2) "uses a California Jurat swearing under the laws of the State of California" and is "signed by a Georgia Notary Public"; and (3) lacks the Certificate of Conformity that New York courts require (NYSCEF Doc. 21).

In opposition, plaintiff claims that it did mail the instant summons and complaint to defendant Jonathon Barrett and that all defendants received additional service, pursuant to CPLR 3215(g), via mail (NYSCEF Doc. 34, at 6). Plaintiff further asserts that defendants admit to having received process (NYSCEF Doc. 34, at 13). As for defendants' invocation of CPLR 2309(c) in referencing that plaintiff failed to e-file a Certificate of Conformity for an oath taken outside of New York, plaintiff asserts that, as defendants agreed to jurisdiction and venue in New York and additional methods of service pursuant to the First and Second Agreements, plaintiff's failure to submit said certificates does not strip this Court of personal jurisdiction over the instant matter. (NYSCEF Documents 32 and 34.)

Discussion

The First and Second Agreements, both in ¶ 27, state the following, in pertinent part:

... Seller: (i) agrees that all actions or proceedings relating directly or indirectly hereto shall, at the option of Buyer, be litigated in courts located within [New York State], and, that, at the option of Buyer, the exclusive venue therefore shall be New York County, State of New York; (ii) consents to the jurisdiction and venue of any such court and consents to service of process in any such action or proceeding by personal delivery or any other method permitted by law; and (iii) waives any and all rights Seller may have to object to the jurisdiction of any such court, or to transfer or change the venue of any such action or proceeding.

(NYSCEF Documents 7-8.)

The Guaranties on the First and Second Agreements state the following:

6. Governing Law; Venue; Service of Process: ... Guarantor: (i) agrees that all actions or proceedings relating directly or indirectly hereto shall, at the option of Buyer, be litigated in courts located within said state, and, that, at the option of Buyer, the exclusive venue therefore shall be New York County, State of New York; (ii) consents to the jurisdiction and venue of any such court and consents to service of process in any such action or proceeding by personal delivery or any other method permitted by law; and (iii) waives any and all rights Guarantor may have to object to the jurisdiction of any such court, or to transfer or change the venue of any such action or proceeding.

(NYSCEF Doc. 35.)

This Court finds that defendants have failed to establish a reasonable excuse and meritorious defense for their failure to interpose an answer timely. Pursuant to the above provisions of the First and Second Agreements and accompanying Guaranties, defendants waived their right to challenge personal jurisdiction and proper venue in New York. The subject alleged defects in the subject affidavits of service that defendants emphasize in their instant CPLR 3211(a)(8) motion to dismiss the complaint are “mistakes,” “omissions,” and/or “irregularities” that do not defeat this Court’s clear jurisdiction over the instant matter. CPLR 2001. Furthermore, pursuant to the signature lines on the First and Second Agreements, defendants Jonathon Barrett and Brandon Smith own Bullsmyth (NYSCEF Documents 7-8). Defendant Jonathon Barrett does not dispute that he received a copy of the instant summons and complaint (when plaintiff’s process server affixed it to his door) (NYSCEF Doc. 16). On November 13, 2020 (three days after plaintiff affixed the subject summons and complaint to defendant Jonathon Barrett’s door), plaintiff also served all defendants pursuant to CPLR 3215(g)(3) and (4) additional notices by mail (NYSCEF Doc. 40); therefore, this Court notes in passing that, pursuant to CPLR 308(4), defendant Jonathon Barrett did indeed receive a mailed copy of the subject summons and complaint within twenty days of receiving the affixed copy.

Plaintiff has made out prima facie cases for breach of contract and breach of guaranty on both the First and Second Agreements by submitting copies of the First and Second Agreements (NYSCEF Documents 7-8) and the December 24, 2020 affirmation of plaintiff's attorney, Yana Chechelnitsky (NYSCEF Doc. 6), among other documents.

Additionally, plaintiff has established that it is entitled to a default judgment against defendants, jointly and severally, by submitting the following, among other documents: copies of the subject summons and complaint (NYSCEF Doc. 9); copies of the subject affidavits of service and CPLR 3215(g) additional notices (NYSCEF Documents 10-11); and the December 23, 2020 affidavit of facts of Joshua Karp, plaintiff's representative (NYSCEF Doc. 5).

Therefore, this Court will grant plaintiff's motion (Seq. No. 001), pursuant to CPLR 3215, for a default judgment and will deny defendants Bullsmyth and Jonathon Barrett's joint motion (Seq. No. 002), pursuant to CPLR 3211(a)(8), to dismiss.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion (Seq. No. 001) by plaintiff, CFG Merchant Solutions, LLC, pursuant to CPLR 3215, for a default judgment against defendants, Bullsmyth Holdings, LLC d/b/a Bullsmyth Holdings, Brandon Smith, and Jonathon Barrett, jointly and severally, is hereby granted, on plaintiff's first through fourth causes of action, in the collective amount of \$292,540.75, plus interest thereon from March 28, 2020 (approximately one month following the date of default on both the First and Second Agreements), plus costs and disbursements. The instant motion (Seq. No. 002), pursuant to CPLR 3211(a)(8), by defendants Bullsmyth Holdings, LLC d/b/a Bullsmyth Holdings and Jonathon Barrett to dismiss the instant complaint is hereby denied. Accordingly, the Clerk is hereby directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$292,540.75, plus interest thereon from February 28, 2020, plus costs and disbursements.

Plaintiff's request for attorney's fees (plaintiff's fifth cause of action in the instant complaint) is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and the payment of any necessary fees.

6/2/2021

DATE



ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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CASE DISPOSED

☐

NON-FINAL DISPOSITION

☐

GRANTED

☐

DENIED

☐

GRANTED IN PART

☒

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE