Greenwich Capital Mgt. L.P. v Joseph's Paving LLC
2022 NY Slip Op 30247(U)
January 12, 2022
Supreme Court, New York County
Docket Number: Index No. 654740/2020
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. LOUIS L. NOCK**	**PART**	**38M**
	Justice		

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GREENWICH CAPITAL MANAGEMENT LIMITED PARTNERSHIP,

Plaintiff,

- v -

JOSEPH'S PAVING LLC and BROOK JOSEPH,

Defendants.

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INDEX NO. 654740/2020

MOTION DATE 08/05/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42

were read on this motion for DEFAULT JUDGMENT.

LOUIS L. NOCK, J.

Plaintiff commenced this action to enforce its rights under a contract with the LLC defendant titled “Purchase and Sale of Future Receivables,” dated July 15, 2020 (NYSCEF Doc. No. 9) (the “Contract”), alleged to be in default by the LLC defendant and by its performance guarantor – the individual defendant.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff has submitted affidavits of service demonstrating service of the summons and complaint on the defendants (NYSCEF Doc. Nos. 2, 13) and the affidavit of Richard Gipstein, Esq., General Counsel for the plaintiff, which attempts to set forth the facts constituting plaintiff's claim as well as defendants' default (NYSCEF Doc. No. 30). After engaging various calculations, referencing selected sections of the Contract, Mr. Gipstein concludes that an outstanding balance of $77,302.63 is owed plaintiff by the defendants, jointly and severally. This court could benefit, however, from explication of the application (or non-application) of certain *other* sections of the Contract which are *not* addressed by Mr. Gipstein. One such section is found on the very front page of the Contract, titled "This Transaction is NOT A LOAN" (NYSCEF Doc. No. 9 § 1.2). It provides as follows:

> This transaction is a sale of a portion of Merchant's Future Receivables and, as such, this Agreement has no predeterminable term. **<u>If Merchant's business declines</u>** or if Merchant's business fails before Purchaser collects the Purchased Amount of Future Receivables purchased hereunder (and Merchant has not violated, or deliberately frustrated performance of, the terms of this Agreement, and Merchant has not otherwise deceived Purchaser), **<u>Merchant will not be in default</u>** under this Agreement and Purchaser will have no recourse. **<u>Purchaser is entering into this Agreement knowing the risks</u>** that Merchant's business may decline or fail, and Purchaser assumes these risks based on Merchant's representations, warranties, and covenants in this Agreement (designed to give Purchaser a reasonable and fair opportunity to receive the benefit of its bargain).

(*Id.* [emphasis added].) The Gipstein Affidavit asks this court to assume that defendants come within the Events of Default section of the Contract (§ 4.1) (*see*, Gipstein Aff. [NYSCEF Doc. No. 30 ¶¶ 10-12). However, no effort is expended to convince this court that defendants do not come within the purview of Section 1.2 of the Contract, quoted above, which excepts the defendants from the brand of "default" if their subject business declines. Granted – the context of a default judgment motion does afford some leniency. Nevertheless, while "[t]he standard of proof is not stringent," there must still be "some firsthand confirmation of the facts" (*Feffer v*

Malpeso, 210 AD2d 60, 61 [1st Dept 1994]). No facts that might be considered as indicia of a deliberate withholding of payment (Contract § 4.1), or other *bona fide* Event of Default (*id.*), going beyond an unavoidable decline in business (*id.*, § 1.2), have been proffered by Mr. Gipstein. The court invites him to do so, if possible, by way of supplementation. But absent such supplementation, the court is not yet in a position where it can issue final judgment for the plaintiff.

By the same token, Section 1.8 of the Contract, titled "Confession of Judgment," required defendants to tender to plaintiff Affidavits of Confession of Judgment which would correspond to the precise relief sought in this action and on this motion, "authorizing entry of judgment in favor of" plaintiff. One would think that the submission of such affidavits would be of high value on a motion such as this. Indeed, the Confession of Judgment procedure could even serve as a expedient means, in and of itself, toward attainment of the ultimate goal intended by the within motion without the need for motion practice altogether. However, no such affidavits have been submitted.

Accordingly, the court holds decision in abeyance subject to further supplementation consistent with the foregoing observations.

Therefore, it is

ORDERED that the motion for a default judgment is denied without prejudice to further supplementation addressing circumstances or indicia placing defendants' conduct or omissions more firmly within the purview of Events of Default under the Contract, and addressing any Affidavits of Confession of Judgment under the Contract.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

1/12/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**	
		GRANTED	**DENIED**		**GRANTED IN PART**	X **OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	**REFERENCE**