

Rosenthal & Rosenthal, Inc. v Brody

2022 NY Slip Op 30465(U)

February 9, 2022

Supreme Court, New York County

Docket Number: Index No. 653867/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ROSENTHAL & ROSENTHAL, INC.,

Plaintiff,

- v -

SHELDON BRODY,

Defendant.

INDEX NO. 653867/2021

MOTION DATE 10/15/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

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

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that Plaintiff’s motion for summary judgment is granted in its entirety. Plaintiff has established its *prima facie* entitlement to summary judgment on both liability and damages as to the first cause of action to enforce the Guarantee signed by Defendant. Plaintiff has also established its right to summary judgment on its second cause of action for costs and attorney’s fees pursuant to the Guarantee. Accordingly, Plaintiff’s motion for summary judgment is granted as set forth herein.

Marcraft Clothes, Inc. (**Marcraft**) was a business that manufactured men’s suits and coats. In 2017, when the business began having financial difficulties, Marcraft entered into a Factoring Agreement dated May 15, 2017 (the **Agreement**) with Plaintiff, Rosenthal & Rosenthal, Inc. (**Rosenthal**), by which it sold and assigned all of Marcraft’s account receivables to Rosenthal. Section 7.3 of the Agreement provided that Rosenthal would advance funds to Marcraft, in its sole discretion, according to the specific terms outlined in the Agreement. The Agreement

provided that interest would accrue on the daily net balance of monies advanced to Marcrafft at a significant rate, which would essentially double upon the occurrence of a default as outlined in the Agreement.

As inducement to, and in consideration of, Rosenthal's agreement to advance funds under the Agreement, Sheldon Brody (**Brody**), a co-owner of Marcrafft, executed a Guarantee dated November 9, 2018 (the **Guarantee**), which made him jointly and severally liable with other guarantors for payment of Marcrafft's obligations to Rosenthal. The Guarantee capped Brody's liability under the Agreement at \$1,000,000 plus all costs, expenses, and fees, including reasonable attorneys' fees, incurred by Rosenthal in enforcing collection under the Guarantee. Brody also waived all defenses in law and equity under the terms of the Guarantee and consented to New York jurisdiction of any dispute.

Rosenthal alleged that Marcrafft defaulted under the Agreement by failing to pay its debts as they became due, which was acknowledged by Marcrafft in a subsequent Forbearance Agreement dated December 4, 2019 (the **Forbearance**). However, Rosenthal claims that Brody has not fulfilled his obligations under the Guarantee, and by this action, they seek to enforce the Guarantee against him. Rosenthal also seeks costs and reasonable attorneys' fees pursuant to the terms of the Guarantee. Attached to Plaintiff's summary judgment motion are copies of the Agreement, Guarantee and Forbearance, as well as a copy of Rosenthal's Client Statement for Marcrafft showing a total outstanding balance of \$9,499,175.60, as verified by the Affidavit of Steven Spagnuolo, vice president of Rosenthal.

Brody's opposition does not challenge the validity of the Guarantee or any of its provisions, nor does it provide evidence that Marcraft has reduced or paid off its outstanding balance. Instead, Brody contends that, because discovery has not yet occurred in this matter, it is unclear whether Rosenthal received any additional payments or whether lawsuits have been brought by Rosenthal against Marcraft or any of the other guarantors. Brody complains that his son, who took over Marcraft after he retired in 2019, and other third parties have taken advantage of him and deprived him of assets that he could have used to make payment on the Guarantee.

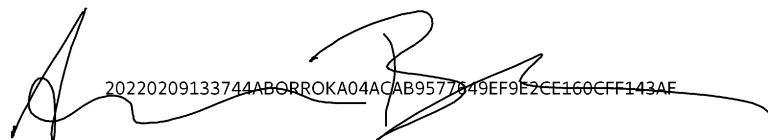
On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Here, there are no issues of material fact. Rosenthal has provided the documentation to support its claim for relief under the terms of the Guarantee. Despite his unfortunate circumstances, Brody has produced no evidence to suggest that any or all of the amounts due and owing Rosenthal have been paid on behalf of Marcraft. Under the clear and unopposed terms of the Guarantee, Brody is liable for \$1,000,000 of Marcraft's outstanding payments to Rosenthal, plus costs and reasonable attorneys' fees. Based upon the language holding Brody and other guarantors jointly and severally liable, Brody may pursue contribution from the other guarantors, should he wish to do so.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is granted in its entirety; and it is further

ORDERED that Plaintiff's counsel is directed to produce documentation supporting its request for reasonable attorneys' fees by no later than February 23, 2022. If the parties cannot agree upon the amount of such reasonable fees and costs upon Plaintiff presenting Defendant with an invoice for their fees and costs, they shall contact Part 53 by email and the issues of such reasonable fees and costs shall be referred to a Special Referee/JHO to hear and determine.


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2/9/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE