

Yes Lender, LLC v Beulah Media Ltd.

2022 NY Slip Op 33924(U)

November 5, 2022

Supreme Court, Kings County

Docket Number: Index No. 508145/2021

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of November, 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
YES LENDER, LLC,

Index No. 508145/2021

Plaintiff,

-against-

DECISION AND ORDER

BEULAH MEDIA LIMITED D/B/A BEULAH MEDIA
and FESTUS OTABOR,

Motion Sequence #1

Defendants.
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	4-12,
Opposing Affidavits (Affirmations).....	
Reply Affidavits (Affirmations)	
Memorandum of Law	13
Affidavits of Service	2, 15, 20

After a review of the papers and upon default of the Defendants, the Court finds as follows:

Plaintiff Yes Lender (hereinafter the “Plaintiff”) has initiated this action as against Defendants Beulah Media Limited d/b/a Beuluah Media (the “Defendant Beulah”) and Festus Otabor (the “Defendant Otabor”) (hereinafter referred collectively as the “Defendants”). The dispute concerns a contract by and between the Plaintiff and the Defendant Beulah (the “Contract”), personally guaranteed by Defendant Otabor, pursuant to which Defendants sold to Plaintiff its future receipts having a value of \$46,150.00 for the sum of \$32,500.00. On or around January 19, 2021, Defendants allegedly failed to make a payment to Plaintiff pursuant to the Contract. Plaintiff subsequently commenced this action. The Plaintiff raises

causes of action for breach of contract, breach of guarantee, and account stated. The Plaintiff now moves (motion sequence #1) for an Order pursuant to CPLR 3212 granting it summary judgment on its claims. Plaintiff seeks \$27,463.94 as the corrected balance due and owing based on the remaining balance of \$23,628.94 uncollected receivables and a default fee of \$3,835.00. In support of its motion, the Plaintiff relies on the pleadings, an affidavit of Bret Dunlap, the President of the Plaintiff Yes Lender, and the Contract. Defendants did not oppose the motion and defaulted at oral argument by not appearing.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See*

Demshick v. Cmty. Hous. Mgmt. Corp., 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

Turning to the merits of the Plaintiff's motion, Plaintiff relies primarily on the affidavit of its president, Bret Dunlap, and a copy of the Contract. In Bret Dunlap's affidavit, he stated that "I am President of YES LENDER, LLC, the Plaintiff herein ('Plaintiff') and, as such, I am fully familiar with the facts and circumstances stated herein. This affidavit is based upon my personal knowledge, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true." (Bret Dunlap's Affidavit, NYSCEF Document 5, Paragraph 1). He further stated that "[o]n or about October 08, 2020, the parties entered into the Contract whereby BEULAH MEDIA LIMITED D/B/A BEULAH MEDIA sold to Plaintiff its future receipts having a value of \$46,150.00 ('Receivables') for the sum of \$32,500.00 ('Purchase Price'), which Receivables were to be paid to Plaintiff pursuant to a payment schedule set forth in the Contract. The individual codefendant(s) executed a Personal Guaranty of Performance of all the obligations of the corporate codefendant set forth in the Contract. A copy of the Contract with Guaranty is annexed as Exhibit 4. BEULAH MEDIA LIMITED D/B/A BEULAH MEDIA agreed that in the event of its default under the Contract, such as the one alleged in this case, the full uncollected Receivables plus all fees due under the Contract (as a result of the default) would become immediately due and payable in full to Plaintiff." (Id. Paragraphs 3 and 4). Mr. Dunlap further stated that "until January 19, 2021, and until the present time, Defendants delivered to Plaintiff Receivables totaling the net amount, after applicable fees, the sum of \$22,521.06, thereby leaving a remaining balance of \$23,628.94 due and owing. Plaintiff's statement of account for Defendants' account (Exhibit 5) shows each payment made by Defendants including those that were returned. The statement of account is maintained in the ordinary course of Plaintiff's business, and I am one of its custodians. On or about January 19, 2021, BEULAH MEDIA LIMITED D/B/A BEULAH MEDIA failed to deliver the Receivables as agreed in the

Contract and thereby defaulted under the Contract. Moreover, pursuant to the Contract, due to the default, Defendants owe Plaintiff the additional sums of \$3,835.00 as Default Fees, and \$195.00 to cover Plaintiff's cost for filing a UCC-1, plus reasonable attorneys' fees." (Id. Paragraphs 6 through 8). The records Mr. Dunlap references in relation to his assertions of the terms of the Contract and the failure of payment have been submitted with the affidavit.


The Plaintiff has failed to lay a proper foundation for the admission of business records. See CPLR 4518. The conclusory statement that the "statement of account is maintained in the ordinary course of Plaintiff's business" is insufficient. See *799 Crown St., LLC v. Leblanc*, 203 A.D.3d 1117, 1119, 166 N.Y.S.3d 230 [2d Dept 2022]; *Wells Fargo Bank N.A. v. Cleoplat*, 191 AD3d 930, 931, 138 N.Y.S.3d 876 [2d Dept 2021]; *Bank of New York Mellon v. Weber*, 169 AD3d 981, 983, 94 N.Y.S.3d 582 [2d Dept 2019]. In addition, the Plaintiff failed to provide proof of service of the Court's scheduling order, dated July 15, 2022, which would serve to provide notice of the appearance to Defendants, in that a certified mail receipt was not annexed.

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff's motion (motion sequence #1) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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