

Merchant Advance LLC v PP Servs. Corp.
2022 NY Slip Op 34022(U)
November 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 517212/2021
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November 2022

HONORABLE FRANCOIS A. RIVERA

-----X
MERCHANT ADVANCE LLC,

Plaintiff,

DECISION & ORDER
Index No. 517212/2021

- against -

PP SERVICES CORP and CESAR MATTOS

Defendant
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the amended notice of motion filed on September 29, 2021, by Merchant Advance LLC (hereinafter the plaintiff) for an order pursuant to CPLR 3212 granting summary judgment in its favor on its causes of action for breach of contract and breach of a guarantee.

- Amended Notice of Motion
- Memorandum of Law in Support
- Affirmation in Support
- Affidavit in Support
- Memorandum of Law in Opposition
- Memorandum of Law in Reply
- Statement of Material Facts¹

In this action, inter alia, for breach of contract, the plaintiff moves for an order granting it summary judgment for the relief demanded in the complaint. The motion is opposed.

¹ On January 6, 2022, the Court issued an interim order which granted plaintiff leave to file a statement of material facts in the NYSCEF system, along with any further supporting affidavits and documentary evidence to support the statement, on or before January 20, 2022; and it is further granted the defendant leave to file a counterstatement of material facts in the NYSCEF system, with any further supporting affidavits and documents to support the statement, on or before February 3, 2022.

BACKGROUND

The verified complaint alleges the following salient facts. Pursuant to a Receivable Purchase Agreement (hereinafter the Agreement) and personal guaranty dated April 7, 2021, the plaintiff purchased from defendant PP Services Corp. (hereinafter the merchant) \$17,280.00 of each future account and payment obligation owing to merchant from its customers as they were generated (hereinafter future receivables). Pursuant to the Agreement, plaintiff was authorized to collect future receivables via an ACH electronic debit, until such time as the plaintiff collected the total amount of purchased receivables.

The Agreement contained the merchant's express covenant not to revoke its ACH authorization to plaintiff or otherwise take any measure to interfere with the plaintiff's ability to collect the future receivables. Plaintiff alleges that the merchant materially breached the terms of the Agreement on June 29, 2021. The agreement was breached by changing the designated bank account without plaintiff's authorization; by placing a stop payment on plaintiff's debits to the account; or by taking measures to interfere with the plaintiff's ability to collect the future receivables.

The Agreement provided that the merchant shall be in default of the Agreement if, inter alia, it breached any covenants contained therein or made any representation or warranty proving to have been incorrect, false, or misleading in any material respect. Plaintiff alleges that due to the merchant's breach of these provisions the merchant has defaulted on the Agreement.

Pursuant to the Agreement, and the merchant's default, the plaintiff may declare the total amount of receivables purchased and not delivered as immediately due and owing to it, including costs and fees. Plaintiff now has a balance of \$14,504.00 in undelivered future receivables. Subtracting the amount of receivables plaintiff has previously collected from the merchant, plaintiff is due and owing from the merchant the amount of \$14,504.00 with interest thereon from June 29, 2021.

The Agreement also contained a separately executed and unconditional guarantee of payment by defendant Cesar Mattos (hereinafter the guarantor) in the event of default by the merchant. Consequently, plaintiff alleges that there is presently due and owing from the guarantor to plaintiff the amount of \$14,504.00 with interest thereon from June 29, 2021.

On July 23, 2021, the defendants filed a verified answer which asserted sixteen affirmative defenses.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*see El-Nahalv. FA Mgt., Inc.*, 126 AD3d 667, 668 [2nd Dept 2015]).

To prevail on the instant motion, it was incumbent upon the plaintiff to prove each of these elements as a matter of law. Since the plaintiff did not meet its burden of demonstrating as a matter of law that the defendants defaulted under the agreement, it failed to meet this burden. For this reason, the motion must be denied regardless of the sufficiency of the opposing papers (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]).

The plaintiff submitted the affidavit of Daisy Gonzalez, the operation executive administrator of the plaintiff, to support the motion. Daisy Gonzalez also verified the complaint in the instant action. Neither the verified complaint nor the affidavit of Daisy Gonzalez averred that the agreed upon purchase price of \$17,280.00 for the defendant's future receivables was actually paid to the defendant. Nor did they demonstrate by their evidentiary submissions that it was actually paid. Consequently, the plaintiff did not demonstrate their own performance pursuant to the agreement. A fortiori, plaintiff did not make a prima facie showing of the merchant's breach of the agreement.

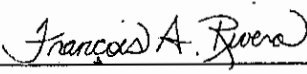
Inasmuch as the plaintiff did not make a prima facie showing that the merchant breached the agreement, the obligation of the guarantor, was not triggered. As a result, the plaintiff also failed to show that the guarantor breached the agreement.

CONCLUSION

The motion by Merchant Advance LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on its causes of action for breach of contract and breach of a guarantee is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:



J.S.C.
HON. FRANCOIS A. RIVERA
J.S.C.