

Cline v Schuster Enters., LLC
2023 NY Slip Op 30177(U)
January 5, 2023
Supreme Court, New York County
Docket Number: Index No. 656167/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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WILLIAM CLINE,

Plaintiff,

- v -

SCHUSTER ENTERPRISES, LLC D/B/A SILVERBACK
DEVELOPMENT, JOSHUA SCHUSTER

Defendants.

INDEX NO. 656167/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion for SUMMARY JUDGMENT.

Plaintiff William Cline (“Plaintiff” or “Cline”) moves for Summary Judgment pursuant to CPLR R. 3212(a) on the sole count of his Complaint against Defendants Schuster Enterprises, LLC d/b/a Silverback Development (“Silverback”) and Joshua Schuster (“Schuster”) (collectively the “Defendants”) for breach of contract and for attorneys’ fees pursuant to the parties’ written agreement(s). Neither Defendant has entered an appearance following the withdrawal of their counsel on May 25, 2022 (NYSCEF 29).¹ Plaintiff filed an Affidavit of Service demonstrating that this motion and supporting papers were served upon Defendants on

¹ Both Defendants filed Answers in this action (NYSCEF 15, 17). On May 6, 2022, Defendants’ counsel moved to withdraw. The Court’s May 25, 2022 Order and Decision granted the motion, and stayed the action for thirty days. The Order directed that “Defendants shall either appoint substitute counsel or advise the Court of their intention to proceed in this matter pro se (the latter option is available only to Mr. Schuster, not to the corporate defendant) within 30 days from the date of this order.” Defendants have not filed an appearance following that Order. On July 8, 2022, Plaintiff filed its motion for summary judgment.

July 8, 2022 (NYSCEF 37). Defendants have not opposed the motion. For the following reasons, Plaintiff's motion is granted.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law, the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med Ctr.*, 64 NY2d 851, 853 [1985]; *Cendant Car Rental Group v. Liberty Mutual Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]).

“A summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion (*i.e.*, ‘defaulted’)” (*Liberty Taxi Mgt., Inc. v Gincheran*, 32 AD3d 276, 277, n 1 [1st Dept 2006]). Rather, the “court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law” (*id.* [citations omitted]).

Here, Plaintiff has established a *prima facie* case for summary judgment by demonstrating “the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach” (*Friends of Wickers Cr. Archeological Site, Inc. v Landing on the Water at Dobbs Ferry Homeowners Assn., Inc.*, 198 AD3d 726, 728 [2d Dept 2021]). Plaintiff has submitted the Loan Documents which consist of (i) the Funding Agreement (NYSCEF 2) which provided that Plaintiff would lend Defendants the sum of one million dollars (\$1,000,000.00), as short-term financing for the purchase of a parcel of real property located in Bronx County, New York; (ii)

the Assignment Agreement (NYSCEF 3); (iii) the First Amendment to the Funding Agreement (NYSCEF 5) which extended Defendants' repayment date on the loan; (iv) the Second Amendment to the Funding Agreement (NYSCEF 6) which further extended Defendants' repayment date on the loan; (v) and the Forbearance Agreement (NYSCEF 7), which gave Defendants ninety days to repay the loan.

In the Forbearance Agreement, Defendants acknowledged a sum certain due and owing to Plaintiff (\$1,076,666.66 plus the amount of interest of \$833.33 accruing on a daily basis), and warranted that Defendants have no claims, counterclaims, causes of action, offsets, rights of recoupment, defenses or demands against Plaintiff with respect to the loan and, to the extent that there were any such rights, that Defendants expressly waived same to induce Plaintiff to forbear (NYSCEF 7 § 16(a)-(b)). Defendants also agreed to pay "any additional legal fees and other expenses reimbursable by Silverback and/or Guarantor pursuant to the Transaction Documents incurred by Cline between the date hereof and the Forbearance Termination Date, in order to satisfy the obligations of Silverback and Guarantor under the Transaction Documents in full" (NYSCEF 7 § 7).

Plaintiff submits that Defendants failed to repay the Loan in full by the expiration of the forbearance term. On or about September 2, 2021, Defendants tendered the sum of \$25,000.00 to Plaintiff, representing the interest accrual for that month (*see* NYSCEF 35 ¶ 29 ["Cline Aff."]). According to Plaintiff, Defendants paid no further monies to Plaintiff, and as of July 1,

2022, Plaintiff is owed the sum of \$1,529,998.13, plus continuing interest at the contractual rate of thirty percent (30%) per annum and fees (Cline Aff. ¶ 31–36).²

Defendants have not sought to rebut Plaintiff’s *prima facie* case for breach of contract.

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment is **granted**; it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendants, jointly and severally, in the sum of \$1,529,998.13, plus interest at the contractual rate of thirty percent (30%) per annum from the date of July 1, 2022, until the date of this Decision and Order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; it is further

ORDERED that the portion of Plaintiff’s motion seeking reasonable attorneys’ fees is severed, and those issues are referred to a Judicial Hearing Officer (JHO) to hear and determine; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon

² The Forbearance Agreement was entered into after Defendants had defaulted on the loan (Cline Aff. ¶ 16–17), and thus the prohibitions of the usury statute do not apply (*72nd Ninth LLC v 753 Ninth Ave Realty LLC*, 168 AD3d 597, 598 [1st Dept 2019] [“[T]he interest rate applicable upon default does not fall within the prohibition of the usury statute”]; *Kraus v Mendelsohn*, 97 AD3d 641, 641 [2d Dept 2012] [“[T]he defense of usury does not apply where . . . the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity”]).

the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

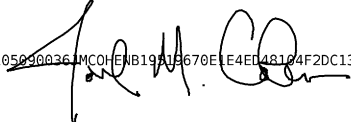
ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on Defendants within five days and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that Plaintiff shall serve this Order with Notice of Entry on Defendants within five (5) days of the date of this Order.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

1/5/2023
DATE

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