

Apex Funding Source LLC v Boomer Naturals Inc.

2023 NY Slip Op 32595(U)

July 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 514779/2021

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 day 21st of July 2023

HONORABLE FRANCOIS A. RIVERA

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APEX FUNDING SOURCE LLC,
Plaintiff,

DECISION & ORDER

Index No.: 514779/2021

- against -

Oral Argument: 6/1/2023

BOOMER NATURALS INC. d/b/a BOOMER
NATURALS, BOOMER NATURALS WELLNESS, INC.,
WHALE SPORTS INC., WHALE SPORTS LLC,
REMINDERS FROM HEAVEN LLC, BOOMER
NATURALS HOLDINGS INC., BOOMER HOLDINGS INC.,
BOOMER FACE MASKS INC., INTERNET CONSULTANTS
OF NEVADA, LLC, and DANIEL JAMES CAPRI,

Cal. No.: 7, Ms. No.: 3

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Apex Funding Source LLC ("Plaintiff") on March 6, 2023, under motion sequence number three, for an order pursuant to CPLR 3212(a) granting summary judgment on its Complaint against defendants Boomer Naturals Inc. d/b/a Boomer Naturals, Boomer Natural Wellness, Inc., Whale Sports Inc., Whale Sports LLC, Reminders from Heaven LLC, Boomer Naturals Holdings Inc., Boomer Holdings Inc., Boomer Face Masks Inc., Internet Business Consultants of Nevada, LLC, and Daniel James Capri (collectively, "Defendants"), jointly and severally, in the amount of \$4,075,351.32, with interest thereon at the rate of 9% per annum from May 26, 2021, and dismissing Defendants' Affirmative Defenses pursuant to CPLR 3211(b).

Notice of Motion
Memorandum of law in support
Exhibit 1
Affidavit in Support
Exhibit 1-6
Affirmation in support
Exhibit A-C
Statement of Material Facts
Memorandum of law in opposition
Affirmation in opposition
Counter statement of material facts
Memorandum of law in reply
Exhibit 1-2

BACKGROUND

On June 7, 2021, plaintiff commenced the instant action for, inter alia, breach of contract by filing a summons and verified complaint with the Kings County Clerk's office. The verified complaint alleges thirty allegations of fact in support of four causes of action, namely breach of contract, breach of a guarantee, unjust enrichment, and conversion.

The verified complaint alleges the following salient facts. On or about May 3, 2021, plaintiff and defendants entered into an agreement whereby plaintiff agreed to purchase all rights to the Company Defendants' future receivables having an agreed upon value of \$4,235,000.00 for \$3,850,000.00 (hereinafter the Agreement). Pursuant to the Agreement, the Company Defendants agreed to remit to plaintiff 12% of their receivables. The Company Defendants further agreed to have one bank account approved by plaintiff (the "Bank Account") from which the Company Defendants authorized plaintiff to make ACH withdrawals until \$4,235,000.00 was fully paid to plaintiff. Said

withdrawals were a good faith estimate of the Specified Percentage of the Company Defendants' receivables at the time the Agreement was entered into.

In addition, plaintiff alleges that defendant guarantor (hereinafter the Guarantor), agreed to guarantee any, and all amounts owed to plaintiff from the Company Defendants upon a breach in performance by Company Defendants. Plaintiff remitted the purchase price for the future receivables to Company Defendants as agreed. Initially, the Company Defendants met their obligations under the Agreement. The Company Defendants ceased remitting to plaintiff the plaintiff's share of purchased receivables and otherwise breached the Agreement by intentionally impeding and preventing plaintiff from receiving the specified percentage of the Company Defendants' receivables, while conducting regular business operations and collecting revenue. The Company Defendants have remitted \$150,000.00 of the receivables purchased by plaintiff, leaving a balance of unremitted receivables in the amount of \$4,085,000.00. In addition, pursuant to Section 31 of the Agreement, Company Defendant incurred an additional contingency fee in the amount of \$674,025.00 (which, upon the occurrence of an event of default or breach, is calculated as sixteen- and one-half percent (16.5%) of the amount claimed/balance of the purchased amount of future receivables to be applied to the balance owed to Plaintiff) for Company Defendant's failure to direct the agreed upon payment(s) to plaintiff and for Company Defendant changing its bank account from the specified bank account. Despite due demand, Company Defendant has failed to pay the amounts due and owing by Company Defendant.

Moreover, the Guarantor was responsible for all amounts incurred as a result of any breach of the Company Defendant. There remains a balance due and owing to plaintiff on the Agreement in the amount of 4,759,025.00 plus interest, costs, and disbursements. The Company Defendants have materially breached the Agreement by failing to remit to plaintiff the plaintiff's share of future receivables, as required under the Agreement and are otherwise intentionally impeding and preventing the plaintiff from receiving the proceeds of the receivables purchased by them.

Plaintiff also alleges that pursuant to the Agreement, the Guarantor personally guaranteed that Company Defendants would perform its obligations thereunder and that he would be personally liable for any loss suffered by plaintiff because of a breach by the Company Defendants. The Company Defendants have breached the Agreement as detailed above. By reason of the foregoing, plaintiff is entitled to judgment against the Guarantor based on the personal guarantee in the sum of 4,759,025.00 plus interest, costs, and disbursements.

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]).

In the case at bar, the only sworn testimony submitted by the plaintiff in support of the motion was an affirmation of Gabriel Mendelberg, plaintiff's counsel (hereinafter Mendelberg), and an affidavit of Joshua Eisenberg (hereinafter Eisenberg). Mendelberg's affirmation refers to a notice to admit served upon the defendants which purportedly demonstrates that the defendants were in receipt of receivables when they stopped making payments to the plaintiff. Mendelberg's affirmation demonstrated no personal knowledge of any of the facts alleged in the motion or in the verified complaint. An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*Nerayoff v Khorshad*, 168 AD3d 866, 867 [2nd Dept 2019], citing *Warrington v. Ryder Truck Rental*,⁵*Inc.*, 35 AD3d 455, 456 [2nd Dept 2006]).

Eisenberg's affidavit averred that he was the authorized officer of the plaintiff. His affidavit is used to authenticate the revenue purchase agreement which was allegedly breached by the defendants. His affidavit is also used as evidence of the defendants' default of the revenue purchase agreement and of the guarantee.

A fundamental requirement of any breach-of-contract action is for the plaintiff to allege that it is a party to the contract or has acquired the rights of a party (*Autovest, LLC v Cassamajor*, 195 AD3d 672, 673, [2nd Dept 2021]). A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2nd Dept 2015]).

Eisenberg, however, does not aver personal knowledge of any of the facts alleged in the verified complaint. Rather his knowledge is derived from a review of the business records of the plaintiff. Eisenberg does not demonstrate the plaintiff's compliance with its obligations under the agreement. Eisenberg does not allege that he provided the purchase price to the defendants for the future receivables. In fact, there is no evidence of the plaintiff's remittance of the purchase for the future receivables. There is no cancelled check, or other proof of any amount of money provided to the defendants.

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 (*Cruz v Cruz*, 213 AD3d 805 [2d Dept 2023]). In the case at bar, the plaintiff did not make a prima facie showing of its performance of the agreement.

The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Sarker v Das*, 203 AD3d 973 [2d Dept 2022], citing *Financial Assistance, Inc. v Graham*, 191 AD3d 952, 956 [2d Dept 2021]). A plaintiff's cause of action for unjust enrichment may not be maintained if a valid contract governing the subject matter actually exists. Under such circumstances, recovery in quasi contract for events arising out of the same subject matter are generally precluded (see *CSI Group, LLP v. Harper*, 153 AD3d 1314 at 1317 [2d Dept 2017], citing *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark—Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

The Court finds that the subject matter of plaintiff's causes of actions against the defendants arises from their alleged breach of agreement. Accordingly, plaintiff's claim in quasi contract for recovery under the theory of unjust enrichment is precluded (*Id.*).

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Petrone v. Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017], citing *C & B Enters. USA, LLC v. Koegel*, 136 AD3d 957, 958 [2d Dept 2016]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property

or interference with it, in derogation of plaintiff's right (*Petrone v. Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2nd Dept 2017], citing *Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, [2006]).

Money, if specifically identifiable, may be the subject of a conversion action (*Petrone v. Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2nd Dept 2017], citing *Simpson & Simpson, PLLC v. Lippes Mathias Wexler Friedman LLP*, 130 AD3d 1543, 1544—1545 [4th Dept 2015]), However, the mere right to payment cannot be the basis for a cause of action alleging conversion since the essence of a conversion cause of action is the unauthorized dominion over the thing in question (*CSI Group, LLP v. Harper*, 153 AD3d 1314, 1320-1321 [2nd Dept 2017], citing *Daub v. Future Tech Enter., Inc.*, 65 AD3d 1004, 1006 [2nd Dept 2009]). In other words, tangible personal property or specific money must be involved (*CSI Group, LLP v. Harper*, 153 AD3d 1314, 1320-1321 [2nd Dept 2017], citing *Independence Discount Corp. v. Bressner*, 47 AD2d 756, 757 [2nd Dept 1975]).

The plaintiff's cause of action is not one for conversion but rather one for breach of an agreement. Inasmuch as the plaintiff did not make a prima facie showing that it performed its obligation under the agreement, it cannot established prima facie that the defendants breached either the agreement or the guarantee of the agreement. The plaintiff did not make a prima facie showing of entitlement to judgment on any cause of action asserted in the complaint. The motion is therefore denied without regard to the

sufficiency of the defendants' opposition papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

CONCLUSION

The motion by Apex Funding Source LLC for an order pursuant to CPLR 3212 granting summary judgment on its Complaint against defendants Boomer Naturals Inc. d/b/a Boomer Naturals, Boomer Natural Wellness, Inc., Whale Sports Inc., Whale Sports LLC, Reminders from Heaven LLC, Boomer Naturals Holdings Inc., Boomer Holdings Inc., Boomer Face Masks Inc., Internet Business Consultants of Nevada, LLC, and Daniel James Capri and dismissing Defendants' Affirmative Defenses pursuant to CPLR 3211(b) is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:

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J.S.C.

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