

Albert v Albert

2023 NY Slip Op 32754(U)

August 4, 2023

Supreme Court, New York County

Docket Number: Index No. 653464/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

was the sole and proximate cause of any alleged damages (eleventh affirmative defense); unjust enrichment (twelfth affirmative defense); and plaintiff's alleged damages are improperly calculated (thirteenth affirmative defense).

Plaintiffs now, move, pursuant to CPLR 3212, for an order granting summary judgment in their favor and against defendant in the principal amount of \$9,000.00, including the interest thereon pursuant to the terms of the settlement agreement, costs and reasonable attorneys' fees to be fixed by the court. Albert reiterates in her affidavit the allegations made in the complaint but adds that even after a settlement agreement was reached establishing defendant's liability, defendant sent checks to Marx after she was served with the summons with notice, but never tendered the full amount owed, inclusive of the interest on the unpaid balance (NYSCEF Doc. No. 9, *affidavit of Laura Albert*, ¶50). Marx's affidavit sets forth that the amount sought in this action is the \$9,000.00 due each year on January 15th, together with interest at the rate of four (4%) percent per annum on the unpaid principal balance that defendant agreed to pay pursuant to the settlement agreement (NYSCEF Doc. No. 10, *affidavit of Tracy Marx*, ¶6). Marx avers that defendant's check of \$9,000.00, though due by January 15, 2021, was rather received on February 22, 2021, not including the 4% interest that was due. Moreover, the check bounced for insufficient funds and defendant was advised of same. Marx's affidavit further sets forth that defendant was advised that the SNT had incurred additional fees and costs because of the bounced check, and therefore, the interest to be paid by defendant would necessarily increase, and the SNT would commence an action against defendant, who would be responsible for the legal fees and costs (*id.*, at ¶13-14). Marx claims that defendant promised to investigate why the check bounced and to send the four (4%) percent interest that was due, but defendant has not updated plaintiffs on the status of any investigation.

In opposition, defendant's counsel avers in his affirmation that plaintiffs have not demonstrated entitlement to summary judgment because the motion is defective as Albert's annexed affidavit, executed in the State of California, fails to attach a certificate of conformity. Additionally, Albert's affidavit fails to identify the amounts defendant paid in 2021 for principal and interest and lacks any accurate statement of account explaining amounts paid and outstanding, especially the two checks defendant sent after she was served with the summons with notice. Defendant also asserts that her alleged failure to pay the January 15, 2021, amount due was not willful as it is feasible that defendant has, herself, been financially affected by the pandemic which in turn affected her ability to follow-up with the bank and payment. She further argues that only the prevailing party is entitled to recover enforcement fees pursuant to the settlement agreement (NYSCEF Doc. No. 34, *affirmation in opposition*).

In reply, Marx argues that defendant's counsel has not indicated that he has any personal knowledge of any of the facts that gave rise to the obligations sought to be enforced against defendant. Marx claims that defendant's counsel does not deny that defendant failed to make full payment for the amount due on January 15, 2021, with interest as the check tendered as payment of same bounced for insufficient funds. Marx likewise maintains that the two checks that defendant sent to the SNT after she was served with the summons with notice purportedly was a payment towards the \$9,000.00 sued for herein. However, each check was only slightly more than \$500.00 and here, that defendant does not proffer any document evincing that the

bank may have been at fault for the check being returned for insufficient funds. (NYSCEF Doc. No. 35, *reply affidavit of Tracy Marx*, ¶19-27).

It is well-settled that the proponent of a summary judgment motion 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 *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562).

In order to establish a *prima facie* case on a breach of contract claim, plaintiff must show proof of a contract, plaintiff’s performance under the contract, defendant’s breach thereof, and damages as a result (see *Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019].) Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (see *Bartfield v RMTS Assoc.*, 283 AD2d 240, 241 [1st Dept 2001].)

Here, upon review of the record, this court finds that plaintiff has established her *prima facie* entitlement to summary judgment on the claim for breach of contract claim. It is undisputed that the settlement agreement is a binding contract between the parties, plaintiffs performed thereunder, defendant did not make the full payment of \$9,000.00, plus interest as the amount due on January 15, 2021, and plaintiffs have been damaged as a result. Although the court notes that the affidavit of Albert, purportedly sworn to in the state of California, lacks the certificate of conformity required by CPLR 2309(c), the affidavit of Tracy Marx establishes defendant’s liability (NYSCEF Doc. No. 10, *affidavit of Tracy Marx*). Therefore, plaintiffs have established their *prima facie* entitlement to summary judgment on their claim for breach of contract.

As the burden shifts, defendant has established the existence of a material issue of fact precluding summary judgment as to damages, but not as to liability. Defendant’s counsel in his affirmation does not dispute that defendant has not made the payment due to plaintiff on January 15, 2021. Counsel, however, makes a sufficient argument that plaintiffs have not accounted for the two checks defendant sent to the SNT after she was served with the summons with notice. Even though Marx claims in the affidavit that the checks were insufficient to satisfy the amount owed, they do not address whether the checks were cleared, and if so, the current outstanding balance to be paid.

The court also grants that portion of plaintiffs summary judgment motion seeking reasonable attorneys’ fees and costs for enforcing the settlement agreement insofar as the parties agreed in the settlement agreement that the prevailing party in an enforcement action is entitled to an award of such costs (NYSCEF Doc. No. 12, *settlement agreement*, ¶16). All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that plaintiffs' summary judgment motion for breach of contract is granted solely as to liability; however, the issues of damages and reasonable attorney's fees shall be determined at the time of trial; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this order, with notice of entry, on defendant, as well as, on the Clerk of the Court, who shall enter judgment in accordance with this decision and order; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

August 4, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE