

Capital Dude LLC v Maid For You, Inc.

2023 NY Slip Op 33031(U)

August 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 535715/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

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 August 2023

HONORABLE FRANCOIS A. RIVERA

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CAPITAL DUDE LLC,

Plaintiff,

- against -

MAID FOR YOU, INC. D/B/A TWO MAIDS
AND A MOP and FABRICO O PERES,

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by Capital Dude LLC (hereinafter Capital or plaintiff) on February 27, 2023, under motion sequence two, for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against Maid For You, Inc. D/B/A Two Maids and A Mop and Fabrico O Peres (hereinafter the defendants). There was no opposition to the motion

- Notice of Motion
- Affidavit in Support
Exhibits A-C
- Affirmation in Support
Exhibit 1 to 5
- Statement of Material Facts
- Memorandum of law in support

BACKGROUND

On December 8, 2022, plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On January 6, 2023, the defendants interposed and filed a joint answer with counterclaim with the KCCO. By decision

and order dated June 26, 2023, the Court granted the plaintiff's motion under motion sequence number one to dismiss the defendants' counterclaim. The counterclaim was dismissed as abandoned.

The verified complaint alleges fourteen allegations of fact in support of two causes of action, namely, breach of contract and breach of a personal guaranty agreement. The complaint alleges the following salient facts. Pursuant to a receivable purchase agreement and personal guaranty dated December 13, 2021 (the "Agreement"), plaintiff purchased a percentage of the defendant-seller's total future accounts receivable up to the sum of \$43,200.00 ("Purchased Amount") in exchange for an upfront purchase price of \$30,000.00.

Pursuant to the Agreement, plaintiff was authorized to collect via an ACH electronic debit of the future receivables, until such time that plaintiff collected the total amount of purchased receivables. The Agreement contains the defendants express covenant not to revoke its ACH authorization to plaintiff or otherwise take any measure to interfere with its ability to collect the future receivables. On May 11, 2022, the defendants materially breached the terms of the Agreement by changing the designated bank account without plaintiff's authorization, by placing a stop payment on plaintiff's debits to the account or by otherwise taking measures to interfere with the ability to collect the future receivables.

The defendants allegedly breached the Agreement by said conduct. The Agreement contains the unconditional guarantee of the guarantor defendant of making payment in the event of default under the Agreement by the defendant seller. As a result of the defendant-seller's breach and default under the Agreement as set forth above and pursuant to the guaranty, there is presently due and owing from the defendant-guarantor to plaintiff the amount of \$31,536.00 with interest thereon from May 11, 2022.

LAW AND APPLICATION

There is no opposition to the instant motion. However, 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 Gincherman*, 32 AD3d 276, 278 n [1st Dept 2006], citing *Vermont Teddy Bear Co., v 1—800 Beargram Co.*, 373 F3d 241 [2nd Cir 2004] [“the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, 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”]; see *Cugini v System Lumber Co., Inc.*, 111 AD2d 114 [1st Dept 1985]).

It is well established that summary judgment may be granted only when 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 the

evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic TransmiCapitalon 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 Cruz v Cruz*, 213 AD3d 805 [2nd Dept 2023]).

In the case at bar, the only sworn testimony submitted by the plaintiff in support of the motion was an affirmation of Steven W. Wells (hereinafter Wells), its counsel, and an affidavit of Julio Izaguirre, its managing partner (hereinafter Izaguirre). Wells' affirmation refers to the pleadings which he annexed as exhibits and copies of decisions involving other parties on other action which he apparently presumed were persuasive in determining the instant action. Wells' affirmation, however, proffered no allegation of fact and demonstrated no personal knowledge of any of the transactional facts alleged in the 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 [2d Dept 2019], *citing Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

Plaintiff used Izaguirre's affidavit to authenticate the Agreement which was allegedly breached by the defendants. Izaguirre averred that he is the plaintiff's managing partner and, as such, has personal knowledge of its business practices and procedures. He further averred that the factual allegations proffered in support of the motion for summary judgment, he derived from his review of the plaintiff's business records. He then referred to the three documents attached to the motion, namely, the Agreement, a document⁴ he described as proof of funding, and a

document denominated as a payment history. It is noted that Izaguirre did not aver that he was a signatory to the Agreement or that he participated in the execution of same.

Izaguirre indicated that one of the exhibits was proof of funding. He did not explain the source of the specific document, how it was created or how to read it. The document was not a bank statement and was not self-explanatory. However, the purported proof of funding indicated the funding amount was \$28,800. The affidavit of Julio Izaguirre stated that the funding amount was \$30,000 less applicable and disclosed fees of \$200.00. The discrepancy was unexplained. Similarly, the annexed payment history was submitted without explaining its meaning or how to read it. It too was not self-explanatory. These facts alone raise material issues of fact regarding the plaintiff's performance under the Agreement. Consequently, the plaintiff did not make a prima facie showing of entitlement to judgment on its claim breach of the Agreement nor of the defendants' guaranty of the Agreement. In sum, plaintiff has failed to make a prima facie showing of entitlement to summary judgment on any of the claims it has asserted against the defendants.

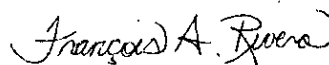
CONCLUSION

The motion by Capital Dude LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against Maid For You, Inc. D/B/A Two Maids and A Mop and Fabrico O Peres is denied.

A copy of this decision and order, along with notice of entry, shall be served upon defendants and filed with the Court within 20 days of entry.

The foregoing constitutes the decision and order of the Court.

ENTER:



J.S.C.

5 of **HON. FRANCOIS A. RIVERA**
J.S.C.