

AKF Inc. v Bella Vita LLC

2023 NY Slip Op 33341(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 653359/2023

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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AKF INC., D/B/A FUNDKITE,

Petitioner,

- v -

BELLA VITA LLC D/B/A SABATINO'S ITALIAN
RISTORANTE and ALESSIO DI SABATINO,

Respondents.

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INDEX NO. 653359/2023

MOTION DATE 09/21/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 13, 20, 21 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, since Respondents Bella Vita LLC d/b/a Sabatino’s Italian Ristorante and Alessio Di Sabatino (collectively “Respondents”) failed to appear in court for either oral argument held on August 24, 2023, and September 21, 2023, after being duly served and notified of said appearances, and since they failed to oppose Petitioner AKF Inc., D/B/A Fundkite’s (“Petitioner”) Verified Petition and motion by order to show cause, the court grants in part the Verified Petition and motion by order to show cause to the extent that the court grants a preliminary injunction in aid of arbitration, pending the resolution of the arbitration between the parties and until further order of the court, and the court restrains the funds held in Respondents Bella Vita LLC d/b/a Sabatino’s Italian Ristorante’s and Alessio Di Sabatino’s Wells Fargo Bank account ending 0578, titled Bella Vita LLC d/b/a Sabatino’s Italian Ristorante up to the amount of \$98,919.00.

This matter involves Petitioner’s attempt to collect on a Revenue Purchase Agreement (“RPA”), dated February 27, 2023, that Respondents allegedly defaulted on by failing to make the agreed upon weekly payments. Pursuant to the terms of the RPA, Petitioner provided

Respondent Bella Vita LLC d/b/a Sabatino's Italian Ristorante with \$99,000.00 in funding, minus \$6,125.00 in service fees and costs, for a total of \$92,875.00. Respondent Bella Vita LLC d/b/a Sabatino's Italian Ristorante agreed to pay back \$142,560.00 of its future receipts and Respondent Alessio Di Sabatino personally guaranteed the performance under the RPA. The RPA included a 18% remittance percentage, with an initial estimated delivery amount of \$969.80/day from its Wells Fargo Bank account ending in 0578.

Petitioner alleges in substance that beginning on April 5, 2023, and again on May 5, 2023, Respondent Bella Vita LLC d/b/a Sabatino's Italian Ristorante's payments were declined by the bank for insufficient funds and Respondent Bella Vita LLC d/b/a Sabatino's Italian Ristorante stopped making the required weekly payments. Petitioner further alleges that the account was closed and that Respondent Bella Vita LLC d/b/a Sabatino's Italian Ristorante failed to notify Petitioner to justify closing the account and failing to make the required payments. Petitioner further alleges in substance that Petitioner is diverting its receipts because it is still in business and still generating revenue. Petitioner further alleges in substance that at the time of the default, Respondent had paid \$43,641.00 of the \$142,560.00 purchased amount, leaving a balance of \$98,919.00 due under the RPA.

Petitioner further alleges that, in addition to the \$98,919.00 owed, Respondents also owe a default fee of 25%, or \$24,729.25, for a total amount due of \$123,648.75. Petitioner further alleges that it attempted to contact Respondents numerous times regarding why Respondents stopped depositing receipts into the designated accounts and to demand that Respondents restore the receipts and allow Petitioner to resume collecting the receipts, but Respondents failed to respond. Petitioner argues that since Respondents failed to respond to Petitioners, failed to deposit its receipts into the designated bank account, failed to justify the insufficient funds or any

downturn or slow-down in their business, that Respondents intentionally diverted their receipts and defaulted on the RPA and that they will not make the required payments. Therefore, any arbitration award in Petitioner's favor would be rendered ineffectual because if Respondents diverted the funds from the designated account, then there would be no funds available to satisfy any judgment rendered in favor of Petitioner.

Petitioner further alleges that the RPA grants any party the right to arbitrate disputes or claims arising from the RPA and they agreed upon the forum.

Petitioner now moves by order to show cause, which includes the same relief requested in the Petition, for an order restraining Respondents' bank accounts at Wells Fargo up to \$123,648.75, pursuant to CPLR 7502(c). The court declined to grant Petitioner's request for a temporary restraining order, but directed the parties to appear in court on August 24, 2023, at 10:00 a.m., for oral argument on Petitioner's request for a preliminary injunction to restrain Respondents' account(s) pending the resolution of the arbitration proceedings.

Petitioner complied with the service requirements set forth in the order to show cause. Respondents failed to file written opposition to Petitioner's order to show cause, failed to file an Answer, failed to oppose the Verified Petition, failed to otherwise appear in this proceeding and failed to appear for oral argument. The court adjourned the matter to September 21, 2023, at 10:30 a.m., to give Respondents a final chance to oppose the matter or otherwise appear in this action. The court issued an Interim Decision and Order on Motion, dated September 5, 2023, including the new adjourn date and warning Respondents in substance that the court would enter a default against them should they fail to oppose the motion by order to show cause and Verified Petition or fail to appear for oral argument. The court required Petitioner to serve Respondents

with the court's Decision and Order with notice of entry within five (5) days of the date of entry of the Order and Petitioner complied.

As such, Respondents are in default.

Here, the court determines that Petitioner demonstrated its entitlement to the relief requested in the order to show cause and Petition as set forth herein. The court finds that Petitioner demonstrated its need for the restraint on Respondent Bella Vita LLC's d/b/a Sabatino's Italian Ristorante's Wells Fargo bank account ending 0578, which was the account designated in the RPA, but only up to \$98,919.00. Additionally, Petitioner demonstrated that it is likely to succeed on the merits, that Respondents owe the money and that Petitioner will suffer irreparable injury if the preliminary injunction is not granted.

Therefore, the court grants in part Petitioner's order to show cause and the relief requested in the Verified Petition, without opposition, to the extent that the court grants a preliminary injunction in aid of arbitration, pending the resolution of the arbitration between the parties and until further order of the court, and the court restrains all funds in Respondent Bella Vita LLC's d/b/a Sabatino's Italian Ristorante's Wells Fargo bank account ending in 0578, up to the amount of \$98,919.00. The court declines to restrain the additional \$24,729.25 for the 25% default fee or to restrain any additional bank account.

The court has considered any additional arguments raised by Petitioner which were not specifically discussed herein and the court denies any additional requests for relief not expressly granted herein.

As such, it appearing to this court that a cause of action exists in favor of Petitioner as against Respondents Bella Vita LLC d/b/a Sabatino's Italian Ristorante and Alessio Di Sabatino and that Petitioner is entitled to a preliminary injunction on the ground that Respondents threaten

or are about to do, or are doing or procuring or suffering to be done, an act in violation of Petitioner’s rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth above, it is hereby

ORDERED that the court grants in part Petitioner AKF Inc., d/b/a Fundkite’s motion by order to show cause filed under motion sequence 001 and relief requested in its Verified Petition, without opposition, to the extent set forth herein; and it is further

ORDERED that the undertaking is fixed in the sum of \$1,000.00 conditioned that the Petitioner, if it is finally determined that it was not entitled to an injunction, will pay to the Respondents all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the court grants a preliminary injunction in aid of arbitration, pending the resolution of the arbitration between the parties and until further order of the court; the court restrains all funds held by Respondent Bella Vita LLC d/b/a Sabatino’s Italian Ristorante’s Wells Fargo Bank account ending in 0578, up to the amount of \$98,919.00, but denies the remainder of the relief requested in the Verified Petition and motion by order to show cause; and it is further

ORDERED that by granting the requested relief, the court disposes of Petitioner’s Verified Petition and motion by order to show cause filed under motion sequence 001.

This constitutes the decision and order of the court.


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| <u>9/27/2023</u> DATE | | | | | <hr/> ERIKA M. EDWARDS, J.S.C. | | | | |
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | | <input type="checkbox"/> | NON-FINAL DISPOSITION | | | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER | |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | | | <input type="checkbox"/> | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |