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, At Brooklyn, New York, on the 6th day of November 2023

HONORABLE FRANCOIS A. RIVERA

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COOLIDGE CAPITAL LLC,

Plaintiff,

- against -

MARINE PLUS LLC and PETER SOLIS,

Defendants.

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DECISION & ORDER
Index No.: 535515/2022

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Coolidge Capital LLC on July 28, 2023, under motion sequence one, for an order: (1) pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted against defendant Peter Solis and, (2) pursuant to CPLR 3215 granting a default judgment as against defendant Marine Plus LLC.

- Notice of Motion
- Affirmation in Support
- Affidavit in Support
  - Exhibit 1 to 6
- Statement of Material Facts
- Memorandum of Law in Support

BACKGROUND

On December 6, 2022, Coolidge Capital LLC (hereinafter CCL or plaintiff) commenced the instant action for, inter alia, breach of contract, by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk's office (KCCO). On December 26, 2022, defendant Peter Solis (hereinafter Solis) joined issued by interposing and filing a verified answer with the KCCO. The complaint alleges eighteen allegations of fact in support of three causes of action, namely, breach of contract, breach of a guaranty agreement, and account stated.

The verified complaint alleges the following salient facts. On or about October 17, 2022, CCL and Marine Plus LLC (hereinafter the corporate defendant) entered into an agreement whereby CCL agreed to purchase all rights to the corporate defendant's future receivables having an agreed upon value of $44,970.00 for the sum of $30,000.00 (hereinafter the Agreement). Pursuant to the Agreement, the corporate defendant agreed to remit to the plaintiff a portion of its receivables.

On or about November 23, 2022, the corporate defendant materially breached the terms of the Agreement by causing the receivables to be deposited into a separate account not designated in the contract, blocked the payment due to the plaintiff and/or prevented the plaintiff from collecting the amount due to insufficient funds or otherwise failed to pay and/or prevented the plaintiff from collecting the amount due pursuant to the payment schedule in the Agreement and thereby defaulted under the terms of the Agreement. Due to the corporate defendant's default, the plaintiff claims damages in an amount of no less than $50,017.88 with interest thereon from November 23, 2022.

Solis executed a personal guaranty of performance of all the obligations of the corporate codefendant set forth in the Agreement. CCL contends that Solis is obliged to pay to plaintiff the amount set forth in the preceding cause of action. CCL further contends that it is entitled to a judgment against Solis based upon his personal guarantee for the sum of $50,017.88, plus interest, costs, disbursements, and attorney's fees.

LAW AND APPLICATION

Claims against Peter Solis

CCL seeks summary judgment against Peter Solis on its claim for breach of a guaranty of CCL's Agreement with the corporate defendant and for an account stated. 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 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).

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]).

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due

(*Coca-Cola Refreshments, USA, Inc. v. Binghamton Giant Markets, Inc.*, 127 AD3d 1319, 1320 [3rd Dept 2015], citing *Whiteman, Osterman & Hanna, LLP v Oppitz*, 105 AD3d 1162, 1163 [3rd Dept 2013]). Although an account stated may be based on an express agreement between the parties as to the amount due, an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period or makes partial payment on the account (*Michael B. Shulman & Assocs., P.C. v Canzona*, 201 AD3d 716, 717 [2d Dept 2022]). CCL's verified complaint does not plead a cause of action for an account stated. Furthermore, CCL's evidentiary submission did not make a prima facie showing that it had an agreement with the corporate defendant or with Solis to an account based upon prior transactions between them with respect to the correctness of the account items and balance due account.

The affirmation of plaintiff's counsel does not demonstrate personal knowledge of the allegations set forth in the verified complaint. An attorney's affirmation that is not based upon personal knowledge is of no probative value (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). The affirmation of plaintiff's counsel refers to the affidavit of Paul Aflen, the plaintiff's CFO (hereinafter Aflen), to support the motion.

Aflen's affidavit is used to authenticate the agreement which was allegedly breached by the defendants. He avers that he is the CFO of CCL and, as such, has personal knowledge of its business practices and procedures. He further avers that the factual allegations proffered in support of the motion for summary judgment are derived from his review of the plaintiff's business records. He then refers to the documentary exhibits attached to the motion, namely, the agreement, a document denominated as proof of funding, and a document denominated as report of defendants' account.

Aflen does not aver that he was a signatory to the agreement or that he participated in the execution of same. Aflen refers to the report of defendants' account, annexed as exhibit 6 to his

affidavit, as a business record which purportedly provides proof of the corporate defendant's default. Specifically, Aflen avers that this document demonstrates the following facts. On or about November 23, 2022, the plaintiff received from its bank a return code indicating that defendant's payment, which is made by ACH debit that is initiated by plaintiff, failed because the corporate defendant instructed its bank to stop the payment (R08) and there were insufficient funds in the corporate defendant's account (R01) for the fourth time in a month without giving the plaintiff prior notice that there were insufficient funds.

Based on Aflen's averment the document purportedly provides bank information and bank codes which have specific meaning. Aflen does not identify the bank or state that he possesses personal knowledge of the undisclosed bank's business practices or procedure. 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 (*Autovest, LLC v Cassamajor*, 195 AD3d 672, 673 [2d Dept 2021], quoting *Citibank, N.A. v Cabrera,* 130 AD3d 861, 861 [2d Dept 2015]). As a rule, the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019]). However, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business (*id.*). Here, the report of the corporate defendant's account is submitted without an explanation of it source, or its meaning. It is neither self-explanatory nor self-admitting and there was an insufficient foundation for its admission as a business record.

Moreover, Aflen avers that the corporate defendant directed a stop payment for a daily ACH payment under Bank Code R08 and that the account had insufficient funds under R01 constituting a default of the Agreement. Aflen, however, proffered no business record reflecting these facts. Rather, he merely alleged the fact without proffering any documentary support for it.

It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted (*Citibank, N.A. v Potente*, 210 AD3d 861, 862 [2d Dept 2022]). Accordingly, evidence of the contents of business records is admissible only where the records themselves are introduced. Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay (*Bank of New York Mellon*, 171 AD3d at 197). Aflen's averments regarding Bank Code R01 and R08 constitutes inadmissible hearsay. In sum, CCL has failed to make a prima facie showing of entitlement to summary judgment on its claim for breach of a guaranty agreement or on its claim for an account stated against either the corporate defendant or Solis.

Claims against Marine Plus LLC

CCL seeks leave to enter a default judgment against Marine Plus LLC based on its failure to appear or interpose an answer to the complaint. CPLR 3215 provides in pertinent part as follows:

> "(a) Default and entry. When a defendant has failed to appear, plead, or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him..."
>
> "(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ... Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney."

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (*Katz v Blau*, 173 AD3d 987, 988 [2d Dept 2019], citing *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649, 651 [2d Dept 2011]; CPLR 3215 [f]). CPLR 3215(f) states specifically, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim are to be set forth in an affidavit made by the party (*U.S. Bank N.A. v Simpson*, 216 AD3d 1043, 1044-45 [2d Dept 2023], citing *HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009]).

Plaintiff must, among other things, demonstrate proper service of the commencement papers on the corporate defendant to obtain a default judgment. Ordinarily, this would be accomplished by the plaintiff's submission of an affidavit of service of the commencement papers in accordance with CPLR 306 (a) and (d). CPLR 306 (a) and (d) pertains to proof of service and the form of proof and provides as follows:

> "(a) Generally. Proof of service shall specify the papers served, the person who was served and the date, time, address, or, in the event there is no address, place and manner of service, and set forth facts showing that the service was made by an authorized person and in an authorized manner."
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> "(d) Form. Proof of service shall be in the form of a certificate if the service is made by a sheriff or other authorized public officer, in the form of an affidavit if made by any other person, or in the form of a signed acknowledgment of receipt of a summons and complaint or summons and notice or notice of petition as provided for in section 312–a of this article. CCL has submitted an affirmation of its counsel as evidence of service of the commencement papers on Marine Plus LLC."

Plaintiff submitted an affirmation of its counsel as proof of service of the commencement papers which contained the following affirmed facts:

> "I am not a party to the above-entitled action, and I am over 18 years of age. That on December 7, 2022, deponent served the within Summons and Verified Complaint with Notice of Electronic Filing upon the defendant(s) shown below by

emailing a copy of same bearing the words 'Personal & Confidential' in the email subject line to the email address indicated below:
MARINE PLUS LLC and PETER SOLIS Email: petersolis@hotmail.com

The above email address was provided by the defendants in the parties' subject contract and designated therein as the email address for effectuating service of process. The foregoing method of service is authorized by and made pursuant to the terms of the parties' subject contract and said service is complete as of the date of transmitting the aforesaid email."

The Agreement which the plaintiff relies upon for the method of services utilized in this instance is annexed as exhibit 4. Paragraph 43 of the Agreement contains the following language:

"ADDITIONALLY, MERCHANT AND GUARANTOR AGREE THAT ANY SUMMONS AND/OR COMPLAINT OR OTHER PROCESS TO COMMENCE ANY LITIGATION BY CLC WILL BE DEEMED PROPERLY SERVED IF MAILED BY CERTIFIED MAIL TO THE ADDRESS(ES) LISTED ON PAGE 1 OF THIS AGREEMENT AND SERVICE OF SUCH PROCESS SHALL BE DEEMED COMPLETE UPON SUCH MAILING IRRESPECTIVE OF WHETHER SUCH MAILING IS ACTUALLY RECEIVED BY MERCHANT AND/OR GUARANTOR.

Alternatively, Merchant and Guarantor agree that any summons and/or complaint other process to commence any litigation will be deemed properly served upon Merchant and Guarantor If a copy of such process Is transmitted by email to: petersolis@hotmail.com and service of such process shall be deemed complete upon the sending of such email irrespective of whether such email is actually received by Merchant and/or Guarantor."

The language pertaining to service of the commencement papers gives the plaintiff the option to serve the corporate defendant and Solis by either certified mail to a specific address set forth on page one of the agreement or by email to a specific e-mail address. Assuming, arguendo, that the contract is valid and thus, the method of commencement is valid, the Court does not interpret the contract language to authorize the plaintiff to serve both the corporate defendant and Solis by sending one set of the commencement papers to the designated address. Each defendant would be entitled to service of a separate set of the commencement papers. Similarly, one email sent to the designated e-mail address is insufficient to effectuate service

upon both or either one of the defendants. Each defendant would be entitled to a separate e-mail of the commencement papers. There is no dispute that the plaintiff's counsel, who prepared the affirmation of service of the commencement papers, averred sending only one e-mail of the commencement papers to serve both defendants. The Court cannot countenance this as proper service. It strains the Court's sense of fairness and due process, to uphold a contract provision which states that an action may be commenced against a defendant served by e-mail whether, the defendant received notice by that method. However, in this instance, the Court has no difficulty finding the method utilized in this instance, emailing one set of papers to serve both defendants, renders service upon the corporate defendant ineffective to confer personal jurisdiction over this defendant.

CONCLUSION

The motion by plaintiff Coolidge Capital LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on the claims asserted against defendant Peter Solis for breach of a guaranty agreement and for an account stated is denied.

The motion by plaintiff Coolidge Capital LLC for an order pursuant to CPLR 3215 granting a default judgment as against defendant Marine Plus LLC is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:

Francois A. Rivera
J.S.C.

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