

C2 Advance LLC v Webuyhouses 123 LLC

2024 NY Slip Op 31722(U)

May 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 526283/2023

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 15th day of May 2024

HONORABLE FRANCOIS A. RIVERA

-----X
C2 ADVANCE LLC D/B/A ORANGE CAPITAL,

Plaintiff,

- against -

WEBUYHOUSES123 LLC
and LARRY JOHN PICKELL JR.,

Defendants.
-----X

DECISION & ORDER

Index No.: 526283/2023

Recitation in accordance with CPLR 2219 (a) of the papers considered on notice of motion, filed on November 27, 2023, under motion sequence number one, by C2 Advance LLC d/b/a Orange Capital (hereinafter plaintiff or C2) for an order pursuant to CPLR 3212 for an order granting summary judgment in favor of plaintiff on its claims for breach of contract asserted against Webuyhouses123 LLC (hereinafter the company defendant) and Larry John Pickell Jr. (hereinafter the guarantor) (hereinafter collectively the defendants) on the ground that the action is based upon an instrument for the payment of money only which is now due and payable. The motion is opposed.

- Notice of motion
- Affirmation in support
- Affidavit in support
- Exhibits 1-7
- Memorandum of law in support
- Statement of material facts
- Memorandum of law in opposition
- Affidavit in opposition
- Memorandum of law in reply

BACKGROUND

On September 11, 2023, plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On October 17, 2023, the

defendants joined issue by interposing and filing a joint answer with the KCCO. The 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 verified complaint alleges the following salient facts, among others. On December 20, 2022, plaintiff and defendants entered into an agreement (hereinafter the agreement) whereby plaintiff agreed to purchase the company defendant's future receivables in the amount of \$52,465.00 for the purchase price of \$35,000.00. The defendants agreed that in the event of its default under the Contract, such as the one alleged herein, the full uncollected receivables plus all fees due under the Contract (because of the default) would become immediately due and payable in full to the plaintiff.

On or about January 23, 2023, the company 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 plaintiff so that plaintiff could not collect the amount of receivables due and/or prevented plaintiff from collecting the amount due to non-sufficient funds or otherwise failed to pay and/or prevented plaintiff from collecting the amount due pursuant to the payment schedule in the contract and thereby defaulted under the terms of the contract or otherwise violated a material term of the contract which constituted an event of default thereunder.

Based upon the foregoing and after accounting for payments made and applicable fees, the defendants owe plaintiff a balance in the amount of \$54,423.13. In addition, guarantor agreed to guarantee all amounts owed to plaintiff from company defendant upon a breach in performance by company defendant. The company defendant and the guarantor have failed to pay the amounts due and owing under the agreement. There remains a balance due and owing to

plaintiff on the agreement in the amount of \$54,323.13 plus interest, costs, disbursements, and attorney's fees.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 32 AD3d 276 [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 any material issues of fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [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, 1063 [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 Transmission Co.*, 168 AD2d 610 [2d 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" (*Cruz v Cruz*, 213 AD3d 805, 807 [2d Dept 2023]).

In the case at bar, the only sworn testimony submitted by the plaintiff in support of the motion was an affirmation of David Fogel, its counsel (hereinafter Fogel), and an affidavit of Jake D'Amelio (hereinafter D'Amelio). Fogel's affirmation contends that the facts in support of the motion are contained in the affidavit of D'Amelio.

Fogel's affirmation demonstrates 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]).

D'Amelio averred that he is the principal of the plaintiff 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 are derived from his review of the plaintiff's business records. He then referred to the documents attached to the motion, namely, the agreement and the documents denominated as proof of funding, payment history, and an ACH report.

It is noted that D'Amelio did not aver that he was a signatory to the agreement or that he participated in the execution of same. D'Amelio averred that on January 23, 2023, the plaintiff received from its bank a return code indicating that the defendants' payment failed because the defendant disabled plaintiff's ability to make the ACH debit or notified its bank that the transaction was not authorized (R29). D'Amelio described Exhibit 7 as the ACH report received by plaintiff from its ACH processor indicating that defendant's payment that was debited on January 23, 2023, was returned by ACH/bank return code R29. D'Amelio indicated that exhibit 7 demonstrated the defendant's default under the agreement. Exhibit 7, however, was a blank page and thus, probative of nothing. Consequently, the plaintiff failed to show that the

defendants defaulted on the agreement. In sum, plaintiff has failed to make a prima facie showing of entitlement to judgment on its claim that the defendants s breach the agreement and breach of the guaranty of the agreement. The motion is therefore denied without regard to the sufficiency or lack of opposing papers (*Cugini v System Lbr. Co.*, 111 AD2d 114 [1st Dept 1985]).

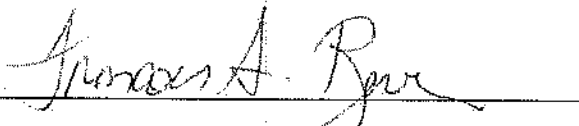
CONCLUSION

The motion by plaintiff C2 Advance LLC d/b/a Orange Capital for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff in all respects on its claims asserted against Webuyhouses123 LLC and John Pickell Jr. 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.

HON. FRANCOIS A. RIVERA