

Prosperum Capital Partners LLC v Pool Fox, LLC

2024 NY Slip Op 31890(U)

May 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 526872/2022

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 29th day of May 2024

HONORABLE FRANCOIS A. RIVERA

-----X
PROSPERUM CAPITAL PARTNERS LLC D/B/A
ARSENAL FUNDING,

Plaintiff,

- against -

POOL FOX, LLC, d/b/a POOL FOX,
and JASON GERALD KOONCE,

Defendants.
-----X

DECISION & ORDER

Index No.: 526872/2022

Oral Argument: 5/2/2024

Ms. 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on notice of motion filed on February 28, 2024, under motion sequence number one, by plaintiff Prosperum Capital Partners LLC d/b/a Arsenal Funding (hereinafter plaintiff) for an order pursuant to CPLR 3212 awarding summary judgment against the defendants Pool Fox, LLC d/b/a Pool Fox (hereinafter business defendant) and Jason Gerald Koonce (hereinafter collectively defendants) jointly and severally for a sum of \$22,514.92, with interest thereon from August 8, 2022, as well as the costs and disbursements of this action. The motion is opposed.

- Notice of motion
- Affidavit in support
- Affirmation in support
- Exhibits A-F
- Memorandum of law in support
- Memorandum of law in opposition
- Counter statement of material facts

BACKGROUND

On September 15, 2022, plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On October 18, 2022, the

defendants interposed and filed an answer and counterclaim the KCCO. On November 1, 2022, the plaintiff interposed and filed a reply to the counterclaim.

The verified complaint alleges thirty-two allegations of fact in support of three denominated causes of action. The first is for breach of contract, the second is for breach of a guaranty agreement, and the third is for attorney's fees based on an alleged breach of the agreement. The verified complaint alleges the following salient facts. Pursuant to a receivable purchase agreement (hereinafter the agreement) and personal guaranty dated July 14, 2022, 2022, the plaintiff purchased from the business defendant its future accounts receivable having a face value of \$14,900.00.

On or about July 14, 2022, the business defendant, in consideration of the sum of \$10,000.00, sold, assigned, and transferred to plaintiff seventeen (13%) percent of its future sales proceeds, up to an aggregate amount of \$ 14,900.00. By the agreement, Jason Gerald Koonce executed a personal guarantee if the business defendant defaulted on the agreement.

On August 18, 2022, the business defendant defaulted under the agreement by stopping its payments to plaintiff and otherwise breached the Agreement by intentionally impeding and preventing plaintiff from making the agreed upon ACH withdrawals from the Bank Account while conducting regular business operations and still in receipt of accounts-receivable.

In total, the business defendant remitted the amount of \$2,980.08 leaving a balance due and owing in the sum of \$11,919.92. The plaintiff claims that the defendants also owe plaintiff \$7,500.00 for a default fee, \$2,500.00 for a blocked account fee, \$400.00 for non-sufficient fees, and \$195.00 for a UCC filing fee to cover the cost of filing the UCC-1 Financing Statement in connection with the Agreement. In sum the defendants allegedly owe the plaintiff the principal

balance sum of \$ 22,089.14, as well as attorney's fees of \$2,873.54 resulting in a total sum of \$24,962.68.

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*, 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 (*Giuffrida 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 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 of 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 [2nd Dept 1990]).

In the case at bar, the only sworn testimony submitted by the plaintiff in support of the motion was an affirmation of Jeffrey Parella, its counsel (hereinafter Parella), and an affidavit of Marlen Kruzchkov, its managing member (hereinafter Kruzchkov). Parella's affirmation demonstrated no personal knowledge of any of the transactional facts alleged in the complaint.

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]). Parella's affirmation states that the facts in support of the motion are contained in the affidavit of Kruzhkov.

Kruzhkov averred that the agreed-upon purchase price of \$10,000.00 minus \$600.00 was paid to the business defendant for its future receivables. However, the plaintiff's evidentiary submission did not demonstrate that it was actually paid. Kruzhov averred that annexed as exhibit B to the motion was proof of the plaintiff's funding of the purchase price. The annexed document, however, contained over sixty redactions. The document was neither explained nor authenticated nor probative of anything.

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]).

To prevail on the instant motion, it was incumbent upon the plaintiff to prove each of these elements as a matter of law. The plaintiff provided no evidence demonstrating that it performed its part of the agreement by paying the defendants the agreed-upon purchase price. Consequently, the plaintiff did not meet its burden of demonstrating as a matter of law that the defendants breached the agreement. Inasmuch as the plaintiff did not make a prima facie showing that the business defendant breached the agreement, the obligation of the guarantor was not triggered. As a result, the plaintiff also failed to show that the guarantor breached the agreement.

Inasmuch, as the plaintiff failed to demonstrate that the business defendant or Jason Gerald Koonce breached the agreement, the third cause of action for attorney's fees based on a

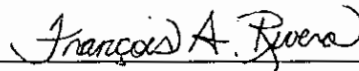
breach of the agreement is also unsupported. The motion is therefore denied without regard to the sufficiency of the defendants' opposition papers (*Cugini v. System Lbr. Co.*, 111 AD2d 114 [1st Dept 1985]).

CONCLUSION

The motion by Prosperum Capital Partners LLC D/B/A Arsenal for an order pursuant to CPLR 3212 granting summary judgment in its favor on its causes of action for breach of contract, breach of a guaranty agreement and attorney's fees based on the breach as against Pool Fox, LLC d/b/a Pool Fox and Jason Gerald Koonce is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:



J.S.C.