

**Highland Hill Capital LLC v Lorenzo Appliances &
Air Repairs Inc.**

2024 NY Slip Op 34079(U)

November 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 501813/2024

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 November 2024

HONORABLE FRANCOIS A. RIVERA

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HIGHLAND HILL CAPITAL LLC,

Plaintiff,

- against -

LORENZO APPLIANCES & AIR REPAIRS INC. D/B/A
LORENZO AIR REPAIR, LORENZO APPLIANCE,
J L LORENZO HOLDINGS LLC.,
and JUAN A LORENZO,

Defendant(s).
-----X

DECISION & ORDER

Index No.: 501813/2024

Oral Argument: 10/10/2024

Cal. No.: 30

Ms. Seq. No.: 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on February 21, 2024, under motion sequence number one, by Highland Hill Capital LLC (hereinafter plaintiff) for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff in the amount of \$476,071.79, plus interest of 16% per annum from the date of default of January 16, 2024, plus costs and disbursements, and pursuant to CPLR 3211(b) to dismiss the affirmative defenses asserted by Lorenzo Appliances & Air Repairs Inc. D/B/A Lorenzo Air Repair, Lorenzo Appliance, J L Lorenzo Holdings LLC (hereinafter collectively the company defendant¹), and Juan A Lorenzo (hereinafter the guarantor) (hereinafter collectively defendants). The motion is opposed.

-Notice of motion

-Affidavit in support

Exhibits 1-8

-Affirmation in support

Exhibits 9-14

¹ Per the complaint, Lorenzo Appliance is located at a different address than Lorenzo Appliances & Air Repairs Inc. D/B/A Lorenzo Air Repair, and J L Lorenzo Holdings LLC. Nevertheless, the plaintiff refers to these company defendants in the singular as company defendant.

- Memorandum of law in support
- Statement of material facts
- Memorandum of law in opposition
- Affidavit in opposition
- Affirmation in opposition
- Counter Statement of material facts
- Memorandum of law in reply

BACKGROUND

On January 18, 2024, plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's Office (hereinafter the KCCO). On February 15, 2024, the defendants interposed and filed a joint verified answer with the KCCO.

The complaint alleges twenty-nine allegations of fact in support of two causes of action, namely, breach of contract and breach of a personal guaranty agreement. The verified complaint alleged the following salient facts, among others. On or about July 18, 2023, plaintiff and the defendants entered into an agreement (hereinafter the first agreement) whereby plaintiff agreed to purchase the company defendant's future receivables. Plaintiff remitted the purchase price of \$165,000, less applicable fees, for the future receivables to the company defendant, as agreed, for the purchase amount of \$247,335.

On or about August 9, 2023, plaintiff and defendants entered into another agreement (hereinafter the second agreement) whereby plaintiff agreed to purchase company defendant's future receivables. Pursuant to the disbursement schedule addendum of the second agreement, plaintiff remitted the purchase price of \$291,060, less applicable fees,

for the future receivables to the company defendant, as agreed for the purchase amount of \$459,262.04.

On or about January 16, 2024, the company defendant breached both agreements by intentionally impeding and preventing plaintiff from making the agreed upon ACH withdrawals from the agreed upon designated bank account while conducting regular business operations. The company defendant had instructed its bank to refuse and stop payment to plaintiff. In addition, the guarantor agreed to guarantee all amounts owed to plaintiff from the company defendant upon a breach in performance by the company defendant. Prior to defendants' breach of the first agreement, the company defendant made payments totaling \$147,813, leaving a balance of \$99,522. Additionally, pursuant to the first agreement, the company defendant incurred costs and fees of \$24,880.50, a default fee of \$2,500, an NSF fee of \$1,650, and a UCC fee of \$195, leaving a total balance of \$128,747.50 on the first agreement.

Prior to defendants' breach of the second agreement, the company defendant made payments totaling \$184,522.61, leaving a balance of \$274,739.43. Additionally, pursuant to the second agreement, the company defendant incurred costs and fees of \$68,684.86, a default fee of \$2,500, and an NSF fee of \$1,400, leaving a total balance of \$347,324.29 on the second agreement. The balance due to plaintiff under the agreements is \$476,071.79. Pursuant to the agreements, the defendants agreed to pay plaintiff reasonable attorney fees of up to 40% of the amount claimed. Pursuant to the agreements, the defendants agreed to pay plaintiff prejudgment interest of 16% per annum from the date of default. Additionally,

the guarantor is responsible for all amounts incurred because of the company defendant's default on the agreements.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [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" (*Alvarez*, 68 NY2d at 324; *Giuffrida v Citibank Corp.*, 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, 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], quoting *Klein v Signature Bank, Inc.*, 204 AD3d 892, 895 [2d Dept 2022]).

In the case at bar, the only sworn testimony submitted by the plaintiff in support of the motion was the affirmation of Jacob Z. Weinstein, its counsel (hereinafter Weinstein), and an affidavit of Andre Versace, its manager (hereinafter Versace). Weinstein referred to several annexed court decisions of other unrelated cases, which addressed similar issues as those raised in the case at bar. Weinstein’s affirmation, however, offered no facts regarding 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], quoting *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

Versace averred that as manager of the plaintiff, he 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 were derived from his review of the plaintiff’s business records. Versace’s affidavit was used to authenticate the first and second agreement which was allegedly breached by the defendants. He identified annexed exhibit 4 as proof of the remittance of the \$165,000.00 purchase price less contractual fees to the company defendants pursuant to the first agreement. Exhibit 4, however, contained only one monetary figure and that figure was for \$40,241.53. The plaintiff offered no

explanation for the discrepancy. This discrepancy alone raised material issues of fact regarding the plaintiff's performance under the agreements.

Versace identified annexed exhibit 6 as proof of the remittance of the of \$291,060 purchase price less contractual fees to the company defendants pursuant to the second agreement. The second agreement, however, stated that the purchase price was \$384,374.73 for the future receivable amount of \$576,177.63. The discrepancy between the amount of \$384,374.73 set forth in the second agreement and the purported remitted payment amount of \$291,060.00 was also not explained. Versace identified annexed exhibit 7 as a correct payment history under the first agreement and exhibit 8 as a correct payment history under the second agreement.

Versace alleged that pursuant to the first agreement plaintiff was to receive 49% of the company defendants future receivables until the purchased amount of \$247,335 was paid to plaintiff. Versace also alleged that pursuant to the second agreement plaintiff was to receive 39% of the Company Defendants future receivables until the purchased amount of \$459,262.04 was paid to plaintiff. The second agreement did not mention the first agreement. By the two agreements, plaintiff was apparently supposed to receive 88% (49% and 39%) of the company defendants' future receivables. The plaintiff did not explain how the two agreements would work together. Were the Company Defendants expected to operate their businesses with only 12% of their receivables?

It is noted that Versace did not aver that he was a signatory to the agreement or that he participated in its execution. Although the plaintiff contended that the company defendants instructed their bank to refuse payments to the plaintiff there was no annexed

business record which provided proof of this fact. “[I]t 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], quoting *Bank of NY Mellon v Gordon*, 171 AD3d 197, 205 [2d Dept 2019]). 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” (*see Bank of NY Mellon*, 171 AD3d at 206). Here, the payment histories were submitted without an explanation of how to read them. The payment histories were not self-explanatory. Nor did they establish the alleged conduct of the company defendants constituting a default under the agreement.

In sum, the plaintiff has failed to make a prima facie showing of entitlement to summary judgment on its claim that the company defendant breached the agreement. Consequently, the plaintiff has failed to show that the obligation of the guarantor was ever triggered. As a result, the plaintiff also failed to show that the guarantor breached the agreement. The motion is therefore denied without regard to the sufficiency or lack of opposing papers (*see Cugini v System Lbr. Co.*, 111 AD2d 114, 115 [1st Dept 1985]).

Plaintiff's notice of motion also sought dismissal of the affirmative defenses raised by the defendants. "CPLR 2214 (a) provides that a notice of motion shall ‘specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor’” (*Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2d Dept 2018], citing *Shields v Carbone*, 99 AD3d 1100, 1102 [3d Dept 2012]). Contrary to the requirements of CPLR 2214 (a), the plaintiff provided no law or argument

in support of the branch of its motion seeking dismissal of the defendant's affirmative defenses (*see* CPLR 2214 [a]). It is therefore denied.

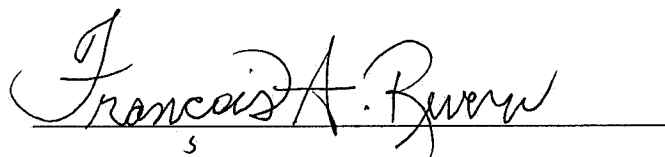
CONCLUSION

The branch of the motion by plaintiff Highland Hill Capital LLC for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiff on its claims asserted against defendants Lorenzo Appliances & Air Repairs Inc. D/B/A Lorenzo Air Repair, Lorenzo Appliance, J L Lorenzo Holdings LLC and Juan A Lorenzo is denied.

The branch of the motion by plaintiff Highland Hill Capital LLC for an order pursuant to CPLR 3212 dismissing the affirmative defenses asserted by defendants Lorenzo Appliances & Air Repairs Inc. D/B/A Lorenzo Air Repair, Lorenzo Appliance, J L Lorenzo Holdings LLC, and Juan A Lorenzo is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA