Velocity Capital Group v Westchester Family Care Inc.
2024 NY Slip Op 34085(U)
November 15, 2024
Supreme Court, Kings County
Docket Number: Index No. 531338/2023
Judge: Francois A. Rivera

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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VELOCITY CAPITAL GROUP,

Plaintiff,

- against -

WESTCHESTER FAMILY CARE INC., and GLENN E LANE

Defendant(s).

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DECISION & ORDER

Index No.: 531338/2023

Oral Argument: 10/24/2024

Cal. No.: 53 & 54

Ms. Seq. No.: 1 & 2

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on August 8, 2024, under motion sequence number one, by Velocity Capital Group LLC (hereinafter plaintiff) for an order pursuant to CPLR 3211 (b) dismissing the defendants' affirmative defenses. The motion is unopposed.

-Notice of motion
-Affirmation in support
Exhibits A-D
-Memorandum of law in support

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on September 17, 2024, under motion sequence number two, by Velocity Capital Group LLC (hereinafter plaintiff) for an order pursuant to CPLR 3212 granting summary judgment in plaintiff's favor on its claims asserted against Westchester Family Care Inc. (hereinafter the corporate defendant) and Glenn E Lane (hereinafter the guarantor) (collectively the defendants) jointly and severally in the principal amount of $78,157.50, plus statutory interest at 9% from October 17, 2023 (the date of the breach), with costs and disbursements as taxed by the clerk. The motion is unopposed.

-Notice of motion
-Affirmation in support
Exhibits A-L
-Memorandum of law in support
-Statement of material facts

BACKGROUND

On October 26, 2023, the plaintiff commenced the instant action for, inter alia, breach of contract by filing a summons and verified complaint with the Kings County Clerk's office (hereinafter the KCCO). On November 22, 2023, the defendants joined issued by interposing and filing a joint answer with the KCCO. The verified complaint alleges sixteen allegations of fact in support of four causes of action. The first cause of action is for breach of contract by the corporate defendant. The second cause of action is for attorney fees against the corporate defendants. The third cause of action is for breach of contract by the guarantor. The fourth cause of action is for attorney fees against the guarantor.

The defendants' joint verified answer has asserted nine affirmative defenses[1] denominated as one through ten as follows. The first affirmative defense is that the plaintiff has failed to mitigate its damages. The second affirmative defense is that the plaintiff is in breach of the agreement. The third affirmative defense is that the plaintiff should be estopped from seeking collection of any money against the defendants based upon the facts and circumstances of the case. The fourth affirmative defense is that the plaintiff should be estopped from seeking collection of any money based upon its unclean hands. The sixth affirmative defense is that the plaintiff lacks personal jurisdiction over answering defendants. The seventh affirmative defense is that the plaintiff failed to

[1] The defendants have misnumbered their affirmative defenses one through ten, but have skipped number five, jumping from four to six.

provide the required consideration. The eighth affirmative defense states two words, namely, impossibility or impracticability. The ninth affirmative defense states one word, namely, duress. The tenth states one word, namely, usury.

The complaint alleges the following salient facts. On January 19, 2023, the parties entered into an agreement whereby the plaintiff agreed to purchase all rights to the corporate defendant's future receivables having an agreed upon value of $222,000.00 (hereinafter the agreement) for a purchase price of $150,000.00. Pursuant to the agreement, the corporate defendant agreed to remit to the plaintiff 20% of their receivables. The corporate defendant agreed that in the event of its default under the contract, the full uncollected purchased amount plus all fees due under the contract would become immediately due and payable in full to plaintiff. Plaintiff paid the purchase price, less applicable contractual fees and deductions. The corporate defendant breached the contract by defaulting on its representations and warranties to plaintiff under the contract and by preventing plaintiff from collecting the purchased amount.

Plaintiff held the corporate defendant in breach of contract on October 17, 2023. The corporate defendant stopped making payments to plaintiff and breached the agreement by intentionally impeding and preventing plaintiff from making the agreed upon ach withdrawals from the corporate defendants' bank account.

In addition, the guarantor agreed to guarantee any, and all amounts owed to plaintiff from corporate defendants upon a breach in performance by corporate defendants. Plaintiff held the corporate defendants in breach of contract on October 17, 2023. By reason of the foregoing, plaintiff has been damaged by the corporate defendant's breach of contract in the

sum of $78,322.50 with 9% interest thereon from October 17, 2023.

Pursuant to the terms of the contract, the corporate defendant agreed to pay plaintiff's reasonable attorneys' fees. By reason of the guarantee, the guarantor is obligated to pay plaintiff the sum of $78,322.50 with 9% interest thereon from October 17, 2023, as well as plaintiff's reasonable attorneys' fees.

LAW AND APPLICATION

Plaintiff's Motion to Dismiss the Defendants' Affirmative Defenses

When moving to dismiss affirmative defenses, the plaintiff bears the burden of demonstrating that such defenses are without merit as a matter of law because they either do not apply under the factual circumstances of the case or because a defense is not stated (CPLR 3211 [b]).

On a motion to dismiss a defense on the ground that it is not stated or has no merit, the court should apply the same standard it applies to a motion to dismiss cause of action on the ground that the pleading fails to state cause of action, and the factual assertions of the defense will be accepted as true (*Lewis v U.S. Bank National Association,* 186 AD3d 694, 697 [2d Dept 2020]; CPLR 3211 [a] [7]; 3211 [b]).. "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed" (*id.*, quoting *Shah v Mitra*, 171 AD3d 971, 974 [2d Dept 2019].

There is no opposition to this branch of the instant motion. The defendants have abandoned their affirmative defenses by failing to address the plaintiff's motion to strike them (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019], citing *Pita v*

Roosevelt Union Free Sch. Dist., 156 AD3d 833, 835 [2d Dept 2017]; *see also Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2d Dept 2010], citing *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

Plaintiff's Motion for Summary Judgment on Liability

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 material triable issues of fact exist" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 325 [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 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 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 plaintiff in support of the motion was an affirmation of Adam R. Nichols, its counsel, and an affidavit of Jacob Avigdor (hereinafter Avigdor), plaintiff's chief executive officer. Nichols' 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]).

Avigdor's affidavit is used to authenticate the agreement which was allegedly

breached by the defendants. Avigdor avers that he is the chief executive officer of the plaintiff 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 three supporting documents attached to the motion, namely, the agreement, a document which is purportedly proof of the plaintiff's payment, and a document denominated as a transaction history.

The purported proof of payment contained four redactions and stated an amount of $145,285.00. Avignor also referred to the payment history, annexed as exhibit B to his affidavit, as proof of the defendants' default. "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" (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015]). Generally, "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], citing *Standard Textile Co. v National Equip. Rental*, 80 AD2d 911, 911 [2d Dept 1981]).

"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.* at 209).

Avignor avers that transaction history, attached as exhibit F, was "made contemporaneously with each transaction logged thereon" and that "it was created and

maintained as a routine business practice by an employee of [p]laintiff who had a duty or obligation to do so, and all information recorded in the [t]ransaction [h]istory came from either employees of [p]laintiff, or from [d]efendants to this action, or from our bank, the financial institution who processes debit transactions for [p]laintiff and with whom the [p]laintiff maintains an account and whose contemporaneous information relating to financial transactions is regularly incorporated into [p]laintiff's own records and relied upon as accurate in the conduct of the [p]laintiff's own business." Avignor avers overseeing the accounting employee that confirms the accuracy of each entry on each day. However, the source of information where the information comes from is stated in the alternative. This raises a question as to the potential reliability of the source information with respect to each item listed in the transaction history. Avignor alleges that it obtained notification from its financial institution on July 7, 2023, that said transaction had "[b]ounced R29." The financial institution that is relied upon as the source of information of the logged failed debit is not identified nor are its records provided to support the failed transaction. Considering that the proffered transaction history under exhibit F has only has one entry under the "Memo" column, "Bounced R29 230705," but under the "Num" column two entries with the word "Bounced", there is ambiguity as to what occurred that is not explained by the Avignor affidavit with sufficient detail.

"[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,* 171 AD3d at 205). 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 206). Avignor's averments regarding bank code R29 constitutes inadmissible hearsay. In sum, plaintiff has failed to make a prima facie showing of entitlement to summary judgment on its claim that the corporate defendant breached the agreement. Consequently, the plaintiff has failed to show that the obligation of the guarantor was triggered. Moreover, plaintiff has failed to demonstrate entitlement to attorney fees from either the corporate defendant or the guarantor based on their alleged breach of the agreement.

CONCLUSION

The motion by plaintiff Velocity Capital Group LLC for an order pursuant to CPLR 3211 (b) dismissing the defendants' affirmative defenses is granted.

The motion by Velocity Capital Group LLC for an order pursuant to CPLR 3212 granting summary judgment in plaintiff's favor on its claims asserted against Westchester Family Care Inc. and Glenn E Lane is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:

Francois A. Rivera

J.S.C.

HON. FRANCOIS A. RIVERA