

AKF Inc. v Force Aviation, LLC
2024 NY Slip Op 35297(U)
March 25, 2024
Supreme Court, Nassau County
Docket Number: Index No. 614723/22
Judge: David J. Gugerty
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DAVID J. GUGERTY
Justice of the Supreme Court

-----X TRIAL/IAS PART 16
AKF INC., D/B/A FUNDKITE, INDEX #614723/22

Plaintiff(s),

DECISION AND ORDER

-against-

Mot. Seq. 1, 2
Submit Date: 11/2/23

FORCE AVIATION, LLC D/B/A FORCE AVIATION, ET AL,

Defendant(s).

-----X

The following numbered papers read on this motion NYSCEF Numbered

Notice of Motion, Affirmation, Exhibits.....	1 - 23, 30, 35
Notice of Cross-Motion, Affirmation, Exhibits.....	32 - 34
Affirmation in Opposition, Exhibits.....	27, 29
Reply.....	31

Upon the foregoing cited papers, and after Microsoft Teams conference, it is ordered that plaintiff's motion for summary judgment in lieu of complaint, and the cross motion by defendant David Fetter ("Fetter") for summary judgment pursuant to CPLR 3212 or dismissal pursuant to 3211(a)(8), are consolidated for disposition, and are determined as follows:

Plaintiff alleges that on or about March 28, 2022, the parties (with the exception of Fetter), entered into a revenue purchase agreement ("RPA") pursuant to which plaintiff agreed to purchase \$384,880.00 of future receivables of defendant Force Aviation, LLC d/b/a Force Aviation ("Force Aviation") for \$283,000.00. Defendants Chad Michael Shaver, Lloyd James II Timmons, James Nathan Word and Dennis Frederick Sorber (together "RPA Guarantors") guaranteed Force Aviation's performance under the RPA. Plaintiff maintains that defendants (with the exception of Fetter), subsequently defaulted on their obligations under the RPA.

On August 3, 2022, the parties entered into a settlement agreement (“Settlement Agreement”) that, among other things, resolved the default under the RPA, in exchange for defendants’ payment of \$215,066.66 in weekly payments of \$9,622.00 from August 15, 2022 through September 14, 2022, with the balance due on September 15, 2022. Fetter is identified as a guarantor under the Settlement Agreement. Plaintiff contends that defendants breached the terms of the Settlement Agreement and subsequently commenced this action by summary judgment in lieu of complaint to recover its damages. Fetter, the only appearing defendant, cross-moves for summary judgment or dismissal.

In support of its motion, plaintiff submits, inter alia, the affidavit of its CEO, Alex Shvarts, and copies of the RPA and Settlement Agreement.

The Settlement Agreement provides that at the time of the breach of the RPA, plaintiff was owed \$210,066.66, in uncollected receivables, and a 25% Default Fee in the amount of \$52,516.66, for a total of \$262,583.32. (Settlement Recitals ¶ D). Defendants agreed, jointly and severally, to pay plaintiff \$215,066.66 (Settlement Agreement Para 2). Defendants waived any defenses to plaintiff’s claims under the RPA. (Settlement ¶ 12[J]).

Mr. Shvarts avers that defendants did not make any payments under the Settlement Agreement, and that plaintiff is presently owed \$215,066.66, plus a 25% default fee (Settlement ¶ 4), which is \$53,766.66, for a total of \$268,833.32.

CPLR 3213 allows for an action to be commenced by summary judgment in lieu of complaint where it is based upon an instrument for the payment of money only. It is well-settled that a settlement agreement can properly be considered as an instrument for the payment of money only by a party seeking summary judgment in lieu of complaint (*see Krape v PDK Labs, Inc.*, 34 AD3d 751 [2d Dept 2006]). An instrument does not qualify for this accelerated relief if outside proof is needed aside from evidence of nonpayment or a minimal deviation from its face (*see Suozzi v Scharf*, 115 AD3d 933, 934 [2014]).

In opposition and in support of his cross motion, Fetter maintains, among other things, that he cannot be held personally liable under the Settlement Agreement as he did not guarantee any obligation to plaintiff, and the Settlement Agreement is not supported by consideration.

“A guaranty is a promise to fulfill the obligations of another party, and is subject to the ordinary principles of contract construction” (*Seabring, LLC v Elegance Rest. Furniture Corp.*, 188 AD3d 744, 747 [2d Dept 2020], quoting *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [internal quotation marks omitted]). A party seeking enforcement of a guaranty has “the burden of proving the existence, terms, and validity of the guaranty,” and “[a]bsent evidence of the complete terms of the guaranty,” the party “cannot satisfy its burden” (*Id* at 747). “A guaranty is to be interpreted in the strictest manner” (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]), “particularly in favor of a private guarantor” (*Lo-Ho LLC v Batista*, 62 AD3d 558, 569 [1st Dept 2009]). A “guarantor should not be bound beyond the express terms of the written guaranty.” (*2402 E. 69th St., LLC v Corbel Installations, Inc.*, 183 AD3d 859, 891 [2d Dept 2020]). “On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” (*Id*, quoting *H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2015]).

Here, construing the terms of the Settlement Agreement strictly, alone and in conjunction with the RPA, it cannot be determined as a matter of law that Fetter bears personal liability under the Settlement Agreement (*see PC 444, LLC v Priority Pediatrics, PLLC*, 133 AD3d 645, 646-47 [2d Dept 2015]). Although plaintiff argues that Fetter’s obligations as a guarantor are sufficiently outlined in page 15 of the RPA, Fetter was not a signatory to that agreement. Conversely, Fetter has not demonstrated as a matter of law that the Settlement Agreement did not intend to hold him personally liable as a guarantor.

As to the issue of consideration, an enforceable contract requires “an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound” as well as a “meeting of the minds” that includes “agreement on all essential terms” (*Kowalchuk v. Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Consideration to support an agreement exists only where there is “either a benefit to the promisor or a detriment to the promisee” (*Hollander v Lipman*, 65 AD3d 1086, 1087 [2d Dept 2009], quoting *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]).

In this matter, the record seems to support competing contentions. Fetter was not a party to the underlying RPA, yet the recitals of the Settlement Agreement state that plaintiff has a meritorious claim for default against Force Aviation and all guarantors, including Fetter. Questions arise as to Fetter's role or connection to Force Aviation, and as a result, the enforceability of his guaranty, and whether he received any consideration for guaranteeing his co-defendants' obligations. Since extrinsic proof is needed beyond the face of the Settlement Agreement, it cannot serve as the basis for CPLR 3213 relief (*see Suozzi v Scharf*, 115 AD3d 933, 934 [2014]). These same questions further preclude granting summary judgment in Fetter's favor.

Accordingly, the motions are denied.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
March 25, 2024

ENTER:


HON. DAVID J. GUGERTY, J.S.C.

ENTERED

Mar 27 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE