Black Olive Capital, LLC v Pro Bldrs. Supplies, Inc.

2024 NY Slip Op 35692(U)

October 29, 2024

Supreme Court, Rockland County

Docket Number: Index No. 032675/2024

Judge: Keith J. Cornell

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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BLACK OLIVE CAPITAL, LLC,

Plaintiff,

-against-

PRO BUILDERS SUPPLIES, INC. D/B/A PRO BUILDER'S; PRO BULIDERS SUPPLIES INC and JOSHUA JAMES EMIGH

Defendants.

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Index #: 032675/2024

DECISION AND ORDER

(Motion Seq. #1)

PRESENT: HON. KEITH J. CORNELL, A.J.S.C.

Before the Court is the motion pursuant to CPLR § 3212 for summary judgment submitted by Black Olive Capital, LLC ("Black Olive" or "Plaintiff") against each of the above captioned Defendants. The Court has read and considered NYSCEF documents #1, 4, 16-25 in deciding the motion.

Background

On January 8, 2024, Pro Builders Supplies, Inc. D/B/A Pro Builders Supplies; ("Merchant") entered into a Revenue Purchase Agreement ("RPA") with Plaintiff on behalf of the named companies.[1] Joshua James Emigh also personally signed the agreement as guarantor of the contract. Per the terms of the RPA, Merchant sold $148,500.00 of its future receivables to Black Olive for $110,000.00. Merchant agreed to make weekly payments to Black Olive in the amount of $2,652.00 until the $148,500.00 was paid. The weekly payment was set at 9% of Merchant's weekly receivables. According to Plaintiff, on January 8, 2024, $104,751.00

[1] The RPA states that Pro Builders Supplies Inc. shall be an additional party in whose assets Merchant has granted a security interest under the Agreement. (NYSCEF 20, Appendix "A").

($110,000.00 less applicable fees) was transferred to Merchant's bank account in accordance with the Agreement (NYSCEF 17 ¶ 9; NYSCEF 24).

This action was commenced by way of a Summons and Complaint filed on May 13, 2024. (NYSCEF 1). Plaintiff alleged that Defendants breached the RPA after remitting $42,963.00 of the amount owed, leaving a balance of $105,537.00. Plaintiff also alleged that Defendants owed $70.00 for NSF fees, $2,500.00 in default fees, and $26,384.25 in attorneys' fees, for a total of $134,491.25 plus interest costs and disbursements. (Id. ¶ ¶ 11, 14).

Defendants filed an Answer with nine affirmative defenses on June 12, 2024. (NYSCEF 4).

On July 11, 2024, Plaintiff moved for summary judgment pursuant to CPLR § 3212 on the claims of breach of contract and the personal guarantee. In support, Plaintiff submitted the affidavit of Brandon Laks, a manager at Black Olive Capital LLC. ("Laks Affidavit") (NYSCEF 17) and the affirmation of Ariel Bouskila, Esq. (NYSCEF 18) with exhibits A-F, (NYSCEF 20-25) which included a copy of the RPA, an exhibit entitled "transaction history," and document that allegedly showed proof of funding. Defendant's discovery responses and bank statements were also included as exhibits. Plaintiff submitted a Statement of Material Facts. (NYSCEF 19). Defendants' counsel submitted a Memorandum of Law in Opposition that includes a Reply to Plaintiff's Statement of Material Facts (NYSCEF 28). Plaintiff submitted a Memorandum of Law in Reply to the opposition. (NYSCEF 29).

In his affirmation, Laks asserts that he has access to Plaintiff's business records maintained in the regular course of business; that he has personal knowledge of how Plaintiff keeps its records which are made at or near the time of the event from information transmitted by a person with knowledge and regularly kept in the course of business.

Laks also claims that on January 8, 2024, Plaintiff performed its part of the Agreement by "applying the $110,000.00 less applicable fees in accordance with the RPA" (NYSCEF 17 ¶ 9). Although Plaintiff states that it attached proof of funding as Exhibit "E", all that is submitted is a two-line document with abbreviations, what appears to be unidentified number and letter codes, lacking any caption, heading or other identifying information. (NYSCEF 24).

Laks asserts that Plaintiff did not collect anything other than what it was entitled to and has complied with its obligations under the RPA. (Id. ¶ 11). Laks also affirmed that "... Defendant Merchant partially performed its part of the Agreement between January 8, 2024, and May 9, 2024" by remitting $42,963.00. (Id. ¶ 10).

In support of Plaintiff's assertions that Defendants made payments between January 8, 2024, and May 9, 2024, they attach what they denominate as a "transaction history." Review of the document reveals that it appears to be a type of default letter, as it states:

> By issuance of this letter or statement, merchant is hereby advised and understands that engagement of, or agreement with, any company or organization who provides and engages in debt consolidation, restructuring or similar service, or procuring debt consolidation, restructuring or similar financing, is an Event of Default under the Agreement, which entitles Black Olive Capital to enforce all of its right and remedies, **including a Default Fee in the amount of $2,500, a Staking Fee in the amount of $7,500 or 10% of the original financing amount, whichever is less and reasonable attorney's fees and costs of collection in the amount of 25% of the financing amount**. [emphasis in the original]

It appears the document was dated May 13, 2024. There is a list of Payment Dates with amounts allegedly paid. There are entries for 5/6/24 and 5/9/24 followed by the letters "NSF." There are entries for 5/10/24, and 5/13/24, with an amount of $531.00 listed and followed by the word "Pending." (NYSCEF 21).

Finally, Laks affirmed that on May 9, 2024, Black Olive was denied access to the Defendant Merchant's account and, consequently, deprived of the 9% of the weekly sales proceeds due. He asserts that all attempts to debit Plaintiff's 9% of sales proceeds from the designated deposit account result in an ACH debit rejection notice coded R08. (NYSCEF 17 ¶ 12).

Defendants oppose the motion and argue, first, that Plaintiff has failed to meet its burden on summary judgment. They submit Black Olive failed to make a *prima facie* showing and that such a failure requires denial of the motion, regardless of the sufficiency of any opposing papers.

Defendants next contend that the RPA is a contract of adhesion and is unconscionable.

Discussion

The remedy of summary judgment is a drastic one, and it should only be granted when it is clear no triable issue of material facts exists. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Andre v. Pomeroy, 35 N.Y.2d 361 (1974). The proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985); see Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The evidence submitted must be in admissible form. See, e.g., JP Morgan Chase Bank, N.A. v RADS Group, Inc., 88 A.D.3d 766, 767 (2d Dept. 2011) (summary judgment denied because plaintiff failed to demonstrate admissibility of defendant's payment history). Once a *prima facie* showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. Alvarez, *supra*. As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. See Phillips

v. Kantok & Co., 31 N.Y.2d 307 (1982); Andre, *supra*. On a motion for summary judgment, the Court's role is issue finding, not issue determination. See Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. See Gitlin v. Chirkin, 98 A.D.3d 561 (2d Dept. 2012); Dowsey v. Megerlan, 121 A.D.2d 497 (2d Dept. 1986). Even if the plaintiff's motion is unopposed, summary judgment should not be granted merely because the party against whom judgment is sought failed to submit opposition papers. See Liberty Taxi Mgt., Inc v. Gincherman, 32 A.D.3d 276, 277 fn. 1 (1st Dept. 2006) (citing Vermont Teddy Bear Co., v. 1-800 Beargram Co., 373 F.3d 241 (2d 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 as a matter of law")).

To establish a *prima facie* claim for breach of contract, a plaintiff must establish the existence of a contract, that plaintiff performed pursuant to the contract, that defendant breached its contractual obligations, and that plaintiff was damaged as a result of the breach. Liberty Equity Restoration Corporation v. Park, 160 A.D.3d 628, 630 (2d Dept. 2018); Dee v. Rakower, 112 A.D.3d 204 (2d Dept. 2013). Plaintiff meets its *prima facie* burden of proof on a motion for summary judgment regarding a breach of contract action by proffering evidence of the obligation and the defendant's default. Velocity Investments, LLC v. Lymon, 218 A.D.3d 1091, 194 (3d Dept. 2023).

The Court finds that the documents submitted by Plaintiff in support of its summary judgment motion fail to demonstrate breach of the contract or what monies remain due and owing due to any breach. Plaintiff's proof does not establish a *prima facie* case for breach of contract. Plaintiff tendered the Revenue Purchase Agreement, alleged proof of funding, and an exhibit entitled "transaction history," and bank statements. However, Plaintiff does not identify which specific event of default occurred, as non-payment, in and of itself, is not an event of default. See RPA Sect. 3.1, listing Events of Default (NYSCEF 20).

Moreover, as the Court noted prior, the alleged proof of deposit of funds to Plaintiff is unidentifiable and does not prove that a deposit was made into Defendants' account. Similarly, the bank statements proffered by Plaintiff do not demonstrate that the funding was made to and received by Defendants. Thus, Plaintiff's performance under the contract has not been established.

Further, the document purporting to be an account transaction history appears to be a default letter with no admissible proof as to the payments made. Again, the banking records proffered do not establish the subject payments were made. Moreover, there is no proof of default given the last two entries state that payments are "pending." As Plaintiff has failed to meet its burden on summary judgment, the motion is denied, and the Court need not consider the remaining arguments in the opposition papers. Winegrad v. New York Univ. Med. Center, supra at 853.

Therefore, it is

ORDERED, that Plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED, that all counsel shall appear for a preliminary conference on a date to be scheduled by the Clerk in a notice to follow, and it is further

ORDERED, that Defendant only may attend virtually by Teams; and it is further

ORDERED, that the attached Preliminary Conference Order shall be completed and submitted to the Court at the preliminary conference.

This constitutes the Decision and Order of this Court on Motion Seq. #1.

Dated: October 29, 2024
New City, New York

Hon. Keith J Cornell, A.J.S.C.

To: All counsel via NYSCEF