Fora Fin. Funding, LLC v Ervin
2024 NY Slip Op 35711(U)
March 18, 2024
Supreme Court, Nassau County
Docket Number: Index No. 615099/21
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE IAS PART 2

____X

FORA FINANCIAL FUNDING, LLC,

Plaintiff,

Index No.: 615099/21
Motion Sequence…01
Motion Date…11/13/23
XXX

-against-

JOHN ERVIN d/b/a COASTAL CONSTRUCTION
and JOHN ERVIN,

Defendants.

____X

Papers Submitted:
Notice of Motion....................x

Upon the foregoing papers, the unopposed motion by the Plaintiff, FORA FINANCIAL FUNDING, LLC ("FFF"), seeking an Order pursuant to CPLR § 3215, granting a default judgment in its favor as against the Defendants, JOHN ERVIN d/b/a COASTAL CONSTRUCTION ("COASTAL") and JOHN ERVIN ("ERVIN"), is determined as hereinafter provided.

In this breach of contract action, the Plaintiff alleges that on or about March 30, 2021, the Fora Financial Advance, LLC ("Purchaser") and the Company Defendant, COASTAL, entered into a Purchase and Sale of Future Receivables Agreement ("Agreement") whereby the Purchaser agreed to purchase $54,000.00 of the Company Defendant's future receivables for a sum of $40,000.00 to be paid to the Purchaser from five point nine percent (5.9%) of the Company Defendant's future receivables (*See* Agreement, NYSCEF Doc. No. 4). Pursuant to the Agreement, the Company Defendant authorized the Purchaser to initiate electronic checks or ACH withdrawals from a bank account until the sum was fully paid to the Purchaser (*Id.* at p. 11). The Plaintiff alleges that on August 31, 2021, the Company Defendant defaulted under the terms of the Agreement by failing to duly remit payments to the Purchaser[1] (*See* Plaintiff's Affidavit, NYSCEF Doc. No. 11 at ¶ 8). On April 5, 2021, the Purchaser sold and assigned all their rights, titles and interests under the Agreement to the Plaintiff, FFF (*See* Form of Assignment, NYSCEF Doc. No. 3).

The Plaintiff alleges that the Defendant, ERVIN, executed a guarantee of performance of all the representations, warranties, and covenants made by the Company Defendant (*See* Plaintiff's Affidavit, NYSCEF Doc. No. 11 at ¶ 6). The Plaintiff asserts that the "Guarantor executed a Performance Guaranty (the "Guaranty"), found on paragraph 29 of the Agreement" (*Id.*). Said paragraph, in part, states the following:

> "**29. PERFORMANCE GUARANTY**
> In Consideration of Purchaser entering into this Agreement, and to induce Purchaser to enter into this Agreement, ***the undersigned principal(s) of Seller** (the "Guarantors") hereby personally and unconditionally guarantees the performance by Seller* of all of its obligations hereunder and further guarantees the accuracy, truthfulness and completeness of all representations, warranties and covenants made by Seller herein as more specifically set forth in this Agreement."

It is unclear to the Court who the Agreement binds as the "Guarantors" as the Online Checkout Digital Signature does not name the alleged Defendant Guarantor, ERVIN. The Online Checkout Digital Signature states "I hereby, as a duly authorized agent of Seller and in my capacity as Guarantor, affirm that I have read, understand and agree to the terms

[1] The Court notes that Complaint states the default occurred on October 5, 2021 (*See* Summons and Complaint, annexed to Motion as Exhibit "B" at ¶¶ 18 and 22).

and conditions of the Purchase and Sale of Future Receivables Agreement…", and is signed by "coastalconstructiondesign@gmail.com," said email is identified as COASTAL's email (*See* Agreement, NYSCEF Doc. No. 4 at pp. 1 and 17). Additionally, there is no mention of the Defendant, ERVIN, on said signature page (*See* Agreement, NYSCEF Doc. No. 4 at p. 17).

As a result of the alleged breach, the Plaintiff alleges that the Defendants, COASTAL and ERVIN, owe the Plaintiff $22,390.08 of the purchased amount together with the costs, judgment interest pursuant to the terms of the Agreement and disbursements (*See* Plaintiff's Affidavit, NYSCEF Doc. No. 11 at ¶ 11).

Pursuant to CPLR § 3215, a plaintiff can make an application for a default judgment against a defendant who fails to answer or otherwise appear in the action. Pursuant to CPLR § 3215 (f), an applicant for a default judgment must provide: (i) proof of service of the summons with notice; (ii) proof by affidavit by the party of the facts constituting the claim; and (iii) proof of the default and/or amount due.

The Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about December 2, 2021 (*See* Summons and Verified Complaint, annexed to Motion as Exhibit "B"). The Plaintiff purports that personal service was effectuated upon the Defendant, COASTAL, on January 11, 2022, by delivering a copy of the Summons and Complaint to John Waters, an authorized representative of the corporation, at 401 Oak Manor Circle, Springdale, AR 72762. Furthermore, the Plaintiff purports that service was effectuated upon the Defendant, ERVIN, on January 11, 2022, by delivering a copy of the Summons and Complaint to a person of suitable age and discretion, John Waters, nephew, at 401 Oak Manor Circle, Springdale, AR 72762, indicated as the actual place of business, and thereafter mailing a copy of same to ERVIN on January 13, 2022 (*See* Affidavits of Service, annexed to the Motion as Exhibit "C").

Upon review of the documents, the Court notes that the Agreement and Summons reflect COASTAL's address as 1813 W Huntsville Ave., Springdale, AR 72762, the Corporate Defendant's place of business. The Agreement does not reflect an address for the Defendant, ERVIN. However, the Request for Judicial Intervention and Notice of Motion reflect the Defendants', COASTAL and ERVIN, respective address(es) as 401 Oak Manor Circle, Springdale, AR 72762. The Summons also reflects said address as the Defendant's, ERVIN, address (*See* Agreement, NYSCEF Doc. No. 4 at p. 1). While the Agreement states the Company Defendant's place of business as 1813 W Huntsville Ave., Springdale, AR 72762, the Affidavit of Service states 401 Oak Manor Circle, Springdale, AR 72762 as the said Defendant's place of business. There is no explanation, reasonable or otherwise, for the discrepancy in the service address for the Defendants, COASTAL and ERVIN.

Moreover, the affidavits of service were electronically filed on February 7, 2022 and March 9, 2022. However, the within motion was not filed until October 4, 2023, well over one year after the default.

Based on the foregoing, the Court finds that the Plaintiff failed to provide proof that the Defendants were duly served with notice of this application. Further, the motion is untimely and thus the action is deemed abandoned. As such, the motion is denied and the matter shall be dismissed.

Accordingly, it is hereby

ORDERED, that the unopposed motion by the Plaintiff, FORA FINANCIAL FUNDING, LLC, seeking an Order pursuant to CPLR § 3215, granting a default judgment in its favor as against the Defendants, JOHN ERVIN d/b/a COASTAL CONSTRUCTION and JOHN ERVIN, is **DENIED**, and this action is hereby **DISMISSED**.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
March 18, 2024

Randy Sue Marber

Hon. Randy Sue Marber, J.S.C.
XXX

ENTERED
Mar 21 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE