Emerald Group Holdings LLC v Daves Fencing & Painting, Inc.
2025 NY Slip Op 35459(U)
January 21, 2025
Supreme Court, Nassau County
Docket Number: Index No. 602796/2024
Judge: Sarika Kapoor

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

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EMERALD GROUP HOLDINGS LLC D/B/A VITALCAP FUND,

Plaintiff,

-against-

DAVES FENCING & PAINTING, INC. D/B/A DAVES FENCING & PAINTING AND BILLY RAY DAVES,

Defendants.

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TRIAL/IAS PART 32
Index No.: 602796/2024

DECISION AND ORDER

Motion Seq. No.: 001
Motion Submission Date:
11/01/2024

NYSCEF documents 8-21 were read and considered in deciding this motion.

Relief Requested

Plaintiff moves for summary judgment directing the entry of a judgment against the defendants, jointly and severally, in the sum of $113,967.84 with interest thereon from February 1, 2024, plus costs and disbursements, as well as the dismissal of the defendants' affirmative defenses. Despite proof of proper service (*see* 22 NYCRR 202.5-b[f][2][ii]; *see also*, doc. 21), the instant motion remains unopposed.

Background

On or about December 7, 2023, plaintiff entered into a contract with defendant Daves Fencing & Painting, Inc. D/B/A Daves Fencing & Painting (hereinafter "company defendant") (hereinafter "the contract"), pursuant to which the plaintiff agreed to purchase $130,500 worth of the company defendant's future receivables for the purchase price of $90,000, with the purchase amount to be remitted to the plaintiff from a bank account from which the plaintiff was authorized to make ACH withdrawals until the $130,500 was paid in full. The company defendant's obligations under the contract were personally guaranteed by defendant Billy Ray Daves (hereinafter "guarantor"). Pursuant to the contract, the plaintiff remitted the purchase price minus the agreed to fees to company defendant. Payments amounting to $19,032.16 were initially made pursuant to the contract, but payments promptly ceased on or about February 1, 2024, leaving a balance of $111,467.84.

On or about February 15, 2024, plaintiff commenced this action alleging that the company defendant defaulted under the terms of the contract by breaching its representations and warranties to the plaintiff by failing to properly direct payments to the plaintiff. Plaintiff alleged that it was owed the sum of $113,967.84[1] plus interest, costs, disbursements and attorney's fees.

Specifically, the complaint alleges three causes of action: (1) breach of contract against the company defendant, (2) to recover on the personal guaranty against the guarantor, and (3) unjust enrichment against both defendants.[2] On March 13, 2024, the defendants filed a verified answer with affirmative defenses in which they denied the material allegations of the complaint and asserted various affirmative defenses.

Motion Sequence 1

Relying upon, inter alia, the plaintiff's affirmation, the business record affirmation, the agreement and proof of funding, counsel for plaintiff moves by Notice of Motion dated April 9, 2024 for summary judgment directing the entry of judgment against the company defendant and guarantor, jointly and severally, in the sum of $113,967.84 with interest thereon from February 1, 2024, and an award of costs, expenses and disbursements. Plaintiff's motion also seeks the dismissal of the affirmative defenses including those based on lack of jurisdiction; unclean hands; unconscionability; failure to state a cause of action; fraud; and General Business Law.

Counsel asserts that this is a "straightforward breach of contract case," with no triable issue of fact. Counsel submits that the evidence confirms that the parties entered into an agreement where the plaintiff paid the company defendant a sum in advance to purchase a percentage of the company defendant's future receivables. Counsel notes that the company defendant breached the agreement by failing to turn over the receivables to the plaintiff and otherwise breached the covenants and warranties made in the agreement. Furthermore, counsel submits, the guarantor contracted with the plaintiff to guarantee performance in the event of the company defendant's default, but the guarantor has breached its guarantee by its failure to perform pursuant to the agreement. Counsel adds that the company defendant should not be unjustly enriched by its own breach in failing to tender the rest of balance owed to the plaintiff. Ultimately, counsel argues that there is no issue of fact of a primary obligation under the agreement, the guarantee by the guarantor of performance of all the representations, warranties, and covenants made by the company defendant in the agreement, and the breach of the agreement and the guarantee. Counsel adds that given that the agreement contains a mandatory reconciliation provision, has no finite term, and that there is no recourse to the plaintiff if the defendants file bankruptcy, the agreement between the parties is a purchase of receivables, and not a criminally usurious loan. Finally, counsel submits, that there is no merit to the defendants' affirmative defenses.

In support of the instant motion, counsel submits an affirmation of service dated April 9, 2024 wherein counsel avers that he served the instant notice of motion, statement of facts, plaintiff affidavits, affirmation in support, memorandum and exhibits upon counsel for the defendants, Michael Anthony Huerta.

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[1] This sum is comprised of the outstanding balance amount of $111,467.84, plus a $2,500 default fee as contracted for by the parties in the agreement.

[2] Plaintiff waives its request for attorneys' fees in the instant motion (doc. 12, ¶25).

Despite the foregoing, and despite proof of proper service in accordance with 22 NYCRR 202.5-b[f][2][ii], the instant motion remains unopposed.

Discussion

The law is settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). "Even where there is no opposition to a motion for summary judgment, the court is not relieved of its obligation to ensure that the movant has demonstrated his or her entitlement to the relief requested" (*Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]).

A prima facie showing of a breach of contract claim requires evidence of (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages (*see Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748 [2d Dept 2022]). A prima facie showing of a breach of guarantee claim is established through proof of (1) the guarantee; (2) a default on the underlying obligation secured by the guarantee; and (3) the defendant's failure to honor the guarantee (*see e.g. Valencia Sportswear v D.S.G. Enters.*, 237 AD2d 171 [1st Dept 1997]). In order to prevail on a claim of unjust enrichment, a party must show that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation and citations omitted]). A cause of action alleging unjust enrichment is a quasi-contract claim, and therefore, is not viable where it is undisputed that the parties entered into an express agreement (*see Vescon Constr., Inc. v. Gerelli Ins. Agency, Inc.*, 97 AD3d 658 [2d Dept 2012]; *Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1120 [2d Dept 2008]).

In support of its motion, plaintiff relies upon, inter alia, the pleadings, two separate affirmations of Daniel Eisen, an authorized representative of the corporate defendant who also offers a business records affirmation in his capacity as custodian for the corporate defendant, the agreement, and proof of funding. Based on the foregoing submissions, the plaintiff established its prima facie entitlement to judgment as a matter of law on all three claims.

In light of this showing, the burden shifts to the defendants to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action (*see Min Capital Corp. Retirement Trust v Pavlin*, 88 AD3d 666 [2d Dept 2011]). The defendants elected to not oppose the plaintiff's motion for summary judgment which also seeks the dismissal of the affirmative defenses. As such, the plaintiff's motion is granted without opposition and the affirmative defenses are stricken.

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Conclusion

Accordingly, it is hereby,

ORDERED, that the branch of plaintiff's motion for summary judgment which seeks the entry of a judgment against the defendants Daves Fencing & Painting, Inc. D/B/A Daves Fencing & Painting and Billy Ray Daves, jointly and severally, in the sum of $113,967.84 with interest thereon from February 1, 2024, plus costs and disbursements is **GRANTED**; and it is further,

ORDERED, that the branch of the plaintiff's motion which seeks the dismissal of defendants' affirmative defenses, is also **GRANTED**.

Any relief requested not specifically addressed herein is **DENIED**.

This constitutes the decision and order of this Court.

Submit judgment on notice (22 NYCRR 202.48[a]-[b]).

Dated: January 21, 2025
Mineola, New York

ENTER:

HON. SARIKA KAPOOR, A.J.S.C.

ENTERED
Jan 27 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE