Revenued LLC v Copostatic Real Estate L.L.C.
2025 NY Slip Op 35466(U)
March 4, 2025
Supreme Court, Nassau County
Docket Number: Index No. 618116/2023
Judge: Gary M. Carlton
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---X

REVENUED LLC,

Plaintiff,

-against-

COPOSTATIC REAL ESTATE LIMITED LIABILITY COMPANY and ANTHONY DENNIS JR,

Defendants,

---X

Index No. 618116/2023

Hon. GARY M. CARLTON
TRIAL PART 26

DECISION AND ORDER

Motion Seq. 002

The following papers read on this motion:

Notice of Motion/Affirmation in Support/Memo of Law/ Supporting Exhibits.......................X
Memo of Law in Opposition..X
Memo of Law in Reply...X

Plaintiff, REVENUED LLC (Revenued), moves this court for an order pursuant to CPLR 3126, precluding Defendants, COPOSTATIC REAL ESTATE LIMITED LIABILITY COMPANY (Copostatic) and ANTHONY DENNIS JR, from contesting the facts upon which discovery has been withheld and pursuant to CPLR 3212 granting Plaintiff summary judgment against the Defendants, jointly and severally, in the principal amount of \$49,424.18, plus statutory interest at 9% from October 27, 2023, with costs and disbursements as taxed by the clerk; or, in the alternative, pursuant to CPLR 3126 striking the Defendants' Answer for willful and contumacious failure to provide Court-Ordered discovery and rendering a judgment against the Defendants, Copostatic and Anthony Dennis Jr, jointly and severally in the principal amount of \$49,424.18, plus statutory interest at 9% from October 27, 2023, with costs and disbursements as taxed by the clerk. Defendants oppose the motion. Plaintiff replies.

Revenued commenced this action by summons and complaint on November 7, 2023. The complaint contains two causes of action, to wit: 1) breach of contract; and 2) breach of the guarantee. Issue was joined by service of an answer dated January 11, 2024. In a decision and order dated October 10, 2024, Plaintiff's motion to dismiss Defendants' affirmative defenses was granted. Defendants filed a Notice of Appeal of the October 10, 2024 (entered on October 11, 2024) decision and order.

According to the complaint and the moving papers, on March 6, 2023, Plaintiff and Defendants entered into an agreement whereby Plaintiff agreed to purchase a percentage of Copostatic's future receivables for \$1.38 per \$1.00 of purchase price. Anthony Dennis Jr. guaranteed the contract.

Plaintiff would receive its payment by making withdrawals from a particular bank account. Plaintiff alleges that Copostatic sold a total of $150,590.53 of its business receivables/revenue to Plaintiff for total upfront sums of $109,123.57. Plaintiff's moving papers alleges that Defendants partially performed by delivering $86,684.96 (plus additional PayNow credits of $16,981.39) for total remittances credited of $103,666.35, leaving a balance of $46,924.18. Plaintiff alleges Defendants breached the agreement on October 27, 2023. Plaintiff also seeks a default fee in the amount of $2,500.00.

Defendants oppose the motion with a memorandum of law. Defendants argue that there has been no court-ordered discovery so the motion to strike the Defendants answer cannot be granted, Plaintiff has not filed any motions to compel before making the instant motion, and that there has only been one preliminary conference held and no compliance conference has been held to give the Defendants a change to rectify any discovery issues. With respect to Plaintiff's motion for summary judgment, Defendants argue that Plaintiff's motion lacks evidentiary support; consists of unsubstantiated hearsay related to the Elie Friedman affidavit; that issues of fact exist; that Plaintiff has not established its guarantee claim because Plaintiff did not establish its breach of contract claim; that Plaintiff did not establish compliance with CPLR 4518 in terms of Plaintiff's payment documentation; and that Defendants have not had sufficient opportunity to argue their affirmative defenses, which were dismissed, and subject to an appeal.

Specifically, Defendants argue that Plaintiff's motion lacks evidentiary support from representatives at the financial institutions purportedly involved in the transactions in question, namely BankUnited N.A. and Sutton Bank, and that Elie Friedman, uses ambiguous language about its business documentation that make the source of possible third-party information questionable.

LAW

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center, supra*, at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]).

Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d

Dept 2009]). Further, "[o]n a motion for summary judgment to enforce a written guarantee, all that the creditor need prove is an absolute and unconditional guarantee, the underlying debt, and the guarantor's failure to perform". *City of New York v Clavose Cinema Corp.*, 256 AD2d 69 (1st Dept. 1998).

"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" (see *Cruz v Cruz*, 213 AD3d 805 [2d Dept 2023], quoting *Klein v Signature Bank, Inc.*, 204 AD3d 892, 895 [2022] [internal quotation marks omitted]).

ANALYSIS

In support of the motion, Revenued submits, *inter alia*, the contract, the guaranty and the affirmation of Elie Friedman, the chief underwriting officer for Plaintiff. In the affirmation, Elie Friedman addresses Revenued entering into the contract for future receivables in exchange for upfront sums. Under the Master Revenue Purchase Agreement, Defendant Copostatic was given access to an online portal to request cash advance draws directly to Defendant's designated business bank account and Defendant was also issued a "Visa network-branded Revenued payment card" for the purchase of goods or services from third parties. For a time, Revenued received payments. However, on or before October 27, 2023, Defendant breached the agreement by stopping the remittance of future receivables from the bank account.

According to the Master Revenue Purchase Agreement, Sutton Bank is the banking or financial institution that issued the Visa network branded Revenued payment card. The Master Revenue Purchase Agreement provides that "[e]ach Swipe shall trigger a transmission by the applicable Vendor or Bank (as defined below), as applicable, to Revenued that an offer is being made by Merchant. Revenued at its sole discretion shall accept or reject such offer by sending a confirmation… to Merchant…"

Elie Friedman's affidavit references Sutton Bank's involvement in the payment card transactions. Friedman avers that "[w]hen the Payment Card is swiped by Business Defendant, offering to sell the Plaintiff a portion of its business receivables at a rate of $1.38 per $1.00 advanced, that occurrence is reported by Sutton Bank to Plaintiff." Friedman's affirmation goes on to describe the process of Plaintiff both declining and accepting offers from Copostatic. Friedman explains how a declined offer results in a contemporaneous email sent to Defendants advising of the declined transaction and no activity is recorded on the transaction history. When Plaintiff approves an offer, Friedman avers that "it results in a successful transaction in the amount set forth on the corresponding Confirmation that is then contemporaneously recorded on the Transaction History". Friedman gives an example of a transaction where Copostatic swiped the payment card on March 30, 2023 at a Lowe's store [NYSCEF Doc. 42, Page 26] seeking an advance from Plaintiff via Sutton Bank, and upon the approval of the offer, a confirmation was issued to Defendants and the transaction was contemporaneously recorded on the transaction history.

Plaintiff does not provide an affidavit from a representative at Sutton Bank and relies on the Friedman affirmation. It is unclear from the Friedman affirmation about what information Sutton Bank is reporting to Plaintiff concerning the occurrence of the payment card swipe. It is unclear how Sutton Bank communicates the swipe occurrence to Plaintiff and whether a document is generated that Plaintiff then relies on. In the March 30, 2023 Lowe's transaction that Plaintiff references as an example, the document that Friedman refers to as a "confirmation" provides *inter alia* that "[t]his transaction is PENDING until we receive a credit authorization from the VISA network, which releases the funds to the transaction counterparty. The information given above is PROVISIONAL, based upon your current Merchant agreement. These terms are provided as a reference, but they are subject to change between the time of the transaction and the final credit authorization."

Plaintiff has not offered the reports from Sutton Bank, or credit authorizations from the VISA network, as business records, or sufficiently detailed the payment card swipe process to remove questions of fact that exist, or explained how Plaintiff relies on and incorporates this process into its own records. The court notes that Paragraph 11, including Footnote 4, of the Friedman affirmation provides details about the confirmations but does not adequately address the issues discussed above. Plaintiff has failed to establish its prima facie entitled to summary judgment.

The court now turns to Plaintiff's motion pursuant to CPLR 3126 striking the Defendants' Answer for willful and contumacious failure to provide Court-Ordered discovery and rendering a judgment against the Defendants. The court notes that Defendants have not responded to Plaintiff's Notice to Admit [NYSCEF Doc. No. 11], and those facts are deemed admitted.

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v Grunwald*, 110 A.D.3d 949 [2d Dept. 2013]; *Murphy v County of Suffolk*, 115 A.D.3d 820 [2d Dept. 2014]; *Chichilnisky v Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]).

At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "Although actions should be resolved on the merits where possible, a court may strike [a pleading] for failure to comply with court-ordered discovery where there is a clear showing that the noncompliance is willful and contumacious" (*Rawlings v Gillert*, 78 AD3d 806 [2d Dept 2010]; *see also* CPLR 3126[3]; *Moray v City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v Schindler El. Corp.*, 74 AD3d 1037 [2d Dept 2010]; *Rini v Blanck*, 74 AD3d 941 [2d Dept 2010]).

A preliminary conference order was issued by this court on September 26, 2024. Plaintiff filed a good faith affirmation [NYSCEF Doc. No. 35], together with its motion papers on

February 4, 2025, and prior to the initial return date set forth in the Notice of Motion, which was February 18, 2025. Counsel for Defendants sought an adjournment of the motion from its original return date and Plaintiff's counsel opposed the request. Counsel for both parties appeared on February 18, 2025 and conferenced the case with my law clerk. My law clerk advised counsel for the Defendant that the court would adjourn the submission of the motion but that outstanding discovery sought by Plaintiff was to be responded to and attached to Defendants' opposition papers so the court could consider the motion on the merits with all information available. Defendants failed to respond to the outstanding discovery demands when they submitted their opposition to this motion. The court finds that the appropriate penalty for Defendants failure to respond to the discovery demands in opposition to this motion is to strike the Defendants answer.

Accordingly, it is hereby

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

ORDERED, that Plaintiff's motion for an order striking Defendants Answer is GRANTED. Plaintiff is directed to file a Note of Issue, on notice to Defendants, for an inquest, on or before April 1, 2025; and it is further

ORDERED, that an inquest take place on April 29, 2025, at 11:00AM on this issue of damages.

This constitutes the decision and order of the court.

Dated: March 4, 2025
Mineola, New York

Hon. Gary M. Carlton, J. S. C.

ENTERED
Mar 06 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE