

**Strategic Funding Source, Inc., v Marco Is. Elecs.,
LLC**

2017 NY Slip Op 30213(U)

January 31, 2017

Supreme Court, New York County

Docket Number: 151547/2015

Judge: Cynthia S. Kern

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RECEIVED NYSCEF: 02/02/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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STRATEGIC FUNDING SOURCE, INC.,

Plaintiff,

DECISION/ORDER
Index No. 151547/2015

-against-

MARCO ISLAND ELECTRONICS, LLC, THOMAS
LANG

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Strategic Funding Source, Inc. commenced the instant action seeking damages arising out of an alleged breach of agreements entered into between plaintiff and defendants Marco Island Electronics, LLC d/b/a Marco Radio Shack ("Marco Radio") and Thomas Lang ("Mr. Lang"). Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment against defendants on two of its claims. Defendants cross-move for an Order pursuant to CPLR § 3211(a)(10) dismissing the complaint for failing to join necessary parties. For the reasons set forth below, both plaintiff's motion and defendants' cross-motion are denied.

The relevant facts are as follows. Marco Radio entered into a franchise agreement with Radio Shack Corporation pursuant to which Marco Radio had an \$80,000.00 line of credit with the Radio Shack Corporation for the purchasing of goods for sale and items otherwise necessary to run the franchise. Defendants allege that at some point in 2013, Radio Shack Corporation informed defendant Mr. Lang, Marco Radio's managing member, that it could no longer extend the line of credit to the franchise because of the financial difficulties Radio Shack Corporation was experiencing and directed Lang to reach out to plaintiff to obtain business loans and/or lines of credit in order to continue running Marco Radio.

By way of three Merchant Cash Advance Agreements for the Purchase and Sale of Future Receivables dated October 22, 2013 (Contract #389361) ("Contract #1"), December 3, 2013 (Contract #411241) ("Contract #2") and February 21, 2014 (Contract #180732) ("Contract #3") (hereinafter collectively referred to as the "Agreements"), plaintiff purchased \$165,600.00 worth of Marco Radio's future accounts, monetary payments, credit card and other general receivables generated in the course of its business (hereinafter referred to as the "Receivables") in exchange for \$120,000.00. Defendant Mr. Lang executed a personal guaranty securing Marco Radio's performance of the obligations under the Agreements.

Plaintiff alleges that in or around February 2014, it paid defendants \$120,000.00, the agreed upon purchase price amount for the Receivables. Under Contract #1 and Contract #3, plaintiff was to collect 23% and 25% respectively of the daily batch amount of credit card receivables collected by Marco Radio, from Marco Radio's designated credit card processor. Additionally, pursuant to Contract #2, plaintiff was to collect 10% of the daily batch amount of receivables collected by Marco Radio via Automated Clearing House ("ACH") debits from defendants' depositing account.

As a condition of each of the Agreements, defendants were to ensure that all Receivables were settled solely through the designated processor and depositing accounts and any changes to the account or processor were to be made only with the express written consent of the plaintiff. Additionally, pursuant to the Agreements, Marco Radio promised to provide plaintiff with an accurate representation of the financial state of defendants' business and to proactively and continually apprise plaintiff of any material adverse changes thereto; settle or "batch out" its credit card receipts with the processor on a daily basis; and not change the accounts or processor through which the Receivables were settled without plaintiff's consent.

Plaintiff alleges that in contradiction of the above representations, in or around July 2014, defendants diverted the Receivables to a non-designated and unauthorized credit card processor and that by July 28, 2014, defendants stopped depositing the Receivables into the mutually agreed upon account. Plaintiff further alleges that as a result, it has been unable to collect its daily percentage of Receivables purchased from defendants since the date of the diversion. Thus, plaintiff commenced the instant action asserting causes of action against Marco Radio and Mr. Lang for breach of contract and against Marco

Radio for an account stated and seeking damages in the amount of \$86,679.57 plus costs, default and processor fees as set forth in the Agreements and attorney's fees.

Plaintiff now moves for summary judgment on its breach of contract claims in the amount of \$86,679.57 plus costs and has withdrawn its claim for an account stated, its request for attorney's fees and its request for default and processor fees. Defendants cross-move to dismiss the complaint on the ground that plaintiff has failed to join necessary parties. Specifically, defendants point to Contract #3 pursuant to which plaintiff, as the lead purchaser, purchased defendants' Receivables along with other unnamed "participants" who were also purchasers under said agreement.

The court first turns to defendants' cross-motion to dismiss the complaint for failing to join the unnamed "participants" who were also purchasers under Contract #3 on the ground that such "participants" are necessary parties to this litigation. Pursuant to CPLR § 3211(a)(10), "the court should not proceed in the absence of a person who should be a party." Indeed, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." CPLR § 1001(a).

Defendants' cross-motion to dismiss the complaint for failing to join the unnamed "participants" who were also purchasers under Contract #3 is denied as such "participants" are not necessary parties to this litigation. Pursuant to Contract #3,

3.2 **Remedies.** Upon the occurrence of an Event of Default that is not waived pursuant to Section 4.4 hereof, [plaintiff] on its own and on behalf of it's [sic] Participants may proceed to protect and enforce its rights or remedies by suit in equity or by action at law, or both, whether for the specific performance of any covenant, agreement or other provision contained herein, or to enforce the performance of [Marco Radio's] and each Owner's/Guarantor's obligations hereunder, under the Merchant Security Agreement and Guaranty, or pursuant to any other legal or equitable right or remedy.

Thus, as the agreement makes clear, plaintiff may seek to enforce its rights under Contract #3 against Marco Radio and Mr. Lang in a court of law regardless of whether other participants to the agreement are joined in the lawsuit.

The court next turns to plaintiff's motion for summary judgment on its first and third causes of action for breach of the Agreements. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In order to establish entitlement to summary judgment on a breach of contract claim, a party must establish (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010).

In the instant action, this court finds that plaintiff's motion for summary judgment on its breach of contract claims against defendants must be denied as there is an issue of fact as to whether plaintiff performed under the Agreements, specifically, whether plaintiff paid to defendants the full \$120,000.00 which was the agreed upon purchase price for the Receivables. Plaintiff has provided the affidavit of David Wolfson, its Vice President of Risk Management and Asset Recovery, pursuant to which Mr. Wolfson affirms that "[b]y February 28, 2014, [plaintiff] paid Defendants the amount of \$120,000.00 as the agreed upon purchase amount for the Receivables." However, defendants have provided the affidavit of Mr. Lang, Marco Radio's managing member, who has affirmed that Marco Radio did not receive the full \$120,000.00 to which it was entitled under the Agreements and that specifically, "[defendant Marco Radio] received only \$21,000 in cash under Contract [#1] [and] only \$19,005.97 under Contract [#3] on March 3, 2014." To the extent plaintiff provides its Merchant Statement which consists of 23 pages of detailed activity for plaintiff's merchant account, including entries for deposits, fees, charge-backs, disbursements, contract payments, pending payments, holdback percentages, lockbox reserve amounts and contract balance amounts as evidence of plaintiff's performance under the Agreements, such Merchant Statement fails to establish

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said performance as a matter of law as the court is unable to decipher, merely by reviewing the Merchant Statement, whether plaintiff paid Marco Radio the full \$120,000.00 as required by the Agreements.

Additionally, in reply, plaintiff provides a second affidavit of Mr. Wolfson in which Mr. Wolfson attempts to explain how plaintiff paid the entire \$120,000.00 to defendants as required by the Agreements.

Specifically, Mr. Wilson states that in addition to the Agreements at issue in this case, plaintiff and Marco Radio entered into two other contracts for the purchase of receivables and that “[a]s shown in Plaintiff’s Merchant Statement..., the parties agreed that Plaintiff would use some of the [\$120,000.00] to pay off [the other two contracts which are not at issue in this case].” However, it is not clear just by looking at the Merchant Statement that \$120,000.00 was paid by plaintiff to Marco Radio pursuant to the Agreements and that the parties then agreed that some of the \$120,000.00 would be applied to other contracts.

Accordingly, plaintiff’s motion for summary judgment and defendants’ cross-motion to dismiss are both denied. This constitutes the decision and order of the court.

DATE: 1/31/17

CK

 KERN, CYNTHIA S., JSC
 HON. CYNTHIA S. KERN
 J.S.C.