

**Performance Frgt., Inc. v United Collective Corp.**

2013 NY Slip Op 30674(U)

April 3, 2013

Supreme Court, New York County

Docket Number: 117032/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

PERFORMANCE FREIGHT, INC.,  
Plaintiff,

Index No.: 117032/09

- v -

Motion Date: 05/18/12

UNITED COLLECTIVE CORP., ARNOLD H. SIMON  
d/b/a SATZWEAR, and STAR FUNDING, INC.,  
Defendants.

Motion Seq. No.: 03

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to vacate default and deny summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

1, 2, 3

Answering Affidavits - Exhibits \_\_\_\_\_

**UNFILED JUDGMENT**

4, 5

Replying Affidavits - Exhibits \_\_\_\_\_

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall grant plaintiff's motion to vacate its default in appearing on the previous motion by defendants Arnold Simon and cross motion by Star Funding (Motion Sequence No. 2, Order dated December 6, 2011, entered on December 14, 2011), and upon considering those motions on their merits including plaintiff's opposition thereto, the court shall grant summary judgment on the merits to the appearing defendants.

With respect to plaintiff's motion to vacate its default under CPLR 5015 (a), the affirmation of plaintiff's counsel detailing the attempts made by counsel to avoid the default

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

including appearing in the court on the return date of the motion and handing up a stipulation to adjourn the motion which was accepted by the court, demonstrate that there was a reasonable excuse for the default owing to errors in the processing of the stipulation at that time. See DiIorio v Antonelli, 240 AD2d 537, 537 (2d Dept 1997) (reasonable excuse found where parties had entered into a stipulation and party relied upon such stipulation). Plaintiff also states a meritorious breach of contract claim insofar as plaintiff asserts that there are invoices and emails documenting contractual rights in favor of plaintiff and against defendants for goods shipped by the plaintiff. See Ahmad v Aniolowiski, 28 AD3d 692, 693 (2d Dept 2006) (review of the affidavit and documents demonstrated potentially meritorious defense to breach of contract action). Therefore the court shall vacate plaintiff's default in opposing the summary judgment motions of Arnold H. Simon and Star Funding, and shall resolve the motions on the merits based upon the papers submitted.

The following facts are taken from plaintiff's affidavit in opposition to the summary judgment motions of defendants. Plaintiff provides freight forwarding for goods from China to the United States including clothing items as was the case here. Plaintiff claims that in the typical transaction it reimburses agents in China for the cost of shipping items here and that its

clients here must similarly reimburse it. Plaintiff also pays the cost for local shipping and storage and must also be reimbursed by its clients for such expenses. In this case Performance hired an agent in China to ship goods worth approximately \$160,000. Performance held the goods in storage locally because of the failure of the buyers, defendant United Collective Corp. (United) and non-party Designer License Holding Company (Designer), to pay for them.

Defendant Simon states that he was the CEO of Designer and that all the acts taken in connection with the transactions referenced herein were done in that capacity. He further states that Designer entered into an agreement to purchase from United the goods imported by plaintiff. Simon also concedes that Designer purchased goods directly from plaintiff as evidenced by invoice number 6140 from plaintiff to Designer. Designer filed for bankruptcy in December 2009 and is not a party to this action. Satzwear is an entity apparently controlled by Simon.

Defendant Simon seeks summary judgment dismissing this action against him on the grounds that there is no basis for holding him liable for either the debts of Designer or United owed to plaintiff. Co-defendant Star Funding, Inc. (Star), cross moves for the same relief. Star is a factoring company which provided financing to Satzwear and claims that it is under no obligation to plaintiff.

Plaintiff's claim is that Simon and Star are liable to plaintiff because they guaranteed payment for goods plaintiff delivered to United and Designer. Plaintiff's claim in this action rests solely upon its claim of guaranty and therefore this court must determine as a matter of law whether such a guarantee satisfying the statute of frauds exists. General Obligations Law § 5-701 (2) provides in pertinent part that

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . .  
 2. Is a special promise to answer for the debt, default or miscarriage of another person.

Therefore, although the burden on a summary judgment motion is upon the movant to demonstrate there is no triable issue of fact, to survive summary judgment there must be sufficient writings in the evidentiary record to satisfy the statute. As stated by the Court

As we recently held . . . [t]o be considered a sufficient memorandum within the ambit of the Statute of Frauds, a writing must designate the parties, identify and describe the subject matter and state all the essential or material terms of the contract. This has been settled law in this State for over a century. While it is true that an agreement may be pieced together from separate writings, those writings must be connected with one another either expressly or by the internal evidence of subject matter and occasion.

DeRosis v Kaufman, 219 AD2d 376, 379 (1<sup>st</sup> Dept 1996) (citations and internal quotations omitted). The Court in DeRosis noted importantly that

Although a court ordinarily might take plaintiff's affidavits into account on a dismissal motion, different considerations apply where the basis for the dismissal motion is a Statute of Frauds defense. Parol evidence, even in affidavit form, is immaterial to the threshold issue whether the documents are sufficient on their face to satisfy the Statute of Frauds. Consideration of parol evidence in assessing the adequacy of a writing for Statute of Frauds purposes would otherwise undermine the very reason for a Statute of Frauds in the first instance. That issue must be determined from the documents themselves, as a matter of law

Id. at 379 (citation omitted).

In this case, the writings relied upon by plaintiff fail to satisfy the statute of frauds and therefore the other evidence advanced by plaintiff to demonstrate an issue of fact as to the parties' intent is inapposite.

The main document cited by plaintiff in support of its argument seeking to uphold a guaranty is a September 23, 2009 email from Simon's secretary to plaintiff, admittedly sent at Simon's direction, which stated in pertinent part

I have instructed my bank - Star Funding (Howard Moore), to send you an email where we will be guaranteeing your payment if your are not paid by Pilot Leng's company prior to 12-days. Star Funding will be sending you a letter or email today guaranteeing that you will be paid.

Plaintiff asserts that this email is sufficient to establish a personal guarantee on the part of Simon as well as on the part of Star Funding. However, case law is to the contrary.

"[A]n agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for,

or to, that of his principal." Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 4 (1964). "What is of crucial importance . . . is the intention of the agent, the party to be charged . . . to be personally bound." Id. at 5. Applying this standard to the instant case, Simon's email by its terms does not constitute a guarantee, but only a proposal to enter into a guarantee which was to be subsequently memorialized in a future writing by a third party, Star Funding. The email makes no mention of a "personal guarantee" and fails to set forth the terms of exactly what is being guaranteed. See Salzman Sign Co. v Beck 10 NY2d 63, 67 (1961) (requirement of clear and explicit evidence of individual-liability intent required to uphold individual guarantee by corporate officer).

Furthermore, there is no evidence that Simon had any authority to contractually obligate Star Funding to the plaintiff. Nor does the e-mail dated September 23, 2009 from Howard Moore, principal of Star Funding, constitute a special promise to answer for the debt of another, here either Performance Freight or Satzwear, under GOL § 5-701(2). Such e-mail stated, in pertinent part, "After we factor these receivables and as soon as the related payment is received from Bon Ton and funds become available in our account under our Factoring Agreement with Satzwear we agree that based on a Letter of Instruction from Satzwear we will advance funds to you as

instructed by Satzwear." The explicit language of the e-mail merely represents Star Funding's promise under its financing agreement with Satzwear to continue to provide financing to Satzwear contingent upon payment on Satzwear's account receivables and to advance such funds to plaintiff upon direction of Satzwear.

Therefore, the movants defense of statute of frauds defeats plaintiff's claim against them and plaintiff's case must be dismissed as there is no factual issue as to the insufficiency of the writing.

Accordingly, it is

ORDERED that plaintiff's motion to vacate its default is GRANTED and the default judgment granted to defendants ARNOLD H. SIMON d/b/a SATZWEAR, and STAR FUNDING, INC., is hereby VACATED; and it is further

ORDERED and ADJUDGED that defendants ARNOLD H. SIMON d/b/a SATZWEAR, and STAR FUNDING, INC., are hereby GRANTED summary judgment on the merits DISMISSING plaintiff's complaint against them and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 3, 2013

ENTER:

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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J.S.C.  
**DEBRA A. JAMES**