Merchant Cash & Capital, LLC v M.B. Auto Body, Inc.
2016 NY Slip Op 31685(U)
August 31, 2016
Supreme Court, Nassau County
Docket Number: 605025/2015
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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MERCHANT CASH AND CAPITAL, LLC,

Plaintiff,

-against-

M.B. AUTO BODY, INC., and DAMIAN DIEZ,

Defendants.

---x

Index No. 605025/2015

Motion Submitted: 07/07/16
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....
Reply.....
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Plaintiff moves this Court unopposed for an Order granting summary judgment in its favor, in the sum of $105,456.63, together with pre- and post-judgment interest at the statutory rate of 9 percent. Plaintiff also seeks costs and attorneys' fees, as well as the striking of defendants' answer for failure to comply with discovery deadlines.

Plaintiff commenced this action to recover the amount due under a purchase and sale agreement executed with the business defendant, and guaranteed by the individual defendant. The business defendant sold $110,025 of its business sales receivables to plaintiff in exchange for plaintiff advancing the sum of $81,500 to the business defendant.

By way of background, plaintiff successfully obtained a Clerk's default judgment against the defendants on January 11, 2016, in the sum of $111,451.35 representing the damages in the sum of $105,456.63, together with costs of $455, and prejudgment interest.

By so-ordered stipulation dated March 22, 2016 and issued by this Court, the parties agreed, *inter alia*, to vacate the previously entered default judgment, waive any objections relating to personal jurisdiction, service of process, and venue, and that defendants would file an answer on or before April 1, 2016. The parties also agreed that initial discovery demands would be exchanged on or before April 11, 2016, and that the parties would produce discovery responses on or before April 29, 2016.

According to plaintiff, the defendants have not responded to any of plaintiff's discovery demands.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendants (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

With respect to its breach of contract claim, plaintiff must establish its *prima facie* entitlement to summary judgment by providing evidence in admissible form of the existence of a contract between the parties, plaintiff's performance and defendant's alleged breach. (***Furia v Furia,*** 116 AD2d 694 [2d Dept 1986]).

With respect to the causes of action pertaining to the individual defendant guarantor, plaintiff must establish the existence of the guaranty, the underlying debt, and the guarantor's failure to make payment according to the terms of the guaranty (***Hyman v. Golio***, 134 AD3d 992 [2d Dept 2015]; *see also* ***Gullery v. Imburgio***, 74 AD3d 1022 [2d Dept 2010]; ***Gera v. All-Pro Athletics., Inc.***, 57 AD3d 726 [2d Dept 2008]; ***Verela v. Citrus Lake Development Inc.***, 53 AD3d 574 [2d Dept 2008]; ***Famolaro v. Crest Offset, Inc.***, 24 AD3d 604 [2d Dept 2005]).

In support of its motion, plaintiff submits the pleadings, requests for discovery, the previous default judgment and supporting papers, the stipulation vacating said judgment, and copies of the agreement.

The affidavit of Robert Knox, vice president of collections for plaintiff sworn to on November 3, 2015 annexes the agreement made by and between plaintiff and the business defendant, which was guaranteed by the individual defendant. According to Mr. Knox's affidavit, the parties entered into the agreement on May 11, 2015. The business

defendant sold $110,025 of its receivables to plaintiff, in exchange for a cash advance of $81,500. Mr. Knox's affidavit also establishes that defendant Diez personally guaranteed the business defendant's obligation. Furthermore, plaintiff states that it fulfilled its obligation by providing the advance, but that only $4,568.37 has been tendered by the business defendant, leaving a balance of $105,456.63. Mr. Knox also avers that, on or about June 12, 2015, the business defendant and personal guarantor began diverting funds from the business bank account and interfering with payments to plaintiff. Defendants have refused to continue to make payments to plaintiff, constituting a breach of the agreement.

Furthermore, the terms of the agreement provide for the payment of costs and attorneys' fees incurred by plaintiff for the enforcement of its rights and remedies in collecting the amount due and payable.

As to the Notice to Admit served with the discovery demands, based upon the submissions to this Court, it appears that defendant failed to timely respond to the notice to admit; thus, plaintiff asserts that the matters therein are deemed admitted pursuant to CPLR § 3123 (a). "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper" (***DeSilva v. Rosenberg***, 236 AD2d 508 [2d Dept 1997]).

The Notice to Admit concerns the terms of the agreement, its status as a true and accurate copy of that agreement, and the fact that it was executed by defendants. The Notice to Admit does not cover ultimate conclusions that go to the heart of this matter; thus, it is proper, and the Court may consider those matters therein as having been admitted by defendants.

Accordingly, plaintiff has established its *prima facie* entitlement to the relief requested in the complaint, as against both defendants, jointly and severally.

Defendants have failed to establish the existence of a triable issue of fact. By failing to controvert plaintiff's claims, the statements made in the affidavit of plaintiff's vice president of collections submitted in support of the instant summary judgment motion are deemed admitted by defendants (***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539 [1975]; ***McNamee v. City of New Rochelle***, 29 AD3d 544 [2d Dept 2006]; ***Bell Atlantic Yellow Pages Co., v. Padded Wagon, Inc.***, 292 AD2d 317 [1st Dept 2002]; ***Schneider Fuel Oil, Inc. v. DeGennaro***, 238 AD2d 495 [2dDept 1997]).

Defendants' answer, which contains general denials and conclusory defenses to this action, is insufficient to establish the existence of genuine, triable issues of fact (***Orange County-Poughkeepsie Limited Partnership v. Bonte***, 37 AD3d 684 [2d Dept 2007]; ***Mlcoch v. Smith***, 173 AD2d 443 [2d Dept 1991]), and in any case, it is hereby stricken for failure to comply with discovery demands.

Accordingly, plaintiff's motion for summary judgment is granted in the amount of $105,456.63, together with pre-judgment interest since June 12, 2015, and post-judgment interest, at the statutory interest rate of 9 per cent per annum, plus costs and reasonable attorney's fees.

Submit a judgment on notice, with a bill of costs and an affirmation as to reasonable attorneys' fees.

The foregoing constitutes the Order of this Court.

Dated: August 31, 2016
Mineola, NY

Karen V. Murphy
J. S. C.

ENTERED

SEP 09 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE