Marjam Supply Co., Inc. v Telyas
2016 NY Slip Op 32492(U)
December 19, 2016
Supreme Court, New York County
Docket Number: 152319/2012
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

MARJAM SUPPLY CO., INC.,	:	
Plaintiff,	:	Index No. 152319/2012
-against-	:	DECISION AND ORDER Mot. Seq. 002
AVI TELYAS,	:	
Defendants.	:	

HON. ANIL C. SINGH, J.:

In this action for breach of contract and breach of a personal guaranty, Marjam Supply Co., Inc., ("plaintiff" or "Marjam") moves for summary judgment in the amount of $105,778.96 in damages, plus interest, costs, and fees against Avi Telyas, ("Telyas" or "defendant") pursuant to CPLR § 3212. Defendant opposes.

Facts

Marjam is a supplier of building materials and supplied Kullman Buildings Corp. ("Kullman") with building materials on various projects. See Plaintiff's Memorandum of Law in Support p. 2 ("Pl.'s Memo.") Pursuant to a Credit Application and Agreement entered into by Kullman (the "Agreement"), Marjam periodically delivered goods and services to Kullman. After delivery Marjam produced and provided an invoice that reflected the quantity and price of the

materials delivered. Id. At no time did Kullman dispute the invoices, statements, and/or the quantity, quality or price of the materials described therein. Id. Kullman made partial payments towards the account, but eventually failed to make complete payments on past due invoices.

Plaintiff asserts and defendant does not deny that defendant, as the owner/principal of Kullman, executed a personal guaranty (the "Guaranty"), which allegedly holds Telyas personally responsible for the amount due and owing from Kullman to Marjam. See Defendant's Memorandum of Law in Opposition p. 6-7 ("Def.'s Memo.") Plaintiff asserts that Telyas is personally liable for the amount outstanding on Kullman's account according to the terms of the Guaranty and is subject to the 2% per month service charge as well as attorney's fees of 33% of the balance owed plus costs and expenses. Pl.'s Memo p. 3.

In 2011, Kullman ceased doing business and on October 11, 2011, Alco Capital Group, Inc. (the "Assignee") was designated as the Assignee for the Benefit of Creditors of Kullman. Id. In accordance with New Jersey Law, Marjam was required to return a portion of the payments it had received from Kullman to the Assignee in the amount of $40,000, which represented payments received during the 4-month period preceding October 11, 2011. Id. Plaintiff contends that this amount should be added back to Kullman's account and that the Guaranty holds the defendant liable for the returned payment. Id. Finally, plaintiff contends that

defendant has provided no viable defenses with regard to his non-payment of the invoices and as such, summary judgment is proper in this matter and should be granted in favor of Marjam and against Telyas.

Analysis

Legal Standard

On a motion for summary judgment, "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 eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id.

Summary judgement is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." Garcia

v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The court's role is "issue-finding, rather than issue-determination." Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

Motion for Summary Judgment by Marjam

Marjam's motion for summary judgment is granted with respect to the outstanding balance, plus interest, costs and fees; and denied with respect to the amount paid to the Assignee. To make out its claim for an enforceable guaranty, the moving party must show "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v. Navarro, 25 N.Y.3d 485, 492 (2015); see also Davimos v. Halle, 25 A.D.3d 270 (1st Dept 2006).

Plaintiff has established a prima facie case that defendant personally, and in writing, guaranteed the obligations of Kullman with respect to Marjam. Plaintiff's Memorandum of Law in Reply p. 2 ("Pl.'s Reply Memo"). Plaintiff asserts and defendant does not deny that defendant, as the owner/principal of Kullman, executed the Guaranty, which stated in part:

> [I]n order to further induce you to sell merchandise on credit, the undersigned jointly and/or severally unconditionally and irrevocably guarantee the full and prompt payment of an indebtedness of the

> applicant to MARJAM including finance/late charges in the amount of 2% per month. In the event that legal action instituted to enforce payment of the amount due pursuant to such extension of credit, the undersigned jointly and severally guarantees to be liable for all attorney's fees in the amount of 33% of the balance owed, including all costs and expense incurred by Marjam for such a situation.

See Defendant's Memorandum of Law in Opposition p. 6-7 ("Def.'s Memo."). Marjam has also indisputably shown, through submitted invoices, that Kullman is liable to plaintiff in the amount of $65,778.96 plus interest in the amount of 2% per month. See Seeta Lochan Aff., Ex. B. Finally, it is undisputed that Kullman has failed to remit payment to Marjam.

Defendant contends that he should be entitled to an adverse inference based upon his allegation of the spoliation of evidence by Marjam. Def.'s Memo p. 8. Defendant contends that these documents contained a written revocation of the Guaranty and assert that the plaintiff's destruction of these documents warrant an adverse inference and appropriate sanctions. Id. at 8-9. It is true that the spoliation need not be in bad faith and there need not be an intentional disregard of discovery requests in order for an adverse inference to be appropriate where relevant evidence necessary to the defense was destroyed by the plaintiff. See Squitieri v. City of New York, 248 A.D.2d 201 (1st Dept 1998). However, this does not take into account relevant facts in the present case.

Although Marjam has conceded that documents have been destroyed, it is disingenuous to conclude they were destroyed in the manner described by defendant. In a deposition of Marjam's representative, it was explained that Marjam destroyed the documents in the ordinary course of business, and instead keeps detailed records of all conversations and correspondences related to its accounts, including the Kullman account. Pl's Reply Memo at 5-6. These logs and records were produced during discovery. Id. Further, these records were destroyed well before this litigation started.

"Typically, the duty to preserve evidence attaches as of the date the action is initiated or when a party knows or should know that the evidence may be relevant to future litigation." Einstein v. 357 LLC, 2009 WL 4543044 (Sup. Ct. N.Y. Cnty. Nov. 12, 2009), citing, Arista Records LLC v. Usenet.com, Inc., 2009 WL 185992, at *15 (S.D.N.Y. Jan. 26, 2009); accord, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001). Courts have held that

> [a] party seeking an adverse inference instruction or other sanctions based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'[;] and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. quoting Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 430 (S.D.N.Y. 2004).

In the present case, plaintiff presents evidence that deleting the documents was within their normal business practice. There is no evidence to suggest the documents were destroyed with a culpable state of mind, and defendant does not provide any evidence, other than a self-serving affidavit by Telyas, that the destroyed documents contained any 'relevant' information that would support his defense.

Next, defendant contends that the Guaranty was capable of being terminated by oral notice and/or by written notice. Def.'s Memo at 9. Even if this court were to agree that the defendant is correct in this assertion, no evidence has been submitted to demonstrate that the Guaranty was ever revoked. The only evidence that defendant submits, are self-serving affidavits. Pl's Reply Memo p. 8. In fact, when asked, Telyas could not produce anything in writing to demonstrate that the Guaranty was revoked. Deposition of Avi Telyas ("Telyas Tr.") at 24:8-11. Further, Telyas was unaware of any document from Roger Mosciatti, a former Kullman employee who Telyas contends was asked to have the Guaranty revoked. Telyas Tr. at 64:24-65:9. At best, Telyas' suggestion that someone told him that the request to revoke was made, is hearsay, and there is a lack of evidence that anyone from Kullman actually asked that the Guaranty be revoked.

Self-serving affidavits with bare conclusory allegations are insufficient to defeat a motion for summary judgment. Caraballo v. Kingsbridge Apt. Corp., 59 A.D.3d 270, 270 (1st Dept 2009), Werner v. Nelkin, 206 A.D.2d 422 (2d Dept 1994),

Fields v. S & W Realty Associates, 301 A.D.2d 625 (2d Dept 2003) see also, Deephaven Distressed Opportunities Trading, Ltd. v. 3V Capital Master Fund Ltd., 100 A.D.3d 505, 506-7 (1st Dept 2012) ("self-serving affidavit without more, is insufficient to demonstrate defendant's entitlement to judgment as a matter of law"); Slates v. New York City Housing Authority, 79 A.D.3d 435, 436 (1st Dept 2010) ("affidavit, introduced solely in opposition to summary judgement, is self-serving and should have been disregarded"). Therefore, the Affidavits of Avi Telyas and Roger Mosciatti do not demonstrate that an issue of material fact exists in this matter.

Lastly, defendant contends that the Guaranty must be strictly construed against the drafter and that the Guaranty applies only in the event of non-payment by Kullman, which is not completely applicable to the facts at hand. Def.'s Memo at 10. It is well settled that "the words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning." Brooke Group Ltd v. JCH Syndicate 488, 87 N.Y.2d 530, 534 (1996). Any ambiguities in a contract should be construed against the drafter, however when the contract is plain and clear it is entitled to be enforced according to its terms. See Uribe v. Merchants Bank of New York, 91 N.Y.2d 336, 341 (internal quotes and citations omitted) accord, Schron v. Troutman Saunders LLP, 97 A.D.3d 87, 93 (2012) ("absent ambiguity, there was also no reason to resort to *contra proferetum* to construe the option agreement against the drafter-attorney).

In the case at hand, the personal guarantee is a form drafted and used by plaintiff and as such, should be construed against plaintiff. As detailed *supra*, the Guaranty expressly provides that it applies "[i]n the event of [sic] non-payment by [Kullman]..." In addition, it is plain and clear that the Guaranty provided for interest charges in the amount of 2% per month and attorneys' fees in the amount of 33%, in addition to the amount due, in the event of non-payment on the account and legal action being pursued to enforce payment of the amount due. See Guaranty, p. 1. Defendant's assertion that Kullman never agreed to these terms and therefore, Telyas' obligation exceeds the principal's is unpersuasive. A plain and clear reading of the contract shows that Kullman had agreed to the terms set forth above, and that Telyas is obligated to abide by these terms pursuant to the executed Guaranty.

Finally, in regards to the payment to the Assignee in the amount of $40,000.00, which represents payments made by Kullman to Marjam in the four months prior to the preferential transfer claim, there is a material issue of fact as to whether that amount is owed by Telyas. Plaintiff contends that Assignee sought the return of any payments "made by Kullman during the four-month period prior to October 21, 2011". Pl's Reply Memo., p. 10. As a result, under N.J.S.A. 2A:19-3, Marjam was required to return $40,000 to Assignee, which represented the value of materials which were delivered and remain unpaid. See Alco Capital Group, Inc. v. Marjam Supply Company, Inc., Docket No. L-247-12 (N.J. Super. Ct. App. Div.,

Apr. 18, 2012). According to plaintiff, this amount was added back to Kullman's account and remains a part of the amount owing by Kullman, and as a result, Telyas. Id. at 10-11.

Beyond the complaint in Alco Capital Group, plaintiff does not provide any further documentation that Kullman, and as a result, Telyas owes the $40,000 in dispute. The complaint in Alco Capital Group only discusses the total amount collected over the four-month period. It does not elaborate on any specific amounts collected related to the $40,000 in controversy. In searching the record, which this court is permitted to do on a motion for summary judgment, there is insufficient evidence in the invoices submitted by plaintiff, showing that Kullman owes $40,000 to plaintiff. In viewing the evidence in the light most favorable to the non-moving party, plaintiff has failed to make a *prima facie* showing of entitlement to judgment as a matter of law. See Winegrad, 64 N.Y.2d at 853; Alvarez, 68 N.Y.2d at 324; Garcia, 180 A.D.2d at 580.

Accordingly, it is hereby,

ORDERED that plaintiff's summary judgment motion is granted with respect to the outstanding balance of $65,778.96 due and owing to plaintiff plus interest in the amount of 2% per month calculated from January 31, 2012 through entry of judgment at the statutory rate thereafter; and it is further,

ORDERED that plaintiff's summary judgment motion for the awarding of attorneys' fees in the amount of 33% of the balance owed is granted and plaintiff is directed to submit a proposed order on notice within 30 days, including an affidavit in support of its claim for attorneys' fees; and it is further,

ORDERED that plaintiff's summary judgment motion is denied with respect to the $40,000.00 payment originally paid by Kullman to Marjam and subsequently returned to the Assignee; and it is further

ORDERED that the parties are to appear for a pre-trial conference at 60 Centre Street, room 218 on January 25, 2017 at 10:30AM.

Date: December 19, 2016
New York, New York

Anil C. Singh