

Card Payment Servs., LLC. v Tech Evolution, Inc.

2018 NY Slip Op 30427(U)

March 8, 2018

Supreme Court, New York County

Docket Number: 151882/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

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CARD PAYMENT SERVICES, LLC.,

INDEX NO. 151882/2016

Plaintiff,

MOTION DATE _____

- v -

TECH EVOLUTION, INC., AHUJA KASHMIR

MOTION SEQ. NO. 003

Defendant.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31
were read on this motion to/for DEFAULT JUDGMENT AND AMEND

Upon the foregoing documents, it is ordered that the motion is granted in all respects.

This is an action by plaintiff Card Payment Services, LLC, a credit card processing company, to recover from defendants Tech Evolution, Inc. and Ahuja Kashmir, a corporate merchant and individual principal of the corporation, respectively, \$48,002.96¹ worth of alleged charges that were rejected by the card issuers (known as charge backs). Plaintiff now moves 1) to amend the complaint to name defendant Ahuja Kashmir as Ahuja Kashmir a/k/a Kashmir Ahuja to reflect the possible correct name of the corporate principal; and 2) for a default judgment against defendants. After a review of the motion papers, as well as the relevant statutes and case law, the motion is granted in all respects.

¹ Plaintiff originally sued for \$55,002.96, although that amount has been changed to reflect updated charges, including credits awarded for additional payments made by defendants.

An application for a default judgment must be supported by “proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v R/JNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011); see *Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 784-785 (2d Dept 2015); *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 668 (2d Dept 2014); *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 (2d Dept 2010).

Plaintiff initially moved for a default against defendants in motion sequence 001 on or about February 2, 2016. Doc. 10. By order dated May 8, 2017, this Court denied the motion with leave to renew upon proper papers, finding that plaintiff failed to provide proof of the facts constituting the claim. Specifically, this Court noted that the agreement that defendant Ahuja Kashmir executed on behalf of Tech Evolution, Inc. was with a company called Priority Payment Systems (PPS), and not plaintiff. Although Sheri Weissman, a manager of plaintiff, submitted an affidavit in which she averred that plaintiff was an independent sales organization that utilizes the services of other information transmitters (here, PPS) to actually process the credit card transactions, proof of the same was not annexed to plaintiff’s papers. Further, this Court noted that, while plaintiff maintained that defendants agreed to be liable for charge backs, it failed to include proof of such agreement, including a guarantee of personal responsibility executed by Ahuja Kashmir. Plaintiff also asserted that it stood in the shoes of PPS in light of a marketing agreement with that company. However, it did not provide a copy of the agreement with its motion. Finally, in denying the prior motion, this Court noted there was no documentation whatsoever to substantiate the amounts that plaintiff claimed it was owed.

Plaintiff has now sufficiently rectified the omissions from its initial motion. Annexed to a new affidavit by Sheri Weissman, dated January 17, 2018, (Doc. 27), are as follows: Exhibit

A, a “Merchant Application & Agreement”, signed by Kashmir Ahuja on behalf of Tech Evolution, Inc. and Priority Payment Systems BMO Harris Bank (Doc. 28); Exhibit C, an “Assignment of Claim Agreement” (Doc. 30), pursuant to which Cynergy Data LLC d/b/a PPS assigned its claims against defendants to plaintiff; and Exhibit D, a “Suspended Funds Report” (Doc. 31) setting forth the amounts still owed by defendants. Although plaintiff fails to annex to the motion an “Executive Partner Card Processing Agreement” between Cynergy Data, LLC and plaintiff (Doc. 20), this document was submitted in support of plaintiff’s previous default motion (mot. seq. 002), which was withdrawn. Since the document was filed with NYSCEF, however, this Court can take judicial notice of the same. *See Kinberg v Kinberg*, 85 AD3d 673, 674 (1st Dept 2011). Weissman’s affidavit, as well as the aforementioned exhibits, constitute the facts giving rise to plaintiff’s claim that it is owed \$48,002.96 by defendant.

Additionally, that branch of plaintiff’s motion seeking to amend the complaint to name defendant Ahuja Kashmir as Ahuja Kashmir a/k/a Kashmir Ahuja is granted. Weissman attests to the fact that, although she initially believed that defendant’s name was Ahuja Kashmir, the latter signed his name as Kashmir Ahuja on the agreement with PPS. Doc. 28. Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of court, and leave shall be freely given upon such terms as may be just. It is within the court’s discretion whether to permit a party to amend its complaint. *See Peach Parking Corp. v 345 W. 40th Street, LLC*, 43 AD3d 82 (1st Dept 2007). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (*see Lucindo v Mancuso*, 49 AD3d 220, 227 [1st Dept 2008]), but must show that the proffered amendment is not palpably insufficient and not clearly devoid of merit. *See Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007); *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). Here, plaintiff has established that

the claims against the additional defendant have a colorable basis (*see NAB Construction Corp. v Metropolitan Transportation Authority*, 167 AD2d 301 [1st Dept 1990]) based on Weissman's representation, under oath, that the individual who signed the agreement with PPS may have been mistakenly sued as Ahuja Kashmir. The absence of any prejudice to Kashmir Ahuja is evident from his failure to oppose the instant motion despite having been served with the same. Thus, the caption is amended to name defendant Ahuja Kashmir as Ahuja Kashmir a/k/a Kashmir Ahuja.

In light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion seeking to amend the caption is granted; and it is further

ORDERED that the caption shall now read as follows:

CARD PAYMENT SERVICES, LLC,
 Plaintiff,

-against-

Ind. No. 151882/16

TECH EVOLUTION, INC. and AHUJA KASHMIR
 a/k/a KASHMIR AHUJA,
 Defendants.

And it is further


ORDERED that counsel for plaintiff is directed to file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, and the Clerk is directed to mark this Court's records to reflect that defendant Ahuja Kashmir shall now be known in the caption as Ahuja Kashmir a/k/a Kashmir Ahuja; and it is further

ORDERED that the motion by plaintiff for a default judgment against defendants Tech Evolution, Inc. and Ahuja Kashmir a/k/a Kashmir Ahuja is granted in the amount of \$48,002.96, plus costs and disbursements as awarded by the Clerk; and it is further,

ORDERED that plaintiff shall serve a copy of this order on defendants and on the Trial Support Office at 60 Centre Street (Room 158) within 20 days after the entry thereof; and it is further

ORDERED that this constitutes the decision and order of the court.

3/8/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE