Merchant Cash & Capital, LLC v Smoke Depot Hookah & Headshop Inc.
2018 NY Slip Op 30722(U)
April 25, 2018
Supreme Court, New York County
Docket Number: 158916/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 23

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MERCHANT CASH AND CAPITAL, LLC
d / b / a BIZFI FUNDING,

Plaintiff,

-against-

SMOKE DEPOT HOOKAH & HEADSHOP INC.
d / b / a FIRST WAVE DISTRIBUTION,
and MICHELLE MILLER,

Defendants.

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Index No. 158916/2017

Mot. Seq. No. 001

DECISION & ORDER

W. FRANC PERRY, J.S.C.:

This is an action to recover damages sustained by plaintiff Merchant Cash and Capital, LLC, d/b/a BizFi Funding (hereinafter, Plaintiff), due to the breach by defendants Smoke Depot Hookah & Headshop Inc., d/b/a First Wave Distribution (Smoke Depot) and Michelle Miller (Miller) (collectively, Defendants) of a written merchant agreement (the Merchant Agreement) (NYSCEF Doc. No. 10), a payment agreement (the Payment Agreement) (NYSCEF Doc. No. 11), and a related personal guarantee (the Guarantee) (collectively, the Agreements) (NYSCEF Doc. No. 10, p. 1). Plaintiff alleges that Defendants executed the Agreements on or about February 1, 2017, and that they breached the agreements on March 31, 2017, by, *inter alia*, failing to pay when due the amounts required to be paid to Plaintiff under the Agreements.

Now, Plaintiff moves for an order granting a default judgment in favor of Plaintiff and against Defendants for their failure to answer and appear in this action. In support of the motion seeking a default judgment against Defendants, Plaintiff submits, *inter alia*, proof of service of the summons and complaint (NYSCEF Doc. Nos. 9, 12) and an affidavit of merit as to Plaintiff's claims against Defendants (NYSCEF Doc. No. 7). There is no opposition submitted to this motion.

Plaintiff's motion seeking a default judgment against Defendants is granted without opposition. Plaintiff has demonstrated that on October 6, 2017 the summons and complaint was duly served upon (i) Defendant Smoke Depot, pursuant to BCL 306, by serving two copies of the summons and complaint and notice of commencement of action subject to mandatory electric filing and a fee of $40.00 on the New York Secretary of State, and (ii) upon Defendant Miller by delivering a copy to a person of suitable age and discretion at Miller's place of business and that on October 20, 2017, service was completed by mailing the summons and complaint to defendant's place of business by first class mail in an envelope marked "privileged and confidential". To comply with the additional notice provisions of the CPLR, on January 11, 2018, Plaintiff mailed additional copies of the summons and complaint to Defendants' last known place of business located at 136 Poospatuck Lane, Mastic, New York 11950. To date no appearance has been filed on behalf of either Defendants and their time to answer or otherwise appear has expired, nor have Defendants obtained an order from the Court extending their time to do so.

An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Zelnick v Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996]).

The Plaintiff's proof on this motion also includes a copy of the subject Merchant Agreement for the purchase and sale of future receivables, showing that Defendant Smoke Depot entered into an agreement with the Plaintiff on February 1, 2017, pursuant to which it agreed to sell the Plaintiff $231,517.00 of its future receivables in consideration of a present cash payment of $161,900.00. The Agreements reveal that Defendant Miller personally guaranteed Smoke

Depot's obligations under the Merchant Agreement, and that Defendants would become obligated to indemnify certain expenses, designated fees, and liquidated damages were they to default under the Agreements.

The Plaintiff further submitted an affidavit of Joseph Boninfante, it's Vice President of Collections and one of the custodians of Plaintiff's books, records and files. Mr. Boninfante explains that, in accordance with the Agreements, Smoke Depot was obligated to employ a primary bank account in which it was to deposit its receivables so that Plaintiff would be able to assess the status of Smoke Depot's receivables and transfer to Plaintiff an agreed upon percentage thereof on an ongoing basis, but that Smoke Depot closed the designated depository bank account on or about March 31, 2017 (Boninfante Aff ¶ 13).

In his affidavit, Mr. Boninfante also asserted that Defendants had delivered only $31,236.48 of the $231,517.00 due under the Agreements. Plaintiff seeks $200,280.52 (the Balance Due), plus interest thereon from March 31, 2017, the date of Smoke Depot's default under Sections 4.4[1] and 3.1 of the Merchant Agreement. Plaintiff seeks an addition $210.00 in fees relating to electronic checks that have not been paid in full (*id* at ¶¶ 21-24), as well as indemnification for its costs and attorneys' fees in this action (*see* Merchant Agreement, Section 5.7 ["In the event of a Breach... Seller and Guarantor(s), jointly and severally, shall assume liability for and do hereby agree to indemnify, protect, save and keep harmless Buyer and its agents and servants, from and against any and all liabilities,... including, without limitation, the payment of all costs and expenses of every kind for the enforcement of Buyer's rights and remedies

[1] Section 4.4 provides in relevant part: "In the event that Seller Breaches the covenants in Section 3.1, the Seller agrees that the Buyer will be entitled to, among other things, damages equal to the amount by which the cash attributable to the Purchase Amount of Future Sale Proceeds exceeds the amount of cash received from the Future Sale Proceeds that have previously been received by the Buyer under this Agreement."

hereunder and/or the collection of amounts due to Buyer hereunder, including attorneys' fees and costs in any trial court or appellate court proceeding"]).

By this proof, Plaintiff has met its burden on the cause of action for breach of contract by the principal of the Merchant Agreement, Defendant Smoke Depot, as well as the defendant guarantor, Miller, since the proof establish, prima facie, "(1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendants' breach of that contract, and (4) resulting damages" (*see Strategic Funding Source, Inc. v. Patrick's Antique Cars and Trucks, Inc.*, 2018 WL 1448578 [Sup Ct NY County 2018], *citing Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145 [1st Dept 2013]). "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement" (*Citibank, NA. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 [1st Dept 2012], *quoting National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1991]). The terms of the subject guaranty are clear, unambiguous, absolute and unconditional and, having defaulted, the defendants have not raised any triable issue as to fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreement (*see Strategic Funding Source, Inc.*, 2018 WL 1448578).

Accordingly, it is hereby

ORDERED that Plaintiff's motion, pursuant to CPLR 3215, for leave to enter a default judgment on the first, third, and fourth causes of action of the Complaint is granted, without opposition, and it is further

ORDERED that the Clerk shall enter judgment in favor of the Plaintiff and against the Defendants, jointly and severally, in the sum of $200,280.52, plus costs and statutory interest from

March 31, 2017, plus fees totaling $210.00 relating to electronic checks that have not been paid in full by Defendant Smoke Depot; and it is further

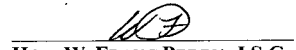
ORDERED that Plaintiff's second cause of action which seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees Plaintiff may recover against the Defendants, jointly and severally, is to be decided at an inquest; and it is further

ORDERED that, upon the filing by the plaintiff with the Trial Support Office (Room 158) of a copy of this order with notice of entry and a note of issue, and the payment of the fee therefor by the Plaintiff, the Clerk shall place this matter upon the trial calendar for an assessment of attorney's fees.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: 4/25/18
New York, New York

SO ORDERED:



HON. W. FRANC PERRY, J.S.C.