

**Principis Capital, LLC v Lisko Beauty & Barber
Supply, Inc.**

2018 NY Slip Op 31262(U)

June 20, 2018

Supreme Court, New York County

Docket Number: 651951/17

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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PRINCIPIS CAPITAL, LLC

Plaintiff

Index No. 651951/17

v

DECISION AND ORDER

LISKO BEAUTY & BARBER SUPPLY, INC. d/b/a
LISKO BEAUTY & BARBER SUPPLY and RICHARD
W. LISKO

Defendant.

MOT SEQ 002

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for breach of contract, breach of a personal guaranty, and fraud, the plaintiff moves for summary judgment on the complaint pursuant to CPLR 3212 and to strike the affirmative defenses of the defendants pursuant to CPLR 3211(b). No opposition is submitted. The motion is granted to the extent that the court awards summary judgment on the plaintiff's first, second, and fourth causes of action, which are respectively to recover for breach of contract, breach of a personal guaranty, and reasonable attorneys' fees, the matter is referred to a referee to hear and report on the issue of the appropriate award of attorneys' fees, and the branch of the motion seeking to strike the defendants' affirmative defenses is denied as academic.

II. BACKGROUND

On December 14, 2016, the defendant Lisko Beauty & Barber Supply, Inc., doing business as Lisko Beauty & Barber Supply (LBB), entered into an agreement with the plaintiff, Principis Capital, LLC (Principis), pursuant to which Principis agreed to purchase \$216,619.19 of LBB's future receivables for the sum of \$163,486.18. In consideration of its receipt of \$163,486.18 from Principis, LBB obligated itself under the agreement to authorize Principis to collect the future receivables by debiting LBB's bank account in the sum of \$839.18 per day until it paid Principis the sum of \$216,619.19. LBB further agreed to deposit all of its sales receipts into the designated bank account, and further agreed not to revoke the authorization to debit that bank account or change the designated bank without Principis's written consent. The agreement further provided that, if LBB defaulted under the agreement, Principis was entitled to accelerate LBB's obligation and recover the full sum of \$216,619.19, less any amounts that had been debited from LBB's account and credited to Principis. The agreement also contained a provision permitting Principis to recover its attorneys' fees in the event that it successfully prosecuted an action against LBB for breach thereof. Lisko personally guaranteed the payment of LBB's obligations.

III. DISCUSSION

The complaint, which is verified by Principis's attorney, alleges that Principis tendered LBB the sum of \$163,486.18 on December 14, 2016, but that, beginning on March 2, 2017, and on every occasion thereafter, its requests to debit LBB's account were "returned." It asserts that it was only able to recover \$7,133.11, which is the equivalent of less than nine days of payments. In support of its motion for summary judgment, Principis submits the pleadings, an attorney's affirmation, an affidavit of its vice-president of asset management, Fernando Alba, and a copy of the agreement and guarantee. In his affidavit, Alba authenticates the documents, and asserts that Principis paid LBB the sum of \$163,486.18, that Principis has only received payment of \$7,133.11 from LBB, and that on March 2, 2017, LBB stopped any payments towards the \$216,619.19 sum agreed upon, leaving a balance owed of \$209,486.19. Alba also avers that Principis requested that the defendants provide it with bank statements for their bank account or any other account into which sales receipts were deposited, in accordance with the agreement, and that the defendants never responded to or complied with this demand.

The proof submitted by Principis establishes, prima facie, that there was "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80,

91 (1st Dept. 2009). Hence, Principis established its prima facie entitlement to judgment as a matter of law on its first cause of action, which seeks to recover for breach of contract. The provision permitting acceleration of the debt upon LBB's default is enforceable, since it provides only for the recovery of actual damages incurred by Principis, "to wit, the debt remaining on the unpaid [obligation] at the time of default." G3-Purves St., LLC v Thomson Purves, LLC, 101 AD3d 37, 43 (2nd Dept. 2012); see generally Fifty States Mgt. Corp. v Pioneer Auto Parks, 46 NY2d 573 (1979). Principis has also established, prima facie, that Lisko is personally liable for any of LBB's obligations under the agreement. "A guaranty is a contract, and in interpreting it [a court will] look first to the words the parties used." Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc., 2 NY3d 495, 500, (2004). The guaranty here must be read in the context of the receivables sales agreement, which was executed contemporaneously. See Greenwich Capital Fin. Prods., Inc. v Negrin, 74 AD3d 413 (1st Dept. 2010). Although a guaranty must be construed in the strictest manner (see White Rose Food v Saleh, 99 NY2d 589 [2003]), a guarantor will be bound to the express terms of the written guaranty. See 665-75 Eleventh Ave. Realty Corp. v Schlanger, 265 AD2d 270 (1st Dept. 1999). Lisko personally guaranteed all of LBB's obligations under the agreement, including the obligation to pay the entire

debt if LBB defaulted thereunder. Hence, Principis established its prima facie entitlement to judgment as a matter of law on the second cause of action.

Principis has not submitted any proof in support of its third cause of action, which seeks to recover for fraud. Moreover, as this cause of action is duplicative of Principis's cause of action for breach of contract, the court does not address it.

Principis's fourth cause of action is for attorneys' fees incurred in bringing this action. Attorneys' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). The contract between the parties provides that "Purchaser shall be entitled to receive from Seller and Seller shall pay to Purchaser, all Purchaser's costs and expenses, including Purchaser's overhead and Purchaser's reasonable attorney's fees, in enforcing any of the terms of this Agreement, regardless of whether or not a legal action has been commenced." Thus, Principis has established that it is entitled to an award of reasonable attorney's fees.

Once the movant meets its burden of establishing its prima facie entitlement to judgment as a matter of law, it becomes incumbent upon the nonmoving party to demonstrate by admissible evidence the existence of a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). By failing to oppose the motion, the defendants have failed to raise any triable issue of fact. Accordingly, Principis's motion for summary judgment on the complaint must be granted as to Principis's first, second, and fourth causes of action, and denied as to Principis's third cause of action.

Prejudgment interest shall be awarded from the date of the defendants' breach, which here is March 2, 2017. See CPLR 5001.

As the court awards Principis summary judgment in the full amount demanded in the complaint and thus disposes of its claims, the branch of Principis's motion seeking to dismiss the defendants' affirmative defenses is denied as academic.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion for summary judgment on the complaint is granted to the extent that the plaintiff is awarded summary judgment on the first, second, and fourth causes

of action, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk shall enter a judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of \$209,486.19, with statutory interest from March 2, 2017; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for reasonable attorneys' fees and costs under the subject agreement; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website)

containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of the plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until


completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendants within 15 days of this order.

This constitutes the Decision and Order of the court.

Dated: 6/20/18

ENTER: 

J.S.C.

HON. NANCY M. BANNON