

**Merchant Cash & Capital, LLC v Julia Knit, Inc.**

2018 NY Slip Op 31997(U)

August 13, 2018

Supreme Court, New York County

Docket Number: 158975/2017

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** PART IAS MOTION 2

*Justice*

-----X INDEX NO. 158975/2017

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

Plaintiff,

MOTION SEQ. NO. 001

- v -

JULIA KNIT, INC. and AVRAHAM LIP,

Defendants.

**DECISION AND ORDER**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15  
were read on this motion to/for DEFAULT JUDGMENT

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

In this action seeking damages for, inter alia, breach of contract, plaintiff Merchant Cash and Capital, LLC d/b/a Bizfi Funding moves, pursuant to CPLR 3215, for a default judgment against defendants Julia Knit, Inc. and Avraham Lip. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is granted.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On or about January 26, 2017, plaintiff Merchant Cash and Capital, LLC (MCC) entered into a written merchant agreement and payment agreement with defendant Julia Knit, Inc. (Julia). Docs. 6, 9, and 10.<sup>1</sup> Pursuant to the merchant agreement, Julia agreed to sell MCC, and MCC

<sup>1</sup> All references are to the documents filed with NYSCEF in connection with this matter.

agreed to purchase from Julia, certain of Julia's accounts receivable in the amount of \$399,000 (the purchase amount). Docs. 6 and 9. At or about the same time, MCC paid to Julia the sum of \$300,000 (the purchase price). Doc. 6. In consideration of MCC paying the purchase amount to Julia, Julia sold, assigned and transferred to MCC accounts receivable in an amount equaling the purchase amount. Doc. 6.

Pursuant to the merchant agreement, Julia agreed to pay MCC for the purchase amount of its accounts receivable by allowing MCC to debit from Julia's designated depository bank each business day 5% of all payments processed by Julia. Doc. 6. The merchant agreement was modified by the payment agreement to the extent that it permitted Julia to pay the purchase amount to MCC by allowing MCC to debit the sum of \$1,583.33 per business day from Julia's designated depository bank until the purchase amount of accounts receivable was paid to MCC in full. Doc. 6.

After MCC paid the purchase price to Julia on or about January 26, 2017, Julia began making payments to MCC towards the purchase price of the accounts receivable pursuant to the merchant agreement. Doc. 6. At or about the same time, defendant Avraham Lip executed a written guarantee pursuant to which he unconditionally agreed to satisfy all of Julia's obligations under the merchant agreement. Docs. 6 and 9. On June 21, 2017, Julia defaulted on the merchant agreement and payment agreement by, inter alia, failing to pay the amounts due and closing its designated depository bank account. Doc. 6.

As a result of Julia's default, and at the election of MCC pursuant to, inter alia, the payment agreement and section 4.4 of the merchant agreement, MCC became entitled to recover from Julia the purchase amount less the sum of all payments made by Julia to MCC pursuant to the agreements (the balance due). Doc. 6. As of June 21, 2017, the date of Julia's default, the

balance due equaled \$248,583.65. Docs. 6 and 11. Following the default, Julia made additional payments to MCC totaling \$3,167.66, thereby reducing the amount of the balance due to \$245,415.99. Doc. 6.

Although MCC has demanded that Julia pay it the balance due, such payment has not been forthcoming. Doc. 6. MCC asserted that it was entitled to recover from Julia the \$245,415.99 balance due, plus interest from June 21, 2017, as well as all costs, expenses and attorneys' fees it incurred in attempting to collect this sum. MCC maintained that, pursuant to section 1.2 of the merchant agreement, it was entitled to collect from Julia \$35 for each business day on which MCC did not have access to Julia's designated bank account and for each electronic check or automated clearinghouse (ACH) payment not made in full. Doc. 6, 9. MCC claimed that, since 22 electronic checks or ACH payments were not paid in full, Julia owed it fees of \$770. Doc. 6. MCC's attorney also represents that MCC incurred \$2,600 in legal expenses in an attempt to recover the money it is owed by Julia. Doc. 5.

MCC commenced the captioned action by filing a summons and complaint against Julia and Lip on October 6, 2017. Doc. 1. Julia was served with process through the secretary of state pursuant to BCL 306 on October 18, 2017. Doc. 2. The same day, Lip was served pursuant to CPLR 308(2). Doc. 3. On February 8, 2018, MCC filed the instant default motion. In support of the motion, MCC submitted an attorney affirmation establishing, inter alia, that Julia and Lip failed to answer; an affidavit of Joseph Boninfante, a representative of MCC, setting forth the facts giving rise to the claim; affidavits of service; the merchant and payment agreements; a transaction history reflecting the payments made by Julia; an affidavit of non-military status; and an affirmation of further mailing of the summons and complaint pursuant to CPLR 3215(g).

**LEGAL CONCLUSIONS:**

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit 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). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

MCC has established its entitlement to a default judgment against Julia and Lip. Initially, MCC has submitted affidavits of service establishing that Julia and Lip were properly served with the summons and complaint pursuant to BCL 306 and CPLR 308(2), respectively, as well as with a follow-up mailing of the said pleadings pursuant to CPLR 3215(g). The affirmation of MCC’s attorney establishes that, despite proper service of process, Julia and Lip have failed to answer or otherwise appear in this matter. Finally, the affidavit of Boninfante establishes the facts constituting the claim.

Given the foregoing, Julia and Lip are to liable to MCC in the amount of \$245,415.99, plus interest from June 21, 2017, fees of \$770, and attorneys’ fees of \$2,600, as well as the costs and disbursements of this action.

In light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Merchant Cash and Capital, LLC d/b/a Bizfi Funding for a default judgment as against defendants Julia Knit, Inc. and Avraham Lip is granted in the amount of \$245,415.99, plus fees in the amount of \$770, attorneys' fees in the amount of \$2,600, and interest at the statutory rate from June 21, 2017, as well as the costs and disbursements of this action as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Merchant Cash and Capital, LLC d/b/a Bizfi Funding and against defendants Julia Knit, Inc. and Avraham Lip in the amount of \$245,415.99, plus fees in the amount of \$770, attorneys' fees in the amount of \$2,600, and interest at the statutory rate from June 21, 2017, as well as the costs and disbursements of this action as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiff shall serve a copy of this order on defendants and on the General Clerk's Office, 60 Centre Street, Room 119, and the Trial Support Office, 60 Centre Street, Room 158; and it is further,

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

8/13/2018  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

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KATHRYN E. FREED, J.S.C.