

LG Funding, LLC v City N. Grill Corp.

2018 NY Slip Op 33290(U)

December 14, 2018

Supreme Court, Nassau County

Docket Number: 606786/2017

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

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

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LG FUNDING, LLC,

**IAS Part 17
Index No.: 606786/2017
Mot. Seq. No. 002**

Plaintiff,

-against-

DECISION AND ORDER

**CITY NORTH GRILL CORP. D/B/A
RIVERDALE GRILL HOUSE AND
IGOR BIRZH,**

Defendants.

-----X
LEONARD D. STEINMAN, J.

The following papers, in addition to any legal memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Plaintiff's Notice of Motion, Affidavit & Exhibits.....	1
Defendants' Affirmation in Opposition & Exhibits.....	2
Plaintiff's Reply Affirmation	3

In this action, plaintiff LG Funding, LLC, seeks to recover from defendants for an alleged breach of a February 8, 2017 Merchant Agreement between LG Funding and defendant City North Grill Corp. ("City North"). Pursuant to the terms of the agreement, City North sold and plaintiff purchased certain City North accounts receivable for a sum of \$45,690. In exchange for the purchase, City North agreed to pay plaintiff 15% of its daily revenue until plaintiff received \$64,879.80. Pursuant to the agreement, if a default were to occur, the \$64,879.80 was due to plaintiff immediately. The individual defendant, Igor Birzh, guaranteed performance of City North.

Plaintiff contends that it performed under the contract, but that City North breached its agreement by failing to pay amounts due. Plaintiff seeks \$50,879 owed on the receivables, \$150 for insufficient funds fees pursuant to the contract, and \$2,500 for a default

fee under the contract. Plaintiff now moves for summary judgment in its favor directing entry of a judgment in the amount of \$53,529.80 with interest from May 25, 2017 in addition to reasonable counsel fees in the amount of \$13,382.45

It is the movant, here plaintiff, who has the burden to establish his or her entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). “CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses.” *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). Where the plaintiff fails to meet its initial burden as the movant, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014). Where plaintiff has made the required showing, the burden then shifts to the opponent to produce evidence, in admissible form, to demonstrate the existence of an issue of material fact which requires a trial of the action. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach. *Investment Retrievers, Inc. v. Fox*, 150 A.D.3d 1090 (2d Dept. 2017). Execution of a guaranty, such as in this case, makes the guarantor personally liable for the obligations of an obligor under a contract to the same extent as the obligor. *Desiderio v. Devani*, 24 A.D.3d 495, 497 (2d Dept. 2005).

Plaintiff has set forth, *prima facie*, its entitlement to judgment. In support of the application, plaintiff has provided the affidavit of Joseph Lerman, the Managing Member of plaintiff. Lerman attests that City North breached the Merchant Agreement by failing to pay plaintiff as required and by blocking plaintiff’s access to the designated bank account from which defendant had previously agreed to allow plaintiff to withdraw funds. Plaintiff provides a printout that reflects that the breach occurred on May 25, 2017.

Defendants provide no evidence that would create an issue of fact with respect to City North’s breach. Instead, defendants contend that additional discovery is necessary. However, those assertions are vague and non-specific. The motion is not premature even

though discovery is not completed. *Rungoo v. Leary*, 110 A.D.3d 781 (2d Dept. 2013). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery is insufficient to deny the motion. *Id.* The opposing parties must identify the information they need to discover. *Id.* See *Jeffrey v. DeJesus*, 116 A.D.3d 574 (1st Dept. 2014). The motion for summary judgment is therefore granted.

Plaintiff seeks for the court to order defendants to pay attorney's fees incurred by plaintiff. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule". *Hooper Assoc. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989). Here, the applicable contract provides for the award of attorney's fees in the event of a default. Accordingly, a hearing is necessary to determine the amount of attorney's fees to be awarded.

Accordingly, it is hereby

ORDERED, plaintiff's application for summary judgment is granted; and it is further

ORDERED, that subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least ten (10) days prior thereto, this matter shall appear on the calendar of CCP on **January 15, 2019 at 9:30 a.m.** for a hearing to determine the counsel fees, if any; and it is further

ORDERED, that a copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing; and it is further

ORDERED, that the directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/ Referee as he or she deems appropriate; and it is further

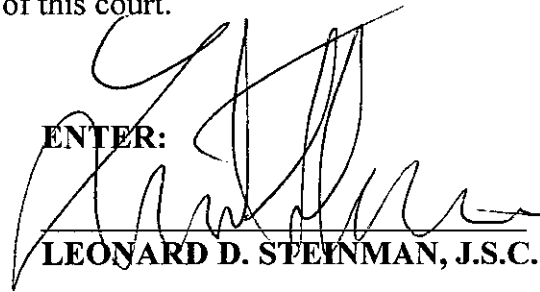
ORDERED, that the plaintiff's counsel shall serve a copy of this order upon counsel for the defendants by overnight mail within ten (10) days of the date of this Order.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: December 14, 2018
Mineola, New York

ENTER:



LEONARD D. STEINMAN, J.S.C.

ENTERED

DEC 18 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE