Merchant Factors Corp. v Haber
2020 NY Slip Op 31769(U)
June 4, 2020
Supreme Court, New York County
Docket Number: 654950/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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MERCHANT FACTORS CORP.,

Plaintiff,

- v -

MAURICE HABER, ESTHER HABER, JACK ASHKENAZIE, RAYMOND ASHKENAZIE, ALLEN ASHKENAZIE

Defendant.

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INDEX NO. 654950/2019

MOTION DATE 10/24/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, Merchant Factors Corp.'s (the **Plaintiff**) motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 is denied without prejudice to renew regarding a motion for the same relief with an appropriate interest rate schedule.

The Relevant Facts and Circumstances

Reference is made to a Discount Factoring Agreement (the **DFA;** NYSCEF Doc. No. 4), dated December 7, 2015, by and between the Plaintiff and Fragments Holdings LLC (**Fragments**) whereby Fragments agreed to sell its accounts receivables to the Plaintiff. Pursuant to the DFA, Fragments owed certain "Obligations" to the Plaintiff, defined as follows:

> **4.** **Advances**. At your request, but in our sole discretion in each instance, we may make advances to you against the Purchase Price of Factor Risk Receivables, in an amount not exceeding 85% of the amount thereof ("Advance Percentage"), subject to our right to retain a reasonable amount of such Purchase Price as a reserve to cover, among other things, customers' returns, allowances, deductions and disputes in the future, and as security for the payment of all your Obligations … ***"Obligations" means all loans,***

> ***advances and debit balances owing to us by you or any Affiliate of yours (whether or not evidenced by any note of other instrument) now existing or hereafter arising, including expenses and attorneys' fees***, and "Affiliate" of any person means any person controlling, controlled by or under common control with such person. The charge for wire transfers to your bank account or other parties as directed by you shall be $20.00 each. In the event that charge is increased we will give you 30 days prior notice in writing.

(*id.* at 3 [emphasis added]).

The Obligations would bear interest, at a yearly rate of 2% in excess of the prime commercial interest rate published in the Wall Street Journal:

> **5. Interest on Obligations.** All Obligations shall be payable by you to us on demand and shall bear interest, payable monthly on the average daily balance of amounts advanced or charge to you hereunder, at the rate ("Effective Rate") per annum (based on a 360 day year) of 2% in excess of the prime commercial interest rate as published in the Money Rates section of the Wall Street Journal (Eastern Edition) from time to time as the "Prime rate" … In no event, however, shall the Effective Rate be less than 5.75% per annum (based on a 360 day year) nor shall the rate of interest payable hereunder be more than the maximum rate of interest permitted to be charged under applicable law …

(*id.*).

Fragments had access to a monthly account statement online, which, per the DFA, was deemed correct unless Fragments provided written notice of objections to the account within 30 days after the last day of the month:

> **12. Monthly Accounts.** We shall make available to you by mail or online, at our option, a monthly account current as of the last day of the preceding month. You agree to view each month's statement online at www.merchantfactors.com, by using your assigned username and password. ***Each monthly account statement shall be considered correct unless, within 30 days after the last day of the month, you deliver to us written notice of any objections which you may have to such account***, provided, however, that you waive any right of presentment and protest to which you might otherwise be entitled … Subject to the foregoing, our books and records will be admissible in any action between us as prima facie evidence of the status of the account between us …

(*id.* at 7, [emphasis added]).

The DFA provided for two ways in which it could be terminated, either upon written notice or upon an "Event of Default":

> **16. Term and Termination.** We shall have the right to terminate this Agreement at any time upon not less than thirty (30) days prior written notice … Notwithstanding any termination hereof, we shall retain our security interest in, and title to, all existing and future Receivables and other collateral held by us hereunder until all the Obligations owed by you to us shall have been fully paid, and until such time you agree to continue to assign all Receivables, to turn over all collections, to us without any obligation on our part to make further advances to you …
>
> **18. Remedies.** Upon the occurrence of an Event of Default, (i) the Effective Rate provided for in Section 5 hereof shall be increased by 3% per annum (subject to the legal maximum), and (ii) we shall have all the rights and remedies of a secured party under the Uniform Commercial Code and, in addition, we shall have the right to terminate this Agreement (except for those provisions which by their terms are not clearly intended to expire upon, or which have otherwise been agreed to survive, such termination) at any time without notice, in which case all of your Obligations to us, whether incurred under this Agreement or otherwise shall become immediately due and payable without notice or demand and, except as otherwise required by law, we may at any time or times sell and dispose of any or all property subject to our security interest and/or other collateral held by us hereunder at public or private sale, for cash, upon credit or otherwise, free from any right of redemption, at such prices and upon such terms as we deem advisable, in our sole discretion, and you hereby waive any requirement for demand, advertisement or notice as a condition of such sale or other disposition …

(*id.* at 8-9).

Reference is also made to five substantially identical Personal Guarantee and Waiver agreements, each respectively, (i) dated December 7, 2015, by and between the Plaintiff and Maurice Haber as guarantor (NYSCEF Doc. No. 5), (ii) dated December 4, 2015, by and between the Plaintiff and Esther Haber (NYSCEF Doc. No. 6), (iii) dated November 21, 2017, by and between the Plaintiff and Jack Ashkenzie as guarantor (NYSCEF Doc. No. 7), (iv) dated December 1, 2017, by and between the Plaintiff and Raymond Ashkenazie as guarantor (NYSCEF Doc. No. 8), and (v) dated December 6, 2017, by and between the Plaintiff and Allen

Ashkenazie as guarantor (NYSCEF Doc. No. 9) (collectively, the **Guaranties**), pursuant to which the guarantors irrevocably and unconditionally guaranteed the Obligations as follows:

> … the undersigned … ***irrevocably and unconditionally guarantees to the Factor and/or the Re-Factor payment when due, whether by acceleration or otherwise, of any and all Obligations*** (as such term is defined in the Factoring Agreement) and the prompt and punctual performance of all terms, covenants and conditions on the part of the Obligor under the Factoring Agreement to be performed …
>
> ***The undersigned waives notice of acceptance of this guarantee and notice of any liability to which it may apply, and waives presentment, demand for payment, protest, notice of dishonor or nonpayment of any such liabilities, suit or taking other action by the Factor and/or the Re-Factor against, and other notice to, any party liable thereon(including the undersigned), and waives any defense, offset or counterclaim to any liability hereunder*** …
>
> No invalidity, irregularity or unenforceability of all or part of the Obligations hereby guaranteed or of any security therefor shall affect, impair or be a defense to this guarantee. ***The liability of the undersigned hereunder is primary and unconditional and shall not be subject to any offset, defense or counterclaim of the Obljgor***, and recourse to security by the Factor and/or Re-factor shall not be required. This guarantee is a continuing one and all Obligations to which it applies or may apply under the terms hereof shall be conclusively presumed to have been created in reliance hereon. The books and records of the Factor and/or the Re-Factor shall be admissible as prima facie evidence of the Obligations.

(*id.* at 1-2 [emphasis added]).

Reference is also made to a Cash Collateral Agreement (NYSCEF Doc. No. 10, the **Cash Collateral Agreement**), dated January 17, 2019, by and between the Plaintiff and Allen Ashkenazie, whereby Allen Ashkenazie deposited $75,000 with the Plaintiff as further security for the obligations and liabilities incurred by Fragments under the DFA and the Plaintiff had the sole discretion, without demand or notice on Fragments to apply all or any part of the balance of the cash collateral to the Obligations whether then due or not due.

By letter dated February 21, 2019 (NYSCEF Doc. No. 11), the Plaintiff terminated the DFA pursuant to Paragraph 16. By letters dated July 31, 2019 (the **Demand Letters**; NYSCEF Doc. Nos. 12-16), the Plaintiff advised the guarantors Maurice Haber, Esther Haber, Jack Ashkenzie, Raymond Ashkenazie, and Allen Ashkenazie (collectively, the **Defendants**) that Fragments was in default of its Obligations under the DFA based on, among other things, Fragments' "failure to pay when due Obligations owed" and "Fragments having become insolvent and unable to pay its debt …and … having ceased [its] business operations," and that, as a result, the Plaintiff demanded immediate payment of all amounts due under the DFA. Each of the Defendants was advised that as of July 31, 2019, after application of the "Cash Collateral in partial satisfaction of the Obligations … the amount due and owing … was $743,855.17, exclusive of costs, fees and expenses incurred by [the Plaintiff] in enforcing its rights and remedies under the" DFA (*id.*). The Demand Letters demanded payment from the Defendants and advised that if payment was not made by August 12, 2020, legal action would be commenced (*id.*).

On August 27, 2019, having not received any payment, the Plaintiff filed the instant motion for summary judgment in lieu of complaints against the Defendants.

Discussion

CPLR § 3213 provides that a plaintiff may bring a summary judgment motion in lieu of complaint when the action is based on an instrument for the payment of money only. To meet its prima facie burden on such a motion, the plaintiff must prove (1) the existence of the guaranty, (2) the underlying debt, and (3) guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). Once a prima facie showing is made, the defendant

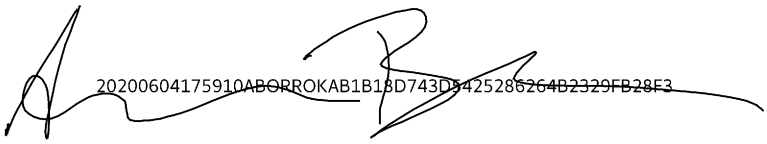
must present admissible evidence that raises a triable issue of fact to preclude liability (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

In support of the instant motion, the Plaintiff adduces the DFA, the Guaranties, Fragments' client ledger report, and a certain interest statement. By affidavit, dated August 27, 2019, Scott Adler, Senior Executive Vice President of the Plaintiff, also attests that the total amount owed by Fragments under the DFA as of August 1, 2019, after applying the cash collateral, was $752,338.82 with interest accruing at a *per diem* rate of $231.10 (NYSCEF Doc. No. 3, ¶¶ 22-23).

Inasmuch as the Plaintiff adduces evidence that the Obligations owed totaled $752,338.82, the Plaintiff does not provide any proper calculation of the applicable interest rate. Significantly, the interest statement submitted lists certain daily charges from August 1, 2019 to August 31, 2019 but ***does not specify any interest rate*** (NYSCEF Doc. No. 18). Although Mr. Adler attests that interest accrues at a *per diem* rate of $231.10 pursuant to the terms of the DFA, he does not provide any basis for said interest rate. The DFA specifies that interest applicable to the Obligations will be 2% in excess of the prime commercial interest rate as published in the Wall Street Journal, however, the Plaintiff fails to submit any evidence of the relevant prime commercial interest rate which was published in the Wall Street Journal for the applicable time period (NYSCEF Doc. No. 4, ¶ 5). Under these circumstances, the Plaintiff fails to establish its prima facie case for damages, namely the interest to be charged. Accordingly, the Plaintiff's motion for summary judgment in lieu of complaint is denied without prejudice to renew regarding a motion for the same relief with an appropriate interest rate schedule.

Accord

ORDERED that the Plaintiff's motion for summary judgment in lieu of complaint is denied without prejudice to renew regarding a motion for the same relief with an appropriate interest rate schedule.



6/4/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE