

Newbridge Global Sourcing, LLC v Zonda Corp., S.A. de C.V.
2021 NY Slip Op 31424(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 653337/2020
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X INDEX NO. 653337/2020
MOTION DATE 04/05/2021
MOTION SEQ. NO. 003

NEWBRIDGE GLOBAL SOURCING, LLC,

Plaintiff,

- V -

ZONDA CORPORATION, S.A. DE C.V. and
JUAN PAYAN GUTIERREZ

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for

JUDGMENT - DEFAULT

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In this action to recover damages for, *inter alia*, breach of a commercial factoring agreement and a personal guaranty, the plaintiff moves for the second time pursuant to CPLR 3215 for leave to enter a default judgment against Zonda Corporation, S.A. de C.V. ("Zonda") and Juan Payan Gutierrez in the sum of \$34,811,160.70.00. No opposition is submitted. The plaintiff's first motions seeking identical relief (SEQ 001, 002) were denied without prejudice by a decision and order dated December 30, 2020. For the following reasons, the instant motion is granted in part.

"On 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 (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)."Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, supra.

As discussed in the court's December 30, 2020, decision and order, the plaintiff's submissions on its original motions pursuant to CPLR 3215 for leave to enter a default judgment against the defendants included proof sufficient to demonstrate that Zonda entered into a Factoring Agreement with the plaintiff on September 12, 2019, pursuant to which it agreed to sell and assign to the plaintiff certain eligible accounts receivable, not specifically identified in

the plaintiff's submissions. The proof further established that since December 2019, no payments have been made to the plaintiff from Zonda's accounts with nonparties Nueva Elektra del Milenio, S.A. de C.V. ("Elektra"), Pegaso PCS, S.A. de C.V. ("Pegaso"), and Sec Iusacell, S.A. de C.V. ("Iusacell"). However, the plaintiff failed to provide evidence that it actually purchased or was assigned the foregoing accounts. Further, the plaintiff did not demonstrate that it otherwise performed its own obligations under the Factoring Agreement, such that it was entitled to the sums demanded.

In addition to the proof included with the plaintiff's original motions, the plaintiff has now submitted: (1) schedules of assignment evidencing that Zonda's accounts with Elektra, Pegaso, and Iusacell were assigned to the plaintiff; (2) wire confirmations showing that the plaintiff advanced a total of \$27,633,967.14 to Zonda, three of Zonda's preexisting lenders, and Aiwa, a Zonda affiliate; (3) payoff letters wherein Zonda authorized the plaintiff to make payments to the preexisting lenders and Aiwa; (4) a spreadsheet indicating that \$1,523,606.00 in factoring fees and \$3,809,060.67 in default factoring fees calculated pursuant to the Factoring Agreement remain owing from Zonda; (5) Zonda's bank statement dated June 10, 2020, showing that Zonda's customers paid \$22,436,680.18 due to the plaintiff directly to Zonda and that Zonda did not forward those monies to the plaintiff, in violation of the Factoring Agreement, such that Zonda owed \$3,365,502.03 to the plaintiff in misdirected payment fees under the terms of the agreement; (6) a new and revised affidavit of Saba Ahmad, the plaintiff's authorized representative; and (7) an audit report representing that the plaintiff incurred attorneys' fees in the sum of \$26,755.00 in connection with the Factoring Agreement and guaranty.

The proof submitted by the plaintiff 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, the plaintiff 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 as against Zonda, in the total sum of \$34,784,405.70, representing the amount the plaintiff advanced to Zonda less the amount Zonda actually paid to the plaintiff (\$26,086,237.00), factoring fees (\$1,523,606.00) and default factoring fees (\$3,809,060.67) owed by Zonda, and misdirected payment fees (\$3,365,502.03) owed by Zonda.

The plaintiff has also established, *prima facie*, that Gutierrez is personally liable for any of Zonda's obligations under the subject 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). 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). Gutierrez personally guaranteed all of Zonda's obligations under the Factoring Agreement, including the obligation to pay the entire debt if it defaulted thereunder. Hence, the plaintiff established its *prima facie* entitlement to judgment as a matter of law on the third cause of action.

Finally, the plaintiff is entitled to judgment on its fourth cause of action seeking attorneys' fees associated with the enforcement of the plaintiff's rights under the Factoring Agreement pursuant to Section 9.05 of the Factoring Agreement and the obligations set forth in the guaranty. However, the plaintiff has not provided sufficient proof of the fees it incurred and the reasonableness of those fees. The factors used to determine the reasonableness of legal fees "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted)." Matter of Barich, 91 AD3d 769, 770 (2nd Dept 2012); see Matter of Freeman, 34 NY2d 1, 9 (1974). An award of reasonable attorney's fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1st Dept. 2009). The documentation the plaintiff submitted only reflects that certain total amounts were billed to the plaintiff on a monthly basis in connection with "Zonda." It does not indicate what work was done or address any of the other factors listed above. Based on the foregoing, the court does not find that \$26,755.00 is a reasonable award for the plaintiff's filing a complaint and moving for default judgment. Since this defect is curable, the court directs the plaintiff, if it be so advised, to provide proper proof of reasonable attorneys' fees incurred within 60 days of this order.

The plaintiff makes no arguments with respect to its entitlement to judgment on the second and fifth through eighth causes of action, which seek to recover damages as against Zonda on a theory of account stated, a preliminary and permanent injunction, to recover certain collateral specified in the Factoring Agreement or the equivalent value of the collateral, and to recover damages and punitive damages for Zonda's alleged conversion. The plaintiff's motion is therefore denied without prejudice as to those causes of action.

Accordingly, and upon the papers submitted, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants pursuant to CPLR 3215 is granted as to the first, third, and fourth causes of action, and the motion is otherwise denied without prejudice, 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 \$34,784,405.70, plus costs and statutory interest from April 23, 2021; and it is further

ORDERED that the plaintiff, if it be so advised, may submit proper proof of reasonable attorneys' fees incurred, including an additional attorney's affirmation, billing records or invoices, and any other supplemental proof, within 60 days of this order.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/23/2021

DATE

CHECK ONE:

CASE DISPOSED

DENIED

X

NON-FINAL DISPOSITION

OTHER

APPLICATION:

GRANTED

SETTLE ORDER

GRANTED IN PART

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE