

Colonial Funding Network, Inc. v CCI Bldrs. & Devs., Inc.
2021 NY Slip Op 32794(U)
December 17, 2021
Supreme Court, New York County
Docket Number: Index No. 653588/2016
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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INDEX NO. 653588/2016

COLONIAL FUNDING NETWORK, INC., as servicing
provider for CORE BUSINESS FINANCE,

MOTION DATE 11/29/2021

Plaintiff,

MOTION SEQ. NO. 007

- v -

CCI BUILDERS & DEVELOPERS, INC. and MICHAEL
SHANE,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 161, 162, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179

were read on this motion to/for DISCOVERY.

ORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of defendant Michael Shane to dismiss the complaint is DENIED; and it is further

ORDERED that plaintiff's motion to compel defendants CCI Builders & Developers, Inc. and Michael Shane to comply with the Order dated January 23, 2020 of this Court and with the Subpoenas Testificandum and Information, each dated September 27, 2019, is GRANTED and it is further

ORDERED that defendants CCI Builders & Developers, Inc. d/b/a CCI Builders and Developers ("CCI") and Michael Shane shall produce to plaintiff, within thirty days of service of a copy of this Order with notice of entry, the following documents:

- (i) all personal bank records of defendant Michael Shane, including bank account statements in which such defendant has an interest, either directly or indirectly, from January 1, 2016 to present;
- (ii) all bank records of CCI working capital account at SunTrust, from January 1, 2016 to present;
- (iii) a list of all bank accounts in which defendant Shane is/was an authorized signatory, from January 1, 2016 to present;
- (iv) a list of all entities in which defendant Shane has an interest, either directly or indirectly;
- (v) all corporate formation documents and documents showing present ownership and the managerial structure of entities with which defendant Shane is affiliated;

and it is further

ORDERED that defendant Shane shall, within 30 days from production of the aforesaid documents, appear as a witness for deposition via a virtual platform to be chosen by counsel for plaintiff, on a date and at a time convenient for the parties.

DECISION

Defendants previously moved, by cross motion, to vacate the ex parte order dated February 6, 2018 (NYSCEF Doc. No. 18), which struck defendants' answer for their failure to respond to plaintiff's discovery demands. Such cross motion, which appended neither an answer, verified by a person with knowledge of the facts; nor an affidavit of defendant Shane; nor any excuse for their failure to respond to discovery demands, was denied by Order dated April 29, 2018 (NYSCEF Doc. No. 55).

Defendant Shane never moved to reargue or appeal such Order dated April 29, 2018. Plaintiff is correct that, therefore, such Order is law of the case and may not be disturbed. See Hampton Val. Farms, Inc. v Flower & Medalie, 40 AD3d 699, 700-701 (2d Dept 2007).

In his cross motion at bar, defendant Shane argues, for the first time, that his default should be set aside pursuant to CPLR 5015(a)(3) on the grounds that the subject of this lawsuit, the Revenue Based Factoring (RBH/ACH) Agreement dated January 21, 2016 (Agreement) is fraudulent. Defendant Shane contends that the Agreement is fraudulent as, in reality, it constitutes a usurious loan.

This court agrees with plaintiff that the language in the Agreement that the "(f)ailure to provide all of their bank statements in a timely manner or missing a month shall forfeit all **rights** to future reconciliations" (bold added) renders its reconciliation provision mandatory and not precatory. Such language distinguishes the matter at bar from the facts of Davis v Richmond Capital Group, 194 AD3d 516, 517 (1st Dept 2021), where, among other factors, the appellate panel found that reconciliation provision was discretionary in nature, and plaintiff merchants alleged that defendant finance company refused to permit reconciliation.

Defendants make no argument in opposition to plaintiff's motion compelling compliance with the subpoenas issued by plaintiff. Therefore, plaintiff is entitled to the relief that it seeks.

Debra A. James

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12/17/2021
DATE

DEBRA JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE