

Emmy Capital Group LLC v Fenix Trans Inc

2023 NY Slip Op 33032(U)

August 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 537206/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of August 2023

HONORABLE FRANCOIS A. RIVERA

EMMY CAPITAL GROUP LLC,

Plaintiff,

-against-

FENIX TRANS INC and GOLUB KOCIC,

Defendants.

DECISION & ORDER

Index No.: 537206/2022

Oral Argument: 8/17/2023

Cal. No.: 27, Ms. No.: 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by Emmy Capital Group LLC (hereinafter Emmy or plaintiff) on May 31, 2023, under motion sequence one, for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against Fenix Trans Inc and Golub (hereinafter the defendants). There was no opposition to the motion

- Notice of Motion
- Affidavit in Support
Exhibits A-B
- Affirmation in Support
Exhibit 1 to 3
- Statement of Material Facts
- Memorandum of law in support

BACKGROUND

On December 21, 2022, plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On January 25, 2023, the defendants interposed and filed a joint verified answer with the KCCO.

The verified complaint alleges fourteen allegations of fact in support of two causes of action, namely, breach of contract and breach of a personal guaranty agreement. The complaint

alleges the following salient facts. Pursuant to a receivable purchase agreement and personal guaranty dated June 17, 2022 (the "Agreement"), plaintiff purchased a percentage of the defendant-seller's total future accounts receivable up to the sum of \$67,455.00 ("Purchased Amount") in exchange for an upfront purchase price of \$45,000.00.

Pursuant to the Agreement, plaintiff was authorized to collect via an ACH electronic debit of the future receivables, until such time that plaintiff collected the total amount of purchased receivables. The Agreement contains the defendants express covenant not to revoke its ACH authorization to plaintiff or otherwise take any measure to interfere with its ability to collect the future receivables. On June 30, 2022, the defendants materially breached the terms of the Agreement by changing the designated bank account without plaintiff's authorization, by placing a stop payment on plaintiff's debits to the account, or by otherwise taking measures to interfere with the ability to collect the future receivables.

Pursuant to the agreement in the event of defendants' default plaintiff may declare the total amount of receivables purchased and not delivered as immediately due and owing to plaintiff including costs and fees plaintiff now has a balance of \$71,108.81 and undelivered future receivables subtracting the amount of receivables plaintiff has previously collected from the defendant under the agreement from the total future receivables purchased by plaintiff there is presently due and owing from defendants to plaintiff the amount of \$71,108.81.

The Agreement contains the unconditional guarantee of the guarantor defendant of making payment in the event of default under the Agreement by the defendant seller. As a result of the defendant seller's breach and default under the Agreement as set forth above and pursuant to the guaranty, there is presently due and owing from the defendant guarantor to plaintiff the amount of \$71,108.81

LAW AND APPLICATION

There is no opposition to the instant motion. However, a summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion, i.e. defaulted (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 278 n [1st Dept 2006], citing *Vermont Teddy Bear Co., v 1—800 Beargram Co.*, 373 F3d 241 [2nd Cir 2004] [“the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the ... court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law”]; see *Cugini v System Lumber Co., Inc.*, 111 AD2d 114 [1st Dept 1985]).

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all the

evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic TransmiCapitalon Co.*, 168 AD2d 610 [2nd Dept 1990]).

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 (*see Cruz v Cruz*, 213 AD3d 805 [2nd Dept 2023]).

In the case at bar, the only sworn testimony submitted by the plaintiff in support of the motion was an affirmation of Steven Zakharyayev (hereinafter Zakharyayev), its counsel, and an affidavit of Zhi Ying Zhu, its CEO (hereinafter Zhu). Zakharyayev's affirmation refers to the pleadings and an affidavit of service of the pleadings. Zakharyayev's affirmation, however, proffered no allegation of fact and demonstrated no personal knowledge of any of the transactional facts alleged in the complaint. An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*Nerayoff v Khorshad*, 168 AD3d 866, 867 [2d Dept 2019], *citing Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

Plaintiff used Zhu's affidavit to authenticate the Agreement which was allegedly breached by the defendants. Zhu averred that he is CEO of the plaintiff and, as such, has personal knowledge of its business practices and procedures. He further averred that the factual allegations proffered in support of the motion were obtained reviewing the plaintiff's business records. He then referred to the two documents attached to the motion, namely, the Agreement and a document he described as a remittance history. It is noted that Zhu did not aver that he was a signatory to the Agreement or that he participated in the execution of same.

Zhu annexed the document denominated as a remittance history without explaining how it was created or how to read it. It is not self-explanatory. In paragraph nine of his affidavit Zhu stated:

“On or about June 30, 2022, Merchant defaulted under the provisions of the Merchant Agreement by placing a stop-payment on plaintiff’s debits to the account or by otherwise taking measures to interfere with plaintiff’s ability to collect the future receivables”

The documentary evidence submitted, however, did not establish that the defendants placed a stop payment on plaintiff’s debits or did anything which would have constituted a default under the Agreement. Also, the plaintiff presented no evidence demonstrating that it provided the defendants with the purchase price of the future receivables. In sum, the plaintiff did not eliminate all material issues of fact regarding its own performance under the Agreement. Furthermore, plaintiff’s evidentiary submission did not make a prima facie showing that the defendants breached the Agreement. Accordingly, the motion is denied regardless of the sufficiency, or lack thereof, of opposing papers (*Cugini v Sys. Lumber Co.*, 111 AD2d 114 [2nd Dept 1985]).

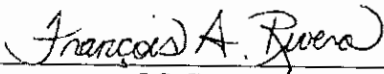
CONCLUSION

The motion by plaintiff Emmy Capital Group LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against defendants Fenix Trans Inc and Golub is denied.

A copy of this decision and order, along with notice of entry, shall be served upon defendants and filed with the Court within 20 days of entry.

The foregoing constitutes the decision and order of the Court.

ENTER:



J.S.C.

5 of HON. FRANCOIS A. RIVERA
J.S.C.