

**CFG Merchant Solutions, LLC v Family Fun RV
Rentals LLC**

2024 NY Slip Op 33986(U)

November 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 517821/2023

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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 7th day of November 2024

HONORABLE FRANCOIS A. RIVERA

-----X
CFG MERCHANT SOLUTIONS, LLC

Plaintiff,

- against -

FAMILY FUN RV RENTALS LLC and
GUADALUPE JAUREGUI

Defendant(s).
-----X

DECISION & ORDER

Index No.: 517821/2023

Oral Argument: 10/10/2024

Cal. No.: 16

Ms. No.: 2

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on February 15, 2024, under motion sequence number two, by CFG Merchant Solutions LLC (hereinafter CFG or plaintiff) for an order pursuant to CPLR 3212 granting summary judgment on the causes of action in its verified complaint asserted against Family Fun RV Rentals LLC (hereinafter the company defendant) and Guadalupe Jauregui (hereinafter the guarantor) (collectively the defendants). The motion is unopposed.

- Notice of motion
- Affidavit in support
Exhibits A-D
- Affirmation in support
Exhibits 1-3
- Memorandum of law in support
- Statement of material facts

BACKGROUND

On June 19, 2023, CFG commenced the instant action for breach of contract by filing a summons and verified complaint with the Kings County Clerk’s office (KCCO). On July 11,

2023, the defendants attempted to join issue by interposing and filing a joint answer¹ with the KCCO. The complaint alleges fourteen allegations of fact in support of two causes of action, namely, breach of contract and breach of a guaranty agreement.

The verified complaint alleges the following salient facts. On or about December 16, 2022, CFG and the defendants entered into an agreement whereby CFG agreed to purchase the right to the corporate defendant's future receivables having an agreed upon value of \$15,950.00 for a purchase price of \$11,000.00 (hereinafter the Agreement). Pursuant to the Agreement, the corporate defendants agreed to remit to plaintiff 9.3% of their receivables.

On December 16, 2022, the corporate 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 plaintiff's ability to collect the Future Receivables.

Subtracting the amount of receivables plaintiff has previously collected from the corporate defendant under the Agreement from the total Future Receivables purchased by plaintiff, there is presently due and owing from the corporate defendant the amount of \$17,416.00 with interest thereon from December 16, 2022. In addition, the guarantor agreed to guarantee any, and all amounts owed to CFG from the corporate defendant upon a breach in performance by corporate defendant.

¹ The answer was signed by Guadalupe Jauregui acting pro se on behalf of himself and the corporate defendant. The answer is valid for him but is a nullity as to the corporate defendant. CPLR 321 compels that an LLC appear in an action by counsel. Jauregui may not answer on the LLC's behalf. Therefore, has joined issue, but the corporate defendant has not answered the verified complaint.

The guarantor are alleged to be responsible for all amounts incurred as a result of the corporate defendants' default. There remains a balance due to CFG on the Agreement in the amount of \$17,416.00, plus interest, costs, disbursements, and attorney's fees.

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

It has been held that the motion does not lie before joinder of issue “[a]lthough the papers present no triable issue” (*Milk v. Gottschalk*, 29 A.D.2d 698 [3rd Dept 1968]). It has also been held that the Supreme Court is powerless to grant summary judgment prior to joinder of issue (see CPLR 3212(a); *Union Turnpike Associates, LLC v. Getty Realty Corp.*, 27 AD3d 725, 728 [2nd Dept 2006]). Family Fun RV Rentals LLC has not joined issue. Consequently, plaintiff's motion must be denied as premature as to this defendant only. However, the denial is without prejudice.

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

In the case at bar, the only sworn testimony submitted by CFG in support of the motion was an affirmation of Steven Zakharyayev, its counsel (hereinafter Zakharyayev), and an

affidavit of Joshua Karp (hereinafter Karp). Zakharyayev's affirmation demonstrates 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]).

Karp's affidavit is used to authenticate the Agreement which was allegedly breached by the defendants. Karp avers that he is CFG's Senior Vice President of Production & Revenue and, as such, has personal knowledge of its business practices and procedures. He further avers that the factual allegations proffered in support of the motion for summary judgment are derived from his review of the plaintiff's business records. He then refers to four exhibits attached to the motion, namely, the Agreement, a document denominated as a remittance history, a proof of wire payment and a transaction report.

Karp does not aver that he was a signatory to the Agreement or that he participated in the execution of same. Karp averred that on December 6, 2022, CFG funded the purchase price less applicable and disclosed upfront fees of \$440 and by applying \$5,396.28 to satisfy the corporate defendant's outstanding balance on the parties' prior agreement; and wiring the corporate defendant \$5,163.72. Karp further averred that proof of plaintiff's satisfaction of the corporate defendant's outstanding balance of \$5,396.28 is annexed as exhibit B.

CFG's evidentiary submission, however, proffered no evidence to support its contention that the corporate defendant had a prior debt with CFG in the amount of \$5,396.28. The Agreement did not mention any such debt. Nor was there any evidence that

the corporate defendant acknowledged the existence of such a debt or that it agreed to the deduction of the alleged debt from the purchase price paid by CFG.

These facts alone raise material issues of fact regarding the plaintiff's performance under the Agreement. In sum, the plaintiff cannot make a prima facie showing of entitlement to judgment on its claim that the defendants breached either the Agreement or the guaranty. Accordingly, the motion is denied without regard to the sufficiency of defendant Guadalupe Jauregui's opposition papers (*see Dowling v Valeus*, 119 AD3d 834, 835 [2d Dept 2014], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

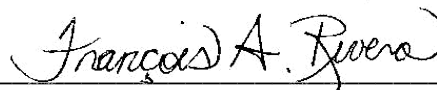
CONCLUSION

The motion by plaintiff CFG Merchant Solutions LLC an order pursuant to CPLR 3212 granting summary judgment on the causes of action in its verified complaint asserted against defendant Family Fun RV Rentals LLC is denied without prejudice as premature.

The motion by plaintiff CFG Merchant Solutions LLC an order pursuant to CPLR 3212 granting summary judgment on the causes of action in its verified complaint asserted against defendant Guadalupe Jauregui is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.