

Silverline Servs., Inc. v Padgett Forestry Prods., LLC

2024 NY Slip Op 34037(U)

November 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 535108/23

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 84, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of November, 2024.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

-----X

SILVERLINE SERVICES, INC.,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 535108/23

Mot. Seq. No. 2

PADGETT FORESTRY PRODUCTS, LLC, dba
PADGETT FORESTRY PRODUCTS;
PADGETT FORESTRY PRODUCT, LLC, and
FRANKLIN LEWIS PADGETT, aka FRANKLIN PADGETT,

Defendants,

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion and	
Affidavits (Affirmations) Annexed	<u>29-36</u>
Opposing Affidavits (Affirmations)	<u>38-47</u>
Affidavits/Affirmations in Reply	<u>48</u>

In this action to recover damages for breach of contract, plaintiff Silverline Services, Inc. (the "plaintiff") moves (in motion sequence 2) for an order, pursuant to CPLR § 3212, granting it summary judgment against defendants Padgett Forestry Products, LLC, doing business as Padgett Forestry Products, and Padgett Forestry Product, LLC (collectively, the "obligor defendants"), as well as against defendant Franklin Lewis Padgett, also known as Franklin Padgett (the "guarantor defendant" and collectively with the obligor

defendants,” the “defendants”). The defendants oppose the plaintiff’s motion. The Court heard oral argument on the plaintiff’s motion on August 7, 2024 and reserved decision. For the reasons stated below, the plaintiff’s motion is denied.

Pursuant to the Merchant and Security Agreement, dated as of October 10, 2023 (the “MSA”), the plaintiff allegedly advanced to the obligor defendants the sum of \$43,850.70, with the payback amount of \$67,924.73. The defendant guarantor executed and delivered its guarantee of the obligor defendants’ covenants under the MSA.

According to the plaintiff (but disputed by the defendants), the obligor defendants paid plaintiff a total of \$31,475, with the balance of \$36,449.73 due and owing. Further, according to plaintiff (but likewise disputed by the defendants), the obligor defendants breached various payment and non-payment covenants under the MSA. Plaintiff contends that the obligor defendants (and concomitantly the guarantor defendant) owe it the aforementioned balance of \$36,449.73, plus the “Blocked ACH” fee of \$2,500.

Plaintiff’s motion is supported by (among other documents) the affidavit of its Director of Risk Management, Shmuel Brummel, dated January 16, 2024 (the “Brummel affidavit”) (NYSCEF Doc No. 30), and an unsigned, unaffirmed three-page Merchant Statement, dated November 24, 2023, listing various payments from October 11, 2023, to November 14, 2023, and several so-called “Returned” payments from November 15, 2023 to November 20, 2023 (the “merchant statement”) (NYSCEF Doc No. 34).

In opposition to the plaintiff’s motion, the defendants contend (among other things) that the Brunner affidavit “failed to lay a foundation for records purportedly reflecting the

defendant [obligors'] payment history and default." Defendants' Memorandum of Law, dated July 31, 2024, at 6 (NYSCEF Doc No. 46).

It is well settled that summary judgment may be granted only when no triable issue of fact exists (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that they are entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*see 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 (*see 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 (*see Alvarez*, 68 NY2d at 324).

Here, the Court finds that the plaintiff has failed to establish, prima facie, its entitlement to judgment as a matter of law, irrespective of the sufficiency of the defendants' opposition papers. The plaintiff's motion is based on evidence that is not in admissible form (*see Federal Natl. Mtge. Assn. v Marlin*, 168 AD3d 679, 681 [2d Dept 2019]). As the defendants correctly point out, the Brummel affidavit fails to lay a foundation for the admission of the merchant statement (*see CPLR 4518 [a]; HSBC Bank USA, N.A. v Berdoe*, 190 AD3d 840, 842 [2d Dept 2021]; *Deutsche Bank Natl. Tr. Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]; *U.S. Bank N.A. v Kochar*, 176 AD3d 1010, 1012 [2d Dept 2019]; *Fulton Holding Group, LLC v Lindoff*, 165 AD3d 1049, 1051 [2d Dept 2018]; *see also RDM Capital Funding, LLC v Shoegod 313 LLC*, 83 Misc 3d 1272[A], 2024 NY Slip Op

51077[U] [Sup Ct, Kings County 2024]; *Capybara Capital LLC v Zilco NW LLC*, 78 Misc 3d 1238[A], 2023 NY Slip Op 50476[U] [Sup Ct, Kings County 2023]).

The Court considered the plaintiff's remaining contentions and found them either unavailing or moot.

Accordingly, it is

ORDERED that the plaintiff's motion (motion sequence 2) for summary judgment is **denied** in its entirety; and it is further

ORDERED that the defendants' counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Decision and Order of the Court.

ENTER,



J. S. C.
HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

2024 NOV 13 A 10:29
KINGS COUNTY CLERK
FILED