

EBF Holdings, LLC v RM Realty Assoc., L.L.C.

2024 NY Slip Op 34183(U)

September 26, 2024

Supreme Court, Monroe County

Docket Number: Index No. E2024001222

Judge: Daniel J. Doyle

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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

EBF HOLDINGS, LLC D/B/A EVEREST BUSINESS
FUNDING,

Plaintiff,

Index # E2024001222

-vs-

RM REALTY ASSOCIATES, L.L.C. D/B/A KELLER
WILLIAMS REALTY and MICHAEL LEROY
MCGAVISK,

Defendants.

Special Term
August 27, 2024

Appearances on Submission

Ariel Bouskila, Esq., Berkovitch & Bouskila, PLLC- for Plaintiff
Dominick Dale, Esq.- for Defendants

DECISION

Doyle, J.

This is a merchant advance agreement case. Pending before the Court are two motions: (1) Plaintiff's motion for summary judgment and (2) Defendants' cross motion to dismiss pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction.

For the reasons set forth herein, the motion to dismiss is **DENIED**, and the motion for summary judgment is **DENIED**.

LAWSUIT FACTS

The parties entered into a merchant advance agreement on July 5, 2023, whereby Plaintiff agreed to purchase the rights to the Company Defendant's future receivables having an agreed value of \$144,000.00. The Guarantor agreed to guarantee all amounts owed to Plaintiff from the Company Defendant upon a breach in performance.

Plaintiff alleges that it remitted the purchase price as agreed and that Company Defendant initially met its obligations. Company Defendant allegedly stopped remitting to Plaintiff, leaving a balance due of \$71,563.41.

LEGAL ANALYSIS

CPLR 3211(a)(8)

CPLR 3211(a)(2) allows for dismissal if the Court does not have subject matter jurisdiction. "Jurisdiction of the subject-matter, is power to adjudge concerning the general question involved. . . ." Hunt v. Hunt, 72 N.Y. 217, 229 (1878).

In support of the cross motion, Defendants submit the Affirmation of counsel, which states that the motion relies on the memorandum of law also filed. No memorandum of law was filed in NYSCEF. An Affidavit from Michael McGavisk, principal of the Company Defendant, is submitted for the Court's consideration, wherein he states that he is not a resident of New York, does not do business in New York, his business is not organized

under New York law, that the Agreement was not made or signed or performed in New York, and that he has not traveled to New York. See Doc. #54. Over two weeks after the cross motion to dismiss was filed, Defendants filed another Affidavit of McGavisk. In his second Affidavit Mr. McGavisk makes no argument in favor of dismissal for lack of subject matter jurisdiction.

The Answer in this action was filed on February 5, 2024. A Verification of the Answer was filed on May 10, 2024. While the Verified Answer includes an affirmative defense premised upon CPLR 3211(a)(2), the Verified Answer also fails to establish any entitlement to dismissal pursuant to CPLR 3211(a)(2).

The motion to dismiss pursuant to CPLR 3211(a)(2) is **DENIED**.¹

CPLR 3212

A party seeking summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). “Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Id. See also, Christopher P. v. Kathleen M.B., 174 A.D.3d 1460 (4th Dept. 2019). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce

¹ To the extent Defendants sought to make an argument with respect to CPLR 3211(a)(8) instead (jurisdiction of the person of the defendant), dismissal also would not have been warranted under that provision. The forum selection clause in the parties’ Agreement is enforceable irrespective of whether the amount in controversy is less than \$1 million. See Puleo v. Shore View Ctr. for Rehabilitation & Health Care, 132 A.D.3d 651, 652-653 (2nd Dept. 2015) (stating that a “contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court”) (citation omitted).

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324.

In moving for summary judgment, Plaintiff submits the Affidavit of Chad Johnson, Manager of Plaintiff. Mr. Johnson's Affidavit is proffered in an effort to establish the necessary foundation to admit the agreement, proof of funding, and the partial performance by Defendants in their deliverance of \$72,436.59 in receivables (see Affidavit of Chad Johnson, Exhibit B) as business records. The transaction history provided to the Court by Plaintiff indicates that from November 9, 2023 through November 21, 2023 the transaction amount was \$0.00, with the amount paid and the balance due remaining unchanged on those dates.

Plaintiff argues that the defendants breached the agreement by denying access to the account and thereby denying Plaintiff 15% of the daily sales proceeds. Mr. Johnson states in his affidavit: "On November 9, 2023, EBF was denied access to the account by the Merchant and, consequently, deprived the 15% of the daily sales proceeds due to EBF. All attempts to debit EBF's 15% of sales proceeds from the designated deposit account result in an ACH debit rejection notice." Affidavit of Chad Johnson, ¶12.

The Agreement provides the following as to Events of Default: "The occurrence of any of the following events shall constitute an "Event of Default": (a) Seller intentionally interferes with Purchaser's right to collect the Daily Payment in violation of this Agreement; (b) Seller violates any term or covenant in this Agreement; (c) Any representation or warranty by Seller in this Agreement proves to have been incorrect, false

or misleading in any material respect when made; (d) Seller defaults under any of the terms, covenants and conditions of any other agreement with Purchaser.” See NYSCEF Doc. #42.

However, Plaintiff’s business records merely indicate that the transaction amount was \$0.00 from November 9, 2023 through November 21, 2023. There is no indication from the records presented to the Court that there was an intentional interference with the right to collect, a violation of a term or covenant of the Agreement, or any other default listed as an Event of Default in the Agreement. Plaintiff’s own business record submissions contradict Mr. Johnson’s averment that the defendants breached the agreement by denying access to the account.

As the proof submitted does not establish the breach alleged, Plaintiff fails to establish prima facie entitlement to summary judgment. Accordingly, Plaintiff’s summary judgment motion is **DENIED**.

Defendants shall submit a proposed order to opposing counsel for approval, and thereafter to the Court, by October 22, 2024.

Signed at Rochester, New York on September 26, 2024.



HONORABLE DANIEL J. DOYLE
Supreme Court Justice