

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

SAWHORSE LUMBER & MORE, INC., x

Plaintiff,

- against -

LOUIS EVANGELISTA,

Defendant.

Index
Number 3198 2003
Motion
Date October 4, 2006
Motion
Cal. Number 53

x

The following papers numbered 1 to 13 read on this motion by the plaintiff, pursuant to CPLR 3212, for an award of summary judgment on an unconditional guarantee and cross-motion by the defendant to dismiss the complaint against it pursuant to CPLR 3211(a) (3) (5) and (7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-8
Answering Affidavits - Exhibits.....	9-10
Reply Affidavits.....	11-13

Upon the foregoing papers it is ordered that the motion and cross-motion are denied.

The plaintiff, Sawhorse Lumber & More, Inc., commenced this action against the defendant to recover damages based upon the defendant's guarantee of payment for goods and services rendered to his company, Nemco Construction, Inc. ("Nemco").

On October 1, 1996, the plaintiff entered into a credit relationship¹ with Nemco pursuant to a credit application filed by Nemco. As part of the extension of credit, the defendant executed a personal and unconditional guarantee of payment for debt incurred by Nemco Construction in connection with the purchase of construction materials. The guarantee provided:

"Each of the undersigned parties personally and unconditionally guarantees payment of all materials and services ordered by said firm, including any and all costs of collection and reasonable attorney's fees."

The plaintiff alleges that from on or about December 9, 1996 through February 6, 1997, the plaintiff furnished materials to Nemco for the benefit of a dormitory construction project for Daytop Village Foundation, Inc. The plaintiff asserts that the value of the various material furnished to Nemco at Nemco's specific request was \$102,521.03. Notwithstanding the plaintiff's delivery of the materials to Nemco, Nemco has allegedly failed and refused to pay for the materials.

The plaintiff also asserts that, on or about April 17, 2003, after an inquest in a prior action entitled Sawhorse Lumber & More, Inc. d/b/a Fowler & Keith against Daytop Village Foundation, Inc., Nemco Construction Corp. and United States Fidelity and Guarantee Company, bearing Queens County Index Number 25259/97, over which JHO Leviss presided, a determination was made awarding the plaintiff the sum of \$133,009.91, which included fees for goods sold and delivered to Nemco, finance charges, loss of profits, counsel fees, expenses and disbursements. The plaintiff was then directed to submit a judgment.

The plaintiff now moves for summary judgment seeking the sum of \$133,009.91, which represents the amount awarded to the plaintiff after the April 17, 2003 inquest, plus attorneys fees for this action and additional late fees, interest and costs from April 2003 to date pursuant to the personal guarantee signed by the defendant. In the complaint, the plaintiff seeks damages in another amount.

¹

The guarantee was written on the letterhead of Fowler & Keith, the d/b/a business name of plaintiff Sawhorse Lumber & More, Inc.

The defendant's cross-motion to dismiss must be denied. The defendant cross moves to dismiss the complaint pursuant to CPLR 3211(a)(3), (5) and (7). The defendant claims that the complaint fails to state a cause of action and that the plaintiff lacks standing to commence this action on the ground that the plaintiff is not a party to the guarantee. The defendant also claims that the action is barred by the doctrine of res judicata or collateral estoppel arising out of the dismissal of an action entitled Sawhorse Lumber & More, Inc., d/b/a Fowler & Keith v Nemco Construction Corp. and Louis Evangelista, Jr., Index No. 671/97 (Ulster County) and the dismissal and/or abandonment of an action entitled Sawhorse Lumber & More, Inc. v Daytop Village Foundation, Inc., et al., Index No. 25259/97 (Queens County).

The defendant's cross-motion to dismiss the complaint on the ground that the plaintiff's claims are barred by the doctrine of res judicata or collateral estoppel is denied since the present claims were not resolved in the prior actions referred to by the defendant. A copy of the order dismissing the complaint in the prior Ulster County action indicates that dismissal was due to the pendency of a prior action in Queens County bearing Index Number 004814/97 and was not on the merits. Further, with respect to the purported "dismissal and/or abandonment of the action entitled Sawhorse Lumber & More, Inc. v Daytop Village Foundation, Inc., et al., Index No. 25259/97 (Queens County)", any purported dismissal or abandonment of that action has no bearing on this action since the defendant was not a party to that action and the guarantee was not at issue therein. Accordingly, the principles of res judicata and collateral estoppel do not serve as a bar to the plaintiff's claims herein. (See generally, Matter of Hunter, 4 NY3d 260 [2005]; Aquilar v Jacoby, 34 AD3d 706 [2006]).

Nor has the defendant established that the plaintiff lacks standing to commence this action since it appears that Fowler & Keith Supply Co. is a "doing business as" name for plaintiff Sawhorse Lumber & More, Inc. with respect to the transactions underlying this action and the subject guarantee.

The defendant's motion for summary judgment must also be denied. Although the defendant concedes that he executed a personal guarantee ensuring payment for all materials and services ordered by Nemco Construction Corp., a triable issue of fact exists with respect to the amount owed by the plaintiff pursuant to the guarantee (see generally, Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]).

Dated: February 23, 2007

J.S.C.