Merchant Cash & Capital, LLC v G&E Asian Am. Enter., Inc.
2016 NY Slip Op 31592(U)
July 29, 2016
Supreme Court, Nassau County
Docket Number: 605800-15
Judge: Jerome C. Murphy

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

MERCHANT CASH & CAPITAL, LLC,

Plaintiff,

-against-

G&E ASIAN AMERICAN ENTERPRISE, INC., GRACE VO, and YEN EVELYN VO,

Defendants.

TRIAL/IAS PART 19
Index No.: 605800-15
Motion Date: 5/24/16
Sequence No.: 001

DECISION AND ORDER

MD
XXX

The following papers were read on this motion:

Order to Show Cause..... 1
Certification Pursuant to 22 NYCRR § 130-1.1a..... 2
Affirmation of Jonathan R. Miller, Esq. And Exhibits..... 3
Affidavit of Grace Vo and Exhibits..... 4
Affirmation in Opposition, Affidavit of David Zullo, Plaintiff's Memorandum of Law and Exhibits..... 5
Defendants' Reply Memorandum of Law..... 6
Affidavit of Yen Evelyn Vo and Exhibit..... 7
Supplemental Affidavit of Grace Vo and Exhibits..... 8
Affidavit of Counsel As to Unpublished Caselaw and Attachments..... 9

PRELIMINARY STATEMENT

Defendants bring this application for an order pursuant to CPLR § 5015(a), vacating the default judgment that was entered in this matter on March 15, 2016; and pursuant to CPLR § 510, transferring this matter to the County of New York. Opposition has been submitted by plaintiff to this application.

BACKGROUND

Plaintiff commenced this action on September 4, 2015, by filing a Summons and Verified Complaint in Supreme Court, Nassau County. The Complaint alleges that on or about July 10, 2015, Merchant Cash & Capital ("MCC") entered into an Agreement with G&E Asian American

Enterprise, Inc. ("G&E"), the performance of which was personally guaranteed by Grace Vo and Yen Evelyn Yo. The Complaint claims that defendants have consented to the jurisdiction of the Supreme Court of New York pursuant to § 5.6(b) of the Agreement (Exh. 2 to Aff. of Jonathan R. Miller, Esq.).

The Agreement is designated as a Merchant Agreement (Revenue Program). It provides that, for $164,000.00, MCC is purchasing $242,720.00 receivables, which were to be paid by G&E to MCC in the form of 9% of the daily proceeds from the operation of the business, until the sum of $242,720.00 is paid.

According to the Complaint, G&E made payments totaling $13,160.00 under the Agreement, leaving a balance of $229,560.00, and has been in default since July 25, 2015. The First Cause of Action alleges breach of contract against G&E. The Second Cause of Action, also against G&E, alleges failure to make payment of the balance. The Third Cause of Action alleges a breach of the obligations of the personal guarantors, and contends that they are jointly and severally liable to plaintiff.

The Fourth Cause of Action, against G&E and the individual defendants, alleges that the Agreement called for the payment of plaintiff's expenses, including court costs, disbursements, and legal fees, in the event of default. The Fifth Cause of Action against G&E alleges that the company is unlawfully in possession of assets belonging to plaintiff, and has deprived plaintiff of their use.

Defendants assert that plaintiff entered a default judgment against them on March 15, 2016 in the amount of $243,620.30 (Exh. 3 to Affirmation of Jonathan R. Miller, Esq.). The affirmation of counsel, and the affidavit of Grace Vo contend that defendants were victimized by Premier Working Capital "Premier", a loan broker who agreed to obtain a business loan for G&E, but instead forged their signatures on the MCC Agreement. They claim, as immigrants from Vietnam, to be unknowledgeable about business affairs, and were improperly manipulated into being responsible for the payment of $242,700.00 in return for an up front payment of $164,000.00 by plaintiff.

Defendants contend that the default judgment should be vacated because of lack of personal jurisdiction, because the Agreement in which consent to jurisdiction was contained was a forgery. Defendants submit testimony and exemplars of their signatures in order to substantiate their claim that they did not sign the Agreement.

They also contend that the default should be vacated on the grounds of forum non

conveniens. They contend that none of the parties are residents of Nassau County, and that the only reason for the Nassau venue is the office address of counsel for plaintiff. Plaintiff's place of business is New York County. Defendants are residents of California, have no ties to New York, and the broker who effectuated the loan is in Florida. If the matter were to be in New York, it would be appropriately venued in New York County.

In opposition, plaintiff submits an affirmation of Christopher R. Murray, Esq. and an affidavit of David Zullo, an Underwriting Manager for plaintiff, as well as a Memorandum of Law. These documents allege that within two weeks of the July 2015 agreement, defendants began withholding the purchased receivables and sales proceeds, and refused to permit MCC to collect any further funds, and demanded that MCC rewrite the Agreement.

DISCUSSION

A motion to open a default is addressed to the discretion of the court. In order to qualify for relief from a judgment, a party is required to establish a justifiable excuse and a meritorious defense (CPLR 5015(a); *Rugieri v. Bannister,* 7 N.Y.3d 742 [2006]). In *Rugieri,* the Court affirmed the Appellate Division's vacating of a judgment of default and reinstating the complaint where plaintiff "proffered a reasonable excuse for default and facts indicating a meritorious cause of action". Similarly, in *Mena v. Choon-Ket Kong,* 269 A.D.2d 575 (2d Dept. 2000), the Appellate Division reversed the trial court, and excused the default in answering, where it was satisfied that defendant provided a justifiable excuse for their default and established a meritorious defense to the action.

The availability of relief from a default judgment is set forth in CPLR § 5015, which provides as follows:

> **(a) On motion.** The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
>
> 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or

> 3. fraud, misrepresentation, or other misconduct of an adverse party; or
>
> 4. lack of jurisdiction to render the judgment or order; or
>
> 5. reversal, modification or vacatur of a prior judgment or order upon which it is based.
>
> **(b) On stipulation.** The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

Plaintiff served Evelyn Vo on September 16, 2015, G&E Asian American Enterprise, Inc. On September 18, 2015, and Grace Vo on October 29, 2015. Follow-up service was thereafter made by mail. Defendants do not challenge service.

On February 17, 2016, plaintiff served copies of the proposed default judgment upon defendants, and mailed pleadings to them on March 3, 2016. Having received no appearance, Answer, or motion for additional time within which to respond, plaintiff entered a Clerk's Default Judgment on March 15, 2016. It was only after service of a copy of the Judgment with Notice of Entry that defendants sought to vacate the judgment.

Other than the claim of lack of funds for an attorney in New York, defendants offer no viable explanation for their failure to appear in the action. Defendants have not offered a justifiable basis for their failure to appear. If nothing else, they were in possession of $164,000.00 which was deposited in their account on July 15, 2015. Within ten (10) days of the deposit, defendants terminated the ability of MCC to withdraw 9% of the daily from their receipts, as provided in the Agreement.

Defendants assert as a defense that the Agreement was not signed by them, but was forged by their agent, Premier, whom they had retained to seek financing. It appears that defendants had considered multiple financing options before selecting MCC. While it is certainly questionable whether the claim of unauthorized execution of the agreement is correct, and their names were forged on the document, defendants ratified the Agreement by arranging for the automatic withdrawals from their account, and providing payments of $16,160.00 under the terms of the Agreement (*Cashel v. Cashel,* 65 A.D.3d 1182 [2d Dept. 2009]).

It is further significant to note that the defendants acknowledge receipt of approximately $164,000.00, but do not come forward with any other written agreement to show what the

consideration was that they agreed to pay to obtain this money. Defendants, in their motion to vacate, would have the Court believe that they received this money without this detail being resolved.

Defendants also contend that the terms of the Agreement constitute a usurious and unenforceable loan. Defendants' contention that the Agreements violate General Obligation Law § 5-501[1] and Banking Law § 14-a[1], and are civilly and criminally usurious is without merit. A corporation is prohibited from asserting a defense of civil usury (*Arbozova v. Skalet*, 92 A.D.3d 816 [2d Dept. 2012]). An individual guarantor of a corporate obligation is also precluded from raising such a defense (*Id.*). Defendants have failed to adequately allege a defense of criminal usury in violation of Penal Law § 190.40, in that they failed to allege that the lender knowingly charged, took or received annual interest exceeding 25% on a loan or forbearance of money. Defendant hypothesizes that the terms of the Agreement could result in payment of criminally excessive interest, but this is clearly insufficient under the pleading requirements.

Essentially, usury laws are applicable only to loans or forbearances, and if the transaction is not a loan, there can be no usury (*Kaufman v. Horowitz,* 178 A.D.2d 632 [2d Dept. 1991]). As onerous as a repayment requirement may be, it is not usurious if it does not constitute a loan or forbearance.

The Agreement was for the purchase of future receivables in return for an up front payment. The repayment was based upon a percentage of daily receipts, and the period over which such payment would take place was indeterminate. Plaintiff took the risk that there could be no daily receipts, and defendants took the risk that, if receipts were substantially greater than anticipated, repayment of the obligation could occur over an abbreviated period, with the sum over and above the amount advanced being more than 25%. The request for the Court to convert the Agreement to a loan, with interest in excess of 25%, would require unwarranted speculation, and would contradict the explicit terms of the sale of future receivables in accordance with the Merchant Agreement.

In *Merchant Cash & Capital v. Edgewood Group, LLC,* 2015 WL 4451057 (U.S.D.C., S.D.N.Y, Koeltl, J.), the Court adopted the Report and Recommendation of Magistrate Judge Freeman, 2015 WL 4430643. Magistrate Freeman undertook an extensive examination of the enforceability of an Agreement of June 21, 2013, whereby Edgewood Group sold $163,726.00

of its business receivables/revenue to plaintiff, for an upfront payment of $115,300.00. Edgewood Group agreed that the "business receivables/revenue" would be paid from a percentage of its daily revenue, but no percentage was set forth in the agreement.

After defendant failed to appear, plaintiff moved for default judgment. The Agreement contained terms consistent with the Agreement presently before this Court. It provided that defendant would pay Edgewood $930.26 per day on each business day until such time as Edgewood had paid plaintiff $163,726.00. Edgewood agreed not to change the designated bank account from which automated deductions would be made, and not to permit necessary licenses or permits to lapse, and the proprietor of Edgewood agreed to be personally liable for the obligations of Edgewood.

At fn. 5, Magistrate Judge Freeman stated that "(i)t is not entirely clear to this Court what differentiates this arrangement from a loan, to which lending laws (such as usury caps) would apply. She further noted that the absence of a percentage of daily receipts to be deducted on a daily basis resulted in an obligation on the part of Edgewood to make payments over an eight month period, including 42% more than it received. As she stated "(t)his arrangement looks substantially like a loan (as opposed to Plaintiff's acquisition of a portion of Edgewood's further receivables), but with an effective interest rate of over 50% per year."

She nevertheless concluded that the Court cannot conclude, as a matter of law, that the transaction at issue was a loan, citing *Express Working Capital, LLC v. Starving Students, Inc.* 28 F. Supp.3d 660, 669 (N.D. Tex. 2014). In analyzing the contractual language, and noting that usury was an affirmative defense which can be waived, based upon defendant's default, the Court accepted plaintiff's characterization of the agreement as a sale of receivables, rather than a loan.

The claimed defense of usury is without merit, and defendants have not established a meritorious defense to the action. **The motion to vacate the default judgment and permit defendants to litigate the claims is in all respects denied.**

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 29, 2016

ENTERED

AUG 02 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.

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