Merchant Cash & Capital, LLC v WETT Plumbing, LLC
2017 NY Slip Op 30881(U)
April 19, 2017
Supreme Court, Nassau County
Docket Number: 609467/16
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 10

X

MERCHANT CASH AND CAPITAL, LLC,

Plaintiff,

-against-

Index No. 609467/16
Motion Sequence...01, 02
Motion Date...02/16/17

WETT PLUMBING, LLC, d/b/a WETT PLUMBING and WALTER DeROUEN,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Affidavit.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Notice of Motion (Mot. Seq. 02).....x
Memorandum of Law.....x
Memorandum of Law.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion (Mot. Seq. 01) by the Defendants seeking an Order changing venue and the motion (Mot. Seq. 02) by the Plaintiff, MERCHANT CASH AND CAPITAL, LLC (hereafter "MCC") seeking an Order dismissing the affirmative defenses and counterclaims asserted by the Defendants pursuant to CPLR § 3211 (b) and striking scandalous and prejudicial content from the Defendants' Answer pursuant to CPLR 3024 (b), are determined as hereinafter provided.

On May 6, 2016, the parties executed an Agreement which provided that the Plaintiff, MCC, as buyer, purchased from the seller, the Defendant, WETT PLUMBING, LLC (hereinafter "WETT"), twelve (12%) percent of the proceeds of future sales of WETT in the amount of $23,460 for a purchase price of $17,000 (*See* the Agreement attached to the Defendants' Notice of Motion as Exhibit "D").

The Defendants now move (Mot. Seq. 01) to change venue, arguing that Nassau County, designated by the Plaintiff, is not proper. Counsel for the Defendants contends that New York County is the proper venue since the Plaintiff resides in New York County and the Defendant, WETT, is a foreign corporation. In opposition, counsel for the Plaintiff argues that the Agreement between the parties herein contains a fully enforceable venue selection clause which permits the Plaintiff to commence its action in Nassau County. Counsel for the Plaintiff cites to section 5.6 (b) which states, in pertinent part, that "all judicial proceedings... shall be brought in any state court of competent jurisdiction in the State of New York..." Further, counsel for the Plaintiff contends that the Defendants waived any claim that this action is brought in an inconvenient forum, referencing section 5.6 (c) of the Agreement.

It is well settled 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' (*See KMK Safety Consulting, LLC v. Jeffrey M. Brown Assoc., Inc.*, 72 A.D.3d 650 [2d Dept. 2010], quoting *LSPA Enter., Inc. v. Jani–King of N.Y., Inc.*, 31 A.D.3d 394 [2d Dept. 2006]; *see also Casale v. Sheepshead Nursing & Rehabilitation Ctr.*, 131 A.D.3d 436 [2d Dept. 2015]; Molino v. Sagamore, 105 A.D.3d 922 [2d Dept. 2013]).

Here, the Defendants have failed to show that enforcement of the venue selection clause would be unreasonable, unjust, or in contravention of public policy, or that the inclusion of the forum selection clause in the agreement was the result of fraud or overreaching. Moreover, the Defendants failed to demonstrate that litigation of this action in Nassau County, as opposed to New York County, would be so gravely difficult that, for all practical purposes, the Defendants would be deprived of their day in court. Lastly, no argument has been proffered by the Defendants that would suggest that the venue selection clause in the Agreement is not binding on the parties.

This Court will now address the Plaintiff's motion (Mot. Seq. 02), seeking an Order dismissing the affirmative defenses and counterclaim asserted by the Defendants pursuant to CPLR § 3211 (b) and striking scandalous and prejudicial content from the Defendants' Answer pursuant to CPLR 3024 (b).

The Defendants have interposed several affirmative defenses and a counterclaim. While the Defendants' Answer is convoluted and not easily discernable, it appears that all of the defenses and the counterclaim asserted therein consist of only one (1)

claim, that the interest rate is usurious.[1] The Defendants allege that the Agreement is unenforceable on the grounds that it is an illegal agreement for the lending of money in exchange of a secured interest in the receivables of the Defendant, WETT, at a usurious rate of interest. The Defendants contend that the payments due to the Plaintiff are based upon an interest rate that is in excess of that allowed by New York State Law (*See* the Answer attached to the Defendants' Notice of Motion as Exhibit "B").

In opposition, counsel for the Plaintiff contends that the Agreement provides that WETT's payments of the purchased receivables and future sale proceeds were contingent upon WETT actually generating the purchased receivables and future sale proceeds. The Agreement does not provide for a fixed payment term as the Plaintiff was only entitled to a percentage of WETT's future sale proceeds and receivables. Counsel for the Plaintiff argues that the Agreement in no way contemplates a loan of any money and that MCC has no recourse in the event the sale proceeds are not generated.

The Defendants' contention that the Agreement is usurious is without merit. A corporation is prohibited from asserting a defense of civil usury. Additionally, an individual guarantor of a corporate obligation is also precluded from raising such a defense (*See Arbuzova v. Skalet*, 92 A.D.3d 816 [2d Dept. 2012]). Based upon a review of the Agreement, the terms of the Agreement do not constitute a loan within the meaning of the usury laws (*See Kaufman v. Horowitz*, 178 A.D.2d 632 [2d Dept. 1991]).

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[1] Considering this Court's ruling on the Defendants' motion (Mot. Seq. 01) to change venue, the Defendants' first affirmative defense in their Answer is dismissed.

Accordingly, it is hereby

ORDERED, that the Defendants' motion (Mot. Seq. 01) seeking an Order changing venue, is **DENIED**.

ORDERED, that the Plaintiff's motion (Mot. Seq. 02) to dismiss the Defendants' affirmative defenses and counterclaim pursuant to CPLR § 3211 (b) and strike scandalous and prejudicial content from the Defendants' Answer pursuant to CPLR 3024 (b), is **GRANTED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
April 19, 2017

Hon. Randy Sue Marber, J.S.C.

ENTERED

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