LG Funding, LLC v Branson Getaways, Inc.
2017 NY Slip Op 32387(U)
November 13, 2017
Supreme Court, Nassau County
Docket Number: 603695/17
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 26

X

LG FUNDING, LLC,
Plaintiff,

-against-

BRANSON GETAWAYS, INC., d/b/a BRANSON GETAWAYS, JOHN WALLEN a/k/a JOHN LAWRENCE WALLEN II, and MICHELE WALLEN,
Defendants.

X

Index No. 603695/17

Mot Seq. No. 002

Present: Hon. Sharon M.J. Gianelli, J.S.C.

Papers submitted on this motion:
Defendant's Order to Show Cause______X
Plaintiff's Affirmation in Opposition____X

Motion by the attorney for the Defendants Branson Getaways, Inc. d/b/a Branson Getaways and John Lawrence Wallen II for an order pursuant to CPLR § 5015(a) vacating the default judgment is DENIED.

The facts are set forth in this Court's short form order dated July 19, 2017, entered by the Office of Nassau County Clerk on July 25, 2017.

> Plaintiff LG Funding, LLC [LG] entered into a Merchant Agreement [Agreement] dated January 27, 2017, whereby Branson Getaways Inc. [Branson] sold LG $68,431.50 [the purchase amount] of Branson's accounts, contracts, and other obligations arising from or relating to the payment of monies from Branson's customers and other third party payors for the sum of $50,690.00 to be paid to LG from 15% of Branson's daily revenue. In the event of default, the full uncollected Purchased Amount, plus all fees due under the Agreement would be due and payable in full to LG. Defendant John Wallen [Wallen] executed a Guarantee of the terms and conditions by Branson in the Agreement. On February 2, 2017, LG paid Branson the Purchase Price [$50,690.00]. The complaint alleges that Branson defaulted on the Agreement by failing to direct Branson's payments to LG, by blocking LG's access to a designated bank account [Designated Account] from which Branson agreed to permit LG to withdraw receivables, and by failing to deposit receivables into the Designated Account. LG declared Branson in breach of the Agreement on March 20, 2017.

The verified complaint pleads the existence of the parties' contract, plaintiff's performance by paying the purchase price, the obligor's breach by failing to pay the specified percentage of the receivable to the Plaintiff and resulting damages. The Plaintiff established a *prima facie* entitlement to summary judgment.

Relief under CPLR § 5015(a) is available where the defendant can demonstrate a reasonable excuse for the failure to appear, and a showing of a meritorious defense. *See: DiLorenzo v. Dutton Lbr. Co.*, 67 N.Y.2d 138; *Szilaski v. Aphrodite Construction*, 247 A.D.2d 532.

The Defendants have made a reasonable excuse for the failure to appear.

The Court will next consider whether the Defendants have raised a meritorious defense.

In support of the motion to vacate the default judgment the attorney for Defendants argue that Wallen never signed six (6) of the pages of the Agreement. Defendant asserts that signatures on pages 12, 14, 15, 16, 17, and 18 of the Agreement are not that of Wallen and must have been forged by someone else. Further, Defendant asserts Wallen never signed the Guaranty.

"It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree." Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403

(2d Cir. 2004). The rule is given in the Second Restatement of Contracts as follows: "(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance... (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation." Restatement (Second) of Contracts § 69 (1981). A comment explains that "The resulting duty is not merely a duty to pay fair value, but a duty to... perform according to the terms of the offer." *Id.* cmt. b.

Defendants had the opportunity to review all pages of the Agreement. This is evidenced by the fact that its fax timestamp was printed on top of every page of the Agreement. Each page of the Agreement listed the page number and total number of pages. There is a notice immediately preceding the signatures section of the Agreement advising the reader that the remaining pages are incorporated by reference, and Defendants admit that the signature on the first page is genuine. Wallen is bound by all pages of the document because he admits signing the first page, which incorporates the other pages by reference. Wallen is bound by the guarantee because he admits signing the tenth [10th] page of the Agreement acknowledging the guarantee. Defendants were aware of the terms of the contract and accepted its benefits by taking $50,690.00 from the Plaintiff and then repaying Plaintiff from the receivables. Defendants' forgery claim facts to demonstrate a meritorious, *See: Nirvana Int'l Inc. v. ADT Sec. Service.* 881 F.Supp.2d 556 [S.D.N.Y. 2012].

Without citing any legal authority or provision in the Guaranty, the attorney for Wallen makes the conclusory statement that since the Guaranty is silent as to the method of

service permitted, the Court lacks jurisdiction over the individual defendants. The first sentence of the Guaranty sates "The undersigned [Wallen] hereby guarantees to LG Merchant's performance of all of the representations, warrantees, covenants made by Merchant in this Agreement..." Therefore, Wallen is bound by any service provisions set forth in the Agreement.

The merchant cash advance [MCA] that is the subject of this action is a legal transaction for the purchase of receivables that is not a loan and is not usurious. An MCA is a specialized form of factoring in which a merchant sells its future receivables for a discounted amount paid upfront. The advantage to an MCA transaction is that it typically provides merchants such as Wallen access to funds much faster than applying for a traditional loan from a lending institution. The MCA agreement is complete, clear and unambiguous on its face and is entitled to enforcement according to the plain meaning of its terms.

Many trial courts have examined similar agreements in the last several years, and have largely determined that most are not loans, but purchases of receivables. *See: Merchant Cash and Capital LLC v. Yohowa Medical Services, Inc.*, 2016 N.Y. Misc. LEXIS 3065, 2016 WL 4458806 at *5 (Sup. Ct. Nassau Co. July 29, 2016) ("Under the terms of the subject Agreement, if Seller/Defendant produces no daily revenue, no payments are required, and there is no absolute obligation of repayment. While the terms of payment provided for in the Agreement may be onerous, they do not involve a loan or forbearance of money, and are unaffected by civil or criminal usury."); *Professional Merchant Advance Capital, LLC v. Your Trading Room, LLC*, 2012 N.Y. Misc. LEXIS

6757, 2012 WL 12284924 (Sup. Ct. Suff. Co. Nov. 28, 2012) ("Upon review of the record adduced on this motion, the court finds that Waryn failed to establish that the subject agreement to purchase credit card receivables was a loan and not an agreement to purchase future receivables for a lump sum discounted purchase price payable in advance by the plaintiff in exchange for a contingent return.").

The facts in the within action can be distinguished from those cited by Defendants' attorney in *Merchant Funding Services LCC v. Volunteer Pharmacy, Inc.*, 55 Misc.3d 316. Unlike in Merchants Funding Services (*Id*), the Agreement in the within action does not fall under the exception of being disguised loan because the payment to Plaintiff is based on the receivables earned by the merchant. If the merchant would not make any money, then Plaintiff would not be entitled to any money. And if the merchant would only make a small amount of money, then Plaintiff would only be entitled to a small amount of money based on the specified percentage set forth in the Merchant Agreement. Here, Branson had receivables of $41,43.94 from February 2, 2017 to February 9, 2017, and Plaintiff was entitled to $6,215.99 based on the specified percentage of fifteen percent [15%] but only took $1,940.00 on February 9, 2017. Branson subsequently had receivables of $31,066.28 from February 10, 2017 to February 16, 2017, and Plaintiff was entitled to $4,659.94 but again took only $1,940.00 on February 16, 2017.

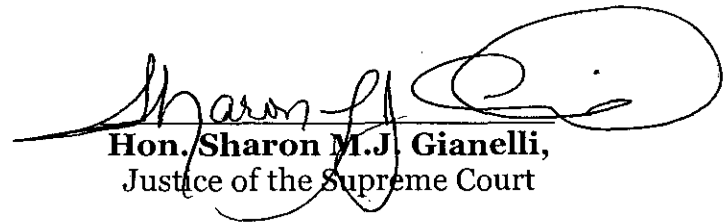
The claimed defense of usury is without merit. Defendants have not established a meritorious defense to this action. The motion to vacate the default judgment and permit Defendants to litigate the claims is in all respects DENIED. *See: Merchant Cash*

& Capital LLC v. Edgewood Group LLC, 2015 U.S. Dist. LEXIS 94018; 2015 WL 4451057 [S.D.N.Y. 2015] also *Merchant Cash & Capital, LLC, v. G&E Asian American Enterprise, Inc.*, 2016 N.Y. Slip Op. 31592[U]; 2016 N.Y. Misc. LEXIS 3067.

This matter is referred to the Calendar Control Part (CCP) for a hearing on the issue of attorney's fees to the Plaintiff, to be held on December 6, 2017. The Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within ten (10) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

This Decision is the Order of the Court.

ENTER: November 13, 2017
Mineola, New York



Hon. Sharon M.J. Gianelli,
Justice of the Supreme Court

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