Zomongo.TV USA Inc. v Capital Advance Servs., LLC
2022 NY Slip Op 34130(U)
December 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 512735/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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ZOMONGO.TV USA INC. D/B/A ZOMONGO.TV USA, JOCELYNE LISA HUGHES-OSTROWSKI and JEREMY GENE OSTROWSKI,

Plaintiffs, Decision and order

- against - Index No. 512735/2021

CAPITAL ADVANCE SERVICES, LLC,

Defendant, December 7, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved pursuant to CPLR §2221 seeking to reargue portions of a decision and order dated August 25, 2022. The defendant has cross-moved likewise seeking to reargue portions of the prior decision. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision, the defendant Zomongo entered into two merchant cash agreements with the defendant. The first agreement was dated February 12, 2018 whereby the defendant purchased $449,700 of plaintiff's future receivables for $300,000. The second agreement was dated April 11, 2018 whereby the defendant purchased $861,925 of plaintiff's future receivables for $575,000. The complaint alleges the defendant failed to deliver the purchased amounts pursuant to the agreements and improperly withdrew daily amounts in excess of the amounts to which the parties agreed. The court denied a request

to amend the complaint to assert various claims and permitted other claims. The parties have moved seeking to reargue those determinations.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

In the prior decision the court noted that a corporation may not affirmatively assert a usury claim and cited to Haymount Urgent Care PC v. GoFund Advance LLC, 2022 WL 2297768 [S.D.N.Y. 2022] to support that conclusion. Upon reargument the plaintiff's argue the inability to assert usury claims allows a usurer to succeed and "get away" with such illegal conduct (see, Memorandum of Law, page 9 [NYSCEF Doc. No. 85]). That policy argument, to the extent the argument is compelling, is a matter properly placed before the Legislature, not the Judiciary. Thus, this court is bound by clear precedent that uniformly holds no such affirmative cause of action based upon usury exists. For example, in Scantek Medical Inc., v. Sabella, 582 F.Supp2d 472 [S.D.N.Y. 2008] the court explained that:

"New York's criminal usury statute prohibits a person from

knowingly charging interest on a loan at a rate exceeding 25% per annum. N.Y. Penal Law § 190.40. The statute does not provide for civil liability and from 1860 until 1965, corporations were prohibited by law from asserting criminal usury as a defense to claims brought in a civil action. Hammelburger v. Foursome Inn Corp., 54 N.Y.2d 580, 589, 446 N.Y.S.2d 917, 431 N.E.2d 278 (1981). In 1965, New York amended its statute to allow corporations to "interpose[ ] a defense of criminal usury" in civil litigation. N.Y. Gen. Oblig. Law § 5-521(3). The legislature created this exception because it felt that "it would be most inappropriate to permit a usurer to recover on a loan for which he could be prosecuted." Hammelburger, 54 N.Y.2d at 590, 446 N.Y.S.2d 917, 431 N.E.2d 278 (citation omitted). Although corporations like plaintiff can assert criminal usury as a defense, they cannot bring civil claims under the criminal statute. "The statutory exception for interest exceeding 25 percent per annum is strictly an affirmative defense to an action seeking repayment of a loan." Intima-Eighteen, Inc. v. A.H. Schreiber Co., 172 A.D.2d 456, 568 N.Y.S.2d 802, 804 (1st Dep't 1991) (citations omitted). In a New York State Supreme Court case seeking a declaratory judgment that securities offerings were void as usurious loans, the court granted defendants' motion to dismiss stating, "[I]nsofar as the complaint seeks affirmative monetary relief, plaintiff improperly attempts to use a shield created by the Legislative as a sword." Zoo Holdings, LLC v. Clinton, 11 Misc.3d 1051(A), 814 N.Y.S.2d 893, 893 (Sup.Ct.2006). In another New York Supreme Court Case, the court determined that the defendant corporation's counterclaim for usury was barred under New York law and that "the affirmative defense may only be asserted as an offset to plaintiffs' claims only to the extent that it is alleged that plaintiffs have engaged in criminal usury." Donenfeld v. Brilliant Techs. Corp., No. 600664/07, 20 Misc.3d 1139(A), 2008 WL 4065889, at *1 (N.Y.Sup.Ct. July 14, 2008)" (id).

Therefore, contrary to the arguments of plaintiffs that prohibiting affirmative causes of action of usury is against public policy, there are no recent cases that support that contention. The plaintiff's review of vintage and outdated cases do not demand a contrary result. Consequently, the motion seeking reargument to assert a usury cause of action is denied.

Next, the plaintiff's seek to reargue the denial of a claim to vacate the confession of judgement pursuant to CPLR §5015. It is well settled that CPLR §5015 does not provide a separate cause of action but rather operates to permit a motion seeking to vacate a default (see, NRO Boston LLC v. Capcall LLC, 2020 WL 9810015 [Supreme Court Westchester County 2020]). Indeed, actions to vacate confessions of judgement must be commenced pursuant to CPLR §3218. Thus, including the incorrect statute within the amended complaint is a mere mistake which is not fatal. This is especially true where adequate notice concerning the nature of the claim is provided to the defendants in any event. Moreover, considering that erroneous inclusion of CPLR §5015 it cannot be said at this juncture the complaint has been filed at an unreasonable time after the enforcement of the confession of judgement.

However, the plaintiff's grounds seeking to vacate the confession of judgement are that it was based upon a false affidavit (see, ¶184 of the Proposed Second Amended Complaint, [NYSCEF Doc. No. 24]). Specifically, paragraphs 121-128 describe false statements made by a representative of the defendant in an affidavit supporting the filing of the confession of judgement. The allegations essentially assert that the affidavit "is not true" (Paragraph ¶126) and certain statements "are false" (Paragraph ¶128). These allegations, if true, are not fraud in

the conventional sense because those statements did not induce any reliance on the part of the plaintiffs. Rather, the allegations merely assert the defendants failed to abide the terms of the contract. Thus, these allegations are a repeat of the breach of contract cause of action. There is nothing specifically unique about these allegations that are not already covered by the breach of contract claim. To the extent the plaintiffs seek to vacate the confessions of judgement, surely if they prevail upon a breach of contract claim then necessarily the confessions of judgement will be vacated. Consequently, the motion seeking to reargue the inclusion of the second count is denied.

Next, the plaintiffs move seeking to reargue the denial of the inclusion of any fraud claim. The court based its conclusion on the fact the fraud claim alleged perjury and there is no civil cause of action based upon perjury. The plaintiff's have not raised any argument demanding a review of that determination. Therefore, the motion seeking to reargue the denial of this cause of action is denied.

Next, the plaintiff's reargue the denial of the sixth cause of action seeking unjust enrichment and quantum meruit. The plaintiff's do not present any argument why the court erred in its earlier determination, rather, just assert that it is unfair defendant's counsel received such a large fee. That fee was

contractually negotiated between the parties and the plaintiff's have not presented any evidence why the court should revisit its prior determination.

Therefore, all the motions seeking reargument are denied.

The defendant has moved seeking to reargue that the individual defendants do not maintain any standing to pursue this action. There can be no doubt the plaintiffs executed confessions of judgement and may have personal claims. The court need not reach that issue since in any event the plaintiff's claims have been assigned by function of their bankruptcy declaration in Canada and they now have no right to pursue any claims in this regard. The plaintiffs assert the bankruptcy trustee will not be taking a position regarding lawsuits in the United States (see, Email dated November 16, 2001 [NYSCEF Doc. No. 100]). First, the email further explains that any other creditors may pursue such interests in this lawsuit. More importantly, whether or not the Canadian Bankruptcy trustee seeks to take any position in this action has no bearing on whether the individual plaintiffs maintain any standing. By virtue of the bankruptcy they have no further standing. Therefore, the motion seeking reargument in this regard is granted and upon reargument the motion seeking to dismiss the individual claims of the plaintiff's is granted.

Any further motion seeking to dismiss any other portion

of the second amended complaint is denied. The motion seeking to dismiss the third amended complaint is granted. Should the plaintiff seek to file any further complaints, court approval is first required.

So ordered.

ENTER:

DATED: December 7, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC