Union CT Telecom, L.L.C. v Vision Phonecard Disttrib. Inc.
2014 NY Slip Op 33399(U)
December 23, 2014
Supreme Court, Bronx County
Docket Number: 250398/2009
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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UNION CT TELECOM, L.L.C. and UNION TELECARD ALLIANCE, LLC,

DECISION AND ORDER

Plaintiffs,

Index No. 250398/2009

- against -

VISION PHONECARD DISTRIBUTORS INC.,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon plaintiffs' notice of motion dated November 14, 2014 and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof; defendant's affirmation in opposition dated December 8, 2014 and the affidavit, exhibits and memorandum of law submitted therewith; plaintiffs' affirmation in reply dated December 12, 2014 and the exhibits and memorandum of law submitted therewith; and due deliberation; the court finds:

Plaintiffs move to renew and reargue the decision and order of the undersigned dated October 7, 2014 denying their motion for partial summary judgment on the issue of defendant's liability. Plaintiffs sought relief on the basis of defendant's written acknowledgment of debt in the amount of $507,766.00.

Assuming plaintiffs had established *prima facie* entitlement to summary judgment, defendant countered first with the assertion that it admitted to a balance which it did not owe because its business substantially relied on its relationship with plaintiff(s). However, "[s]uch self-imposed, undisclosed, and subjective fears do not constitute an act of duress . . . cognizable in law." *Joseph F. Egan, Inc. v. New York*, 17 N.Y.2d 90, 98, 215 N.E.2d 490, 494, 268 N.Y.S.2d 301, 305 (1966). Furthermore, the court is not aware of defendant having raised the issue of duress

until its response to the summary judgment motion, and a claim of economic duress will be deemed waived "in light of the inordinate length of time which passed between the alleged duress and the assertion of the claim." *Fruchthandler v. Green*, 233 A.D.2d 214, 215, 649 N.Y.S.2d 694, 696 (1st Dep't 1996).

Defendant next argued that subsequent invoices received from Union Telecard Alliance LLC, dated September to December 2011, bore negative or nominal balances, thus showing that it did not owe the amount claimed or any amount. The court found these invoices sufficient to demonstrate an issue of fact.

Plaintiffs argued in reply that the motivation for a hearsay email from Joe Farber (CFO of Union Telecard Alliance, LLC) to Natalia Osorno (Accounts Receivable Manager for Union Telecard Alliance, LLC) stating "Please write off $569,713.75 for Vision" was explained by further hearsay from the attorney regarding the feasibility of collecting on any judgment against defendant. Farber's motivation, however, remains a question of fact, and the court would be merely speculating to attribute a motive to his actions. Whether Farber's email represents forgiveness of the debt or merely an internal accounting maneuver is purportedly explained by resort to yet another hearsay email between Osorno and others stating, "I need to write off some amounts and once I do that the invoice will show a different pending balance" for all customers of "Union Telecom." The court found that plaintiffs' reply, served on the return date, was untimely served and that, in any event, these emails were hearsay and insufficient on a motion for summary judgment.

Plaintiffs move for reargument on the grounds that their reply was timely served and that counsel's affirmation was "appropriate evidence." "A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Even according to the terms of the parties' September 15, 2014

stipulation, plaintiffs' reply was not timely served, as the stipulation merely extended the time to *file* the reply. In any event, the court stated that its decision would be the same even considering the reply.

As to plaintiffs' second argument, it is true that "[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may . . . serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form.'" *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563, 404 N.E.2d 718, 721, 427 N.Y.S.2d 595, 598 (1980); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 n 4, 980 N.Y.S.2d 21, 26 (1st Dep't 2014). Where this is the manner of submission of documents on a summary judgment motion, the documents themselves must be in admissible form. *See Sela v. Hammerson Fifth Ave., Inc.*, 277 A.D.2d 7, 716 N.Y.S.2d 564 (1st Dep't 2000). "An attorney's affidavit is of no probative value on a summary judgment motion unless accompanied by documentary evidence *which constitutes admissible proof*." *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 239, 656 N.Y.S.2d 753, 757 (1st Dep't 1997) (emphasis added). Contrary to plaintiffs' argument, "a document lacking evidentiary foundation does not become admissible by mere attachment to an attorney's affirmation." *Basis Yield Alpha Fund (Master)*, *supra*, 115 A.D.3d 128, 142, 980 N.Y.S.2d 21, 32 (DeGrasse, J., concurring). Accordingly, an attorney affirmation relying on hearsay documentary evidence is simply not sufficient on a motion for summary judgment. *See Batista v. Santiago*, 25 A.D.3d 326, 807 N.Y.S.2d 340 (1st Dep't 2006); *Perez v. Brux Cab Corp.*, 251 A.D.2d 157, 674 N.Y.S.2d 343 (1st Dep't 1998). Reargument is therefore denied.

This misguided argument also forms the basis of plaintiffs' excuse on the motion for leave to renew for not submitting appropriate evidence in reply to the summary judgment motion. "A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that

would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (3). Even where the newly submitted evidence was available at the time of the original motion, the court has discretion to "relax this requirement . . . in the interest of justice." *Atiencia v. MBBCO II, LLC*, 75 A.D.3d 424, 904 N.Y.S.2d 59 (1st Dep't 2010). However, "[w]hile the statutory prescription to present new evidence 'need not be applied to defeat substantive fairness,' such treatment is available only in a 'rare case,' such as where liberality is warranted as a matter of judicial policy, and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance." *Henry v. Peguero*, 72 A.D.3d 600, 602, 900 N.Y.S.2d 49, 51 (1st Dep't 2010) (citations omitted). Plaintiffs' failure on the summary judgment motion was not merely "inadvertent" or "procedural error." *Cf. Ramos v. Dekhtyar*, 301 A.D.2d 428, 753 N.Y.S.2d 489 (1st Dep't 2003). As all of the information submitted on the motion to reargue was readily available to plaintiffs at the time of the motion and plaintiffs submitted no viable reason for failing to submit it, renewal is denied. *See Genger v. Genger*, 2014 NY Slip Op 8481 (1st Dep't Dec. 4, 2014); *Lax v. Design Quest, NY Ltd.*, 118 A.D.3d 490, 987 N.Y.S.2d 134 (1st Dep't 2014).

Accordingly, it is

ORDERED, that plaintiffs' motion for leave to reargue the decision and order of the undersigned dated October 7, 2014 is denied; and it is further

ORDERED, that plaintiffs' motion for leave to renew the decision and order of the undersigned dated October 7, 2014 is denied.

This constitutes the decision and order of the court.

Dated: December 23, 2014

Lucindo Suarez, J.S.C.