Merchant Cash & Capital, LLC v Randa's Bakery, Inc.

2016 NY Slip Op 31732(U)

September 20, 2016

Supreme Court, Nassau County

Docket Number: 603446-16

Judge: Jerome C. Murphy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

MERCHANT CASH & CAPITAL, LLC,

Plaintiff,

-against-

RANDA'S BAKERY, INC. and AHMAD ABDULLA,

Defendants.

TRIAL/IAS PART 19
Index No.: 603446-16
Motion Date: 7/18/16
Sequence No.: 001

DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation, Affidavit of Robert Knox and Exhibits..................1
Affidavit in Opposition...2

PRELIMINARY STATEMENT

Plaintiff brings this application for an order pursuant to CPLR § 3215, granting plaintiff's motion on default and entering judgment on sum certain damages against the defendant, and for such other and further relief as the Court deems just and proper. Defendants have submitted opposition to this application.

BACKGROUND

On July 15, 2015 Randa's Bakery, Inc. ("Randa's") entered into an agreement with Merchant Cash and Capital, Inc ("MCC") to sell $98,670 of its business sales receivables/revenue in return for an up front payment by Merchant of $71,500 (Exh. "A"). MCC provided $71,500 to Randa, and Randa tendered $37,144.20 toward the agreed upon purchase price of $98,670, leaving an unpaid balance of

$61,525.80. Defendant Ahmad Abdullah ("Abdullah") personally guaranteed the Agreement.

Plaintiff commenced this action by filing a Summons and Complaint on May 16, 2016. They made service upon Abdulla by service upon his wife, Diana, at 1356 St. Louis Avenue, Bayshore, New York on May 17, 2016, and upon Randa's by service upon the Secretary of State on May 18, 2016. Additional service by mail was made to Abdulla and Randa's on May 23, 2016.

The Complaint alleges that Randa has been in default under the terms of the Agreement since January 7, 2016. The Complaint alleges Four Causes of Action: breach of contract against Randa's; failure of Randa's to pay the Balance due MCC pursuant to the Agreement; against Abdulla as personal guarantor of the Agreement; and against both defendants for costs associated with the enforcement of the Agreement, including court costs, disbursements, and attorney's fees, as provided for in § 5.7 of the Agreement.

Plaintiff submits an Affidavit of Robert Knox, Vice President of Collections for MCC. He asserts that MCC complied with its obligations under the Agreement, and that, beginning on or about January 7, 2016, Randa began diverting funds from the business bank account, thereby interfering with payments to MCC. Since the date of the breach, defendants have comingled the purchased receivables with Randa's operating funds, and have continued to withhold $61,528.80 of the receivables which were purchased by MCC.

Defendants oppose the motion for default judgment and submit a proposed Verified Answer, in which they include Affirmative Defenses of Usury and that the Agreement does not contain the name, title or date the Agreement was signed. Abdulla submits an Affidavit, in which he asserts that the yield on the loan is in excess of 25%, and is usurious under New York law. He also contends that the Agreement (Exh. "A") is incomplete, as it does not identify the name of the seller, the title of the person signing on its behalf, or the date. As such, it is claimed to be unenforceable.

DISCUSSION

The decision whether to grant a default judgment is left to sound judicial discretion (*Shah v. New York State Dep't. Of Civil Service,* 168 F.3d 610, 615 [2d Cir.1999]; *Briarpatch Ltd. V. Geisler Roberdeau, Inc.*, 513 F.Supp.2d 1, 3 [S.D.N.Y. 2007]). In considering whether a default

judgment is appropriate, the Court must first consider whether service of process has been properly effectuated upon the defaulting defendant; and second, whether the unchallenged facts alleged in the complaint state a legitimate cause of action (*Kee v. Hasty,* 2004 WL 807071 at 4 [S.D.N.Y] *citing*, 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2688 [3d ed. 1998]).

The plaintiff must establish by affidavit of an individual with personal knowledge, or similarly verified complaint, facts sufficient to establish the claims alleged (*Dyno v. Rose,* 260 A.D.2d 694 [3d Dept. 1999]). Where the verified complaint is conclusory, and devoid of factual allegations, constituting the claim alleged, a motion for default judgment shall be denied (*Celnick v. Freitag,* 242 A.D.2d 436 [1st Dept. 1997]; *Luna v. Luna,* 263 A.D.2d 470 [2d Dept. 1999]).

The next consideration which the Court must consider is the appropriate level of damages to be awarded plaintiff. By defaulting, a defendant admits to all well-pleaded allegations, except those pertaining to damages (*Greyhound Exhibitgroup, Inc. V. E.L.U.L Realty Corp.,* 973 F.2d 155, 158 [2d Cir.1992]; *Traffic Sports USA, Inc. v. Segura,* 2008 WL 4890164 [E.D.N.Y.]). "(W)here the plaintiff has filed reasonably detailed affidavits and a memorandum of law pertaining to the damages requested . . . and the defendant has failed to make an appearance in the case, the Court can make an informed recommendation regarding damages without an evidentiary hearing." *Id.* at 5.

Plaintiff has made a prima facie showing of a legitimate cause of action, service upon defendants, and provided an affidavit by an individual with personal knowledge of the facts of the action, and have itemized the basis of their claim for the unpaid balance.

Defendants have not appeared, answered or moved for an extension of time within which to appear. In order to be relieved of this default, plaintiff is obligated to provide a justifiable excuse for failure to timely appear, as well as the existence of a meritorious defense (*Blazo v. Wyckoff Hgts. Med. Ctr.,* 125 A.D.3d 705 [2d Dept. 2015]). Whether an excuse is reasonable is left to the sound discretion of the Court (*Apledenaki v. Greenpoint Mtge. Funding, Inc.,* 117 A.D.3d 975, 976 [2d Dept. 2014]).

Defendants do not deny having been served on May 17, and May 18, 2016, nor do they deny

receipt of the subsequent mailing of the Summons and Complaint to them on May 23, 2016. Plaintiff has established a presumption of receipt by the affidavit of mailing them to both defendants (*Residential Holding Corp. v. Scottsdale Ins. Co.*, 266 A.D.2d 679 [2d Dept. 2001]).

They claim that although the action is subject to Mandatory Electronic Filing, there is no evidence that either defendant was served by electronic filing, and, further, the allegation that defendants were served on May 17 and May 18, 2016 did not give them a reasonable opportunity to interpose their Verified Answer. While an action is commenced by the filing of a Summons and Complaint, whether or not electronically, does not alter the provisions of the CPLR with respect to service of process. Plaintiff has submitted affidavits of service, and defendants have not controverted such service. The time within which to appear, answer, or move for additional time within which to appear is governed by CPLR §320 (a), and defendants have failed to comply.

Defendants have failed to establish a justifiable excuse for failure to appear in the action. In addition, their assertions of a meritorious defense is unsubstantiated. They contend that the Agreement is usurious, and that the Agreement is unenforceable since it is allegedly missing the name of the Seller, the title of the person signing on behalf of the corporation, and a date.

Defendants' contention that the Agreements violate General Obligation Law § 5-501[1] and Banking Law § 14-a[1], and are civilly or 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 sole $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 future 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 assertion that the Agreement is unenforceable for lack of the name of the Seller, the title of the person who signed on behalf of the corporation, and is undated is insufficient. Despite these assertions, a review of Exh. "1" reflects a date of July 15, 2015, the identity of the Seller as "Randa's Bakery, Inc." The document provides that "[t]he person executing this Agreement on behalf of the Seller warrants and represents that he/she is authorized to bind the Seller to all of the terms and conditions set forth on this page and on the attached 'Additional Terms of Agreement' . . ." In the Verified Answer submitted with the Affidavit in Opposition, defendants do not deny the allegation of ¶ 4 of the Complaint, which alleges that "[d]efendant Personal Guarantor is the owner and operator of the Business Defendant."

The motion by plaintiff for default judgment against defendants is granted. Plaintiff Merchant Cash and Capital, LLC is entitled to the entry of judgment in their favor against Randa's Bakery, Inc. and Ahmad Abdulla in the amount of $61,525.80, together with interest at the rate of 9% from January 7, 2016, and costs and disbursements as taxed by the Clerk. Plaintiff has waived its claim for entitlement to legal fees.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
August 26, 2016

ENTER:

ENTERED

SEP 20 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.