SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

WILKINSON FLOOR COVERING, INC., STEPHEN WILKINSON,

Plaintiffs,

- against -

CAP CALL, LLC, TVT CAPITAL, LLC, YELLOWSTONE CAPITAL, LLC, ACE FUNDING SOURCE, LLC,

Defendants.

Index No.: 160256/2016
Motion Sequence No.: 001, 002, 003

DECISION/ORDER

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In this action, plaintiffs seek to vacate four confessions of judgment entered against them. In addition, they seek a declaration from this Court that the confessions of judgment are illegal and usurious contracts. In motion sequence 001, defendants Cap Call, LLC and TVT Capital, LLC, move to dismiss the action as against them. In motion sequence 002, defendant Yellowstone Capital, LLC moves to dismiss the complaint as against it. In motion sequence 003, Ace Funding Source, LLC moves to dismiss the complaint as against it. Plaintiffs oppose all three motions. Motion sequences 001, 002, and 003 are consolidated for disposition and granted for the reasons below.[1]

According to the complaint, plaintiffs entered into usurious loan agreements with the various defendants. Plaintiffs assert that the interest rates exceeded 25%, the maximum allowable

[1] The parties filed separate legal memoranda along with their motions, and plaintiffs filed their opposition in each motion. As the applicable legal arguments are the same, the Court discusses them and refers to movants' positions jointly.

in New York, and that defendants "masked" the usury by framing the agreements as Merchant Cash Advance Agreements, or purchases of future receipts of the business, and requiring fixed daily payments. Plaintiffs claim that these daily payments exceeded the amount they borrowed, and the amount added was a usurious interest. Along with each loan, plaintiffs signed a confession of judgment, which all parties filed upon plaintiffs' refusal to pay. Plaintiffs allege the confessions of judgment should be vacated.

Cap Call and TVT move jointly for relief. The October 10, 2016 agreement between Cap Cal and plaintiffs provided that Cap Call would pay plaintiffs $100,000 for $145,900 of plaintiffs' future receivables. Around October 3, 2016, TVT purchased $85,200 of plaintiffs' future receivables for $60,000. According to Cap Call and TVT, plaintiffs promptly breached the agreements, refusing to make the required payments. Therefore, Cap Call and TVT attempted to exercise their rights under the confessions of judgment. They contend that plaintiffs incorrectly characterize these as loan agreements because on their face and in their substance they are contracts for the purchase and sale of future receivables. Under the agreements, plaintiffs had the option of 1) allowing Cap Call and TVT to deduct the amounts plaintiffs owed them pursuant to a specified method, or 2) requiring plaintiffs to remit 15% of its daily receipts -- $1,999 for Cap Call, and $,1,199.20 for TVT. Because these amounts might not reflect 15% of the receipts, the agreement further provided for a monthly reconciliation. The agreement further provided that plaintiffs' payments depended on the generation by plaintiffs of sales proceeds and explicitly stated that the agreement was not a loan.

Motion sequence number 002 relates to plaintiffs' agreement with Yellowstone. Around September 14, 2016, plaintiffs entered into a secured merchant agreement with defendant Yellowstone. Under this agreement, Yellowstone paid plaintiff $375,000 in exchange for $517,500

of plaintiffs' future accounts receivable. The agreement contained similar provisions regarding the payment of these receivables – that is, plaintiffs were to pay Yellowstone 15% of its daily receipts, setting forth a daily payment of $4,313 per business day, and providing for reconciliations. Rather than making payments of the receivables, plaintiffs commenced this action less than three months later. The third motion relates to ACE Funding Source's (AFS) October 10, 2016, agreement with plaintiffs. Under this agreement, AFS paid plaintiffs $150,000 for $217,350 in future receivables.

After careful consideration, the Court grants all three motions to dismiss. While this case was being argued, the First Department was considering the appeal of a nearly identical action, in which plaintiffs moved to vacate confessions of judgment to enforce a contract to enforce a merchant agreement to purchase future receivables. The trial court dismissed the action. Recently, the First Department issued its decision and affirmed the trial court's determination. In that case, the First Department found that "the evidence demonstrates that the underlying agreement leading to the judgment by confession was not a usurious transaction" (*Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507, 507 [1st Dept 2018] [Champion]). This determination is consistent with trial court decisions in other judicial departments.

Champion set forth this general principle without extensive discussion of the facts. None of the facts and arguments plaintiffs make here mandate a contrary determination in this action because, as movants unanimously contend, Penal Law § 190.40, for criminal usury, does not state a cause of action for civil liability (*Scantek Med., Inc v Sabella*, 582 F Supp 2d 472, 474 [SDNY 2008]). Instead, in a civil action, criminal usury only can be asserted as an affirmative defense to an action to recover money due under a loan. In addition, both a corporation and its guarantor are precluded from asserting usury (*Scneider v Phelps*, 41 NY2d 238, 242 [1977]; *see Seidel v 18 East 17th St. Owners, Inc.*, 79 NY2d 735, 740 [1992]; *Intima-Eighteen, Inc. v A.H. Schreiber Co.*, 172

AD2d 456, 457 [1st Dept] [citing General Obligations Law § 5-521 (1)], *lv denied*, 78 NY2d 856 [1991]).

Even if such a complaint were possible, plaintiffs have not established usury. "The rudimentary element of usury is the existence of a loan or forbearance of money and where there is no loan, there can be no usury" (*NY Capital Asset Corp. v F & B Fuel Oil Co., Inc.*, Sup Ct Westchester County, Ecker, J. [2018 NY Slip Op 50310 (U)], at * 14). Moreover, in New York there is a predisposition in this State against declaring that contracts are usurious (*id.*; *see Transmedia Restaurant Co., Inc. v 33 E. 61st Street Restaurant Corp.*, 184 Misc 2d 706, 710 [Sup Ct NY County 2000]). This is especially true with respect to commercial agreements, where "usurious agreement[s] will not be presumed from facts equally consistent with a lawful purpose" (*Schaff v Borsher*, 82 AD2d 880, 880 [2nd Dept 1981]). Additionally, because plaintiffs' obligation to pay them future receivables is conditioned on plaintiffs' receipt of such, the agreements at issue are not loans (citing *Professional Merchants Advance Capital, LLC v Your Trading Room, LLC*, 2012 WL 12284924, at *5 (Sup. Ct. Suffolk County Nov. 28, 2012), *aff'd*, 123 AD3d 1101 [2nd Dept 2014]).

Movants also point to CPLR § 3218, which sets forth the requirements for a judgment by confession. As they argue, the documents in dispute contain all the information that CPLR § 3218 (a) requires. Thus, plaintiffs have not presented a viable challenge to the judgment by confession.

Based on the above, and on the documents and materials submitted, this Court concludes that plaintiffs have failed to state a valid claim – and that, moreover, they have failed to satisfy their high burden of showing that the binding agreements at issue were usurious or otherwise unenforceable. The Court need not reach the argument that if it denies dismissal, it should stay this action and compel arbitration. Accordingly, it is

ORDERED that motion sequences 001, 002, and 003 are granted; and it is further

ORDERED that this action is dismissed in its entirety with prejudice.

Dated:
May 16, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.