Wright Way Co., Inc v EIN Cap, Inc.
2021 NY Slip Op 30007(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 652346/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH**   PART   **IAS MOTION 14**

Justice

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THE WRIGHT WAY COMPANY, INC, dba THE WRIGHT   **INDEX NO.**   652346/2020
CENTER, DEON J. WRIGHT
                                                   MOTION DATE   10/23/2020
                          Plaintiff,
                                                   MOTION SEQ. NO.   001 002
                    - v -

EIN CAP, INC.,   **DECISION + ORDER ON**
                                                        MOTION
                          Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 26

were read on this motion to/for   STAY   .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for   DISMISSAL   .

Motion sequence numbers 001 and 002 are consolidated for disposition. The motion (MS001) by plaintiffs for various relief including vacating a judgment entered against plaintiffs in Albany County and vacating a "coercive" settlement agreement is denied. The motion (MS002) by defendant to dismiss this complaint is granted.

Background

This case concerns a judgment entered in Albany County in favor of defendant and against plaintiffs. Plaintiffs contend that they provide disaster relief around the country. In 2019, plaintiffs sought financing while waiting for federal funding for disaster relief related to wildfires in California. They maintain that defendant induced plaintiffs to enter into a usurious

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loan pursuant to a merchant's cash advance agreement. Plaintiffs argue that defendants filed a confession of judgment against them in April 2019 without permission.

Defendant offers a different account in its motion.[1] It claims that plaintiffs voluntarily entered into an agreement to receive immediate cash funding but now do not want to pay the money back. Defendant acknowledges that plaintiffs initially performed under the merchant's agreement but eventually blocked payments (the agreement authorized defendant to debit money from plaintiffs' bank account).

Defendant commenced a case in Albany County and another one in Alabama. The parties then entered into a settlement agreement dated March 23, 2020, but defendant contends that plaintiffs breached this agreement by not making a payment in May 2020. Defendant argues that plaintiffs waived any right to challenge the validity of the judgment and that the Disclosure for Confession of Judgment contains express language about plaintiffs' waiver. It insists that the Court should disregard plaintiffs' claims of duress. Defendant argues that if the Court does not dismiss the case, it should transfer this action to Albany County—where the confession of judgment was filed and where another action was filed.

In reply, plaintiffs claim that defendant failed to attach a copy of the complaint to the motion papers and contend that defendant failed to attach an affidavit of someone with personal knowledge. Plaintiffs point out that defendant's opposition does not address that a reconciliation (an action typically used in Merchant Cash Advance Agreements such as the one here) is forbidden under a rider to the agreement. Plaintiffs also take issue with the over $100,000 in legal fees added to the judgment.

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[1] The Court will consider defendant's moving papers under MS002 as opposition to MS001. Although defendant should have filed a cross-motion, the memo of law (NYSCEF Doc. No. 34) specifically states it is being offered both in support of defendant's motion and in opposition to plaintiffs' order to show cause.

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Discussion

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

As an initial matter, the Court can consider the complaint and all other documents filed in this case because it is an e-filed action. The fact that defendant did not directly attach the complaint to its motion to dismiss is of no moment because the Court has ready access to it.

The Court's analysis begins with the release and settlement agreement entered into between plaintiffs and defendant (NYSCEF Doc. No. 7). This agreement stated that the balance of the judgment was $486,301.40 and that Wright Way and Mr. Wright would pay only $445,000 at $25,000 per month for seventeen consecutive months (*id*.). It also provided that "In consideration stated above, [Ein Cap] shall release any pending garnishments and Plaintiff shall not issue execution on this Judgment provided the [Wright Way and Mr. Wright] honor the payment schedule set forth in paragraph 2; if [Wright Way and Mr. Wright] default from the payment schedule, [Ein Cap] shall be free to issue execution on this Judgment" (*id*. ¶ 3).

"It is further agreed that [Ein Cap] shall release the Judgment upon the timely payment and clearance of $445,000, as stated above. In the event [Wright Way and Mr. Wright] fails [sic] to render monthly payments of $25,000.00 on or before the 15th of each month, as outlined in paragraph 2 above, this agreement shall be rendered null and void, and [Ein Cap's] release of its claim herein shall be voided; moreover, in such event, any partial payment paid herein by

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[Wright Way and Mr. Wright] to [Ein Cap] shall remain the sole possession of [Ein Cap]" (*id*. ¶ 4). Plaintiffs also signed an affidavit of confession of judgment in which they "authorized entry of judgment against them as the Judgment Debtors/Defendants" (NYSCEF Doc. No. 6).

These documents compel the Court to dismiss the case. Plaintiffs and defendant agreed to settle two cases (one in Albany County and another in Alabama). Plaintiffs would get a discount on the total amount owed so long as they made monthly payments. Defendants held off on entering judgment unless and until plaintiffs defaulted, and if there was a default, then lost the discount and defendant could enter judgment on the amount then due. That is exactly what happened here: plaintiffs stopped paying and now they want to litigate the underlying merits of the merchant's agreement. That is not a basis to ignore a valid settlement agreement.

The time to challenge the provisions of the underlying merchant's agreement was prior to entering into a settlement agreement or signing a confession of judgment, not after defaulting on the settlement agreement. The Court cannot simply ignore the fact that plaintiffs agreed, on two separate occasions, that it owed money to defendant.

It may be that plaintiffs had legitimate arguments about why the underlying merchant's agreement with defendant was improper and should be voided (*see* NYSCEF Doc. No. 26 [plaintiff Wright's affidavit]), but the Court is unable to reach the merits of those arguments because plaintiffs do not dispute that they signed a settlement agreement that permitted defendant to enter a judgment if they defaulted on the settlement agreement. Nor do plaintiffs deny that they made initial payments under the settlement agreement and then stopped paying.

For some reason, the only mention of the settlement agreement in the complaint is an allegation that "Plaintiffs were forced to enter into an extortionate settlement agreement with Defendants [sic] so that they could keep their employees and maintain their business until such

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time as they could work again" (NYSCEF Doc. No. 4, ¶ 16). Plaintiff Wright's affidavit completely omits any mention of the settlement agreement.

A bare unsubstantiated claim that the settlement agreement was "extortionate" is not a basis to throw it out. It may be inconvenient that plaintiffs entered into the agreement, but that does not mean they can completely avoid it. Plaintiffs had a choice: they could raise the arguments they now assert about why the underlying receivables agreement with defendant was improper or they could settle the case. Plaintiffs chose to settle the case and only made two payments before defaulting on the settlement agreement. They cannot relitigate the Albany case because they defaulted on a settlement agreement.

Accordingly, it is hereby

ORDERED that the motion (MS001) by plaintiffs *inter alia* to vacate a judgment entered in Albany County is denied; and it is further

ORDERED that the motion (MS002) by defendant to dismiss the complaint is granted, and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

01/04/2021		
DATE		**ARLENE P. BLUTH, J.S.C.**

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

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