IRM Ventures Capital LLC v East Wind Consulting LLC
2023 NY Slip Op 32864(U)
August 11, 2023
Supreme Court, Kings County
Docket Number: Index No. 510067/2021
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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IRM VENTURES CAPITAL LLC,

Plaintiff,

-against-

EAST WIND CONSULTING LLC d/b/a EAST WIND CONSULTING LLC, and MELISSA C. WOLCOTT WIND,

Defendants.
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Index No.: 510067/2021
Motion Date:
Mot. Seq. No.: 1

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 3-19, the motion is decided as follows:

In this action alleging breach of a contract for the sale of future receivables, the defendants move for an order dismissing this action, pursuant to CPLR 3211(a) and CPLR §327 on the grounds that this Court does not have jurisdiction over the action or the defendant. In the alternative, the defendants seek an order pursuant to CPLR §2004, extending their time to answer the complaint in this action in the interests of justice and so that this action may be heard on the merits and granting such other and further relief as the Court deems proper.

There is no merit to defendants' claim that the Court lacks personal jurisdiction over them. A defendant can agree by contract to submit to jurisdiction in a given forum (*see Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1038 [2d Dept 2017]). "... [S]uch a forum selection clause, when it is part of the contract that forms the basis of the action, will be enforced, obviating the need for a separate analysis of the propriety of exercising personal jurisdiction" (*see id.*). A guarantor of a contract is also deemed to have consented to personal jurisdiction in New York when he or she signs a guaranty that incorporates the terms of the contract, including the forum selection clause (*see Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 123 AD3d 1101, 1102 [2d Dept 2014]). Here, the contract between the parties contains a forum selection clause in which the defendants agreed to subject themselves to the jurisdiction of the courts of the state of New York. Defendants' contention that this Court lacks jurisdiction over them is therefore without merit.

To the extent that the plaintiff is seeking an order setting aside the forum selection clause, the motion is denied. In order for the Court to set aside a forum selection clause, a party must demonstrate either that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the forum set in the contract would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court (*see D.O.T. Tiedown & Lifting Equip., Inc.* at 291(emphasis added); see *Hirschman v National Textbook Co., 184* AD2d 494, supra). Defendants made no such showing.

Defendants' reliance on CPLR 327 and General Obligations Law § 5-1402 is misplaced. CPLR 327 articulates the common-law doctrine of forum non conveniens (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 [1984]) and permits a court, in its discretion, to impose any conditions that may be just when dismissing an action on the ground that in the interest of substantial justice, the action should be heard in another forum (*see* CPLR 327; *Lischinskaya v Carnival Corp.*, 56 AD3d 116, 123 [2d Dept 2008]). "On a motion to dismiss the complaint on the ground of forum non conveniens, the defendant bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation" (*see Mason-Mahon v Flint*, 166 AD3d 754, 759 [2d Dept 2018]). In making its determination, the court must weigh, among other factors, "the parties' residences, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system (*see Mason-Mahon*, 166 AD3d at 759). In this case, however, these considerations are irrelevant and dismissal is not discretionary since a valid and enforceable forum selection clause exists between parties (*see Lischinskaya*, 56 AD3d at 123; *Bizfund LLC v. Holland & Sliger Steel, LLC*, 71 Misc. 3d 1226(A), 146 N.Y.S.3d 465 (N.Y. Sup. Ct. 2021)

With respect to General Obligations Law § 5-1402, the statute is not a limitation on the use and effectiveness of forum selection clauses and simply provides that a clause designating New York as the forum "shall" be enforceable, in cases involving $1 million or more, regardless of any inconvenience to the parties (*National Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228). Since the contract contains an enforceable form selection clause, General Obligations Law § 5-1402 has no bearing on this matter.

With respect to defendants' contention that the subject matter of the contract between the parties involves a usurious loan agreement, "[u]sury is an affirmative defense, and a heavy burden rests upon the party seeking to impeach a transaction based upon usury" (*Hochman v Larea,* 14 A.D.3d 653, 654, 789 N.Y.S.2d 300 (2d Dept. 2005). "Thus, usury must be proved by clear and convincing evidence as to all its elements and usury will not be presumed" (*id*.). "The rudimentary element of usuary is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be." *LG Funding, LLC v United Senior Props. of Olathe, LLC,* 122 NYS 3d 309 [2d Dept. 2020] citing *Seidel v 19 E. 17th St. Owners*, 79 NY 2d 745 [1992]*; Abirv Malky, Inc.* 59 AD3d 646, 649 [2009]. In determining whether a loan exists, "[t]he court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances." Unless a principal sum advanced is repayable absolutely, the transaction is not a loan." Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare future bankruptcy" (*see LG Funding v United Senior Props. of Olathe, LLC*, supra at page 4).

After reviewing the subject Agreement, the Court finds that the Agreement is not a usurious loan, as there is a reconciliation provision in the Agreement, there was no fixed period for repayment provided in the Agreement, and no remedy existed against the merchant in the event of a declaration of bankruptcy (*see Principis Capital, LLC v. I Do, Inc.*, 201 AD 3d 752 [2d Dept. 2022] (holding that plaintiff established that the transaction set forth in the agreement was not a loan as the terms of the agreement specifically provided for adjustments to the monthly payments based on changes in the merchant's monthly sales, the monthly payments could change, the terms of the agreement were not finite and no contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default). The fact that the guarantor's obligations under the agreement would continue if the merchant was declared bankrupt is not a basis to find that the agreement is a loan.

Clearly, the complaint states a cause of action for breach of contract and the defendants have not submitted sufficient documentary evidence demonstrating that there is no merit to the action or demonstrating a defense to the action as a matter of law. That branch of the motion seeking dismissal pursuant to CPLR 3211a)(1) is therefore denied.

Accordingly, is hereby

ORDRED that the motion is **DENIED**, and it is further

ORDERED that the Defendants are directed to interpose an answer to the complaint within 30 days of service of this order.

This constitutes the decision and order of the Court.

Dated: August 11, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020