At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the _____ day of _____ 2024

JUL 24 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION AND ORDER

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ROBIN FUNDING GROUP LLC,

Plaintiff,

-against-

KALO TRANSPORT, LLC and FERNANDO CANTU

Defendants.

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Index No.: 537927/2022
Motion Date: 1/07/2024
Motion Cal. No.: 44
Mot. Seq. 2

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendants' Notice of Motion to Dismiss Complaint, Attorney Affirmation in Support of the Motion to Dismiss affirmed by Mikhail Usher, Esq. on January 30, 2023, Defendants' Memorandum of Law in Support of the Motion to Dismiss	10-12
Plaintiff's Memorandum of Law in Opposition to the Motion to Dismiss, Exhibit A-Revenue Purchase Agreement.....	13-16

Montelione, Richard J., J.

Robin Funding Group, LLC ("plaintiff" or "RFG") commenced this action by filing a summons and complaint on December 27, 2022. Kalo Transport, LLC and Fernando Cantu ("defendants") move by pre-answer motion (Motion Seq. 1) to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a claim and for lack of jurisdiction under CPLR 3211 (a)(8) and General Obligations Law § 5-1402. This court previously denied defendants' motion to dismiss for failure of either party to appear for oral arguments on May 3, 2023. NYSCEF #9. Defendants now move again (Motion Seq. 2) for an order dismissing plaintiff's complaint with prejudice pursuant to CPLR 3211(a)(7) for failure to state a claim, for lack of jurisdiction under CPLR 3211 (a)(8), and under General Obligations Law § 5-1402, but fail to provide the court with any good cause regarding its previous default.

This is an action to recover damages for breach of contract, personal guarantee and there is a claim for an account stated. Plaintiff and defendants entered into a written agreement for the sale of future receivables ("Agreement"), dated July 14, 2022. The agreement provided that defendant Kalo Transport, LLC agreed to sell its future receipts of $30,400.00 ("Receivables") to plaintiff for the sum of $20,000.00 ("Purchase Price") pursuant to a payment schedule set forth in the agreement. Defendant Fernando Cantu guaranteed the agreement. Plaintiff alleges that defendants breached the agreement and personal guaranty on August 26, 2022, by failing to remit the receivables into a separate account designated by the agreement and blocking plaintiff from collecting the amount due.

Moving defendants present a memorandum of law in support of their motion to dismiss. Specifically, defendants contend that the forum selection clause contained in the agreement does not give this court jurisdiction because defendants are organized under the laws of Texas, do business in the state of Texas and the non-corporate defendant is domiciled in Texas.

"When a defendant objects to the court's exercise of personal jurisdiction, the ultimate burden of proof rests upon the plaintiff." *Sutton v. Houllou,* 191 A.D.3d 1031 (2d Dep't 2021) (quoting *Lowy v. Chalkable, LLC*, 186 A.D.3d 590, 591 (2d Dep't 2020)). "In opposing a motion to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists." *Sutton Supra* quoting *Skutnik v. Messina*, 178 A.D.3d 744, 744–745 (2d Dep't 2019). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." *Puleo v. Shore View Center for Rehabilitation and Health Care,* 132 A.D.3d 651, 653 (2d Dep't 2015) (quoting *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assoc., Inc.*, 72 A.D.3d 650, 651 (2d Dep't 2010)). In the instant case, the agreement contains a forum selection clause which states, "[t]his agreement shall be governed by and construed exclusively in accordance with the laws of the State of New York…Any lawsuit, action or proceeding arising out of or in connection with this Agreement shall be instituted exclusively in any court sitting in New York State,…". NYSCEF #16 ¶43.

The moving defendants allege that this court lacks jurisdiction over them, notwithstanding the above referenced forum selection clause. Defendants argue that GOL § 5-1402 does not apply, as the transaction involves less than $1 million. GOL § 5-1402(1) states:

> Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state *where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401* and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, *not less than one million dollars*, and (b) which contains a provision or provisions *whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.* (*Emphasis Added*).

Moving defendants maintain that GOL § 5-1402(1) limits this court from exercising jurisdiction over cases involving foreign corporations with less than $1 million in controversy. However, in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley,* 257 A.D.2d 228, 230 (1st Dep't 1999), the Appellate Division, First Department held that GOL § 5-1402 "is not a limitation on the use and effectiveness of forum selection

clauses. Rather, it contains a statutory mandate 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."

For purposes of determining the motion to dismiss, the court will assume the applicability of the forum selection and choice of New York law clauses. The parties agreed to New York as the forum and the exclusive application of New York law. The court finds that the foregoing facts constitute an exception under GOL § 5-1402(1) as *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley,* 257 A.D.2d 228, 230 (1st Dep't 1999) gives discretion to the court when the amount is less than $1 million dollars and the court further finds the forum is appropriate. *See* CPLR Rule 327; *Bizfund LLC v Holland & Sliger Steel, LLC*, 71 Misc 3d 1226(A), 146 NYS3d 465, 2021 NY Slip Op 50504(U), 2021 WL 2173314 [Sup Ct 2021].

See also Siegel's Practice Review, 101 Siegel's Prac. Rev. 4 (November, 2000), Forum Selection Clause PROVISIONS MANDATING RECOGNITION OF FORUM SELECTION CLAUSE IN $1 MILLION+ CASES DO NOT BAR ITS RECOGNITION IN SMALLER CASES, 101 Siegel's Prac. Rev. 4:

> A 1984 law that amended CPLR 327 and other statutes provides that in a commercial transaction involving "not less than one million dollars" and in which the parties have stipulated in their contract to both a choice of New York law substantively and the jurisdiction of the New York courts exclusively, the doctrine of forum non conveniens is superseded and the New York courts must entertain the case. *See Siegel*, New York Practice 3d Ed. § 28. The idea is to keep such commercial cases in New York and insulate them from what might otherwise be, on the facts of an individual case, a dismissal under the conveniens doctrine.
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> Do these provisions, mandating recognition of a forum selection clause in $1 million+ cases, prevent the court from recognizing the clause in a smaller case? They do not, holds *National Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 690 N.Y.S.2d 57 (1st Dep't 1999), recognizing the clause in a smaller one.

The court is aware that other courts have found that even where there is a written agreement designating New York as the forum, and the application of New York law, that consent to long arm jurisdiction is not recognized and that unless the amount in controversy *is more than one million dollars* the court lacks long arm jurisdiction. *See Mobile Programming LLC v Tallapureddy*, 71 Misc 3d 1219(A), 144 NYS3d 558, 2021 NY Slip Op 50411(U), 2021 WL 1899461 [Sup Ct 2021]. *See also Harper Advance v Chance Reynolds Trucking LLC and Chance Roland Reynolds*, King Cty Index No. 522065/2020 (NYSCEF Doc. 41), *Mobile Programming LLC v Tallapureddy*, 71 Misc 3d 1219(A), 144 NYS3d 558, 2021 NY Slip Op 50411(U), 2021 WL 1899461 [NY Cty Sup Ct 2021]; *Funding Metrics, LLC d/b/a Quick Fix Capital v Letha's Pies, LLC, et al*, [NY Cty Sup Ct. Index No. 655798/2019]. But given the public policy considerations underlying GOL § 5-1402(1) to promote New York as a forum for commercial disputes, and the trend toward enforcing such provisions, especially between business entities, this court will not dismiss this action based on forum inconvenience. *See* CPLR Rule 321. *Cf. Lifetime Brands, Inc. v Garden Ridge,*

L.P., 105 AD3d 1011, 1012, 963 NYS2d 718, 719, 2013 NY Slip Op 02721, 2013 WL 1749383 [2d Dept 2013]:

> "Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract" (*Brooke Group v. JCH Syndicate 488,* 87 N.Y.2d 530, 534, 640 N.Y.S.2d 479, 663 N.E.2d 635). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Creative Mobile Tech., LLC v. Smart Modular Tech., Inc.,* 97 A.D.3d 626, 948 N.Y.S.2d 375 [citation omitted]).

See and Cf. Sterling Nat. Bank as Assignee of NorVergence, Inc. v E. Shipping Worldwide, Inc., 35 AD3d 222, 826 NYS2d 235, 2006 NY Slip Op 09291, 2006 WL 3592323 [1st Dept 2006]; *see Zucker v Waldmann*, 43 Misc 3d 1233(A), 993 NYS2d 647, 2014 NY Slip Op 50914(U), 2014 WL 2649912, at 13 [Kings Cty Sup 2014], "the 'very point' of forum selection clauses was 'to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute,' and that 'it is the well-settled policy of the courts of this State to enforce contractual provisions for ... selection of a forum for litigation' (*Sterling Natl. Bank*, 35 AD3d at 222, *quoting Koob v. IDS Fin. Servs.*, 213 A.D.2d 26, 33 [1st Dept 1995])."

Defendants further argue that the breach of contract claim should be dismissed because the agreement between the parties is a usurious loan and not an asset purchase agreement. Even if the court were to consider these arguments, defendants' motion would still be denied. Whether a contract involving a purchase of future receivables is actually a loan will depend on whether repayment under any condition is required or contingent, whether adjustments or "reconciliations" are available to adjust the payments as a percentage of the receivables, whether there is a definite or indefinite term and whether there is any recourse in the event of bankruptcy. *See L.G. Funding, LLC v. United Senior Props. Of Olathe, LLC,* 181 A.D.3d 664, 666 (2d Dep't 2020).

The contractual language regarding the purchase of future receivables indicates that "RFG agrees to purchase the Purchased Future Receipts knowing the risks that Seller's business may slow down or fail, and RFG assumes the risk…RFG, hereby acknowledges and agrees that Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations." Exhibit A, ¶16.b., NYSCEF #16. Bankruptcy is therefore not a default under the agreement. *Id* at ¶27. Moreover, the agreement is for an indefinite period. "[T]he period of time that it will take RFG to collect the Purchased Amount is not fixed,…" *Id* at ¶16.a.ii. There are provisions for reconciliation and adjustments of payments to RFG under ¶¶s 10-13 of the agreement.

Notwithstanding the above, the court finds that plaintiff's unjust enrichment claim is duplicative of a contractual cause of action and is therefore dismissed. *See Panwest NCA2 Holdings, LLC v. Rockland NCA2, LLC,* 205 A.D.3d 551, 552 (2d Dep't 2022).

Based on the foregoing, it is

ORDERED, that defendants' motion to dismiss the complaint based on lack of jurisdiction is DENIED as this contract involves the commercial sale of future receivables, and the forum selection clause clearly designates New York for the choice of law and venue; and it is further

ORDERED, that as a matter of discretion in considering defendants' motion to dismiss the cause of action for unjust enrichment, this cause of action is DISMISSED as duplicative of damages sought through plaintiff's breach of contract claim; and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.

ENTER

Hon. Richard J. Montelione, J.S.C.

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