

First Funds, LLC v European Flight Training, L.C.

2010 NY Slip Op 32856(U)

October 7, 2010

Supreme Court, New York County

Docket Number: 115431/08

Judge: Joan M. Kenney

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 115431/2008
FIRST FUNDS, LLC
VS.
EUROPEAN FLIGHT TRAINING, L.C.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 115431/08
MOTION DATE 8/19/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

FILED

OCT 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/7/10

JMK
J.S.C.
JOAN M. KENNEY

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

----- X

FIRST FUNDS, LLC,
as Assignee of American Capital Advance, LLC,

Plaintiff,

Decision + Order

INDEX NO.
115431/08

-against-

EUROPEAN FLIGHT TRAINING, L.C. D/B/A
EUROPEAN FLIGHT TRAINING and TREVOR
BRACKSTON,

Defendants.

----- X

EUROPEAN FLIGHT TRAINING, L.C. D/B/A
EUROPEAN FLIGHT TRAINING and TREVOR
BRACKSTON

Third-Party Plaintiffs,

INDEX NO.
590067/09

-against-

AMERICAN CAPITAL ADVANCE, LLC,

Third-Party Defendant.

FILED
OCT 14 2010
NEW YORK COUNTY CLERK'S OFFICE

HON. JOAN M. KENNEY, J.:

Papers considered in review of this motion seeking dispositive relief and cross motions seeking dispositive and ancillary relief:

Papers	Numbered
Notice of Motion, Affidavit, Affirmation, Exhibits and Memorandum of Law	1-12
Cross Motion, Affirmation, Affidavit and Memorandum of Law in Opposition and in support of Cross Motion with Exhibits	13-21
Reply Affirmation, Affidavit, Memorandum of Law and Exhibits	22-25

Plaintiff's Counsel:
Joseph I. Sussman, P.C.
132 West 31st Street, Suite 1502
New York, NY 10001

Defendants/Third Party Plaintiff's Counsel
Malcolm S. Taub LLP
110 East 59th St., 25th Floor
New York, NY 10022

Defendants/third-party plaintiffs European Flight Training ("European") and Trevor

Brackston (“Brackston”) move for an order granting them summary judgment dismissing plaintiff’s claims and awarding them judgment on their counterclaims. Defendants alternatively request an order granting them summary judgment on their third-party claims against American Capital Advance, LLC (“ACA”) and dismissing ACA’s counterclaims.

Plaintiff cross-moves for an order pursuant to CPLR 3212(f), 3214(b) and 3126 lifting the automatic stay of discovery and compelling Brackston to appear for a deposition.

ACA cross-moves for an order pursuant to CPLR 3212 and 3211 and 22 NYCRR § 130-1.1(a) granting it summary judgment against defendants and awarding it “costs and fees.”

BACKGROUND

The underlying action is for breach of contract. Plaintiff and third-party defendant ACA are commercial finance companies engaged in the business of purchasing accounts receivable at a discount. Defendant European is in the business of training airline pilots, who pay for their instruction via a credit card. Defendant Brackston is European’s principal.

According to the complaint (Exhibit A to defendants’ moving papers), ACA and European entered into a Purchase and Sale of Future Receivables Agreement (the “Agreement”) on July 12, 2007, whereby ACA purchased \$88,800 of European’s future credit card receivables for \$60,000. European’s performance under the Agreement was guaranteed by Brackston. On July 18, 2007, ACA paid the \$60,000 purchase price to European. On July 31, 2007, ACA assigned its interest in the Agreement to plaintiff. Shortly thereafter, on or about August 25, 2007, European allegedly breached the Agreement by diverting its credit card processing transactions from a designated third-party credit card processor, to an unauthorized credit card processor, and by failing to provide plaintiff with bank statements. The complaint asserts causes of action for breach of the Agreement,

breach of the guaranty, and reasonable attorneys' fees.

In January 2009, defendants filed an answer (Defendants' Exhibit B) asserting counterclaims for rescission, disgorgement and unjust enrichment based on allegations that the Agreement and guaranty were void because Brackston's signature on both documents was forged and because the Agreement provided for a usurious rate of interest. Defendants seek damages of \$39,567.27, which is the amount European already paid to plaintiff under the assigned Agreement. Shortly after filing their answer, defendants filed a third-party complaint against ACA (Defendants' Exhibit D) alleging that ACA is plaintiff's alter ego and asserting causes of action for rescission of the Agreement and guaranty, disgorgement, unjust enrichment, and usury. As with their counterclaims, defendants request damages in the amount of the \$39,567.27 already paid to plaintiff. In March 2009, ACA served its answer to the third-party complaint asserting counterclaims for abuse of process, punitive damages, sanctions, and libel based on allegations that defendants were maliciously harassing and defaming ACA by bringing an unfounded third-party action.

ARGUMENTS

Defendants' summary judgment motion is grounded in allegations of forgery and usury, which underlie the counterclaims and third-party claims. In his supporting affidavit, Brackston avers that he never signed the Agreement nor guaranty, and that his signature on both documents was forged by Charlotte Hale ("Hale"), a former employee of European. Brackston further states that he was unaware that a portion of the payments made to European by its clients, was being paid to either ACA or plaintiff. In his supporting affirmation, defendants' attorney states that plaintiff is seeking to enforce a usurious loan agreement, disguised as the purchase of European's future credit card receivables. According to counsel, the alleged Agreement is structured so as to require interest

payments of approximately 64% *per annum*, a criminally usurious rate which renders the purported Agreement void. Defendants conclude that, based on the foregoing, they are entitled to summary judgment on their counterclaims or, alternatively, their third-party claims, in the amount of the \$39,562.27 already paid under the Agreement.

In opposition and in support of its cross-motion, plaintiff contends that issues exist as to whether Brackston executed the Agreement, whether Hale, who plaintiff claims was Brackston's girlfriend, office manager, and sole employee, had actual and/or apparent authority to execute the Agreement; and whether defendants ratified Hale's actions by accepting ACA's wire transfer of the \$60,000 purchase price to European's account on July 18, 2007.¹ Plaintiff argues that the stay of disclosure imposed by CPLR 3214(b) (pending resolution of a motion pursuant to CPLR 3211, 3212 and 3213) should be lifted so that Brackston could be deposed with respect to the aforementioned allegations. Plaintiff then argues that the Agreement cannot be construed as a usurious loan because neither defendant was absolutely obligated to repay the purchase price to plaintiff, which sought repayment from European's future credit card receipts without imposing any time limits. In support of this argument plaintiff cites section 8 of the Agreement, which provides that the parties agree that the purchase price for the receivables is not to be construed as a loan or an assignment for security from purchaser to seller.

ACA's opposition to defendants' motion is summarized by its attorney as follows: "ACA did not sign or otherwise execute the Agreement herein, and duly assigned any rights it may have had under the proposed agreement which is the subject of the action herein. Accordingly, there exists

¹According to plaintiff's complaint (¶¶ 4-5), ACA paid \$60,000 to European on July 18, 2007. According to plaintiff's memorandum of law (unnumbered page 9), plaintiff paid \$60,000 to European on July 18, 2007.

no basis at law or equity for holding ACA liable on any of the Counts in the Third-Party Complaint” (Zietz opposing affirmation, ¶ 3). ACA then makes the following specific arguments: Hale’s transgressions are irrelevant; the bottom line is that defendants accepted \$60,000 from plaintiff and only repaid \$39,567.21; ACA merely referred the transaction to plaintiff, which simply stamped its signature onto ACA’s initial proposed agreement; ACA is not plaintiff’s alter ego; defendants performed under the Agreement for over a year and cannot now disavow it; ACA did not execute the Agreement and the name appearing on the Agreement is not an employee or agent of ACA; and, ACA never received any money from defendants (it is undisputed that plaintiff, not ACA, received \$39,567.21 from European’s credit card receivables). ACA concludes that defendants’ third-party complaint and instant motion are “frivolous” as defined by 22 NYCRR § 130-1.1(c) and that defendants continue to make false representations about ACA’s involvement in the underlying transactions.

In reply, Brackston accuses plaintiff and ACA of “engag[ing] in ‘bucket shop’ operations where they prey upon small businesses” and states (in response to plaintiff) that he was never romantically involved with Hale.

DISCUSSION

The court finds that defendants’ motion should be denied. Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978], see also *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985] [movant must demonstrate entitlement to judgment as a matter of law]). Notwithstanding this well known precept, defendants have chosen to move for summary judgment in a pre-discovery action where confusion reigns and legal as well

as factual questions abound. In their counterclaims and third-party claims defendants seek the same relief (damages in the amount of \$39,567.27 based on causes of action for rescission of the Agreement, disgorgement and unjust enrichment) against two separate entities.² It is for defendants, not the court, to sort their claims out. According to the parties, the Agreement, which is the centerpiece of this litigation, wasn't signed by any of them. Plaintiff has presented exhibits (2 and 3) which reflect that Hale, who was employed by European, was guilty of forgery, embezzlement and theft and that she was ordered by a Florida court not to get within 50 feet of Brackston. Hale's misdeeds cannot serve as a ground for summarily dismissing plaintiff's claims against defendants and granting defendants judgment on their counterclaims or third-party claims, which is what defendants are asking the court to do.

At the same time that Brackston repudiates the Agreement, he invokes it to assert a claim of usury. Defendants cannot have it both ways. They cannot contend that the Agreement constituted a usurious loan and at the same time contend that they were not a party to the Agreement. In any event, the nature, structure and legality of the underlying financial transactions between European and ACA and/or plaintiff is unclear and cannot be properly addressed at this time.

For the reasons set forth, the court finds that plaintiff's cross-motion which seeks discovery is entirely appropriate. ACA's cross-motion for summary judgment and sanctions is premature and is denied without prejudice.

Accordingly, it is hereby

ORDERED that defendants' motion is denied in its entirety; and it is further

² Defendants have presented no evidence to support their contention that plaintiff is ACA's alter ego.

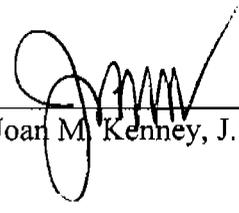
ORDERED that plaintiff's cross-motion is granted; and it is further

ORDERED that defendants are directed to produce Brackston for deposition at the office of counsel for plaintiff or other location if agreed to by the parties within 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that ACA's cross-motion is denied without prejudice; *and it is further ORDERED that the parties appear for a preliminary conference on December 9, 2010, at 9:30 am, in Room 304, located at 71 Thomas St. NYC 10013.*

Dated: October 7, 2010

ENTER:



Hon. Joan M. Kenney, J.S.C.

FILED
OCT 14 2010
NEW YORK
COUNTY CLERK'S OFFICE