iPayment, Inc. v Allstate Merchant Servs., LLC
2015 NY Slip Op 30695(U)
April 28, 2015
Supreme Court, New York County
Docket Number: 650470/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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IPAYMENT, INC.,

Index No.: 650470/2014

Plaintiff,

DECISION & ORDER

-against-

ALLSTATE MERCHANT SERVICES, LLC, APCO MERCHANT SERVICES, INC., IGOR ERIC KUVYKIN, and SVETLANA SHNEYDERSHTEYN-KUVYKIN,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff iPayment, Inc. moves, pursuant to CPLR 3215, for a default judgment against the remaining defendants, Igor Eric Kuvykin (Igor) and Svetlana Shneydershteyn-Kuvykin (Svetlana) (collectively, the Kuvykins). The Kuvykins oppose the motion. Plaintiff's motion is granted for the reasons that follow.

I. Procedural History & Factual Background

On February 12, 2014, plaintiff, an "Independent Sales Organization" (ISO) in the credit card processing industry, commenced this action against the Kuvykins and their "Sub-ISO" businesses, former defendants Allstate Merchant Services, LLC (AMS) and APCO Merchant Services, Inc. (collectively, the Corporate Defendants). The underlying allegations and relevant contractual provisions are set forth in an order dated March 5, 2014, which granted a preliminary injunction against defendants, and will not be repeated here. *See* Dkt. 73. Simply put, plaintiff asserted claims (1) against the Corporate Defendants for violating the non-solicitation clauses in the governing "ISO Agreement"; and (2) against the Kuvykins for breach of their personal guaranty of the Corporate Defendants' obligations under the "Purchase Agreements." Critically, litigation over the Corporate Defendants' breach of the Purchase Agreements occurred in the

Chancery Court of Tennessee, pursuant to a forum selection clause, and not in this action. By order dated September 5, 2014, the Tennessee court granted summary judgement on the Purchase Agreements in favor of plaintiff and against AMS in the amount of $2,107,200. *See* Dkt. 244.[1]

All of the defendants were represented by counsel, the Law Office of Lila Roizman, P.C., in connection with the injunction motion. The defendants were then represented by a second law firm, Sam P. Israel, P.C., in connection with their motion to dismiss. That same counsel represented defendants at a preliminary conference on April 3, 2014, at which a discovery schedule was set. *See* Dkt. 92. The discovery schedule required document production to be completed by July 3, 2014. *See id.* Discovery never commenced in earnest because defendants' second counsel moved to withdraw on April 28, 2014. They were relieved by order dated May 6, 2014, which directed, upon pain of default, that the defendants appear for a status conference on June 12, 2014. *See* Dkt. 125. The May 6 order specifically noted that the Kuvykins may appear *pro se* but that the Corporate Defendants must be represented by counsel. *See id.* Igor was the only defendant who appeared at the June 12, 2014 conference. *See* Dkt. 131. Consequently, by order dated July 14, 2014, the court granted plaintiff's motion for a default judgment against the Corporate Defendants, but denied the motion as to Svetlana, whose default was excused. *See* Dkt. 192. Judgment was entered against the Corporate Defendants on July 18, 2014. *See* Dkt. 197. The action against the Corporate Defendants was severed and continued

[1] It should be noted that there is also related litigation in Kings County Supreme Court, but such litigation has no bearing on the disposition of this action. *See Mega M, LLC v Allstate Merchant Servs., LLC*, Index No. 506797/2013 (Sup Ct, Kings County). By order dated August 21, 2014, this court denied defendants' motion to dismiss this action in favor of the Kings County action. *See* Dkt. 201. Additionally, after judgment was entered against them in this action, on August 4, 2014, the Corporate Defendants filed bankruptcy petitions in the United States Bankruptcy Court for the Eastern District of New York. The bankruptcy stay does not affect the claims against the Kuvykins.

against the Kuvykins. All that remains is plaintiff's claim under the Kuvykins' personal guaranty (the Guaranty).

The Kuvykins executed the Guaranty on September 4, 2013, pursuant to which they "absolutely, unconditionally, and irrevocably," personally guaranteed AMS's financial obligations under the Purchase Agreements. *See* Dkt. 225. Section 2.1 of the Guaranty provides:

> that [the Kuvykins'] obligations under this Guaranty shall constitute a guarantee of performance and payment and not of collection and shall be unconditional, irrespective of the validity, regularity or enforceability against any AMS Entity, the absence of any action to enforce the same, any waiver or consent by iPayment with respect to any provisions thereof, the recovery of any judgment against any AMS Entity or any action to enforce the same or any other circumstance which might otherwise constitute a legal or equitable discharge or defense of either of any AMS Entity. The Guarantors hereby waive diligence, presentment, demand of payment, filing of claims with a court in the event of a Bankruptcy of any AMS Entity, any right to require a proceeding first against any AMS Entity, protest or notice with respect to the Transaction Documents or the amounts payable by any AMS Entity and all demands whatsoever. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time all or part of any payment (or interest thereon) made by any AMS Entity under the Transaction Documents, is avoided or must otherwise be restored by iPayment upon the bankruptcy of any AMS Entity or otherwise.

See Dkt. 225 at 2. Thus, once AMS breached the Purchase Agreements, plaintiff could immediately seek to collect on the Guaranty against the Kuvykins. Section 3 of the Guaranty memorialized the fact that the Kuvykins "have reviewed with the benefit of its legal counsel the terms of this Guaranty and each of the other Transaction Documents"[2] and that they "are deriving a material financial benefit from the transactions contemplated by the Transaction Document." *See id.* at 3. The Guaranty is governed by New York law and provides for jurisdiction in this court. *See id.* at 4.

[2] They were represented by the law firm of Mound Cotton Wollan & Greengrass.

The Guarantee was consideration for forbearance of AMS's shortfalls under the Purchase Agreements. There were prior proposals to address these shortfalls, such as the proposal sent by Igor to plaintiff on August 27, 2013. *See* Dkt. 217. Plaintiff rejected this proposal, and, instead, proposed alternative terms on August 28, 2013. *See* Dkt. 219. The negotiations culminated with the execution of the Guaranty and a mortgage on the Kuvykins' home. *See* Dkt. 221-224.[3] There is no question of fact that the Kuvykins voluntarily, acting under the advice of highly competent counsel, agreed to plaintiff's terms in consideration for forbearance on their production shortfalls under the Purchase Agreements. As discussed further below, these circumstances do not amount to economic duress. Despite the bargained-for forbearance, defendants never met their production obligations under the Purchase Agreements. As noted earlier, plaintiff now has a judgment against AMS on the Purchase Agreements, and, in this action, plaintiff seeks to collect that judgment from the Kuvykins under the Guaranty.

On August 21, 2014, a status conference was held, which was attended by plaintiff's counsel and the Kuvykins. *See* Dkt. 200. As neither party sought any further discovery, a summary judgment schedule was set. *See id.* By letter dated September 15, 2014, plaintiff requested a modification of the summary judgment schedule in light of the Kuvykins' failure to file an answer to the complaint.[4] *See* Dkt. 203. After a telephone conference call was held on September 17, 2014, the court issued an order directing the Kuvykins to file an answer by October 7, 2014, an answer which Igor indicated would contain an affirmative defense of

[3] Contemporaneously with the Guaranty, the parties executed an Agreement of Understanding (the AOU), which memorializes the state of AMS's defaults under the ISO Agreement and Purchase Agreements. *See* Dkt. 224. The AOU is one of the Transaction Documents covered by the Guaranty.

[4] *See Myung Chun v N. Am. Mtg. Co.*, 285 AD2d 42, 45 (1st Dept 2001) (court is "without power to grant summary judgment before joinder of issue").

economic duress. *See* Dkt. 204. The parties were further ordered to serve discovery demands regarding this proposed defense by September 30, 2014, respond to them by October 15, 2014, and complete depositions by November 7, 2014. Plaintiff's summary judgment motion was to be filed by November 26, 2014, and the Kuvykins were given two months to oppose. The motion was to be made returnable on February 12, 2015.

Plaintiff was not able to file a summary judgment motion because the Kuvykins defaulted on each of their deadlines. The Kuvykins did not file an answer, nor did they provide discovery or appear for depositions. The Kuvykins' defaults were brought to the court's attention during a telephone conference on November 10, 2014. *See* Dkt. 207. On that call, Igor provided no valid excuse for his defaults, other than once again asking for more time. Plaintiff requested leave to file a motion for a default judgment and a briefing schedule was set.

Plaintiff filed the instant motion for a default judgment on November 19, 2014. The Kuvykins served opposition on December 19, 2014.[5] Plaintiff filed a reply on January 6, 2015, and oral argument was held on March 26, 2015. *See* Dkt. 265 (3/26/15 Tr.).

II. Discussion

"It is well established that where service is proper and a plaintiff makes out the facts of its entitlement to judgment, a plaintiff is entitled to a default judgment when defendant fails to appear." *Ostroy v Six Sq. LLC*, 74 AD3d 693 (1st Dept 2010). "In order to avoid the entry of default judgment upon its failure to submit a timely answer, [the] defendant [is] required to come forward with a reasonable excuse for its default and to demonstrate a meritorious defense to the action." *Galaxy Gen. Contracting Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 (1st

[5] At the court's direction, plaintiff e-filed the Kuvykins' opposition. *See* Dkt. 263.

Dept 2012). "If it is shown that a [defendant] has failed to proffer an acceptable excuse for its default, then it becomes unnecessary to determine whether a meritorious defense exists." *Id.*

The Kuvykins have no legitimate excuse for not filing an answer or complying with the court's discovery orders. The court has been more than accommodating of the Kuvykins *pro se* status. The court has provided them with clear direction as to their obligations and has allowed them substantial leeway. The Kuvykins, however, have not abided by a single deadline since the August 21, 2014 discovery conference. Indeed, the court has already excused a prior default by Svetlana.[6] Moreover, the Kuvykins have not demonstrated a potentially meritorious defense.

The Kuvykins are indisputably liable under the Guaranty by virtue of the Tennessee judgment against AMS on the Purchase Agreements. The Kuvykins' only proffered defense is economic duress. Though the Kuvykins' opposition papers lack the argument one would expect experienced counsel to provide, assuming every fact they allege is true and giving them the benefit of every possible inference, their duress defense is not viable.

Were this the summary judgment motion plaintiff originally contemplated, the result would be the same. It should be noted that, in addition to duress, the Kuvykins' proposed answer asserts counterclaims of breach of contract, breach of the covenant of good faith and fair dealing, violation of GBL §§ 349 & 350, and "equitable relief". As noted herein and in the court's injunction decision, claims arising under the Purchase Agreement are subject to a Tennessee forum selection clause, a clause plaintiff abided by. This precludes the assertion of claims under the Purchase Agreements. The remaining claims merely concern performance under the ISO Agreement, which the Kuvykins lack standing to assert, and, in any event, are the very subject of

[6] The court also is excusing the Kuvykins' filing of a 40-page brief, which exceeds this court's page limit by 15 pages. The court has read and considered their brief, as well as their proposed answer.

the Kings County litigation where defendants also have defaulted. Additionally, the GBL claims are not viable since the allegations pertain to arms' length commercial dealings, not consumer-oriented conduct. *See generally Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). None of the proposed counterclaims, even if they were meritorious or could be litigated in this court, are defenses to the Kuvykins' payment obligations under their unconditional, personal Guaranty. Only the Corporate Defendants' rights are implicated by the Kuvykins' proposed answer. The Corporate Defendants previously defaulted in this action, and judgment has already been entered against them.

In sum, most of the claims made in the Kuvykins' opposition are legally irrelevant. For instance, to the extent the Kuvykins appear to be asserting defenses to the Corporate Defendants' breaches of the ISO Agreement and the Purchase Agreements, the Kuvykins lack standing to do so. And, even if they were entitled to represent the Corporate Defendants, the proffered defenses are to no avail. AMS's breach of the Purchase Agreements was validly litigated in Tennessee, making such breach *res judicata*. *See Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 (1999). To the extent the Kuvykins allege that plaintiff breached the ISO Agreement, such claim is not before this court. The ISO Agreement is the subject of the Kings County action and has never been at issue in this case other than with respect to the Non-Solicitation Clause. Regardless, even if plaintiff breached the ISO Agreement, such breach is not a defense to the Kuvykins' obligations under the Guaranty because that claim belongs to the Corporate Defendants. The Kuvykins, who are not parties to the ISO Agreement, cannot assert a claim thereunder.[7] *See Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538 (1st Dept 2014).

[7] To be sure, an ISO which fails to provide adequate services will necessarily hamper the Sub-ISO's ability to perform and will likely make merchant acquisition and retention difficult. The court expresses no opinion on plaintiff's performance under the ISO Agreement. That being

Turning to the Kuvykins' proposed economic duress defense, this theory "permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will." *805 Third Ave. Co. v M.W. Realty Assocs.*, 58 NY2d 447, 451 (1983). "The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand." *Id.*

The Kuvykins complain that they agreed to the Guaranty under great financial pressure. That is, AMS had not met its production goals under the Purchase Agreements,[8] and, therefore, the Kuvykins' Sub-ISO business was in dire straits. However, it is well settled that "financial pressures, even when coupled with inequality in bargaining position, do not, without more, constitute duress." *Gubitz v Sec. Mut. Life Ins. Co. of N.Y.*, 262 AD2d 451, 452 (2d Dept 1999); *see Gartech Elec. Contracting Corp. v Coastal Elec. Const. Corp.*, 66 AD3d 463, 485 (1st Dept 2009) (same); *see also Ameritel Mobile LLC v Wireless Connection*, 41 Misc3d 1204(A), at *15 (Sup Ct, Kings County 2013) (Demarest, J.) ("In order to rescind and void a contract based on economic duress, an agreement must have been procured by means of a wrongful threat that precluded the exercise of free will; mere financial pressure is insufficient to constitute duress"), citing *Sitar v Sitar*, 61 AD3d 739 (2d Dept 2009).

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said, even if a breach of plaintiff's obligations under the ISO Agreement could be used to justify defendants' breaches under the Purchase Agreements, the proper fora for raising such issues were the actions in Tennessee and Kings County. The Corporate Defendants defaulted in both actions, as well as in this action. It is simply too late to raise defenses belonging to parties that defaulted and against whom judgment has been entered.

[8] Again, the opportunity to claim this was caused by plaintiff's breach of the ISO Agreement was lost by virtue of the Corporate Defendants' default.

Additionally, it is not as if the Kuvykins had no choice but to sign the Guaranty. They could have refused to do so and allowed their business to fail without incurring further personal liability. By signing the Guaranty, the Kuvykins received the benefits of temporary forbearance and had the opportunity to fulfil the production requirements set forth in the Purchase Agreements. In other words, the Kuvykins took a personal finical risk in an attempt to salvage their business.

By signing the Guaranty and accepting the benefits of forbearance, the Kuvykins are foreclosed from asserting a duress defense. *See Foundry Capital Sarl v Int'l Value Advisers, LLC*, 96 AD3d 620, 620-21 (1st Dept 2012) ("a party cannot claim that it was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement"), citing *Mendel v Henry Phipps Plaza W., Inc.*, 27 AD3d 375, 376 (1st Dept 2006) ("[planitiffs'] claims of economic duress are belied by their acceptance of the benefits of [the contract] and their failure to promptly repudiate [it]"). Moreover, "an agreement purportedly procured under duress must be promptly repudiated." *Wujin Nanxiashu Secant Factory v Ti-Well Int'l Corp.*, 14 AD3d 352, 353 (1st Dept 2005); *see Allen v Riese Org., Inc.*, 106 AD3d 514, 517 (1st Dept 2013) ("ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it"). The Kuvykins did not promptly repudiate the Guaranty, nor did they raise the issue of duress until the fall of 2014, more than a year later, and after the Corporate Defendants had already defaulted. For these reasons, duress is not a valid defense to the Guaranty.

To calculate damages, the court refers this matter to a Special Referee to conduct an inquest. The referee shall also compute the amount of plaintiff's reasonable attorneys' fees, as

provided for in the Guaranty.[9] The inquest, however, may only be used to compute damages against the Kuvykins, as nothing in the record indicates that the bankruptcy stay applicable to the Corporate Defendants is no longer in effect.[10] Accordingly, it is

ORDERED that the motion by plaintiff iPayment, Inc. for a default judgment is granted against defendants Igor Eric Kuvykin and Svetlana Shneydershteyn-Kuvykin; and it is further

ORDERED that an inquest on damages, including plaintiff's reasonable attorneys' fees, is referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine; and it is further

ORDERED that within 15 days, plaintiff shall pay the appropriate fees and file a note of issue and shall serve a copy of this order with notice of entry, as well as a completed information sheet,[11] on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on the Kuvykins by email and overnight mail.

Dated: April 28, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[9] *See* Dkt. 225 at 3 (Guaranty § 2.2).

[10] If the stay is lifted and the Corporate Defendants' debts are not discharged as a result of their bankruptcy, plaintiff may seek the inquest against the Corporate Defendants provided for in the July 18, 2014 judgment. *See* Dkt. 197.

[11] Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".