Platinum Rapid Funding Group Ltd. v VIP Limousine Servs., Inc.
2016 NY Slip Op 32226(U)
October 27, 2016
Supreme Court, Nassau County
Docket Number: 604163-15
Judge: Jerome C. Murphy
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 19
Index No.: 604163-15
Motion Date: 8/26; 9/14/16
Sequence Nos.: 004, 005, 006
AMENDED
DECISION AND ORDER

PLATINUM RAPID FUNDING GROUP LTD.,

Plaintiff,

- against -

VIP LIMOUSINE SERVICES, INC. and CHARLES COTTON,

Defendants.

The following papers were read on this motion:

Sequence No. 004:

Notice of Motion, Affirmation and Exhibits	1
Defendants' Memorandum of Law in Opposition	2
Affirmation of Daniel Ginzburg in Support of Opposition	3
Reply Affirmation in Further Support of Plaintiff's Motion and Opposition To Defendants' Cross-Motion and Exhibits	4
Reply Affirmation in Further Support and Exhibit	5

Sequence No. 005:

Order to Show Cause, Affirmation, Memorandum of Law in Support, Affirmation in Reply and Exhibits	6
Memorandum of Law in Opposition	7
Reply Affirmation and Exhibit	8

Sequence No. 006:

Notice of Cross-Motion	9
Defendant's Memorandum of Law in Support	10
Affirmation of Daniel Ginzburg in Support and Exhibits	11

PRELIMINARY STATEMENT

The purpose of this Amended Decision is to correct a typographical error which is corrected in the first full paragraph at the top of page 8.

[* 2]

In Sequence No. 004, plaintiff brings this application for an order granting summary judgment against the defendants jointly and severally in the amount of $66,964.94, plus pre-judgment interest at 9% from the date of the defendants' breach to the date of entry of judgment, post-judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees, and such other, further and different relief as may be just and proper. Opposition to this application has been submitted.

In Sequence No. 005, plaintiff brings this application: (1) ordering the defendants to immediately transfer all sales proceeds, revenues, currently in defendant's bank accounts up to $66,964.94 into defendants' counsel's IOLA Trust Account pending the outcome of this litigation; (2) ordering defendant to remit 15% of its gross sales proceeds up to $66,964.94 into defendants' counsel's IOLA trust account pending the outcome of this litigation; (3) ordering defendants not to sell, dispose, or encumber any future sales proceeds or receivables pending the outcome of this litigation; and (4) granting plaintiff such other, future, and different relief as may be just, proper, and/or equitable.

In Sequence No. 006, defendants bring this application for an order staying this action pursuant to CPLR § 2201 or, in the alternative, extending defendants' time to respond to plaintiff's motion for summary judgment; and vacating the Court's Temporary Restraining Order dated August 27, 2016. Opposition to this application has been submitted.

BACKGROUND

On or about December 18, 2014, VIP Limousine Services, Inc. ("VIP") entered into a Merchant Agreement with Platinum Rapid Funding Group, Inc. ("Platinum"), whereby Platinum sold its future receivables with a face value of $28,400.00 to Platinum for an upfront discounted price of $20,000.00 ("First Agreement"). Platinum deposited $20,000.00, less any agreed upon amounts, into a bank account designated by VIP.

On or about December 18, 2014, VIP Limousine Services, Inc. ("VIP") entered into a second Merchant Agreement with Platinum Rapid Funding Group, Inc. ("Platinum"), whereby Platinum sold its future receivables with a face value of $71,000.00 to Platinum for an upfront discounted price of $50,000.00 ("Second Agreement"). Platinum deposited $50,000.00, less any agreed upon amounts, into a bank account designated by VIP.

In accordance with the Agreements, Platinum purchased, and was the sole owner of $99,400.00 if VIP's future revenue and receivables. Between December 28, 2014 and March 10, 2015, VIP paid Platinum $32,435.06 of the future receivables. Plaintiff contends that VIP breached its

contract on or before March 10, 2015 by terminating Platinum's ability to electronically withdraw funds from their account through ACH, the Automated Clearing House.

Plaintiff served an Amended Verified Complaint dated December 29, 2015 (Exh. "A"). The First Cause of Action is for Breach of Contract for defendant's withholding the balance of $66,964.94, plus the costs and attorneys' fees incurred as a result of this action.

The Second Cause of Action alleges Breach of Representations and Warranties, in that defendant represented and warranted that it would "not change its processor, add terminals, change its financial institution or bank account(s) or take any other action that could have any advese effect upon Merchant's obligations under this Agreement . . ." without Platinum's prior written consent.

In the Third Cause of Action, plaintiff alleges a breach of the personal guarantee of performance of Charles Cotton. The Fourth Cause of Action alleges that, in accordance with the Agreement, Business Defendant and Defendant Cotton are obligated to pay all costs and attorneys' fees incurred as a result of a breach of the Agreement.

On February 5, 2016, defendants filed a Verified Answer with Affirmative Defenses and a Counterclaim (Exh. "B"). After generally denying the allegations of the Complaint, the Answer sets forth the following Affirmative Defenses: (1) failure to state a claim upon which relief can be granted; (2) claim barred by estoppel, unclean hands, waiver and doctrine *in pari delicto*; (3) defendants did not breach any duty or obligation allegedly owed to plaintiff; (4) claims are barred by plaintiff's failure to exercise due diligence to protect its interests and avoid injury; (5) plaintiff has failed to satisfy all conditions precedent; (6) to the extent plaintiff has suffered damages, its claim is barred in whole or in part by its failure to mitigate damages; (7) defendants deny plaintiff was damaged by them; (8) any damages sustained by plaintiff were incurred as a result of acts or omissions of individuals or entities that defendants "did not retain, reserve or exercise control over, and for which Defendants are not legally responsible"; (9) any damages suffered by plaintiff were due to their own affirmative actions and/or omissions, and do not give rise to any liability of defendants; (10) defendants did not make any false or misleading representations to plaintiff; (11) plaintiff has committed civil and criminal usury; and (12) defendants reserve the right to move for leave to add additional defenses as discovery progresses.

By Decision and Order dated June 8, 2016, this Court granted plaintiff's motion to dismiss all but the Sixth Affirmative Defense, and the Counterclaim, to the extent that an Answer may be read to assert one. The Court also directed compliance by defendants with some, but not all of the outstanding

discovery demands of plaintiff. The cross-motion by defendant to compel responses to document requests was also denied, on the ground that plaintiff has submitted responses.

DISCUSSION

Motion Sequence No. 4

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial." (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

In its cross-motion (Motion Seqence No. 6), defendants seek a stay of this matter pending their appeal of the prior Decision and Order which determined that the Merchant Agreement did not constitute a loan, and was not governed by the statutory prohibitions against civil and criminal usury (General Obligation Law § 5-501[1] and Banking Law § 14-a[1]). They have submitted a copy of their Notice of Appeal, and assert that they are obligated to perfect their appeal by December 27, 2016. They also oppose the application by plaintiff for injunctive relief in the form of a direction that defendant transfer all sales proceeds, and revenues currently in VIP bank accounts up to $66,964.94 into their counsel's IOLA account pending the outcome of the litigation, and ordering VIP to remit 15%

of its gross sales proceeds up to $66,964.94 into their counsel's IOLA account pending the outcome of this litigation.

Defendants, in their Memorandum of Law in Support of their Cross-Motion, and in Opposition to the Motion for Summary Judgment, refer to the matter of *Clever Ideas v. 999 Restaurant Corp, d/b/a Nello's Ristorante, et al.,* 2007 NY Slip Op. 33496U, 2007 N.Y. Misc. LEXIS 9248 (Sup.Ct., NY Co. [Ramos, J.]). The matter involved an agreement for the purchase of accounts receivable, similar to that in this action. Defendants sought to dismiss the Complaint arguing that usury laws barred plaintiff's action. In the course of his Decision and Order, Justice Ramos stated that "[t]he transactions at issue here are clearly payable absolutely, and thus loans." But the Court denied the motion for summary judgment as premature, asserting that "further discovery is required to delve further into the parties' intent."

Justice Ramos had occasion to address the issue of summary judgment at the conclusion of discovery (*Clever Ideas, Inc. v. 999 Rest. Corp.,* 2009 NY Slip Op. 30284[U], 2009 N.Y. Misc. LEXIS 3994 [Sup.Ct., NY Co.]). Defendants renewed their prior motion to dismiss the Complaint on the grounds that the two loan agreements between the parties are civilly and criminally usurious. Seemingly stepping back from the language of the earlier decision, Justice Ramos stated that "[t]he Court will not assume that the parties entered into an unlawful agreement, and when the terms of the agreement are in isue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate, citing *Giventer v. Arnow,* 37 N.Y.2d 305, 309 [1975]). The Court denied the motion, leaving the determination as to whether the lenders intent met the clear and convincing standard of usury to the trier of fact.

This Court respectfully distinguishes the *Clever* findings in two material respects. The Court there stated that obligation to make payment was unconditional, but these are not the terms of the Merchant Agreements in the instant case. The only source of payment is deposited receipts from future transactions. Plaintiff assumes the risk that there will be no receipts, and therefore no payment. The personal guaranty is no broader than the obligations under the Agreement, and the requirement of payment by the Guarantor is no greater than that of the Merchant.

Secondly, this Court does not take the position that the intention of the Funder is relevant to an interpretation of an Agreement which is unambiguous on its face. Since the Agreement specifically provides that it involves the purchase of accounts receivable, and is not a loan, and does not require

unconditional repayment by the Merchant or the Guarantor, it is not a loan, and thereby not governed by the General Obligations or Banking Law as they relate to usury.

There are no material facts which are undetermined. Plaintiff has established jurisdiction over defendants, and has submitted an affidavit of Ali Mayar, Chief Executive officer of Platinum Rapid Funding Group, Ltd., an individual with personal knowledge of the facts of the matter (Exh. "A"). Defendants, in response to a Notice to Admit, acknowledge that they have continued to operate and receive payments through at least December 30, 2015 (Exh. "G").

Plaintiff has established its prima facie entitlement to summary judgment. Defendants have failed to raise a material fact, except for their claim that the Agreement was barred by the usury statutes, which this Court has determined in its prior decision. **Plaintiff's motion for summary judgment against defendants in the amount of $66,964.94, together with interest at the rate of 9% from March 10, 2015, together with costs and disbursements is granted. Plaintiff has not submitted a Statement of Costs and Disbursements, or an Affidavit of Legal Services. The Court hereby schedules a hearing on these issues for December 19, 2016, at 9:30 A.M. in this Part 19.**

Motion Sequence No. 5

Plaintiff bases this application for injunctive relief on the ground that defendant is actively marketing the sale of their accounts receivable to competitors of plaintiff. Plaintiff alleges that based upon the terms of the Merchant Agreements, these receivables are owned by plaintiff, and the effort to dispose of them is an effort to make the Agreement unenforceable. In addition, counsel for defendants has submitted evidence and documentation from a similar case involving defendants in Westchester County attesting to the claim that defendants are judgment proof, and that efforts by plaintiff in this case to recover their purchased accounts receivable, will be fruitless.

In the Temporary Restraining Order issued in connection with the Order to Show Cause, this Court enjoined defendants from selling, disposing of, or otherwise encumbering VIP's future sales proceeds, and directed that defendants deposit the proceeds of their sales in their possession, up to the amount of $66,964.94, into the IOLA account of their attorney. Plaintiff asserts that they have not done so, in defiance of the Order, and this has not been contradicted by counsel for defendants. Defendants apparently fail to understand that the proceeds from the sales of services, up to the amount of $66,964.94, do not belong to them.

"To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 6301, *Doe v. Axelrod,* 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi,* 52 N.Y.2d 496. 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

"Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient" (*Walsh v. Design Concepts,* 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, "(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v. McCormack,* 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073).

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia,* 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1st Dept. 2007]).

Plaintiff has established its entitlement to, and, in fact, has been granted summary judgment. The likelihood of success has been established. Certainly, equity favors plaintiff, who has paid for the proceeds of accounts receivable, which is the subject of the action. CPLR § 6301 provides that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual . . ."

The conduct of the defendants in depriving plaintiff of its right to possession of its own property, and the avowal that plaintiff will never be able to recover their property from defendants, is precisely the type of conduct for which injunctive relief is available. **Plaintiff's motion for an injunction directing defendants to immediately deposit into their counsel's IOLA Account, funds from the provision of services presently in their possession, up to the amount of $66,694.94, and 15% of the future receipts for the provision of services, until the amount of $66,694.94 is deposited, is granted.**

Motion Sequence No. 6

Defendants seek a stay of the proceeding pending appeal, or, in the alternative, extending the time for defendants to respond to plaintiff's motion for summary judgment, and for a vacatur of the Temporary Restraining Order.

CPLR § 2201 provides simply that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." "A determination as to whether or not to grant a stay pending appeal is a discretionary one 'as courts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them (*Kobrick v. New York State Div. Of Housing and Community Renewal,* 37 Misc.3d 1224[A] [Sup.Ct. NY Co. 2012, quoting *Grisi v. Shainswit,* 119 A.D.2d 418 [1st Dept. 1986]).

Defendants have filed a Notice of Appeal of the prior Order of this Court dated June 8, 2016, and have indicated that they are required to perfect the appeal on or before December 27, 2016. Plaintiff responds that defendants have done no more than file the Notice of Appeal, and that they have not been served with a Record on Appeal. While defendants may be in a position to perfect the appeal in a timely fashion, there is certainly no guarantee as to when a determination of the appeal will be forthcoming.

While this Court cannot predict the determination of the Appellate Division, it is of the opinion that its determination of June 8, 2016 was correct, and that the likelihood of a reversal is certainly not assured. There is no reason for plaintiff to be denied what are perceived to be its rights under the Merchant Agreement and the grant of summary judgment in this Decision and Order. **The Court therefor exercises its discretion in denying the motion for a stay pending appeal.**

The Court also denies the application for additional time for defendants to oppose the

motion for summary judgment. The sole basis upon which defendants apparently rely is the claim that they are entitled to claim usury, and that the Agreement is void ab initio. This point has been clearly made by them, and there is no rational basis upon which the Court can justify denial of the relief requested by plaintiff.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
October 27, 2016

ENTER:

JEROME C. MURPHY
J.S.C.

ENTERED

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NASSAU COUNTY
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