SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Billy Caudill,

Index No.
653837/2016

Plaintiff,

- against -

DECISION and ORDER

Can Capital, Inc., ABC Corporations 1-10 and John Does 1-15,

Mot. Seq. 2

Defendants.

HON. EILEEN A. RAKOWER, J.S.C.

As alleged in the Complaint, "This is an action seeking to declare a loan $113,095.00 (sic) made by the Defendants to Billy Caudill as criminally usurious and, therefore, void *ab initio*." The Complaint alleges "[t]he loan made by Defendants was disguised in the form of a purchase of Billy Caudill's accounts receivables in the aggregate amount of $142,499.70 under a 'Purchase and Sale Agreement for Future Receivables' for a purchase price of $113,095.00." It further alleges that Caudill "agreed to guaranty repayment of the loan."

Annexed to the Complaint as an exhibit A is a copy of a "Universal Business Credit Application" dated February 16, 2016 in which the entity Digital Comm. Services ("DCS") seeks a loan. Caudill is listed as the owner of DCS. Also annexed as Exhibit A is a "Business Loan Agreement" ("the Agreement") between DCS, as Borrower, and WebBank, as lender, dated February 24, 2016, memorializing the terms of the loan. The agreement is signed by Caudill, on behalf of DCS and as a personal guarantor.

Defendant "ABC Corporation #1" is alleged to be "last known as Can Capital Merchant Services, Inc." Defendant "ABC Corporation #2" is alleged to be

"last known as Can Capital Asset Servising, Inc." Defendant "John Doe" is alleged to be "last known as Dan Demeo," "the Chief Executive Officer of Defendant Can Capital Inc." Defendant ABC Corporation #3 is alleged to be "last known as Web Bank," a corporation with an office located in Utah.

Plaintiff's Complaint asserts the following causes of action: (1) "Usury- Failure to Disclose the True Interest"; (2) "Fraud- Failure to Disclose Terms"; (3) "Criminal Usury- Declaratory Judgment"; (4) "Civil Usury"; (5) "Illegality of Payday Loans"; (6) "Void Arbitration Clause and Fraudulent Utah Governing Clause"; and (7) "Fraudulent Rent a Bank Scheme." Plaintiff seeks a declaratory judgment declaring that the loan "is void ab initio as criminally usurious and, therefore, the Defendants are precluded from recovering any remaining daily installments due under the Loan and must repay all payments made to date and that all documents and collateral be cancelled and surrendered."

Presently before the Court is defendants CAN Capital, Inc. ("CCI"), CAN Capital Merchant Services, Inc. ("CCMS"), CAN Capital Asset Servicing, Inc. ("CCAS"), and Dan DeMeo's ("DeMeo") motion to compel this action to arbitration under the terms of the Agreement entered between DCS, Caudill's business, for which he is a personal guarantor, and co-defendant WebBank, on February 24, 2016.

Defendants submit the attorney affirmation of Justin Angelo; the affidavit of James Holder, the Manager, Asset Management & Asset Performance for CCI; Complaint; Assignment of the Agreement from WebBank to CCAS; and a copy of the February 24, 2016 Agreement between DCS and WebBank. Plaintiff does not oppose.

Holder states that CCMS and CCAS are subsidiaries of defendant CCI; defendant Dan DeMeo is the Chief Executive Officer of CCI. CCAS purchased the loan underlying the Agreement from WebBank on March 3, 2016. CCAS succeeded to all of WebBank's rights under the Agreement.

CPLR § 7501 provides in pertinent part, "[a] written agreement to submit ... any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award." CPLR § 7503(a) also provides, "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with.... the court shall direct the parties to

arbitrate" and the court's order compelling arbitration "shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration."

In the instant matter, Defendants argue that FAA applies to this dispute because the loan underlying the Agreement was made between Caudill's business located in Florida and WebBank, which is located in Utah. Furthermore, the arbitration provision of the Agreement states that "[t]his Arbitration Agreement is made with respect to transactions involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), and not by state law." See id., § 18. Plaintiff, in failing to oppose, does not dispute Defendants' assertion.

Under the FAA, a court must compel arbitration if it finds that: (1) a valid arbitration agreement exists between the parties; and (2) the dispute before it falls within the scope of the agreement. (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614. 626-28 [2000]). State law determines whether the parties agreed to arbitrate. (*Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 364-365 [2d Cir. 2003]). Here, as far as what state law governs, paragraph 15 of the Agreement expressly provides that it "shall be governed and enforced in accordance with the laws of the state of Utah ..." Under Utah law, in interpreting an arbitration agreement, the court "look[s] first to the document itself." (*Reed v. Davis Cnty. Sch. Dist.*, 892 P.2d 1063, 1064 [Utah App. 1995]). "When a written contract's language is not ambiguous, the intention of the parties must be determined from the words of the agreement." (*Id.* at 1065).

Here, Caudill, as owner of DCS and as personal guarantor, signed the Agreement, manifesting his intent to be bound by the Agreement's terms and its arbitration provision. Section 18 of the Agreement requires arbitration of "any and all claims and disputes relating in any way to this Agreement or our dealings with one another ..." and applies to claims bought by the signing principal of the business [Caudill], as well as the business itself [DCI]. The personal guaranty of the Agreement is also subject to the arbitration provision.

As Defendants argue and Plaintiff does not dispute, Caudill's action relates to the alleged validity, legality, and enforceability of the Agreement, and therefore is a "claim [or] dispute" which relates to the Agreement, and thus falls within the broad scope of the arbitration provision and must be arbitrated.

Lastly, Defendants argue that CCI, CCMS, and DeMeo, who are not signatories or direct successors in interest in the Agreement, are entitled to compel

Caudill's claims against them to arbitration for two reasons. The first is because Agreement itself requires arbitration of claims asserted against "employees, affiliated companies and vendors" of CCAS as Assignee under the Agreement. Defendants argue that since the remaining defendants are employees and affiliated companies of CCAS, they are also entitled to compel Caudill's claims to arbitration.

Wherefore, it is hereby

ORDERED that the motion to compel arbitration is granted without opposition; and it is further

ORDERED that the action is stayed pending such arbitration.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 3, 2017

J.S.C.

HON. EILEEN A. RAKOWER