Merchant Cash & Capital LLC v Amerivet Enters., Inc
2017 NY Slip Op 31677(U)
June 26, 2017
Supreme Court, Suffolk County
Docket Number: 602081/2017
Judge: Joseph C. Pastoressa
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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PUBLISH

PRESENT:
HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #001-MD
002-MD

MERCHANT CASH & CAPITAL, LLC d/b/a BIZFI FUNDING,

Plaintiff(s),

-against-

AMERIVET ENTERPRISES, INC d/b/a AMERIVET ENTERPRISES and JIM SERVANTEZ and EDWIN EILERS,

Defendant(s).

ATTY FOR PLAINTIFF(S):
GIULIANO MCDONNELL & PERRONE
170 OLD COUNTRY ROAD, SUITE 608
MINEOLA, NY 11501

ATTY FOR DEFENDANT(S):
AMOS WEINBERG
49 SOMERSET DRIVE, S.
GREAT NECK, NY 11020

	Pages Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5-6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, it is

ORDERED that the motion by the defendants for an order, pursuant to CPLR 510(1), changing the venue of this action to New York County is denied, and it is further

ORDERED that the motion by the plaintiff to dismiss the defendants' affirmative defenses and counterclaims and to strike scandalous content from their answer is denied.

In 2015, the parties entered into a merchant agreement in which the plaintiff purchased future receivables and sale proceeds from the defendant Amerivet Enterprises. The plaintiff commenced this action for breach of contract alleging that the defendant failed to make required payments pursuant to the agreement. The complaint alleges that the plaintiff's principal place of business is in Manhattan and the defendants are residents of Illinois. The agreement contains a provision that any actions "shall be brought in any state court of competent jurisdiction in the State of New York" and that the defendants "waive any claim that the action is brought in an inconvenient forum [or] that the venue of the action is improper." The defendants now move to change the venue of this action to New York County on the grounds that Suffolk County is not the proper venue because none of the parties reside here.

"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" (***KMK Safety Consulting v Jeffrey M. Brown Assoc.***, 72 AD3d 650, 651 quoting ***LSPA Enter. Inc v Jani-King of NY***, 31 AD3d 394, 395; *see* ***Puleo v Shore View Center for Rehab. & Health Care***, 132 AD3d 651; ***Casale v Sheepshead Nursing & Rehab Center***, 131 AD3d 436).

Here, the defendants do not challenge the validity of jurisdiction in New York but claim that the contractual provision does not specify a particular county and the plaintiff failed to comply with CPLR 503 in selecting venue. However, the contract specifically provides that an action may be brought in any state court in New York and the defendants waive any claim that venue is improper. It is well settled that venue provisions are not jurisdictional and may be waived (*see* ***Wager v Pelham Union Free School Dist.***, 108 AD3d 84; ***Lowenbraun v McKeon***, 98 AD3d 655; ***Matter of TNT Petroleum v Sea Petroleum***, 12 AD3d 452). The defendants have failed to show that the waiver of venue provision is unreasonable, unjust or invalid or that they would be deprived of their day in court by litigating the action in Suffolk County (*see* ***Merchant Cash & Capital v Wett Plumbing***, 55 Misc3d 1220[A]; *cf.* ***Merchant Cash & Capital v Laulainen***, 55 Misc3d 349). Accordingly, the motion to change venue is denied.

The plaintiff moves, pursuant to CPLR 3211 and CPLR 3024(b), to dismiss the defendants' affirmative defenses and counterclaims and to strike scandalous content from their answer. "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (***Bank of NY v Penalver***, 125 AD3d 796, 797 quoting ***Fireman's Fund Ins. Co v Farrell***, 57 AD3d 721, 723; *see* ***Gonzalez v Wingate at Beacon***, 137 AD3d 747). "If there is any doubt as to the availability of a defense, it should not be dismissed" (***Chestnut Realty Corp v Kaminski***, 95 AD3d 1254, 1255 quoting ***Fireman's Fund Ins. Co v Farrell***, *supra; see* ***Gonzalez v Wingate at Beacon***, *supra*).

Here, the answer is sufficient to assert the affirmative defense of usury as the defendants allege that the transaction at issue was actually a loan. The plaintiff contends that the defense is meritless but has not moved for summary judgment to address the merits of the defense. Accordingly, the motion to dismiss is denied without prejudice to move for summary judgment.

DATED: June 26, 2017

HON. JOSEPH C. PASTORESSA, J.S.C.

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