R.H.K. Recovery Group, Inc. v Danbury Pharma, LLC
2017 NY Slip Op 33205(U)
November 3, 2017
Supreme Court, Nassau County
Docket Number: 602315-17
Judge: Jerome C. Murphy
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

R.H.K. RECOVERY GROUP, INC.,

Plaintiff,

- against -

DANBURY PHARMA, LLC and BIBBY INTERNATIONAL TRADE FINANCE, INC. d/b/a BIBBY FINANCIAL SERVICES, INC.,

Defendants.

TRIAL/IAS PART 18
Index No.: 602315-17
Motion Date: 8/31/17
Sequence Nos.: 001, 002
MG, MG
DECISION AND ORDER

The following papers were read on this motion:

Sequence No. 001:
Notice of Motion.....1
Petition to Compel Arbitration.....2
Memorandum of Law in Support of Petition.....3
Corrected Memorandum of Law.....4
Affirmation of Robert S. Landy in Support.....5
Affirmation in Opposition to Defendant Danbury Pharma LLC's Motion to Compel Arbitration and Exhibits.....6
Affidavit in Opposition to Defendant Danbury Pharma LLC's Motion to Compel Arbitration and Exhibits.....7

Sequence No. 002:
Notice of Motion to Vacate.....8
Affidavit of Balasubramaniam Harid in Opposition.....9
Memorandum of Law in Support of Motion to Vacate.....10
Affirmation in Opposition to Defendant Danbury Pharma LLC's Motion to Vacate.....11
Affidavit in Opposition to Defendant's Motion to Vacate.....12

PRELIMINARY STATEMENT

In Sequence No. 001, defendant, Danbury Pharma, LLC, brings an application for an Order, pursuant to CPLR § 7503(a), granting the relief requested and compelling the plaintiff to arbitrate the disputes asserted in the Verified Complaint filed by plaintiff on March 17, 2017 in the same Court and granting such other relief as may be just, proper and equitable. Plaintiff has submitted opposition to this application.

In Sequence No. 002, defendant, Danbury Pharma, LLC brings an application for an Order, pursuant to CPLR § 5015(a) and § 3215(a), vacating the default judgment against Danbury Pharma, LLC on the grounds of excusable default under CPLR § 5015(a) and improper granting of default judgment under CPLR § 3215(a). Plaintiff has submitted opposition to this application.

BACKGROUND

As best as can be determined from the papers submitted herein, the facts are as follows:

In or about August 2016, defendant, Danbury Pharma, LLC ("Danbury"), as borrower and defendant, Bibby International Trade Finance Inc. d/b/a Bibby Financial Services, Inc. ("Bibby"), as lender, entered into a Loan and Security Agreement ("LSA") wherein Bibby obtained a security interest in Danbury's assets including, but not limited to, its "accounts, inventories, equipment, intellectual property and all remaining unencumbered assets."[1]

Thereafter on January 27, 2017, in accordance with the foregoing LSA, the defendants directly and indirectly, and jointly and severally, retained the plaintiff, R.H.K. Recovery Group, Inc. ("RHK") to render work, labor and services (referred to herein as the "Services") including, but not

[1]Pursuant to a Stipulation Discontinuing Action with Prejudice dated June 15, 2017, Bibby was dismissed from this action upon the consent of all parties.

limited to, the collection of outstanding receivables (herein referred to as the "Collection Agreement"). Defendants, in turn, agreed to pay the Plaintiff the "fair, reasonable and agreed value of said Services based up [sic] the terms of the Collection Agreement" (Complaint, ¶7).

Notably, the Collection Agreement provided, in pertinent part, as follows:

> [Danbury] (The Client) retains [RHK] to handle the collection of past due accounts receivables as requested. Collection rates are based on the explicit terms of this Agreement and the [RHK] Rate Schedule.
> ***
> 4. Client [Danbury] further agrees to the terms and conditions of RHK's posted rate schedule. This agreement will continue in force from year to year or as long as client continues to use RHK for collection of past due accounts. In the event this agreement is cancelled by client [Danbury], the terms of this agreement will remain in effect for any active accounts.
> ***
> RHK RATE SCHEDULE
> ***
> We charge 15% of what is collected. If the debt is referred for legal action, our rate will be 30% of what is collected.
> ***
> Terms and Conditions
> 9. [RHK] will be entitled to its earned commission on any claim withdrawn...unless otherwise agreed to in advance.
>
> 10. Any controversy or claim arising out of or relating to the above authorization or the breach thereof shall be settled by arbitration administered by the American Arbitration Association in New York City under its Commercial Arbitration Rules, and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof.
> ***

On February 1, 2017, the Vice President of defendant Bibby, Jerry Brown, wrote to plaintiff that the "Lender [Bibby] further authorizes [RHK] to employ every tool at its avail to recovery of these Accounts."

In accordance with the Collection Agreement, at the special instance and request of the

defendants, the plaintiff rendered Services including, but not limited to, verification of defendant Danbury's account debtor data, making calls to account debtors, and sending correspondence on each of the open accounts placed with the plaintiff for collection.

On or about February 8, 2017, at plaintiff's business premises, and in furtherance of the Collection Agreement, plaintiff met with Jeffrey Morse, COO and Jerry Brown, Vice President of Bibby and discussed, among other things, the services provided by the plaintiff and what appeared to be the "irregular billing and accounting" practices of defendant Danbury.

Thereafter – also on February 8, 2017 – defendants repudiated and attempted to terminate the Collection Agreement thereby breaching the Collection Agreement. Plaintiff objected to this repudiation and sought adequate assurances of performance by the defendants but defendants further referenced and neglected to reinstate the Collection Agreement.

Defendant submits that, at the time that it terminated the Collection Agreement, no debt had been collected by the plaintiff under the Collection Agreement and therefore no payment was owed to the plaintiff under its fee schedule.

On March 17, 2017, plaintiff filed a complaint against the defendant (and Bibby) seeking $317,006.36 with interest based on five legal theories.

Plaintiff submits that on or about February 27, 2017, and at various times thereafter, plaintiff rendered to the defendants an account stated in the sum of $317,006.39 which account was accepted by the defendants without objection and yet no part of the sum of $317,006.39 has been paid despite due demand. Additionally, plaintiff submits that the defendants have had the full use and benefit of the proceeds received, and to be received, from the Services provided by the Plaintiff pursuant to the

Collection Agreement but that defendants have failed, refused and neglected to compensate the plaintiff therefore. Additionally, according to the plaintiff, in or about between January and February 2017, pursuant to the Collection Agreement between the parties, the plaintiff performed various Services on behalf of and at the special instance of the defendants, and, that as a direct result of the Services provided by the plaintiff to the defendants, the Defendants have collected and will collect various monies from the accounts placed by the defendants with the plaintiff pursuant to the Collection Agreement. Plaintiff has demanded payment from the defendants but defendants have failed, refused and neglected to remit the monies collected and to be collected by the defendants, retaining the monies received for their own use and benefit all to the detriment, damage and injury of the defendant. Plaintiff submits that it does not know and may not be able to ascertain the exact amounts of said monies collected and to be collected by the defendants, and therefore, in addition to the foregoing, they have demanded of the defendants, albeit to no avail, that they: (a) account to it for monies received from the accounts placed by defendants with the plaintiff but not remitted to the plaintiff pursuant to the Collection Agreement between the parties; and (b) pay to plaintiff any sums so collected by defendants.

In bringing this suit, plaintiff advances five causes of action: 1) breach of the Collection Agreement; 2) account stated; 3) unjust enrichment; 4) *quantum meruit*; and, 5) conversion.

DISCUSSION

This Court begins by addressing the defendant's motion pursuant to CPLR 5015(a) and CPLR 3215(a), to vacate the judgment of default entered against it by the Nassau County Clerk (Maureen O'Connell) dated June 22, 2017.

In support of that application, the defendant submits that the plaintiff knew at the time it filed its complaint herein (March 17, 2017) that Danbury had ceased operations in January 2017[2] and further that when Danbury became aware of plaintiff's complaint, it was aware that the claim had been improperly filed in violation of the arbitration provision and did not (at the time) devote Danbury's limited resources to retaining counsel for the purpose of seeking to compel arbitration. Danbury claims that on or about June 16, 2017, it was informed that the time to respond to RHK's complaint had expired and that RHK was seeking a default judgment. It was at that point that Danbury engaged counsel to appear in this action and seek to enforce the parties' agreement to arbitrate, and five days later, on June 21, 2017, it filed a "petition" to compel arbitration.[3] Thus, in seeking to vacate the judgment of the County Clerk, the defendant argues that its default is excusable (CPLR 5015[a]) and that the granting of default judgment was improper (CPLR 3215[a]).

Based upon the papers submitted herewith, this Court finds that the Nassau County Clerk does not have the authority to enter a judgment against the defendant, Danbury, pursuant to CPLR 3215(a), since, under the circumstances of this case, the damages sought against the Danbury are not for a "sum certain" and can not be determined without extrinsic proof (*Reynolds Sec. v. Underwriters Bank & Trust Co.*, 44 NY2d 568, 572–573 [1978]; *Stephan B. Gleich & Assoc. v. Gritsipis*, 87 AD3d 216, 222–224 [2nd Dept. 2011]; *Pikulin v. Mikshakov*, 258 AD2d 450, 451 [2nd Dept. 1999]).

Accordingly, this Court herewith grants the defendant's motion which is, in effect, pursuant

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[2]Defendant ceased operations in January 2017 and terminated the Collection Agreement on February 8, 2017.

[3]On June 23, 2017, Danbury corrected its papers at the Clerk's request to convert the "Petition" to a Motion.

to CPLR 5015(a)(4) to vacate a judgment dated June 22, 2017 and which was entered upon the defendant's default in appearing or answering, supra.

Moreover, in light of the lack of any prejudice to the plaintiff resulting from the short delay by the defendant in appearing in this action, the existence of a potentially meritorious defense to the action, and the public policy favoring the resolution of cases on the merits, the defendant's default in appearing and answering is herewith excused (CPLR 2004, 3012[d]; *Zeccola & Selinger, LLC v. Horowitz*, 88 AD3d 992, 993 [2nd Dept. 2011]; *Feder v. Eline Capital Corp.*, 80 AD3d 554, 555 [2nd Dept. 2011]; *Schonfeld v. Blue & White Food Prods. Corp.*, 29 AD3d 673, 674 [2nd Dept. 2006]).

Turning to the defendant's motion which seeks an Order, pursuant to CPLR 7503(a), to compel the plaintiff to arbitrate the disputes asserted in the Verified Complaint, defendant submits that the parties have a valid agreement to arbitrate the claims raised in the compliant and each of the claims that the plaintiff asserts in its compliant is subject to arbitration. Plaintiff opposes the motion and submits that defendant's application to compel arbitration must be denied because the Court cannot compel arbitration of a cause that has already been adjudicated, the defendant's right, if any, to seek to compel arbitration has been waived and the defendant's motion is untimely.

CPLR 7503(a) provides, in pertinent part, as follows:

> (a) Application to compel arbitration; stay of action. 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, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

It is noted at the outset that, given this Court's determination above vacating the judgment entered on default against the defendant Danbury, the plaintiff's arguments that the defendant has waived its right to compel arbitration, and that the matter has been adjudicated and the instant motion to compel arbitration is untimely, because the action is over and judgment has been entered, such argument are all wholly meritless, *supra*.

Thus, this Court adheres to the analysis offered by the Court of Appeals in *Matter of Smith Barney, Harris Upham & Co. v. Luckie*, 85 NY2d 193 [1995] as follows:

> Generally, under New York statutory and case law, a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court***.
> (*Id.* at 201 [Internal citations omitted]).

Having met each of the three prongs of this test, it is plain to this Court that the parties to this valid collection agreement containing a provision directing arbitration, be directed to submit their claims to arbitration. Specifically, each of the plaintiff's claims as asserted in the Verified Complaint constitute a "controversy or claim arising out of or relating to the terms and conditions of the parties' agreement" and as such fall within the arbitration clause. Each of the plaintiff's claims sound in breach of the collection agreement or in quasi contract relating to the Collection Agreement.

Accordingly, the defendant's motion for an Order compelling the plaintiff to arbitrate the disputes asserted in the Verified Complaint is herewith granted.

The parties' remaining contentions have been considered and do not warrant discussion.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 3, 2017

ENTERED

NOV 27 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.