Whitehurst v Lusk
2019 NY Slip Op 32510(U)
August 16, 2019
Supreme Court, New York County
Docket Number: 151199/2019
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

----------X

INDEX NO. 151199/2019

MICHAEL WHITEHURST,

MOTION DATE 03/27/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

HEIDI LUSK,

DECISION + ORDER ON MOTION

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion is denied and the action is dismissed.

This case arises out of a loan made by plaintiff, Michael Whitehurst ("Whitehurst"), out of his trust account, to defendant, Heidi Lusk ("Lusk"). On April 6, 2018, Lusk executed a Promissory Note in consideration for a loan of $350,000.00 from Whitehurst's trust account, referred to as "the Fleming Family Income Trust." Additionally, on the same day, Whitehurst and Lusk executed a Loan Agreement, which delineated the terms of the loan.

The Loan Agreement states that the loan is being made because Lusk was both: (1) in need of funds to litigate an action contesting the validity of her late husband's will; and (2) anticipating funds from the ultimate recovery of her late husband's estate, as well as an unrelated personal injury action with the New York City Transit Authority. The Loan Agreement sets forth the following pertinent "recitations":

> B. Assuming she is able to obtain the necessary settlements and releases from her stepchildren, Lusk will have access to the funds left by her husband (the "Estate") in an amount more than sufficient to repay the loans made hereunder, and she anticipates that the funds would be available in the next 6-12 months. Any Estate distribution to Lusk is referred to in this Agreement as an "Estate Event."
>
> C. Lusk has filed a personal injury action with the New York City Transit Authority ("NYCTA") for injury to her hand caused by a negligently operated bus. While it is impossible to predict the timing or amount of any settlement or court-ordered award

> regarding that claim, it is likely that any such payment would enable Lusk to repay all loans hereunder. Any such payment is referred to in this Agreement as a 'Claim Event.'

(NYSCEF Doc. No. 14.) The sixth clause of the Loan Agreement states, as here relevant:

> Repayment. Subject to Paragraph 5 [interest] above, and unless the Trust shall have made demand for payment pursuant to the terms of the Notes, Lusk will repay all amounts borrowed under this Agreement no later than thirty (30) days after the occurrence of an Estate Event or Claim Event, together with all unpaid accrued interest.

Id. Sometime after executing the Loan Agreement, the relationship between the parties began to sour. On December 7, 2018, Whitehurst sent Lusk a demand letter requesting immediate repayment of the loan. Lusk did not respond to the letter.

Whitehurst then commenced this action, pursuant to CPLR 3213, to recover the sum of $350,000.00, plus 12% per annum, by filing a summons with notice of motion for summary judgment in lieu of complaint. In so doing, Whitehurst asserts that the Promissory Note is a financial instrument for the payment of money only, that the Promissory Note is a complete document that stands on its own, and that the Loan Agreement is "not relevant."

In opposition, Lusk asserts that the action must be dismissed because the Loan Agreement contains a forum selection clause that designates Massachusetts as the forum for disputes. Lusk further asserts that the Promissory Note and the Loan Agreement are two documents that comprise one contract such that the forum selection clause applies to the entire contract.

The eighth clause of the Loan Agreement contains the following provision, as here relevant:

> This Agreement and the Notes constitute the entire agreement between The Trust and Lusk, and supersede all prior communications between them, with respect to it subject matter.
> ...
> This Agreement will be governed by the laws of the Commonwealth of Massachusetts without regard to the conflicts of laws provisions thereof, and in any action arising under or relating to this Agreement, the federal and state courts located in Massachusetts will have exclusive jurisdiction over the action and the parties, and Lusk hereby irrevocably consents to such jurisdiction.

(NYSCEF Doc. No. 14.)

Whitehurst's argument, that the Promissory Note is a separate document from the Loan Agreement, such that the Loan Agreement's forum selection clause does not apply to the Promissory Note, is unavailing.

Moreover, the Promissory Note itself contains the following language:

> This note will be governed by the laws of the Commonwealth of Massachusetts, without regard to the conflicts of laws provisions thereof. The Maker irrevocably consents to the personal jurisdiction of the federal and state courts located in said Commonwealth in any action to enforce this Note.

(NYSEF Doc. No. 4.) Furthermore, the Appellate Division has affirmed that:

> It is the well-settled "policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation." Forum selection clauses, which are prima facia valid, are enforced "because they provide certainty and predictability in the resolution of disputes," and are not to be set aside unless a party demonstrates that the enforcement of such "would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court."

Sterling Nat. Bank v E. Shipping Worldwide, Inc. 35 AD3d 222, 222 (1st Dep't 2006) (internal citations omitted).

Whitehurst does not demonstrate, nor does he even argue, that enforcement of the forum selection clause would be so unreasonable as to effectively deprive him of his day in court. Accordingly, this Court must enforce the contract as entered into by the parties, which provides that all disputes arising out of this contract be litigated in the courts of Massachusetts. Boss v Am. Express Fin. Advisors, Inc., 6 NY3d 242, 245 (2006) (holding forum selection clause must be enforced where contract unambiguously states that disputes are to be decided in courts of Minnesota and finding that under contract parties waived privilege to have claims heard elsewhere); Sydney Attractions Grp. Pty Ltd. V Schulman, 74 AD3d 476 (1st Dep't 2010) (dismissing action due to enforcement of forum selection clause); Landmark Ventures, Inc. v. Birger, 147 AD3d 497 (1st Dep't 2017) (finding dismissal was proper based on forum selection clause).

For the reasons stated herein, plaintiff's motion for summary judgment is denied; this action is hereby dismissed pursuant to the forum selection clause that mandates all actions be commenced in the courts of Massachusetts; and the Clerk is hereby directed to enter judgment dismissing the complaint in its entirety.

8/16/2019
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE