

Paycation Travel, Inc. v Global Merchant Cash, Inc.
2019 NY Slip Op 34393(U)
October 7, 2019
Supreme Court, Westchester County
Docket Number: Index No. 52579/2017
Judge: John P. Colangelo
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
PAYCATION TRAVEL, INC.,

Plaintiff,

-against-

GLOBAL MERCHANT CASH, INC.,

Defendant.
-----X

DECISION AND ORDER
Index No.: 52579/2017
Motion Sequence # 6

COLANGELO, J.

The following papers were considered on Defendant's Motion for Summary Judgment pursuant to CPLR §3212:

Notice of Motion- Affidavit- Affirmation-Exhibits A-O	NYSCEF	<u>86-103</u>
Affirmation-Affidavit in Opposition-Exhibits A-J		<u>104-114</u>
Reply Affirmation-Exhibit H		<u>115-116</u>

Relevant Background

The background of this litigation is set forth in the Affirmation of Defendant's counsel, Joshua E. Abraham, Esq. ("Abraham Aff."). Defendant Global Merchant Cash ("Defendant" of "GMC") and Plaintiff Paycation Travel, Inc. ("Plaintiff" or "Paycation") were parties to a Merchant Funding Agreement ("Agreement") dated November 5, 2015. (Def. Exh. C). Pursuant to the Agreement, GMC disbursed the sum of \$180,000 to Paycation, and according to the GMC ledger of disbursement and Paycation repayment history, Paycation timely repaid GMC as required. (Def. Exh. D). (Abraham Aff. ¶¶2-4).

GMC and Paycation (as well as various Paycation sister entities) subsequently entered into another Merchant Funding Agreement ("Agreement 2") dated May 10, 2016. (Def. Exh. E). Pursuant to this Agreement 2, GMC disbursed the sum of \$250,000. (Def. Exh. F). (Abraham Aff. ¶¶5-6). In order to secure its obligations under this Agreement, Jeremy Monte ("Monte") in his capacity as "principal, owner, and officer of Paycation" had signed an Affidavit of Confession of Judgment in favor of GMC. (Def. Exh. G). (Abraham Aff. ¶¶5,6 & 8).

Paycation ceased making payments on July 25, 2016, which constituted a default under the Agreement. (Def. Exh. F, p.2). Upon the default, GMC filed the Affidavit of Confession of Judgment with this Court under Index No. 60331/2016. After the Judgment was entered, GMC garnished the sum of \$269,845.27 belonging to Paycation from its account at BBVA Compass Bank. (Def. Exh. A. ¶44) (Abraham Aff. ¶¶7, 9-10). Paycation commenced the instant action.

The instant action seeks a declaration that the Judgment is void and unenforceable and an Order vacating same, and for money damages based upon Defendant's unjust enrichment by means of the fraudulent Judgment. (Def. Exh. A). The Complaint contains the following allegations: Paycation alleges that in July 2015, it hired Jeremy Monte and his wife Allison Monte (the "Montes") and a company known as Montbriar, Inc. which is owned by them to procure a new merchant account. Instead, the Montes claimed to be the sole owners of Paycation to multiple third parties and obtained millions of dollars in loans from third parties, including GMC, based upon their fraudulent statements and by providing counterfeit stock certificates as collateral. Both Jeremy Monte and Allison Monte executed Affidavits of Confession of Judgments, falsely representing that they were principals, owners and officers of Paycation, and providing a false address for the company. Plaintiff contends that the Montes knew their

Affidavits contained false statements when they were signed, and the Montes executed these Affidavits in exchange for a loan from GMC in an amount in excess of \$365,000, which loan was secured by the fraudulent Affidavits of Confession of Judgment.

Paycation alleges that the interest rate charged by GMC was well in excess of 25% per annum. Further, it is alleged that Paycation never had access to the funds provided by GMC, as the funds were deposited in and 35 payments were made to GMC from an account opened by and under the exclusive control of the Montes. Paycation alleges that it was unaware of the payments made to GMC by the Montes as the Montes refused to provide access to the bank records.

On July 27, 2016, GMC filed the fraudulent Affidavits of Confession of Judgment and obtained an unlawful Judgment, which has never been served on Paycation. Upon receiving an Information Subpoena with Restraining Notice, Paycation informed GMC of the fraudulent activities of the Montes. Despite the Unlawful Judgment, the sum of \$269,845.27 was garnished from Paycation's account at BBVA Compass Bank.

The basis of the instant motion is GMC's claim that a corporation such as Paycation cannot proactively assert criminal usury in an action to recover funds, that Monte was an officer of Paycation and his execution of the Affidavit of Confession of Judgment is binding upon Paycation,, and that Payaction cannot assert a claim for unjust enrichment since the complaint does not contain a breach of contract claim. GMC points to the public corporate records of the Nevada Secretary of State (Def. Exh. H) and a bank signature card at BBVA Compass Bank (Def. Exh. I), identifying Monte as the sole director, treasurer and secretary of Paycation. (Abraham Aff. ¶¶16-27). Defendant further contends that the Montes own Paycation, having purchased the company from prior owner, David Manning. (*Id.* ¶¶28-29).

Paycation opposes the motion on a number of grounds, including that GMC has failed to establish that Monte had any actual position at Paycation. The deposition of David Manning, *inter alia* is submitted in support of the opposition. According to Manning, Jeremy Monte opened up an unauthorized bank account under Paycation's name at Chase. (Pl. Exh. E, pp.123-124; Pl. Exh. 6). Jeremy Monte was never authorized to file the Paycation Tavel, Inc filing with the Nevada Secretary of State listing Allison Monte as the president, and Jeremy Monte as the secretary, treasurer and a director of Paycation. (*Id.*, p. 133). The Montes were never authorized to publicly represent to any Secretary of State in any jurisdiction that they are owners or officers of Paycation. (*Id.*, p. 134). Manning further testified that the bank signature card that names Jeremy Monte as a director is false since he was not a director, and none of the Paycation officers hold the title of "director." (*Id.*, 140). While GMC contends that Manning described Monte as an owner in an email Def. Exh. N), Manning was identifying Monte as an owner of Montbriar, and not Paycation. (*Id.*, p. 157).

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Moreover, if summary judgment is granted, plaintiff is entitled to an immediate trial on the issue of damages pursuant to CPLR§ 3212(c), after completion of the outstanding discovery.

On a motion for summary judgment, the moving party has the burden to make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Voss v. Netherlands Ins Co.*, 22 N.Y.2d 728 (2014), quoting *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); see also *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985), *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993), *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341(1974), *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

Once the moving party has sustained his or her burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

CPLR §5015(a)(3) provides that the Court may vacate a judgment on grounds of "fraud, misrepresentation, or other misconduct of an adverse party."

In this Court's view, Defendant has failed to tender evidence sufficient to establish as a matter of law that no triable issue of fact exists as to whether the Judgment was obtained by fraud. In addition, Plaintiff has raised, through the deposition testimony of David Manning, the factual issue of whether the Affidavits of Confession of Judgment executed by the Montes falsely represented that they had authority to act on behalf of Paycation.

Accordingly, and based upon the foregoing, it is hereby

ORDERED that Defendant's motion is denied in all respects; and it is further

ORDERED that all parties and counsel shall appear at the Settlement Conference Part,
Courtroom 1600 on November 12, 2019 to schedule a trial of this matter.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 7, 2019
White Plains, New York


HON. JOHN P. COLANGELO, J.S.C.