

Epic Advance, Inc. v 15 Div. St. Rest. Corp.
2020 NY Slip Op 30413(U)
February 7, 2020
Supreme Court, Westchester County
Docket Number: 68180/2019
Judge: Terry Jane Ruderman
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To commence the statutory time 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
EPIC ADVANCE, INC.,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence No. 1
Index No. 68180/2019

15 DIVISION ST. RESTAURANT CORP. d/b/a
HURLEY'S STEAKHOUSE & PUB and FINOLA
HURLEY,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with defendants' motion to vacate the judgment by confession entered in this matter:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affidavit, Affirmation, Affidavit, Exhibits A - F and Memorandum of Law	1
Affirmations and Affidavit in Opposition, Exhibits A - D	2

On February 25, 2019, plaintiff Epic Advance Inc. entered into a Funding Agreement with defendant 15 Division St. Restaurant Corp. d/b/a Hurley's Steakhouse & Pub ("Hurley's"), pursuant to which Hurley's agreed to sell \$145,000 of its future receivables in exchange for an up-front payment of \$100,000, in exchange for which Hurley's would provide future receivables to plaintiff through daily weekday payments calculated as 35 % of its daily receipts from its credit card processor, until plaintiff received a total of \$145,000. The agreement defines events of default, and provides that if a defined default occurs, the full uncollected purchase amount

would be immediately due and payable, along with costs and attorney's fees. Along with that agreement, defendant Finola Hurley, individually and on behalf of Division St. Restaurant Corp. d/b/a Hurley's Steakhouse & Pub, executed an Affidavit of Confession of Judgment on January 26, 2017, authorizing entry of judgment in favor of plaintiff and against defendants in the amount of \$145,000.00, less any payments made in accordance with the agreement, with interest, and attorneys fees in the amount of 33% of the amount due.

On November 1, 2019, a judgment was entered in favor of plaintiff and against defendants based on that confession of judgment, supported by an affidavit by Rafael Jacobs, the Director of Operations of Epic Advance, asserting that defendants breached the funding agreement by preventing Epic Advance from collecting receivables to which it was entitled under the agreement.

In now moving to vacate that judgment, and to void the Funding Agreement, defendants protest that there was no default, asserting that plaintiff had collected its agreed-upon percentage of the restaurant's daily receipts from March 5, 2019 through October 28, 2019, so it should not have declared a default on October 29, 2019. Defendants also contend in their moving papers that the Funding Agreement amounts to a usurious loan.

At oral argument regarding defendants' application for a temporary restraining order, it was clarified that soon after the funding agreement took effect, the parties had orally agreed to reduce the percentage of receipts payable to plaintiff from 35% to 20%. While plaintiff acknowledged that it agreed to the reduction, an affidavit by Rafael Jacobs explains that he had authorized only a temporary reduction of the payable percentage. He submits in support of that assertion an email exchange between himself and Paul Hurley, beginning May 18, 2019 and proceeding intermittently until June 13, 2019, in which Jacobs insisted that Epic needed to raise

the daily receipts percentage from 20%, and Hurley suggested 25%, but refused to go any higher. When Jacobs proposed “Best I can do [is] 28%,” Hurley replied, “Then you get zero.”

Although defendants, in their moving papers, asserted that they were not in breach, they acknowledged that the amount of payables Epic had collected through October 28, 2019 did not represent 35% of their receivables. They offered no support for the proposition that the reduction to 20% remained in effect indefinitely.

Analysis

Initially, as plaintiff correctly observes, a plenary action, rather than a motion, is required under these circumstances. “Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief” (*Merchant Funding Services, LLC v Volunteer Pharmacy, Inc.*, __ AD3d __, 2020 NY Slip Op 00582, 2020 NY App Div LEXIS 624, 2020 WL 465440 [2d Dept January 29, 2020]; *Merchant Funding Servs., LLC v Micromanos Corp.*, __ AD3d __, 2020 NY Slip Op 00581, 2020 NY App Div LEXIS 574, 2020 WL 465442 [2d Dept January 29, 2020]). While there are apparently exceptions to that general rule (*see id.*), the allegations made by defendants here bring this matter squarely within the foregoing rule. Notably, defendants have not established that the Clerk acted improperly in entering the judgment by confession.

Even if a motion were permissible for the claims made by defendants, they have failed to establish the merits of such a claim. Indeed, defendants merely established that they entered into a funding agreement, subsequently found that its repayment terms left them too little of their earnings, and that for a time plaintiff temporarily acceded to a request to accept a reduced percentage of receipts in repayment. They did not establish their contention that they were not in breach at the time a default was declared. Nor have they established that the funding agreement

is illegal as a usurious loan.

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion to vacate the confession of judgment is denied, and
it is further

ORDERED that the temporary restraining orders are vacated.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 7, 2020


HON. TERRY JANE RUDERMAN, J.S.C.