

Quicksilver Capital LLC v Obioha
2020 NY Slip Op 31321(U)
May 11, 2020
Supreme Court, New York County
Docket Number: 161123/2019
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

QUICKSILVER CAPITAL LLC,

Plaintiff,

INDEX NO. 161123/2019

MOTION DATE 05/16/2020

MOTION SEQ. NO. 001

- v -

STELLA OBIOHA d/b/a DESTINY MISSION HOME CARE
and STELLA OBIOHA,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

In this action by plaintiff Quicksilver Capital, LLC sounding, inter alia, in breach of contract, defendants Stella Obioha d/b/a Destiny Mission Home Care and Stella Obioha individually move, in effect, pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), to dismiss the complaint. Plaintiff opposes the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about April 3, 2018, plaintiff and Stella Obioha (“defendant”) d/b/a Destiny Mission Home Care (“Destiny”) entered into a “Purchase And Sale Agreement” pursuant to which plaintiff paid \$20,000 to purchase 22% of Destiny’s

future accounts receivable having an agreed upon value of \$28,400, subject to various terms including, but not limited to, guaranteed reconciliation fees. Doc. 9. Defendant herself guaranteed payment on the agreement, which required her to make daily payments of \$190 to plaintiff. Doc. 9.

The agreement provided, among other things, that defendant consented to jurisdiction in federal and state courts in the State of New York. Doc. 9 at par. 6.8. The agreement also provided that plaintiff “may serve [defendant] with legal process for any [d]ispute via certified mail by mailing same to [defendant’s] address set forth herein or to [defendant’s] last known address at the time of suit, and upon such mailing, service shall be proper irrespective of whether a signed certified mail receipt is returned to [plaintiff].” Doc. 9 at par. 6.8.

In May 2018, defendant allegedly breached the agreement by preventing plaintiff from debiting defendant’s bank account. Doc. 1 at par. 8. As of that date, defendant had paid plaintiff a total of \$4,951 pursuant to the agreement but, after accounting for fees incurred by plaintiff, still owed \$23,449. Doc. 1 at par. 9.

On November 14, 2019, plaintiff commenced the captioned action by filing a summons and complaint. Doc. 1. The summons and complaint were served on defendants by certified mail on November 15, 2018. Doc. 2. In its complaint, plaintiff alleged causes of action for breach of contract, unjust enrichment, and conversion. Doc. 1. Plaintiff also sued on the guarantee. Doc. 1.

Defendant joined issue by service of her answer filed December 12, 2019 denying all substantive allegations of wrongdoing and asserting affirmative defenses including failure to state a cause of action, lack of personal jurisdiction, and usury. Doc. 5.

Defendant now moves, in effect, pursuant to CPLR 3211(a)(1)(documentary evidence), (a)(7)(failure to state a cause of action), and (a)(8)(lack of personal jurisdiction), to dismiss the complaint. In support of the motion, defendant argues that this Court does not have personal jurisdiction over Obioha because she was not properly served with process. Doc. 13. She further asserts that the complaint must be dismissed since the agreement was criminally usurious. Doc. 13.

Plaintiff opposes the motion, asserting that defendant was properly served with process, that she consented to jurisdiction in New York, and that the agreement was not usurious.

LEGAL CONCLUSIONS:

Personal Jurisdiction

Defendant's contention that this Court lacks personal jurisdiction over her due to improper service of process is clearly belied by the agreement. As noted above, the agreement provided that plaintiff "may serve [defendant] with legal process for any [d]ispute via certified mail. . ." Doc. 9 at par. 6.8. Since parties to

a contract are “free to contractually waive service of process” (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140 [1st Dept 2010][citation omitted][waivers of service of process “render inapplicable the statutes that normally direct and limit the means of serving process on a defendant”]), the parties were free to set a method for service which differed from that set forth in the CPLR. Since there is no dispute that defendant was served by certified mail, the method prescribed by the agreement, service on defendant was not defective.

Additionally, paragraph 6.8 of the agreement provides that defendant “consents to the jurisdiction of the federal and state courts located in the State of New York” and that such courts “shall be the exclusive forum for all actions, proceedings, or litigation arising out of or relating to this [a]greement.” Doc. 9 at par. 6.8. Since “[j]urisdiction over the person of the defendant may be acquired by [her] consent” (*Gilbert v Burnstine*, 255 NY 348 [1931] [internal quotation marks and citation omitted]), there is no question that this Court has personal jurisdiction over her.

Usury

Purchases and sales of future receivables are common commercial transactions expressly contemplated by the Uniform Commercial Code. *See Rapid Capital Finance, LLC v Nature's Market Corp.*, 57 Misc3d 979 (Sup Ct,

Westchester County 2017). "Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be." *Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 744 (1992) (internal quotation marks and citations omitted).

In New York, there is a presumption that a transaction is not usurious. As a result, claims of usury must be proved by clear and convincing evidence, a much higher standard than the usual preponderance. *Giventer v Arnow*, 37 NY2d 305, 309 (1975). In determining whether a transaction is a loan or not, the court must examine whether or not defendant is absolutely entitled to repayment under all circumstances. "For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." *Rubenstein v Small*, 273 App Div 102, 104 (1st Dept 1947).

There are certain factors that a court should look for to see whether repayment is absolute or contingent. The first, and the one cited by each and every court that found that the transaction was not a loan, is whether or not there is a reconciliation provision in the agreement. A reconciliation provision allows a merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof). If a merchant is doing poorly, the merchant will pay less, and will receive a refund of anything taken by the company exceeding the specified percentage (which often can also be adjusted downward). If the merchant

is doing well, it will pay more than the daily amount to reach the specified percentage. *See e.g. Retail Capital, LLC v Spice Intentions Inc.*, 2016 N.Y. Misc. LEXIS 4883, 2017 WL 123374 at *2, 2016 NY Slip Op 32614(U), *2 (Sup Ct, Queens County, Jan. 3, 2017)(not a loan when "[t]he agreement provided a reconciliation on demand provision whereby the parties [were each] permitted to demand the monthly reconciliation of funds from the other to ensure that neither entity collected more or less of the sales proceeds than they were contractually entitled to collect from the designated bank account").

If there is no reconciliation provision, the agreement may be considered a loan. (*See Professional Merchant Advance Capital, LLC v C Care Servs., LLC*, 2015 U.S. Dist. LEXIS 92035, *13, 2015 WL 4392081, *4 [SDNY, July 15, 2015, No. 13-cv-6562(RJS)] [agreement obligated merchant "to make a minimum weekly payment *irrespective* of (the) accounts receivable," such that it was a loan]; *Merchant Funding Servs., LLC v Volunteer Pharm. Inc.*, 55 Misc 3d 316, 318, 44 NYS3d 876, 878 [Sup Ct, Westchester County 2016]).

The next factor is whether the agreement has a finite term or not. If the term is indefinite, then it "is consistent with the contingent nature of each and every collection of future sales proceeds under the contract." *IBIS Capital Group, LLC v Four Paws Orlando LLC*, 2017 N.Y. Misc. LEXIS 884, 2017 WL 1065071 at *5, 2017 NY Slip Op 30477(U), *5 (Sup Ct, Nassau County, Mar. 10, 2017). This is

because defendants' "collection of sales proceeds is contingent upon [plaintiffs] actually generating sales and those sales actually resulting in the collection of revenue." *K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 816-817, 57 N.Y.S.3d 625 (Sup Ct, Westchester County 2017).

"The third factor to be considered in determining the finality of a repayment requirement is whether plaintiff has any recourse should the merchant declare bankruptcy. (*K9 Bytes, Inc. v Arch Capital Funding, LLC, supra*; *IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra*)." *NY Capital Asset Corp. v F & B Fuel Oil Co., Inc.*, 58 Misc 3d 1229(A), 2018 NY Slip Op 50310(U), *6 (Sup Ct, Westchester County 2018).

Reconciliation Provision

The agreement contains a reconciliation provision. Doc. 9 at par. 1.2. In brief, that paragraph provides that plaintiff is to collect future receivables based on amounts collected by defendant during a particular calendar month. Doc. 9 at par. 1.2. If defendant is not in default, she "may once each calendar month request that [plaintiff] reconcile the [monthly amount to be paid by defendant] to more closely reflect [defendant's] actual [f]uture [r]eceipts times the [p]urchased [p]ercentage." Doc. 9 at par. 1.2. Since the payments were based on a contingency, the

agreement is valid even assuming, as defendants assert, that the return exceeded the legal rate of interest. *NY Capital Asset Corp. v F&B Fuel Oil Co., Inc., supra.*

Definiteness of the Term

The agreement does not contain a finite date for repayment and, thus, evidences the contingent nature of the repayment plan. Doc. 9. *See Rapid Capital Finance, LLC v Nature's Market Corp., 57 Misc3d 979 (Sup Ct Westchester County 2017).*

Bankruptcy

The agreement does not contain a provision regarding protection of defendant in the event she filed for bankruptcy. Doc. 22. Although the existence of the guaranty could suggest that the agreement is a loan rather than an agreement to purchase receivables, the "protection of plaintiff's ultimate ability to collect its full entitlement is insufficient, alone, to establish that [the agreement was] actually a loan." *Rapid Capital Fin., 57 Misc3d at 984.*

This Court further notes that the agreement provides that it "is not intended to be, nor shall it be construed as, a loan from [plaintiff] to [defendant]." Doc. 9 at par. 5.1. Although this clause is not dispositive of whether the transaction was a loan, it is relevant in determining the true nature of the agreement (*NY Capital*

Asset Corp. supra), which, finds this Court, was a contingent contract for the sale of future receivables without a finite payment date.

Given that the agreement was not a loan, it could not have been criminally usurious. Indeed, in *Principis Capital LLC v 3148521 Canada Inc.*, 2018 NY Misc LEXIS 1616 (Sup Ct, NY County 2018), this Court (Cohen, J.) rejected the argument by defendant's attorney that an agreement with terms similar to those in the agreement herein was usurious. In so holding, this Court relied on the recent decision of the Appellate Division, First Department in *Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507 (1st Dept 2018), *lv denied* 31 N.Y.3d 910 (2018), which held that an agreement to purchase future receivables, which gave rise to a judgment by confession, did not constitute a usurious transaction.

The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 6, 2020 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/11/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE