American Resources Corp. v C6 Capital, LLC
2020 NY Slip Op 34198(U)
December 16, 2020
Supreme Court, Kings County
Docket Number: 518051/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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AMERICAN RESOURCES CORPORATION, QUEST ENERGY INC, ERC MINING INDIANA CORP, MCCOY ELKHORN COAL LLC, DEANE MINING LLC, KNOTT COUNTY COAL LLC AND QUEST PROCESSING LLC,
Plaintiffs, Decision and order

- against - Index No. 518051/20

C6 CAPITAL, LLC, TVT CAPITAL LLC, CANNA BUSINESS RESOURCES LLC, EPRODIGY FINANCIAL, LLC, CAPITAL STACK LLC, ACH CAPITAL LLC, JUSTIN COOPER, DAVID COOPER, DAVID RUBIN, ANDREW FELLUS, BRIAN STULMAN, GREG IKHILOV AND FRAN HICKS,
Defendants, December 16, 2020
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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved seeking to vacate a confession of judgement filed and seek a preliminary injunction restraining its enforcement. The defendants have cross-moved seeking to dismiss the complaint and for a turnover pursuant to CPLR §5225(a). The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination. On May 29, 2018 the defendants, merchant cash advance funding providers entered into a contract with plaintiffs. Pursuant to the agreement the defendants purchased $1,662,500 of plaintiff's future receivables for $1,250,000. The parties further agreed that the defendants would be able to obtain a weekly amount of $51,953.12 until the amount of $$1,662,500 was fully paid. The plaintiffs argue the contract was really a loan and that

consequently it is not enforceable because it is usurious. The plaintiffs have thus moved seeking a preliminary injunction to vacate the confession of judgement.

Conclusions of Law

It is well settled that to vacate a judgement based upon a confession of judgement a plenary action must generally be commenced (Morocho v. Monterroza, 170 AD3d 710, 93 NYS2d 574 [2d Dept., 2019]). Thus, this plenary action is proper.

The plaintiffs main argument in support of vacating the confession is judgement is that the contract, although disguised as a purchase of receivables, was really a usurious loan.

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593

[2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

To maintain an action for unlawful debt it must be established that (1) the debt was unenforceable in whole or in part because of state or federal laws relating to illegal usury, (2) the debt was incurred in connection with "the business of lending money ... at a [usurious] rate," (3) the usurious rate was at least twice the enforceable rate, and (4) as a result of all the above factors the plaintiff was injured in his or her business or property (Durante Bros. & Sons Inc., v. Flushing National Bank, 755 F2d 239 [2d Cir. 1985]).

The defendants assert the money afforded to the plaintiffs was not a loan, rather it was a cash advance. Moreover, defendants argue the agreements contained reconciliation provisions which conclusively establish the agreements were not usurious (see, K9 bytes, Inc., v. Arch Capital Funding LLC, 56 Misc3d 807, 57 NYS2d 625 [Supreme Court Westchester County 2017]). The plaintiffs argue the reconciliation provision in the

contract was merely illusory and thus not a true reconciliation provision, hence the contract was a loan and was usurious.

The courts have developed three criteria evaluating whether a particular arrangement is a loan or a merchant case advance. First, whether there is a reconciliation provision, whether the agreement has an indefinite term and lastly, whether the funder has recourse if the merchant declares bankruptcy (IBIS Capital Group LLC v. Four Paws Orlando LLC, 2017 WL 1065071 [Supreme Court New York County 2017]).

The reconciliation provision that governs this case states that "the initial Weekly Amount is intended to represent the Specified Percentage of Seller's Weekly Future Receipts. For as long as no Event of Default has occurred, once each calendar month, Seller may request that Buyer adjust the Weekly Amount to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Seller agrees to provide Buyer any information requested by Buyer to assist in this reconciliation. No more often than once a month, Buyer may adjust the Weekly Amount on a going-forward basis to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Buyer will give Seller notice five business days prior to any such adjustment. After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Weekly Amount until any subsequent adjustment" (see, 'Agreement for the

Sale of Future Receipts' §2). The plaintiffs argue that since the reconciliation agreement states the buyer "may" adjust the weekly amount, the buyer is clearly not required to do so rendering the entire reconciliation clause illusory.

There can be no dispute that in general a reconciliation provision affording the merchant the ability to adjust the amount of any payments indicates the agreement is not a loan. The central reason such reconciliation provision expresses an agreement other than a loan is because the funder, the defendants in this case, are not "absolutely entitled to repayment under all circumstances" (NY Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc3d 1229(A), 98 NYS3d 501 [Westchester County 2018]). As the court there noted "when payment or enforcement rests on a contingency, therefore, the agreement is valid though it provides for a return in excess of the legal rate of interest" (id). Further, if the reconciliation provision "is missing, repayment may not be contingent and the agreement may be considered a loan" (id). In this case there is no dispute a reconciliation provision exists. The issue is whether the equivocal nature of the provision undermines its presence and impact.

There is scant authority governing the precise reconciliation provision that exists in this case. The case of LG Funding LLC v. United Senior Properties of Olathe LLC, 181 AD3d 664, 122 NYS3d 309 [2d Dept., 2020] though is instructive.

In that case the court refused to dismiss claims of usury regarding a reconciliation provision that stated the funder "may" upon the request of the merchant "adjust the amount of any payment due under this Agreement" (id). It is true in that case there were other provisions of the agreement that clearly indicated the arrangement was a loan. Specifically, the agreement provided that a written statement the funder could not pay its debt or its bankruptcy constituted a default. Thus, the court concluded that "these provisions suggest that the plaintiff did not assume the risk that United [the borrower] would have less-than-expected or no revenues" (id). Consequently, in LG Funding LLC(supra) the agreement, which afforded the funder sole discretion whether to exercise the reconciliation provision, clearly evidenced a loan even if couched in terms of a merchant cash advance.

Again, in Matter of AH Wines Inc., v. C6 Capital Funding LLC, 2020 N.Y. Misc. LEXIS 4642 [Supreme Court Ontario County 2020] the court recently examined a merchant cash agreement identical to the one in the instant case.[1] The court explained that "while the language of the reconciliation provision makes it seem as though AH Wines had the absolute right to a

[1] The only difference between the agreement in AH Wines and the agreement in this case is that in AH Wines the agreement permitted the seller to request changes to the daily amount while in this case the agreement permitted the seller to request changes to the weekly amount. That is a non-material difference. In all other respects the two agreements are identical.

reconciliation, implementation of the provision is solely in C6's discretion: C6 ***may*** adjust the daily amount to reflect actual future receipts, but there is no mandate for C6 to do so. As such, Plaintiffs establish a likelihood of success on their claim that the reconciliation provision is illusory because the language of the provision reserved to C6 the right to reject AH Wine's request for a reconciliation" (id). Further, the court rejected the same argument made here that indeed the defendants already agreed to reconcile surely evincing the agreement was not a loan. The court stated that "in opposition, C6 notes that AH Wines received the benefit of reconciliation because C6 chose to assist in that regard. Whether C6 was willing to reconcile is not relevant, however; the language of the Agreement is controlling, and the Agreement does not require C6 to agree to reconcile. By virtue of the unambiguous Agreement, AH Wines did not have an enforceable right of reconciliation" (id). In McNider Marine LLC v. Yellowstone Capital, 2019 N.Y. Misc. LEXIS 6165 [Supreme Court Erie County 2019] the court likewise concluded a reconciliation provision that contained language the funder "may" adjust any amounts was illusory and hence a usurious loan. The defendants dismiss these cases as "outliers" that have departed from well established law in this regard. Indeed, the defendants argue that Champion Auto Sales LLC v. Pearl Beta Funding LLC, 159 AD3d 507, 69 NYS3d 798 [1st Dept., 2018] contained an agreement

that provided the funder "may" adjust the rates of payment and the court found such agreement was not a loan. A careful examination of the agreement in that case reveals that it did not grant the funder the sole discretion to entertain a reconciliation request. The provision in that case stated that "at any time PBF [the funder] may adjust the Specific Amount so that the amount PBF receives in the future more closely represents the Specified Percentage" (see, Merchant Agreement included within Defendant's Motion in Opposition, Exhibit 34). That language surely vested the funder with sole discretion to adjust any amounts. However, that provision did not flow following a reconciliation request. Thus, the language of the agreement continues that "once each calendar month Merchant may request that PBF reconcile Merchant's actual receipts and adjust the Specific Amount so that the amount received by PBF in the future more closely represents the Specific Percentage" (id). The agreement states that PBF may request information supporting the request and that "PBF shall not be required to adjust the Specific Amount until such time as it has received all such requested information" (id). Clearly, the agreement in Champion Auto Sales, (supra) did not contain a clause that granted discretion to the funder whether to entertain a reconciliation request which the court still found was a merchant cash agreement and not a loan. That agreement contained not such language.

Further, guidance by the Second Department in LG Funding (supra) as well as the compelling arguments presented in McNider and AH Wines which all hold language the funder "may" reconcile amounts to a loan and not a cash advance demand the court reach the same result in this case. Consequently, the plaintiffs have demonstrated a likelihood of success on the merits the loan was usurious. Moreover, the plaintiffs have presented irreparable harm that would result if the injunction is not granted. Specifically, Mark Jensen the plaintiff's Chief Executive Officer submitted an affidavit wherein he elaborates that without the injunction the reputation among the small community where it operates will be adversely affected (see, Affidavit of Mark Jensen, ¶21). This is a sufficient basis to establish irreparable harm (see, Klein, Wagner & Morris v. Lawrence A. Klein P.C., 186 AD2d 631, NYS2d 424 [2d Dept., 1992]). In addition "it is well settled in New York that the loss of the business relationship which ostensibly took time and money to cultivate, constitutes irreparable harm that cannot be compensated by money damages" (see, Liberty Ashes, Inc., v. Taormina, 43 Misc3d 1213(A), 988 NYS2d 523 [Supreme Court Nassau County 2014]). Lastly, consider all the facts in this case the equities favor the plaintiffs.

Therefore, based on the foregoing the motion seeking a preliminary injunction is granted.

Turning to the defendant's motion seeking to dismiss the complaint it is well settled that a "motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). The complaint in this case alleges a vacatur of the confession of judgement, the agreement is void based on usury, fraudulent misrepresentation and public policy.

The court has already determined the plaintiffs have a likelihood of success on merits the agreement executed by the parties in this case may be void because it is usurious. Obviously, the complaint states a valid cause of action in this regard. The fourth cause of action, headlined as an action for public policy, is really an action the court does not maintain jurisdiction over the case since New York state has prohibited confessions of judgement against non-residents of New York. While there are questions whether that prohibition applies in this case the complaint has adequately pled causes of action the confession of judgement should be vacated. Clearly, it cannot be stated as a matter of law the complaint fails to allege any cause of action. Further discovery will narrow the specific causes of

action and following all discovery any party may move for further substantive relief. Consequently, the motion seeking to dismiss the complaint is denied at this time. Further, since there are questions whether claims against the judgement debtors can be pursued the motion seeking a turnover of funds is denied at this time.

So ordered.

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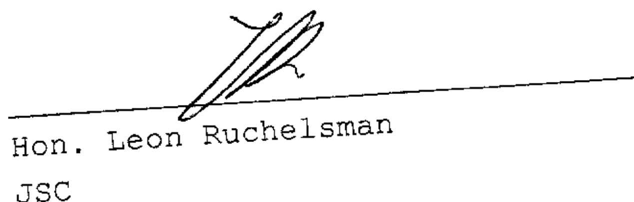

DATED: December 16, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC