NRO Boston LLC v CapCall LLC
2020 NY Slip Op 34510(U)
July 8, 2020
Supreme Court, Westchester County
Docket Number: 70219/2019
Judge: Linda S. Jamieson

Disp ____ Dec __x__ Seq. Nos. __1-2___ Type _dismiss_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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NRO BOSTON LLC, NRO EDGARTOWN LLC, and ALICE INDELICATO, individually and on behalf of all those similarly situated,

Index No. 70219/2019

Plaintiffs,

DECISION AND ORDER

-against-

CAPCALL LLC, YES FUNDING SERVICES, INC., RTR RECOVERY LLC, EVAN MARMOTT, JASON LEAK, VADIM BARBAROVICH, and THE JOHN and JANE DOE INVESTORS,

Defendants.

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The following papers numbered 1 to 8 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Notice of Motion, Affirmation and Exhibits	3
Memorandum of Law	4
Memorandum of Law and Exhibits in Opposition	5
Affirmation and Exhibits in Opposition	6
Reply Memorandum of Law	7
Reply Memorandum of Law	8

There are two motions to dismiss the complaint filed by defendants. The first motion is filed by CapCall, LLC, Yes Funding Services Inc. and RTR Recovery LLC (the "corporate

defendants"). The second motion is filed by defendants Marmott and Leak (the "individual defendants") (collectively, "movants"). Plaintiff dismissed defendant Barbarovich from the action at the outset of the litigation.

A simplified version of the facts follows. As set forth in the complaint, the corporate plaintiffs are a small business selling outdoors and sports furnishings in Massachusetts, owned by the individual plaintiff and a non-party. Beginning in December 2014, plaintiffs entered into a series of agreements with the corporate defendants in which they received money from the corporate defendants. Plaintiffs characterize the agreements as loans, while defendants consider them to be merchant cash advance agreements, in which they take a business' receivables as repayment. Significantly, neither side attaches a single one of these agreements to any of the papers filed in this action.

Plaintiffs allege that the agreements contain ineffectual, sham reconciliation provisions, a slew of onerous requirements and "a venue and choice-of-law provision requiring the merchant to litigate in a foreign jurisdiction under the laws of a foreign jurisdiction." Throughout the complaint, plaintiffs imply that all of the agreements require litigation in New York, under New York law,[1] another oppressive aspect of the agreements.

[1]In a previous, unrelated action involving one of the same defendants, the agreements – which were standardized forms – contained a New York choice of law provision.

Plaintiffs contend that because the agreements were so burdensome, they were forced to enter into additional agreements over the course of several years. They claim that although on their faces the agreements provided for legal interest rates, the real interest rates amounted to between 84% and 145%, which is usury under New York law. Eventually, plaintiffs stopped making payments, and this litigation ensued.[2]

Analysis

It has long been settled that "on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Clarke v. Laidlaw Transit, Inc.*, 125 A.D.3d 920, 921-22, 5 N.Y.S.3d 138, 141 (2d Dept. 2015). As the *Clarke* Court elaborated, "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." *Id.* "Where evidentiary material is submitted and considered on a

[2]Plaintiffs actually commenced litigation in Massachusetts District Court first, against the same corporate defendants and Mr. Marmott, among others. That litigation was dismissed for lack of personal jurisdiction against defendants in Massachusetts.

motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Atalaya Asset Income Fund II, LP v. HVS Tappan Beach, Inc.*, 175 A.D.3d 1370, 1371, 108 N.Y.S.3d 169, 172 (2d Dept. 2019).

A review of the complaint shows that on its face, plaintiffs have alleged properly each of the claims against movants. Although movants argue otherwise, these claims are all suitably detailed, alleging a plethora of specifics of who did what and when it was allegedly done.

Nonetheless, movants contend that each of the causes of action is deeply flawed. The Court begins by addressing the Fourth Cause of Action, which seeks damages under Mass. Gen. Law ch. 93A §§ 2 and 11. This statute "provides for a private right of action to those suffering monetary losses from unfair deceptive conduct in commercial dealings," *OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co.*, 123 A.D.3d 222, 229, 995 N.Y.S.2d 35, 39 (1st Dept. 2014), and any "unfair trade or practice" that occurs "primarily and substantially" in Massachusetts. *Volt Sys.*

Dev. Corp. v. Raytheon Co., 155 A.D.2d 309, 309, 547 N.Y.S.2d 280, 281 (1st Dept. 1989). Significantly, "The Massachusetts statute . . . does not apply when another jurisdiction's laws govern the underlying breach of contract claims." *OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co.*, 123 A.D.3d 222, 229, 995 N.Y.S.2d 35, 39 (1st Dept. 2014). *See also Worldwide Commodities, Inc. v. J. Amicone Co.*, 36 Mass. App. Ct. 304, 308, 630 N.E.2d 615, 618 (1994) ("Contract's choice-of-law clause bars application of the Massachusetts statute."). In this case, it is clear from plaintiffs' allegations that Massachusetts law does **not** govern any of the parties' agreements. As a result, this Court cannot apply Mass. Gen. Law ch. 93A §§ 2 and 11, and must dismiss the Fourth Cause of Action.[3]

Turning next to the Third Cause of Action, which seeks to vacate the judgments pursuant to CPLR § 5015, the Court finds that this is not a cause of action, but a request for relief properly made by motion. The language of this section specifically requires a motion (unless the parties stipulate to such relief). Such a motion must be made within "a reasonable time," *Mark v. Lenfest*, 80 A.D.3d 426, 426, 914 N.Y.S.2d 141, 142 (1st Dept. 2011), with a party demonstrating a reasonable excuse

[3]Because the Massachusetts law does not apply to this action, the Court need not address the issues of whether the Massachusetts District Court already held that it lacked jurisdiction over movants, or whether the unfair trade occurred primarily in Massachusetts.

for its default and a meritorious defense. *New Century Mortg. Corp. v. Corriette*, 117 A.D.3d 1011, 1012, 986 N.Y.S.2d 560, 560-61 (2d Dept. 2014) ("A defendant seeking to vacate a default pursuant to CPLR 5015(a)(3) based on intrinsic fraud must establish both a reasonable excuse for the default and a potentially meritorious defense to the action."). That simply does not apply in this action, where the only default was in making payments; there was no default involved in entering the judgments against plaintiffs.[4]

In any event, the Court agrees with defendants that this cause of action is more properly characterized as a claim to set the agreements aside as void because of usury. As such, it is subject to a one year statute of limitations. CPLR § 215(6) (one year statute of limitations applies to "An action to recover any overcharge of interest or to enforce a penalty for such overcharge."). Plaintiffs contend that this statute is irrelevant, because "preventing Defendants from enforcing a judgment does not entail the recovery of any overcharge of interest of [sic] the enforcement of a penalty against them." This literal reading of the statute clashes with well-settled law that holds that this section encompasses claims for usury. *See, e.g., Glassman v. Zoref*, 291 A.D.2d 430, 431, 737 N.Y.S.2d 537,

[4]To the extent that the Erie County Supreme Court held otherwise *in McNider Marine, LLC v. Yellowstone Capital, LLC*, 2019 WL 6257463, at *7 (N.Y. Sup. Ct. Nov. 19, 2019), this Court does not adopt that reasoning.

538 (2d Dept. 2002); *Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820, 617 N.Y.S.2d 830, 831 (2d Dept. 1994); *Chassman v. Shipley*, 2016 WL 1451585, at *2 (S.D.N.Y. Apr. 12, 2016), *aff'd* on other grounds, 695 F. App'x 630 (2d Cir. 2017). As more than one year passed between the last of the agreements and the commencement of this action, the Court dismisses the Third Cause of Action.

The Court next examines the Fifth and Sixth Causes of Action, for "wrongful execution regarding levies and demands" and "wrongful execution regarding restraining notices," respectively. Defendants point out, without contradiction, that each of these claims has a three-year statute of limitations, pursuant to CPLR § 214. Defendants further assert, also without contradiction, that the acts about which plaintiffs complain occurred in August 2016, more than three years prior to commencement. In response, all that plaintiffs state is that "the wrongful execution claims are not time-barred, because some of the injuries — the actual restraint of funds — may have occurred within the statutory period." This is nonsensical. If anyone were to know when the restraint of funds occurred, it would be plaintiffs. This is not a matter which requires unearthing during discovery. The Court thus finds that the Fifth and Sixth Causes of Action are barred by the statute of limitations.

The remaining two causes of action, the First and Second,

seek damages for "RICO: 18 U.S.C. § 1962," and "Conspiracy under 18 U.S.C. § 1962(d)," respectively. Defendants argue vociferously that these claims must be dismissed, for multiple reasons. The Court, having reviewed all of the parties' papers,[5] finds that the arguments raised by movants are all extremely fact-intensive – and all are disputed by plaintiffs. The Court finds that it is, accordingly, not appropriate at this juncture to dismiss the first two causes of action.

As for the individual defendants' motion to dismiss, the only claims remaining are the first two causes of action. As stated above, these claims, and the parties' differing analyses of them, are fact-intensive. The Court thus declines to grant the individual defendants' motion to dismiss these claims.

The parties are directed to contact this Court's Part Clerk to request a Preliminary Conference.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 8, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

[5]The Court points out that the Court's Commercial Division Part Rules set forth strict page limits. Any future motion papers that fail to comply with these rules will be rejected.

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