EIN CAP, Inc. v Lee's Foodservice Parts & Repairs Inc
2021 NY Slip Op 31282(U)
April 15, 2021
Supreme Court, Kings County
Docket Number: 501701/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
--x
EIN CAP INC.,

Plaintiff, Decision and order

- against - Index No. 501701/20

LEE'S FOODSERVICE PARTS & REPAIRS INC
d/b/a LEE'S FOODSERVICE PARTS & REPAIRS/
LEE'S OVEN and BRIAN M. ANDERSON,

Defendants, April 15, 2021
--x
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement that the defendant Brian Anderson owes money pursuant to a guaranty. Further, the defendant has cross-moved seeking to amend the answer. 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 January 7, 2020 the plaintiff entered into a contract with defendant Lee's Foodservice Parts & Repairs Inc. Pursuant to that contract the plaintiff purchased $181,250 of defendant's future receivables for $125,000. Brian Anderson executed a personal guaranty as part of the contract. The defendant failed to make all the payments pursuant to the agreement. This lawsuit was filed and although the matter has been discontinued as to Lee's Foodservice Parts & Repairs Inc., the claims are still valid against Mr. Anderson. Indeed, the plaintiff now seeks summary judgement arguing there are no questions of fact the guaranty is

valid and that Mr. Anderson is responsible for the amount sought. Mr. Anderson has opposed the motion and argues that language within the guaranty as well as the contract forecloses a summary determination. Further, Mr. Anderson has moved seeking to amend the answer.

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.

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

The plaintiff asserts the money afforded to the plaintiffs was not a loan, rather it was a cash advance. Moreover, plaintiff argues the agreement contained a reconciliation provision which conclusively establish the agreement was not usurious (see, K9 bytes, Inc., v. Arch Capital Funding LLC, 56

Misc3d 807, 57 NYS2d 625 [Supreme Court Westchester County 2017]). The defendant argues 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 "at any time EINC may adjust the Specific Daily Amount so that the amount in the future more closely represents the Specific Percentage. EINC will reconcile the payments on a monthly basis to equal the Specified Percentage by either debiting or crediting the difference back to Merchant" (Merchant Agreement Terms and Conditions, ¶1.1). The defendant argues that since the reconciliation agreement states the buyer "may" adjust the amount at any time, 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 plaintiff 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 that contained such equivocal language. The court explained that "while the language of the reconciliation provision makes it seem as though AH Wines had the absolute right to a 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). Thus, 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 agreement in this case does state that plaintiff will conduct a reconciliation on a monthly basis and such reconciliation appears to be based upon the defendant's request or the facts and circumstances. Thus, there are questions of fact concerning the nature of the agreement and whether it can be classified as a loan and is perhaps usurious. Consequently, any motion seeking summary judgement is denied.

Further, pursuant to CPLR §3025 the defendant's motion seeking to amend the answer is granted.

So ordered.

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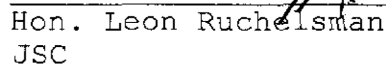

DATED: April 15, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC