

Hi Bar Capital LLC v Parkway Dental Servs., LLC

2022 NY Slip Op 30989(U)

March 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 533245/2021

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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HI BAR CAPITAL LLC D/B/A KINGDOM KAPITAL,
Plaintiff,

Decision and order

- against -

Index No. 533245/2021

PARKWAY DENTAL SERVICES, LLC,
and CHRISTOPHER COOLEY,

Defendants,

March 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants Edward Doyle has moved seeking to vacate a judgement entered February 4, 2022 on default. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On October 20, 2021 the plaintiff a merchant cash advance funding provider entered into a contract with defendants located in Florida. Pursuant to the agreement the plaintiff purchased \$472,500 of defendant's future receivable for \$350,000. The parties further agreed that the plaintiff would be able to obtain a daily amount of \$4,725 until the amount of \$472,500 was fully paid. Moreover, the defendants executed a guaranty and a security agreement. The defendants stopped remittances in December 2021 and still owed \$292,950. An action was commenced on December 29, 2021 which the defendants did not answer. The plaintiff then obtained a default judgement, which as noted, was entered on February 4, 2022. The defendants have now moved

seeking to vacate the default.

Conclusions of Law

It is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious defense (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]). In this case the reasonable excuse presented is that defendant Cooley was not properly served with process. However, other than passing references to improper service the defendant has failed to explain the nature of any infirmity regarding service. The process server submitted an affidavit that service was proper. Thus, a process server's affidavit provides prima facie evidence of proper service (Kaywood v. Cigpak Inc., 258 AD2d 623, 685 NYS2d 770 [2d Dept., 1999]). The defendant has not presented any evidence at all challenging service. Therefore, there is no basis upon which to challenge service and thus no reasonable excuse has been presented.

Even if a reasonable excuse was presented, a motion to vacate will prove unsuccessful if the party does not allege a meritorious defense (Halali v. Gabbay, 223 AD2d 623, 636 NYS2d 838 [2d Dept., 1996]). The defense need not entitle the party to judgment as a matter of law, rather it must simply raise the possibility that the case can be adequately defended (Bellcourt

v. Bellcourt, 169 AD2d 855, 564 NYS2d 580 [3rd Dept., 1991]).

The defendants argue the agreement consisted of improper usury and such usury constitutes a defense.

The plaintiff asserts the money afforded to the defendants 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 defendants 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 "Merchant may request a retroactive reconciliation of the total Remittance Amount...Such reconciliation, if applicable, shall be performed by KDK within two (2) Business Days following its receipt of Merchant's request for reconciliation by either

crediting or debiting the difference back to, or from, Merchants Bank Account so that the total amount debited by KDK shall equal the Specific Percentage of the Future Receipts that Merchant collected during the requested month" (Merchant Agreement Terms and Conditions, ¶1.3).

The defendants argue the discretionary nature of the reconciliation provision renders it illusory. However, there is nothing speculative or discretionary about the provision at all. On the contrary, the provision automatically becomes operative upon the presentation of the necessary bank statements required for the reconciliation. Thus, the reconciliation provision also provides that the request "must include copies of all of Merchant's bank account statements, credit card processing statements, and accounts receivable report outstanding if applicable, from the date of this Agreement through and including the date the request is made. KDK retains the right the request additional reasonable documentation including without limitation bank login or access to view Merchant's accounts using third party software, and Merchant's refusal to provide access shall be a breach of this Agreement and KDK shall have no obligation to reconcile" (id). That disclaimer clearly indicates that such reconciliation would be honored if the necessary paperwork is furnished.

There is, thus, no discretion that may be employed by the

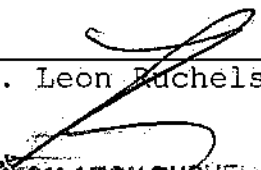
funder. Consequently, there is no basis to assert the agreement in this case was really a usurious loan.

Therefore, the defendants have not provided any reasonable excuse or meritorious defense. Consequently, the motion seeking to vacate the default is denied.

So ordered.

ENTER:

DATED: March 25, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

HON. LEON RUCHEL