

Thryve Capital Funding, LLC v Dilshaan LLC

2022 NY Slip Op 32449(U)

January 19, 2022

Supreme Court, Queens County

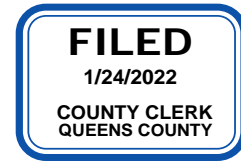
Docket Number: Index No. 710453/21

Judge: Robert I. Caloras

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice**



-----X
THRYVE CAPITAL FUNDING, LLC,

**Index No. 710453/21
Seq. No. 1**

**Plaintiff,
-against-**

**DILSHAAN LLC D/B/A CASHS TRUCKSTOP,
TARINDER JEET KAUR, and AMANDEEP SINGH,
Defendants.**

-----X

The following papers numbered E4-E18 read on this motion by the Defendants for an order dismissing this action, pursuant to CPLR 3211(a) and CPLR 327 on the grounds that this Court does not have jurisdiction over this action or subject matter or, in the alternative, pursuant to CPLR 2004, extending Defendants' time to answer the complaint in this action in the interests of justice and so that this action may be heard on the merits.

**PAPERS
NUMBERED
E4-E12
E13-E17
E18**

Notice of Motion-Affidavits-Exhibits-Memo of Law.....
Memo of Law in Opposition-Affidavit-Exhibits.....
Reply Affirmation.....

Upon the foregoing papers, it is ordered that Defendants' motion is granted in part and denied in part for the following reasons:

It is undisputed that on February 1, 2021 Plaintiff and Defendant Dilshaan LLC d/b.a Cashs Truckstop ("Dilshaan") entered into a Future Receivables Sale and Purchase Agreement ("Agreement") wherein Dilshaan, as Seller, sold \$81,9500.00 (the "Purchased Amount") in future receipts to Plaintiff, as Buyer, for \$55,000.00 (the "Purchase Price"). Defendants Tarinder Jeet Kaur ("Kaur") and Amandeep Singh ("Singh") executed a personal guaranty on the agreement. The Agreement provided, among other things, the following: Upon receiving the Purchase Price, Dilshaan was required to deposit all its Daily Receipts into a designated bank account (the "Account"), out of which Plaintiff was authorized to ACH debit 25% (the "Specified Percentage") each business day, until the Purchased Amount was remitted in full. Dilshaan must continuously authorize Plaintiff to debit the Specified Percentage from the Account without interference or adverse action, and authorized the remittance of an "Initial Daily Installment" of \$1,170.71 each business day out of the Account. Those daily estimated payments were defined as "the fixed amount that Seller and Plaintiff agree to be a good faith approximation of the Specified Percentage of Seller's Daily Future Receipts". The Initial Daily Installments were subject to a mandatory reconciliation provision. Section 10 of the Agreement included an audit procedure available to the merchant (Seller) if Dilshaan suffered a decline in its business receipts in the ordinary course of business. The Agreement expressly provided that it is not a consumer transaction and is not a loan. The following constitutes an event of default : (a) Seller's failure to deposit its Future Receipts into, or diversion of Future Receipts from, the Account; (b) Seller's use of multiple depository account without obtaining prior written consent of the purchaser; (c) Seller's change of the approved processor designated for auto-debiting of the Specified Percentage; (d) Seller's interference with the purchaser's collection of the specified percentage; and (e) four or more ACH transactions attempted by purchaser are rejected by Seller's bank. The Purchase Agreement did not include a provision providing the Plaintiff any recourse if Dilshaan declares bankruptcy. In the event a default occurs and is not waived by Plaintiff

in writing, then Plaintiff may declare Dilshaan in default under the Agreement without notice. In such event, among other remedies, "Seller [Dilshaan] shall immediately deliver to [Purchaser/Plaintiff] the entire unpaid portion of the Purchased Amount" and is also liable to the Purchaser [Plaintiff] for its reasonable attorneys' fees". Finally, the forum selection clause provided that New York law shall govern and that any related action shall be brought exclusively in the State of New York.

Plaintiff commenced this action by filing a Summons and Verified Complaint on May 6, 2021, wherein Plaintiff alleged causes of action for breach of contract against Dilshaan, breach of the personal guarantees against Kaur and Singh, and attorneys' fees against all Defendants. Plaintiff annexed thereto as Exhibit A, the Purchase Agreement, along with the Personal Guaranty ("Guaranty"), Rider 1 for applicable fees, Rider 2 for prior balance, Rider 3 for an origination fee and Appendix A the ACH Authorization Form, and as Exhibit B the remittance history. In the Complaint, Plaintiff alleged the following: on or about March 3, 2021 Dilshaan breached the Agreement by failing to deposit its receipts in to the Account, blocking Plaintiff's access to the account, and/or otherwise failing to remit the Specified Percentage to Plaintiff. A balance remains due and owing in the amount of \$62,471.62, plus interest from March 1, 2021, in addition to attorney's fees and costs.

In the first branch of the motion, Defendants move in this pre-answer motion to dismiss this action for failing to state a cause of action pursuant to CLPR 3211(a)(7). In support thereof, Defendants submitted, among other things, an affidavit from Singh and Kaur (owner/ managing member of Dilshaan), and a copy of Plaintiff's Webpage. Defendants argue that the Complaint should be dismissed because the Agreement was a loan subject to a usurious rate and Defendants believed the transaction was a loan based upon the claims on Plaintiff's Webpage. Both Kaur and Singh claim that "[their] business slowed down after Covid-19 and has still not gotten back on its feet", however neither indicated that they initiated a request for reconciliation pursuant to the terms of the Agreement. In opposition, Plaintiff submitted an affidavit from Diana Sanchez, an authorized representative of Plaintiff. Based therein, Plaintiff argues that the Agreement is not a loan that is subject to the usury laws.

"When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Polite v Marquis Marriot Hotel, 195 AD3d 965 [2d Dept. 2021]). "Conclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss" (id.).

"The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (LG Funding, LLC v United Senior Properties of Olathe, LLC, 181 AD3d 664, 665 [2d Dept 2020]; *see Seidel v 18 E. 17th St. Owners*, 79 NY2d 735 [1992]). "To determine whether a transaction constitutes a usurious loan, it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (LG Funding, LLC v United Senior Properties of Olathe, LLC, 181 AD3d at 665 [internal quotes and citation omitted]; *see Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009]). "The court must examine whether the plaintiff 'is absolutely entitled to repayment under all circumstances'" (LG Funding, LLC v United Senior Properties of Olathe, LLC, 181 AD3d at 665, quoting K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc 3d 807, 816 [Sup Ct, Westchester County 2017]). "Unless a principal sum advanced is

repayable absolutely, the transaction is not a loan ... Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy” (LG Funding, LLC v United Senior Properties of Olathe, LLC, 181 AD3d at 666; *see* K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc 3d at 816-819).

Here, the Agreement did not include any recourse for the Plaintiff in the event Dilshaan declares bankruptcy. Rather, Paragraph 3(f) in the Guaranty merely provided that

The liability of Guarantor hereunder shall not be impaired, abated, deferred, diminished, modified, released, terminated or discharged, in whole or in part, or otherwise affected, by any event, condition, occurrence, circumstance, proceeding, action or failure to act, with or without notice to, or the knowledge or consent of, Guarantor, including, without limitation:

f. any act or omission or delay to do any act by Buyer which may in any manner or to any extent vary the risk of Guarantor or which would otherwise operate as a discharge of Guarantor as a matter of law”.

The Agreement also included a reconciliation provision. Section 10 of the Agreement entitled “Seller’s Right of Reconciliation”, provided in pertinent part, the following:

a. If at any time during the term of this Agreement Seller will experience unforeseen decrease or increase in its Daily Receipts, for so long as Seller is not in default under the terms of this Agreement, Seller shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 11 below, to request reconciliation of the Initial Daily Payments for one (1) or more full calendar month(s) immediately preceding the day when such request for reconciliation is received by TCF (each such calendar month for which a reconciliation is requested, a 'Calendar Month').

b. Such reconciliation (the 'Reconciliation') of the Seller's Initial Daily Installment for one or more Reconciliation Month(s) shall be performed by TCF within five (5) Workdays following its receipt of the Seller's request for Reconciliation by either crediting or debiting the difference back to, or from, the Approve Bank Account so that the total amount debited by TCF from the Approved Bank Account during the Reconciliation Month(s) at issue is equal to the Specified Percentage of the Future Receipts that Seller collected during the Reconciliation Month(s) at issue.

Section 11 entitled “Request for Reconciliation Procedure” provides, in pertinent part, the following:

a. It shall be Seller's sole responsibility and the right hereunder to initiate Reconciliation of Seller's actual Initial Daily Installments during any Reconciliation Month by sending a request for Reconciliation to TCF.

b. Any such request for Reconciliation of the Seller's Initial Daily Installments for the specific Reconciliation Month(s) shall be in writing, shall state the Reconciliation Month(s) for which Reconciliation is requested, and shall include copies of Seller's bank statement(s) and credit card processing statements for each Reconciliation Month at issue, and shall be received by TCF via email to reconciliation@customerinfoortal.com with the subject line 'REQUEST FOR RECONCILIATION' or by other

means during the calendar month immediately following the latest Reconciliation Month listed in the request for reconciliation (time being of the essence as to the last day of the period during which such demand for Reconciliation shall be received by TCF). The Section entitled Adjustment of the Initial Daily Installment provides, in pertinent part that "...no Adjustment shall take place until and unless Reconciliation for at least one (1) Reconciliation Month takes place resulting in the reduction of the total amount debited from Seller's Approved Bank Account during the Reconciliation Month by at least fifteen percent (15%) in comparison to the amount that would have been debited during that month without Reconciliation

Section 12 entitled Adjustment of the Initial Daily Installment provides, in pertinent part, "...no Adjustment shall take place until and unless Reconciliation for at least one (1) Reconciliation Month takes place resulting in the reduction of the total amount debited from Seller's Approved Bank Account during the Reconciliation Month by at least fifteen percent (15%) in comparison to the amount that would have been debited during that month without Reconciliation".

Section 2 entitled "The Term" provides "[t]his Agreement for the purchase and sale of Future Receipts does not have a fixed duration or term, which is potentially infinite The term of this agreement shall commence on the Effective Date and shall expire on the date ... when the Purchased Amount and all other sums due to TCF pursuant to this Agreement are received by TCF in full."

Based upon a thorough and careful review of the evidence in the record, in particular to the above-mentioned language of the agreement itself, which is unambiguous on its face, the Court has determined that this was not a loan since the Agreement did not require absolute repayment (*see Colonial Funding Network, Inc. for TVT Capital, LLC v Epazz, Inc.*, 252 F Supp 3d 274, 283 [SDNY 2017]; *see also K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d at 816). Moreover, contrary to Defendants' claims, the Guaranty did not indicate that Dilshaan filing for bankruptcy qualifies as a default. Since the evidence has sufficiently demonstrated that the Agreement was not a loan, it is not subject to New York's usury statutes because "[i]t is well established that there can be no usury in the absence of a loan ..." (*Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]; *see also Transmedia Rest. Co., Inc. v 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706, 710 [Sup Ct, New York County 2000]). Accordingly, the branch of Defendants' motion seeking to dismiss the Complaint pursuant to CPLR 3211(a)(7) is denied.

In the next branch of the motion, Defendants move to dismiss pursuant to CPLR 327 and GOL 5-1402 on the grounds that the Court lacks subject matter jurisdiction. Plaintiff opposes. GOL §5-1402 provides, in pertinent part that:

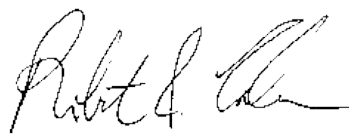
...any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section GOL §5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign company or non-resident agrees to submit to the jurisdiction of the courts of this state.

CPLR 327(b) provides that “the Court from dismissing the case for selection of an inconvenient forum where the action arises out of or relates to a contract, agreement or undertaking to which GOL§5-1402 applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part”.

It is well settled that “where a party to a contract has agreed in advance of litigation to submit to the jurisdiction of a court, she is later precluded from attacking that court's jurisdiction on grounds of forum non conveniens (National Union Fire Ins. Co. v Worley, 257 AD2d 228, 232 [1st Dept. 1999]). Here, prior to this litigation the parties consented in the Agreement to any disputes being governed by the law of the State of New York and to submit to the jurisdiction of New York (Section 43 of the Agreement). Accordingly, the branch of the motion seeking to dismiss for lack of subject matter jurisdiction is denied.

The remaining branch of the motion seeking leave to serve a late Answer is granted, without opposition. Accordingly, Defendants are directed to file an Answer within 45 days after entry of this order.

Dated: January 19, 2022



ROBERT I. CALORAS, J.S.C.

