

**Zomongo.TV USA Inc. v Capital Advance Servs.,
LLC**

2022 NY Slip Op 32928(U)

August 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 512735/2021

Judge: Leon Ruchelsman

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

-----x
ZOMONGO.TV USA INC. D/B/A ZOMONGO.TV
USA, JOCELYNE LISA HUGHES-OSTROWSKI and
JEREMY GENE OSTROWSKI,

Plaintiffs, Decision and order

- against -

Index No. 512735/2021

CAPITAL ADVANCE SERVICES, LLC,

Defendant,

August 25, 2022

-----x
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint on various grounds. The plaintiffs cross-move seeking to amend the complaint. The motions have been opposed respectively by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, the defendant Zomongo a corporation involved in the advertising industry entered into two merchant cash agreements with the defendant. The first agreement was dated February 12, 2018 whereby the defendant purchased \$449,700 of plaintiff's future receivables for \$300,000. The second agreement was dated April 11, 2018 whereby the defendant purchased \$861,925 of plaintiff's future receivables for \$575,000. The complaint alleges the defendant failed to deliver the purchased amounts pursuant to the agreements and improperly withdrew daily amounts in excess of the amounts to which the parties agreed. The complaint alleges further improprieties

concerning usury, unconscionability and the lack of any reasonable basis for the daily amounts determined in the agreements. The proposed amended complaint asserts causes of action for breach of contract, declaratory judgement, violations of the Uniform Commercial Code, fraud and unjust enrichment. The defendant asserts that essentially the claims are time barred and therefore the complaint or the proposed amended complaint fails to state any cause of action. The plaintiffs oppose the dismissal and seek to amend the complaint as noted.

Conclusions of Law

The first issue that must be addressed is the residence of the plaintiffs. The original complaint filed on September 10, 2021 asserted that Zomongo as well as Jocelyne Lisa Hughes-Ostrowski and Jeremy Gene Ostrowski all resided in Alberta Canada (see, First Amended Complaint, ¶¶ 1-3). However, the proposed amended complaint now asserts Zomongo is a Delaware corporation. Further, the bank statements for Zomongo for the relevant period during May 2018 as well as the confession of judgement entered on May 29, 2018 list the address of Zomongo as well as the individuals in Peoria, Arizona. Further, the notice to judgement debtor executed by the sheriff of New York City also lists Zomongo's address in Arizona. Further, the first agreement and the second agreement both list the plaintiff's "physical

address" in Arizona and the ACH Authorization Form concerning the first agreement lists Jocelyne Lisa Hughes-Ostrowski's address in Arizona and the ACH Authorization Form concerning the second agreement lists Jeremy Gene Ostrowski's address in Arizona. Thus, all information related to this case indicate the plaintiffs reside in Arizona. There is other information submitted, none of which relates to this case, that indicates the plaintiffs reside in Canada. This includes a 2016 Franchise Tax Report from Delaware, Ms. Hughes-Ostrowski's driver's license,¹ an answer in a Florida lawsuit dated August 8, 2018, a Canadian bankruptcy record search and a W-9 Tax document dated December 29, 2016. The documents from 2016 have little value since the agreements in this case were executed in 2018. Even the documents that do indicate a Canadian address are not related to this case at all. Thus, while the exact residence of the plaintiff's might require further discovery or the plaintiff's might permissibly maintain two residences, also the subject of discovery, at this juncture the court will consider the plaintiff's residents of Arizona.

Concerning the plaintiff's motion seeking to amend the complaint, it is well settled that pursuant to CPLR §215(6) usury carries a one year statute of limitations. There really is no

¹ It should be noted that Jeremy Gene Ostrowski's driver's license lists an Arizona address.

dispute the contracts were executed on February 12, 2018 and April 11, 2018 and the complaint was filed more than a year after those dates. The plaintiffs argue that in the context of a motion to vacate a default any statute of limitations argument does not apply. In NRO Boston LLC v. CapCall LLC, 2020 N.Y. Misc. LEXIS 4064 [Supreme Court Westchester County 2020] the court dismissed a cause of action for usury where the lawsuit was filed more than one year after the contract was executed. The court specifically rejected the argument raised here that preventing the enforcement of the judgement has nothing to do with usury. In this case, the third cause of action is one for usury. Since the events which give rise to that cause of action are barred it cannot proceed. To the extent McNider Marine LLC v. Yellowstone Capital, 2019 N.Y. Misc. LEXIS 6165 [Supreme Court Erie County 2019] or NRO Boston LLC v. Yellowstone Capital LLC, 74 Misc3d 267, 147 NYS3d 375 [Supreme Court Rockland County 2021] reached contrary conclusions the court declines to follow those portions of those decisions. Moreover, the plaintiff is not moving to vacate a judgement pursuant to CPLR §5015(a) which allows a party to move within a reasonable time (Long Island Capital Management Corp., v. Silver Sands Motel Inc., 167 NYS3d 857, 91 NYS3d 130 [2d Dept., 2018]). Rather, the plaintiff has filed a lawsuit and seeks to vacate the judgement as a cause of action, one really based upon usury. Reliance upon CPLR §202

reveals that Arizona has based its statute of limitations upon the State of Texas and thus those statutes govern (Van Cleef v. Aeroflex Corp., 657 F2d 1094 [9th Cir. 1981]). Thus, pursuant to the Finance Code of Texas, §305.006(a)(2) the statute of limitations for a usury claim is four years. Therefore, this claim is timely.

Considering the request to amend the complaint, a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]).

Addressing the merits of the usury claim, it is well settled that a corporation is prohibited from asserting an affirmative usury claim and that there is "no countervailing case law suggesting that they can seek affirmative relief under the New York usury statute" (Haymount Urgent Care PC v. GoFund Advance LLC, 2022 WL 2297768 [S.D.N.Y. 2022]). Therefore, the motion seeking to dismiss the third claim of the proposed amended complaint is granted and the motion seeking to amend to assert this claim is denied.

Considering the remaining causes of action, the first cause of action of the proposed amended complaint adequately pleads breach of contract. While, of course, the allegations will be subject to discovery, at this juncture the claim of a breach of contract are properly asserted and the motion seeking to amend to assert this cause of action is granted.

The second cause of action seeks to vacate the judgement by confession. It is true that generally, "a judgment which is paid and satisfied of record ceases to have any existence since a defendant, by paying the amount due, extinguishes the judgment and the obligation thereunder" (see, Platinum Funding Corp., v. Blue Ocean Lines Inc., 249 AD2d 19, 671 NYS2d 221 [1st Dept., 1998]). However, where a levy is imposed without payment then a claim pursuant to CPLR §5015(d) is proper (Valtech Research Inc., v. Meridian Abstract Corp., 23 Misc3d 531, 872 NYS2d 274 [Civil Court of the City of New York 2009], see, also, Barretta Realty Skyline Div. Of Real Property Technologies LLC v. Sunrise Land Services Corp., 44 Misc3d 142(A), 997 NYS2d 97 [Supreme Court Appellate Term 2014]). In any event, in an order dated May 4, 2022 in Capital Advance Services LLC v. Zomongo.Tv USA Inc., Index Number 1229/2018, 2022 WL 1441154 [Supreme Court Kings County 2022] the court held that the Capital Advance Services "shall provide restitution of all funds removed from the bank accounts maintained by the defendants at BMO Harris Bank under

the execution and levy served on or about May 29, 2018, within thirty (30) days of the filing of this decision with notice of entry of the order" (id). Therefore, the cause of action sought here has already been decided. Consequently, the motion seeking to dismiss the second cause of action of the proposed amended complaint is granted and the motion seeking to amend the complaint to assert this claim is denied.

The fourth cause of action adequately pleads a cause of action for a violation of the Uniform Commercial Code and the motion seeking to amend the complaint to add this cause of action is granted.

The fifth cause of action is for fraud. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). The proposed amended complaint does not assert the defendants made any false representations which induced any reliance. Rather, the allegation states that the defendant Davis made false statements in order to obtain a judgement against the plaintiffs. The proposed amended complaint alleges a cause of action based upon violations of perjury pursuant to Penal Law §210. However, that is a crime and does not give rise to a civil cause of action

(Orrego v. Knipfing, 564 F.Supp3d 273 [E.D.N.Y. 2021]).

Therefore, the motion seeking to amend the complaint to add this cause of action is denied.

The sixth cause of action of the proposed amended complaint alleges unjust enrichment, quantum meruit and to modify the judgement against counsel that obtained the judgement. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since there is a viable claim for breach of contract the unjust enrichment claim is duplicative. Therefore, the motion seeking to amend the complaint to add this cause of action is denied.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC