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

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LIBERTAS FUNDING LLC,

Plaintiff, Decision and order

- against - Index No. 514223/2022

ULTIMATE JET LLC D/B/A ULTIMATE AIR SHUTTLE; ULTIMATE JETCHARTERS, LLC D/B/A ULTIMATE AIR SHUTTLE; WOOSTER OHIO INVESTMENTS LLC; MRBH CAPITAL LLC and JOHN GORDON,

Defendants, September 19, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 arguing there are no questions of fact the defendants owe the money sought. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On October 29, 2019 and November 25, 2019, the plaintiff a merchant cash advance funding provider entered into a contract with defendants who reside in Ohio. Pursuant to the agreement the plaintiff purchased $1,111,525 and $744,625 respectively of defendant's future receivable for $865,000 and $575,000. Pursuant to the first agreement the defendants were required to remit a daily amount of $4,811.80 and pursuant to the second agreement were required to remit a daily amount of $1,295. The defendant John Gordon guaranteed both agreements. The plaintiff asserts the defendants stopped remittances in March 2022 and now

owe $599,839.40 and $302,187 for a total of $902,206.40. This action was commenced and now the plaintiff seeks summary judgement arguing there can be no questions of fact the defendants owe the amount outstanding and judgement should be granted in their favor. The defendants oppose the motion.

Conclusions of Law

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, 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 (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

It is well settled that to assert the defense of novation there must be a previously valid obligation, the agreement of all parties to a new contract, the extinguishment of the old contract and a valid new contract (see, Grimaldi v. Sangi, 177 AD3d 1208, 113 NYS3d 771 [3rd Dept., 2019]). Thus, a subsequent agreement does not extinguish an earlier agreement unless there is clear intent the subsequent agreement intended to so substitute the earlier one (Rockwood v. Vicarious Visions Inc., 44 AD3d 1229, 843 NYS2d 867 [3rd Dept., 2007]). Therefore, unless a second

agreement extinguishes earlier obligations no such novation exists (Sudit v. Roth, 98 AD3d 1106, 950 NYS2d 709 [2d Dept., 2012]). By contrast an executory accord, essentially, is an agreement to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim or obligation and a promise to render such performance in satisfaction or in discharge of such obligation (see, GOL §15-501(1)). A reconciliation provision within a merchant cash agreement is neither a novation nor an executory accord. The provision does not discharge previously existing obligations (novation) nor does it consist of substituted performance for existing claims (accord). Rather, the reconciliation provision, as part of the agreement itself, permits the change of daily remittances based upon changed revenue or unexpected decreases in receipts. Thus, pursuant to any reconciliation provision the only accommodation it affords is smaller payments over a longer period of time. Any extension of time in which to pay obligations is not a novation (Spiro v. Reade Pure Food, 149 Misc 601, 267 NYS2d 794 [City Court Bronx County 1933]). Further, although not explicit within the agreement, it is surely implicit that the reconciliation provision would not change any other provisions of the agreement and would not act as a novation (see, HSH Nordbank AG New York Branch v. Street, 421 Fed.Appx. 70 [2d Cir. 2011]).

The defendant John Gordon argues the guarantees cannot impose any liability upon him because he sought and obtained reconciliations pursuant to reconciliation provisions and thus novations of the agreements were created. However, as noted, no such novations exist. Further, the mere fact that Gordon may no longer work for the defendant companies does not affect his status as a guarantor. Therefore, no issues of fact have been raised which would demand a denial of the motion for summary judgement. Consequently, the motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: September 19, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC