

Libertas Funding LLC v Ultimate Jet LLC
2022 NY Slip Op 33670(U)
October 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 514223/2022
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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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,

October 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §2221 seeking to renew and decision and order decided September 19, 2022 granting the plaintiff summary judgement. The defendant opposes the motion and has cross-moved seeking sanctions. That motion is opposed. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior order, on October 29, 2019 and November 25, 2019, the plaintiff a merchant cash advance funding provider entered into contracts with defendants whereby plaintiff purchased \$1,111,525 and \$744,625 respectively of defendant's future receivable for \$865,000 and \$575,000. The defendant John Gordon guaranteed both agreements. The plaintiff asserted the defendants stopped remittances in March 2022 and owed \$599,839.40 and \$302,187 for a total of \$902,206.40. The court granted the plaintiff's motion for summary judgement holding that the

existence and use of a reconciliation provision in the agreements did not establish any novation absolving defendant from his guarantees. Upon renewal the defendant John Gordon asserts that while the summary judgement motion was pending he sold his interest in Wooster Ohio Investments LLC to an entity called Alberta Air LLC and that pursuant to the agreement Alberta assumed any liability Mr. Gordon maintained under the merchant cash agreements. Thus, the sale to Alberta "nullifies any conceivable obligation Mr. Gordon could have had under the Guaranty" (see, Memorandum of Law in Support, page 1 [NYSCEF Doc. No. 48]) and therefore seeks renewal based upon these new facts. As noted, the plaintiff opposes the motion.

Conclusions of Law

It is true that generally, a motion to renew must contain evidence that existed at the time the original motion was filed but was unknown to the moving party (Brooklyn Welding Corp., v. Chin, 236 AD2d 392, 653 NYS2d 631 [2d Dept., 1997]). However, that rule has been defined as 'flexible' and a party may file a motion to renew even if the evidence was known at the time of the original motion provided the party offers a reasonable explanation why the additional facts were not included within the original motion (Progressive Northeastern Insurance Company v. Frenkel, 8 AD3d 390, 777 NYS2d 652 [2d Dept., 2004]).

Article 2.2 of the Wooster Ohio Investments, LLC Membership Units Purchase/Sale Agreement states that Alberta will "assume, pay and hold harmless, and indemnify" many of Gordon's debts including the amount of \$400,000 owed to the plaintiff (id [NYSCEF Doc. No. 46]). However, the guarantees signed by Gordon state that "neither Merchant nor Guarantor shall have the right to assign their respective rights or obligations under this Agreement without first obtaining Purchaser's written consent" (see, Agreements of Sale of Future Receipts, ¶ 48 [NYSCEF Doc. No. 2 and 3]). Thus, the plaintiff need not pursue any claims against Alberta since the agreement between Alberta and Gordon could not affect the plaintiff's rights in any way. Gordon responds that Alberta should be joined and added to this lawsuit so that the rights of all the parties can be resolved in one seamless action.

CPLR §1001(a) states that joinder of a party is appropriate "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (id).

However, in this case Alberta is not "necessary" for the plaintiff to pursue its claims against Gordon. Indeed, the agreement between plaintiff and Gordon prohibited Gordon from allowing any other entities to be responsible for Gordon's debt without the plaintiff's consent. Rather, Gordon may commence any

action against Alberta pursuant to the agreement they contracted among themselves. Those subsequent agreements hardly classify Alberta as necessary to this action. This is particularly true since Alberta is unaffected by any decision against Gordon and could present any claims against Gordon himself (American Realty Company v. 64 B. Venture, 176 AD2d 226, 574 NYS2d 344 [1st Dept., 1991]). Moreover, any discrepancy between the amount owed the plaintiff and the amount contained in the agreement with Alberta does not concern the plaintiff at all and is only between Alberta and Gordon.

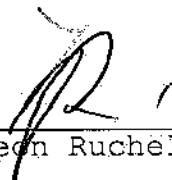
Therefore, based on the foregoing the motion seeking renewal is denied.

The cross-motion seeking sanctions is denied.

So ordered.

ENTER:

DATED: October 25, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC