

Trust Capital Funding LLC v Wibargain LLC

2022 NY Slip Op 34113(U)

December 5, 2022

Supreme Court, Kings County

Docket Number: Index No. 500998/2022

Judge: Leon Ruchelsman

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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

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TRUST CAPITAL FUNDING LLC DBA SUTTON
FUNDING,

Plaintiff, Decision and order

- against -

Index No. 500998/2022

WIBARGAIN LLC and LIN MIAO,

Defendants, December 5, 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 June 24, 2021 and August 2, 2021, the plaintiff a merchant cash advance funding provider entered into contracts with defendants who reside in California. Pursuant to the first agreement the plaintiff purchased \$340,000 of defendant's future receivable for \$250,000. Pursuant to the second agreement the plaintiff purchased \$335,000 of defendant's future receivable for \$250,000. The defendant Lin Miao guaranteed the agreement. The contracts required the defendant to permit daily remittances to the plaintiff. The plaintiff asserts the defendants stopped remittances in January 2022 and now owe \$262,000 under both agreements. This action was commenced and now the plaintiff

seeks summary judgment arguing there can be no questions of fact the defendants owe the amount outstanding and judgment 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]).

In this case, there are no questions of fact the agreement was a cash advance agreement and not a usurious and unenforceable loan. 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]). Thus, a reconciliation provision demonstrates, without any evidence to the contrary, that the plaintiff is not entitled to repayment in all circumstances. In this case the reconciliation provision is mandatory, supporting the simple conclusion the agreement is not a loan. This is particularly true where the defendants "have not alleged that reconciliation did not in actuality function as agreed (or, indeed, that" the defendants "ever even requested reconciliation)" (see, Streamlined Consultants Inc., et., at., v. EBF Holdings LLC, 2022 WL 4368114 [S.D.N.Y. 2022]). While the memorandum in opposition states that "On or about January 4, 2022 defendants communicated with plaintiff to request an adjustment or reconciliation of the daily remittance amount pursuant to the loan agreements" and that "Plaintiff rejected defendants request and demanded that defendant continue to make the daily remittance payments or be in default" (see, Memorandum in Opposition, Page 7 [NYCEF Doc. No. 25]) there is no evidence supporting that contention. Likewise, defendant Lin Miao submitted an affidavit which states that "on or around January 4th 2022, I communicated with plaintiff to request a


reconciliation of the daily remittance amount two thousand dollars (\$2,000.00.) Soon thereafter, plaintiff informed me that my request was denied and that I must continue to make the daily payments in that exact the amount or be in default" (see, Affidavit of Lin Maio, ¶11 [NYSCEF Doc. No. 23]). Again, there is no evidence supporting the request for any reconciliation. This is particularly important because the contracts require any reconciliation requests to be in writing (see, Sutton Funding Future Receivables Sale and Purchase Agreement, ¶11(b), ¶13(b) [NYSCEF Doc. Nos. 12 &13]). Without any evidence of a request for any reconciliation there has been an insufficient opposition to the motion seeking summary judgement. Thus, the defendants have failed to raise any question of fact whether any reconciliation was sought or denied to even challenge its validity.

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: December 5, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC