

**Canary Bus. Funding LLC v Tammy Tran Attorneys
at Law, LLP**

2023 NY Slip Op 30805(U)

March 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 520837/2020

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 520837/2020
Seq. 003 and 004

Part 91

DECISION/ORDER

CANARY BUSINESS FUNDING LLC,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed.	<u> </u>
Answering Affidavits	<u>2, 3</u>
Replying Affidavits	<u> 3</u>
Exhibits	<u> </u>
Other	<u> </u>

TAMMY TRAN ATTORNEYS AT LAW, LLP D/B/A THE
TAMMY TRAN LAW FIRM AND MINH TAM TRAN,

Defendants.

Upon the foregoing papers, defendants’ motion to vacate and dismiss a judgment (Seq. 003) and plaintiff’s cross-motion for contempt or to compel (Seq. 004) is decided as follows:

Introduction

The plaintiff Canary Business Funding LLC (“Canary”) commenced this action by summary judgment in lieu of complaint seeking repayment of a prior debt. This action was resolved by a stipulation of settlement for \$505,000, payable by the defendants on a monthly basis from July 1, 2021 through June 1, 2023. On March 2, 2022, Plaintiff sought a default judgment based upon the defendants’ alleged default of the stipulation. A judgment was entered against the defendants on March 3, 2023.

Factual Background

It is undisputed that the parties signed a stipulation to settle the action, and that the settlement stipulation was so ordered on June 21, 2021. Section 1 states that “Defendants shall pay to the Plaintiff the sum of \$505,000 plus interest at 15% per annum,” with a subsequent outline of the requisite payments from July 1, 2021 to June 1, 2023. Section 3 of the stipulation

permits the plaintiff to apply for entry of default judgment without notice to the defendant if the defendants, after notice to counsel, fail to cure any default in payment. Sub-section (a) permits that judgment to include the “unpaid settlement amount plus all reasonable attorneys fees incurred by the Plaintiff in this and all related matters.”

The March 3, 2022 judgment that the plaintiff obtained was in the amount of \$542,163.33. At the time of oral argument, the parties conferred and agreed that the amount currently paid by the defendants on the settlement is \$33,000 after some dispute related to canceled or bounced checks.

Analysis

First, the defendants seek vacatur of the March 2022 judgment. CPLR 5015 (a) (3) states that the court which rendered a judgment may relieve a party from it upon such terms as may be just upon the ground of “fraud, misrepresentation, or other misconduct of an adverse party.”

The defendants’ arguments are predicated on two alleged misrepresentations. The first is that of the amount defendants have paid to plaintiff. This issue was resolved at oral argument, and any question of checks returned for insufficient funds was laid to rest. The defendants are entitled to an off-set of \$33,000 on any judgment—the amount of the defendants’ obligation that has heretofore been satisfied.

Second, the defendants argue that the stipulation of settlement, which is in its essence a contract, is silent on the issue of whether the 15% per annum interest is to be calculated based on the original principal of the loan or upon the outstanding balance of the loan at the time of calculation. “It is well settled that [the court’s] role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract” (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]). The text of the contract obligates the defendants to pay \$505,000 plus

interest at 15% per annum. A simple calculation of the payment schedule to which the defendants agreed reveals a total obligation of \$587,658, which is approximately the principal plus interest at the agreed upon rate. The interest rate is calculated prior to any payments by the defendants—and therefore not contingent upon the amount that the defendants have paid at any point in time. The defendants’ argument that interest should only be calculated based on the outstanding balance would be compelling if the interest rate was included in Section 3 of the Agreement, which outlines the plaintiff’s available remedies in the case of a default. That is not the case. Instead, Section 1 makes clear that the per annum interest is contractual consideration for the extended period of time over which the defendants are to pay the amount of the settlement (*see eg National Citizens’ Bank of City of New York v Toplitz*, 178 NY 464, 466–467 [1904]). The interest, therefore, comprises a part of the defendants’ total obligation—not a penalty for the defendants’ default on the agreement.

Therefore, the plaintiff has demonstrated its entitlement to a judgment on default for the amount outstanding on the judgment, which includes the interest as calculated upon the original balance minus that defendants’ payments to date. The judgment entered by the plaintiff is proper with the sole exception of the amount that defendants have already paid. The defendants’ motion is therefore granted to the extent of modifying the judgment to reflect the proper judgment amount. Importantly, this holding about the nature of the interest rates means that the contractual interest rate of 15% does not apply to the judgment (*see Retirement Accounts, Inc. v Pacst Realty, LLC*, 49 AD3d 846, 847 [2d Dept 2008] [requiring “clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate” in order to bind parties to such a rate on a judgment]).

Therefore, the statutory interest rate of 9% applies going forward (CPLR 5004).

The plaintiff cross-moves to compel defendant Minh Tam Tran to respond to certain post-judgment subpoenas.¹ The plaintiff contends that on September 29, 2022, the defendant was served with three information subpoenas and her attorney was served with one. Mr. Warner, defendants' counsel, responded to the subpoena served on his office; Ms. Tran, however, did not respond. Despite communication with opposing counsel, the plaintiff contends that Ms. Tran has continued to resist responding to the information subpoenas.

CPLR 5224 specifically permits the issuance of subpoenas for the purpose of enforcing money judgments. Service of subpoenas *duces tecum* and *ad testificandum* are governed by CPLR 2303, which mandates that these subpoenas must be served in the same manner as a summons. Informational subpoenas are subject to a less strict requirement outlined in CPLR 5224 (a) (3). However, here, there is no evidence that the subpoenas the plaintiff is seeking to enforce were properly served upon Ms. Tran. Instead, Plaintiff seems to concede that the subpoenas were served upon defendants' counsel, which is inadequate service. Plaintiff's motion is therefore denied.

Conclusion

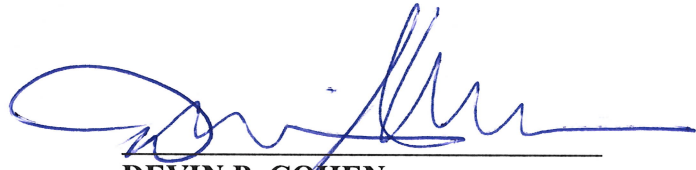
Defendants' motion to vacate the judgment (Seq. 003) is granted only to the extent that the amount of the judgment is modified to reflect the additional \$15,000 that defendants have paid toward the settlement. Therefore, the total judgment amount is reduced from \$542,163.33 to \$527,163.33.

¹ Plaintiff's motion is styled as a motion for contempt. However, the gravamen of the motion and Plaintiff's arguments is compelling compliance with the subpoena. Plaintiff's papers do not make a colorable argument for contempt. The motion will be addressed accordingly.

Plaintiff's cross-motion to compel compliance with its subpoenas (Seq. 004) is denied.

This constitutes the decision and order of the court.

March 15, 2023
DATE



DEVIN P. COHEN
Justice of the Supreme Court