

Fundfi Merchant Funding, LLC v Shopno I LLC

2023 NY Slip Op 31307(U)

April 18, 2023

Supreme Court, Kings County

Docket Number: Index No. 537362/2022

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 PART 8

-----X
FUNDFI MERCHANT FUNDING, LLC,

Plaintiff,

Decision and order

- against -

Index No. 537362/2022

SHOPNO I LLC, YOUR DREAM HOME CARE and
MISBA ABDIN,

Defendants,

April 18, 2023

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The corporate defendant has moved seeking to vacate a default judgement entered on February 16, 2023 in the amount of \$252,738.64. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On October 24, 2022 the defendant Misba Abdin, as owner, entered into a merchant cash agreement with the plaintiff. The verified complaint alleges that the defendants breached the agreement on November 10, 2022 by blocking payments due the plaintiff among other breaches (see, Verified Complaint, ¶9 [NYSCEF Doc. No. 1]). The lawsuit was commenced on December 22, 2022 and a judgement was obtained on February 16, 2023. The defendant argues the judgement should be vacated because the contract was executed by Misba Abdin who had no authority to execute that agreement. The defendant asserts that Abdin sold sixty percent of the shares of the corporation on August 4, 2022 and only retained forty percent ownership and specifically had no authority to enter into any agreement. The corporate minutes

dated August 4, 2022 indicate that while Abdin is not designated as the managing member he is designated as the vice president. The plaintiff argues that prior to Abdin's execution of the document he presented copies of a corporate void check, corporate bank statements and tax returns which demonstrate he had authority to enter into any contracts on behalf of the corporation. Therefore, the motion seeking a vacatur of the default should be denied.

Conclusions of Law

It is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious defense (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]).

The reasonable excuse for failing to answer is the allegation that Abdin provided an incorrect address to the plaintiff and thus the corporate defendant was never aware of the lawsuit. The address provided in the merchant agreement is 8310 Rockaway Boulevard in Rockaway, New York (see, Merchant Agreement [NYSCEF Doc. No. 5]). Mohammed Aziz, the managing member of the corporate defendants states that "we operate Shopno at 32-85 Steinway Street, Astoria, New York" (see, Affidavit of Mohammed Aziz, ¶14 [NYSCEF Doc. No. 8]). However, the bank statements

provided to the plaintiff list an address of 8310 Rockaway Boulevard, Ozone Park, NY (see, Bank Statements [NYSCEF Doc. No. 27]). Further, the letter from the accountant as well as the tax return itself also list the address of the corporate defendant as 8310 Rockaway Boulevard, Ozone Park, NY (see, Tax Return [NYSCEF Doc. No. 28]). Thus, notwithstanding the assertion the corporation conducts business at another location all the documents indicate the address provided by Abdin was the correct address.

However, the summons and complaint was served via email pursuant to the agreement. Indeed, the affidavit of service states that service was effectuated by emailing misba@deshiseniorcenter.com, the obvious email address of Abdin (see, Affirmation of Service [NYSCEF Doc. No. 2]). Thus, it is surely reasonable to conclude that the corporation was never aware of the lawsuit. Thus, a reasonable excuse has been presented.

Turning to the issue of meritorious defense, that issue concerns whether Misba Abdin had authority to execute the contract on behalf of the defendant. The defendant asserts he had no such authority. The plaintiff asserts that "the exhibits submitted herein collectively suggest that ABDIN had authority, and that Plaintiff had every reason to believe that ABDIN had authority to enter into the Contract on behalf of the corporate


codefendant" (see, Affirmation in Opposition, ¶13 [NYSCEF Doc. No. 24]). However, as the court noted in Zigabbara v. Falk, 143 AD2d 901, 533 NYS2d 536 [2d Dept., 1988], "a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" (id). Thus, the issue is not whether Mr. Abdin had the authority to execute the agreement. Rather, the issue is whether it was reasonable for the plaintiff to rely upon Abdin's representations concerning the agreement. Further, in the context of apparent authority the duty of inquiry on the part of the plaintiff whether such authority in fact existed only arises when the transaction is extraordinary or "the 'novelty' of the transaction alerts the third party to the danger of fraud" (Herbert Construction Company v. Continental Insurance Company, 931 F.2d 989 [2d Cir. 1991]). In Marathon Enterprises Inc., v. Schroter GmbH & Co., KG, 95 Fed.Appx. 364 [2d Cir. 2004] the court, citing earlier authority, explained that novel or extraordinary transactions are defined by "whether the particular transaction falls within the range of transactions in which [the principal] or similarly situated institutions normally engage" (id). Thus, the plaintiff bears the burden demonstrating the transaction in this case was neither extraordinary or novel (Musclétech Research and Development, Inc., v. East Coast Ingredients, LLC, 2004 WL 941815 [W.D.N.Y. 2004]).

Thus, there are certainly questions of fact whether it was reasonable for the plaintiff to rely upon the authority of Abdin. The entire basis for concluding Abdin had authority is the fact he presented bank statements and a tax return of the corporation. Merely having access to those documents does not create any reasonable conclusion that he had authority to engage in a merchant cash advance, a transaction that does not comprise routine or expected engagements. Surely, there are questions in this regard. Therefore, based on the foregoing, the motion seeking to vacate the default is granted. The parties are now directed to proceed with discovery.

So ordered.

ENTER:

DATED: April 18, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC