RDM Capital Funding, LLC v Stellar Beach Rentals LLC
2023 NY Slip Op 33656(U)
October 17, 2023
Supreme Court, Kings County
Docket Number: Index No. 520319/2023
Judge: Leon Ruchelsman

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

RDM CAPITAL FUNDING, LLC DBA FINTAP,
Plaintiff, Decision and order

- against - Index No. 520319/2023

STELLAR BEACH RENTALS LLC,
and JOHN KOZAK,
Defendants, October 17, 2023

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The defendants have moved seeking to enjoin the plaintiff from issuing any liens and from affecting any property of the defendants. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On May 16, 2022, the plaintiff a merchant cash advance funding provider entered into a contract with defendants who reside in North Carolina. Pursuant to the agreement the plaintiff purchased $600,000 of defendant's future receivable for $500,000. The defendant John Kozak guaranteed the agreement. According to the complaint, the defendants stopped remittances in July 2023 and now owe $136,500. This action was commenced and now the defendants seek an injunction arguing the agreement is unenforceable. As noted, the defendants oppose the motion.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a

preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the fact the merchant

cash agreement is really a usurious loan and therefore, is no enforceable. Thus, an examination of the relevant provisions is necessary.

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 a finite term and lastly, whether the funder has recourse if the merchant declares bankruptcy (LG Funding LLC, v. United Senior Properties of Olathe, LLC, 181 AD3d 664, 122 NYS3d 309 [2d Dept., 2020]). Thus, the three requirements can be synthesized as follows: "the court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan" (Principis Capital LLC v. I Do, Inc., 201 AD3d 752, 160 NYS3d 325 [2d Dept., 2022]). The agreement in this case required the merchant to remit five percent of its future receivables to the funder on a weekly basis. The reconciliation provision states that "Merchant may give written notice to FinTap requesting that FinTap conduct a reconciliation in order to ensure that the Receivables collected by FinTap equals the Specified Percentage. If such reconciliation determines that FinTap collected more than the Specified Percentage, then FinTap will credit the difference to Merchant's Account and decrease the Daily Amount in an amount commensurate

with the decrease in Merchant's financial performance, and if FinTap collected less than the Specified Percentage, then FinTap will debit the difference from Merchant's Account and may increase the Daily Amount in an amount commensurate with the increase in Merchant's financial performance. In order to effectuate this reconciliation, Merchant must produce with its request the login and password for Merchant's Account and any and all bank statements, merchant statements, and other documents necessary to ascertain the amounts of the Specified Percentage. Nothing herein limits the amount of times that such a reconciliation may be requested" (see, Master Receivable Purchase Agreement, ¶9 [NYSCEF Doc. No. 2]). Thus, the reconciliation provision demonstrates, without any evidence to the contrary, that the plaintiff is not entitled to repayment in all circumstances. The defendants dispute that characterization and insist that indeed the reconciliation provision is illusory. The defendants argue that although a reconciliation was provided it was adjusted back to the original amount. Thus, on November 17, 2022 the plaintiff informed the defendants that the amount of their weekly payment due has been reduced by half for six weeks and that "if your banking will show a greater reduction in gross receivables please provide the most recent 3 months for each account" (see, Email sent November 17, 2023 [NYSCEF Doc. No. 12]). Again, on May 5, 2023 a reconciliation was approved

whereby the defendants were only required to submit $3,000 for four weeks (id). Thus, contrary to the defendant's assertions, the reconciliation provision was employed to the defendant's benefit. The mere fact the reconciliation was terminated does not render it illusory. This is particularly true considering the correspondence between the parties where there were numerous extensions and accommodations offered the defendants. Therefore, there is no likelihood of success demonstrating the merchant agreement in this case was really a usurious loan.

Further, the agreement states that "if the Amount Sold is never remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business, and Seller has not breached this Agreement, Seller would not owe anything to Buyer and would not be in breach of or default under this Agreement" (see, Master Receivable Purchase Agreement, ¶7 [NYSCEF Doc. No. 2]). There is no merit to the argument that clause is qualified, and hence rendered meaningless, by another clause that states that any breach by the merchant constitutes a default (see, Master Receivable Purchase Agreement, ¶15 [NYSCEF Doc. No. 2]). Clearly, a declaration of bankruptcy is not a breach and hence cannot constitute a default. Lastly, the agreement does not impermissibly contain any finite term. As noted, the amount sought each week could be reconciled upon proper information presented necessitating any reduction.

Therefore, there is no basis to conclude the agreement was anything other than a merchant cash agreement and not a loan. Therefore, there are no grounds the defendants will be able to demonstrate a likelihood of success on the merits in this regard.

Therefore, the motion seeking an injunction is denied.

So ordered.

ENTER:

DATED: October 17, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC