Chinamine Trading Ltd. v Joseph Henry LLC
2024 NY Slip Op 31815(U)
May 15, 2024
Supreme Court, New York County
Docket Number: Index No. 654279/2021
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

--X

CHINAMINE TRADING LTD.,

Plaintiff,

- v -

JOSEPH HENRY LLC d/b/a EGG BY SUSAN LAZAR,

Defendant.

--X

INDEX NO. 654279/2021

MOTION DATE 01/17/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, and 31

were read on this motion for ENFORCEMENT.

LOUIS L. NOCK, J.

By decision and order filed July 13, 2023 (NYSCEF Doc. No. 27), this court granted the plaintiff's motion for enforcement of an alleged settlement agreement to the extent that an evidentiary hearing would be held to resolve issues of fact concerning the parties' intent. Essential facts are provided in said decision and order; but will be expanded upon hereinbelow.

In accordance with said decision and order, an evidentiary hearing was conducted on September 14 and 18, 2023 (*see*, Transcript [NYSCEF Doc. Nos. 30, 31]).

Background

This action was commenced by summons and complaint filed July 9, 2021, alleging that a contract existed between the parties whereby plaintiff would deliver childrens' clothing to defendant for retail sale by defendant in exchange for the price of $208,258.57. It is alleged that defendant has only paid $61,472.34 of that price, leaving a balance of $146,786.23 – the amount prayed for in the complaint.

On September 21, 2022, the attorneys for the parties entered into, and signed, a handwritten stipulation (the "Stipulation") in open court, the intended purpose of which was to reach terms of settlement of the action (NYSCEF Doc. No. 19), as follows:

- "Def." (i.e., defendant Joseph Henry LLC d/b/a Egg by Susan Lazar) "pays $75,000.00, with $25,000.00 due at signing, followed by monthly payments of $4,000.00 due 1st business day of each month (last two payments of $5,000.00)";
- "$20,000 personally guaranteed by Edward Harrison";[1]
- "Def." (i.e., defendant Joseph Henry LLC d/b/a Egg by Susan Lazar) "executes a Confession of Judgment for full amount of claim as alleged in the Complaint, less any payments already made per this agreement, plus $5,000.00 – Confession of Judgment shall be immediately due, owing, and enforceable, without notice, if Def. [i.e., defendant Joseph Henry LLC d/b/a Egg by Susan Lazar] fails to make any payment per this agreement."
- "Monthly payments to commence Jan. 3, 2023."

Significantly, the Stipulation closed with the proviso: "Full agreement to follow." Further significantly, the Stipulation was only signed by the attorneys for the parties – not by corporate representatives of the parties themselves and certainly not by Edward Harrison who is not a party to this action in any capacity, whether that be individually or as defendant's corporate representative.[2]

Subsequent to the foregoing events, plaintiff's counsel forwarded a formal form of "Settlement Agreement and General Release" (NYSCEF Doc. No. 21) bearing a typewritten date of October 27, 2022, setting forth the items found in the Stipulation, including the part about Mr. Harrison's purported guarantee to the extent of $20,000 of the settlement amount. Specifically, the form contains the following language:

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[1] Mr. Harrison is the managing member of the defendant (*see*, Transcript [NYSCEF Doc. No. 31] at 3).
[2] *See, id.*

> $20,000 of the $75,000.00 owed shall be, and hereby is, personally, unconditionally, and irrevocably guaranteed by Edward Harrison, a principal of Egg, who hereby waives any notice of Egg's default on the terms of this Agreement, and hereby agrees and consents that his personal guarantee shall be immediately due, owing, and enforceable, without any notice to him upon Egg's default of the terms of this Agreement[.]

(NYSCEF Doc. No. 21 at 2.) The form contains signature blocks for the parties; but also, for Mr. Harrison "personally" (*see, id.*, at 4).

Neither defendant, nor Mr. Harrison, signed the aforementioned form.[3] Nor were any payments made pursuant to the Stipulation. Consequently, plaintiff made the instant motion for an order "enforcing the settlement agreement reached between the parties" (Notice of Motion [NYSCEF Doc. No. 16] at 1).

The Prior Decision and Order

As noted at the outset, by decision and order filed July 13, 2023 (NYSCEF Doc. No. 27), this court granted the plaintiff's instant motion for enforcement of an alleged settlement agreement to the extent that an evidentiary hearing would be held to resolve issues of fact concerning the parties' intent. But prior to that interim disposition, this court provided the following principles of law:

> "A party will not be relieved from the consequences of a stipulation unless there was sufficient cause to invalidate it, such as fraud, mistake, collusion, accident, or some other ground" (*Charlop v A.O. Smith Water Products*, 64 AD3d 486, 486 [1st Dept 2009], *citing Hallock v State of New York*, 64 NY2d 224 [1984]). Defendant fails to demonstrate any such grounds to invalidate the stipulation. It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "The court construe[s] the plain and ordinary meaning of the unambiguous terms and conditions of the agreement" (*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327, 327 [1st Dept 2007]). "Only where a contract term is ambiguous may parol evidence be considered to clarify the disputed portions of the parties' agreement" (*Impala Partners v Borom*, 133 AD3d 498, 499 [1st Dept 2015]). Here, the terms of the stipulation are unambiguous, and parol evidence of other discussions between the parties either before or since entering into the stipulation are inadmissible to vary its terms.

[3] Nor did plaintiff.

(NYSCEF Doc. No. 27 at 2.)

Nonparty Edward Harrison was Never a Party to the Stipulation

In the aftermath of recitation of the above-quoted principles, the only seminal issue of fact that actually required a hearing was whether the Stipulation's reference to a guarantee binding nonparty Edward Harrison is enforceable. Indeed, defendant's counsel's opposition papers focus in large part on that precise part of the Stipulation (*see*, NYSCEF Doc. No. 24 ¶¶ 4-5) – even conceding an error on his part with regard to that aspect of the Stipulation (*see, id.*). Furthermore, the court observes that Mr. Harrison is not a party to this action and, therefore, counsel of record for the defendant (i.e., defendant Joseph Henry LLC d/b/a Egg by Susan Lazar) – Eliezer Cohen, Esq. – who signed the Stipulation, was not technically acting on Mr. Harrison's personal behalf, and no indication exists in the record that said counsel possessed any authority to bind Mr. Harrison, personally, to anything. The following hearing testimony makes that even clearer:

> THE COURT: Mr. Harrison, here is a copy of Plaintiff's Exhibit 1 [the Stipulation]. You may continue, counsel.
>
> Q. That says "Stipulation" on it; correct?
>
> A. Yes.
>
> Q. On the bottom it says "Attorneys for Defendant, Joseph Henry LLC"; correct?
>
> A. Yes.
>
> Q. It has your counsel, Eliezer Cohen; correct?
>
> A. It has counsel for the Company.
>
> Q. Counsel for the Defendant, Joseph Henry, LLC, Eliezer A Cohen; correct?
>
> A. Yes, but it doesn't have any representation for me.

(NYSCEF Doc. No. 31 at 5.)[4] Mr. Harrison testified that Mr. Cohen did call him from the courthouse during the Stipulation negotiation and that "[w]e did talk about general terms, and on the general terms we did agree on the general terms" (*id.*, at 7). As to specific terms, such as the guarantee aspect, Mr. Harrison was clear in testifying that he never consented to that, as follows:

> Q. Mr. Harrison, the Stipulation says that you, personally, would guarantee $20,000; correct?
>
> A. I understand that's what is written here, but I never agreed to that. . . .

(*Id.*, at 9.)

Plaintiff's counsel, quite astoundingly, asked Mr. Harrison whether he was "aware that the Court has already ruled that this PX-1 Stipulation is a Binding Agreement between Plaintiffs and Defendants?" (*Id.*, at 10.) The question is astounding because the court had done no such thing. This action has only one plaintiff and only one defendant, which is a corporate defendant. At no time has Mr. Harrison been a party to this action or to the Stipulation; nor did the court in its prior decision and order find that the Stipulation is binding on any nonparty, such as Mr. Harrison. Consistent with those realities, Mr. Harrison accurately answered "No, I'm not aware" (*id.*).

In sum, no credible evidence emerged at the hearing to enable a conclusion, for plaintiff (which bears the burden of proof), that defendant's counsel possessed any authority whatsoever to act as Mr. Harrison's personal agent, binding Mr. Harrison to an agreement to provide a personal guarantee for any portion of the settlement contemplated by the parties hereto. He was,

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[4] At a later point, plaintiff's counsel repeated the question, in substance, "Was it signed by your attorney, sir?" to which Mr. Harrison answered "This is signed by Eliezer Cohen, yes." (NYSCEF Doc. No. 31 at page 5 line 23.) The court does not apply a literal construction to Mr. Harrison's said answer, to the effect that Mr. Cohen represented him personally, in light of his previous, and objectively accurate, answer to that same question, to the effect that Mr. Cohen served only as "counsel for the Company" and that Mr. Cohen "doesn't have any representation for me" (*id.*, lines 13, 16). The accuracy of that answer is objectively verified by Mr. Cohen's own execution of the Stipulation solely as counsel for "Defendant Joseph Henry" (NYSCEF Doc. No. 19).

and still is, a nonparty – both to this action and to the Stipulation. Indeed, the very face of the Stipulation boldly demonstrates that Mr. Cohen signed it on behalf of "Defendant Joseph Henry" (NYSCEF Doc. No. 19).

On the first day of hearing, plaintiff's counsel posited to the court that "[t]his Court has already ruled that the settlement is the settlement . . . ." (NYSCEF Doc. No. 30 at 20.) No doubt, counsel had been referring to the language from this court's prior decision and order, quoted above (*supra*, at 3). Counsel was justified in trying to make the point; but this court's response was equally justified in noting that "this Court is sitting now as a Trial Court, not as a Motion Court" (NYSCEF Doc. No. 30, *supra*). Any holdings made in the prior decision and order, preliminary as they were, predated the evidentiary hearing it itself ordered and, therefore, predated the credible hearing evidence that nonparty Edward Harrison was never bound by the Stipulation, which was never signed by him, and never signed by any attorney of record for him, as Mr. Cohen described himself on the Stipulation as counsel for "Defendant Joseph Henry" – a corporate defendant. And most significantly, Mr. Harrison credibly testified that he never agreed to guarantee anything (*e.g.*, NYSCEF Doc. No. 31 at 9), which is in harmony with Mr. Cohen's self-described status as corporate counsel only (NYSCEF Doc. No. 19).

The only question that remains is whether the excision of the guarantee term from the ostensible deal gives rise to a loss in mutual assent vis-à-vis the overall deal.

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Express Indus. & Term. Corp. v New York State Dept. of Transp.,* 93 NY2d 584, 589, *rearg denied* 93 NY2d 1042 [1999]). The court now finds that the guarantee provision which made its way, hastily, and without proper authorization, into the Stipulation was a material term of

sufficient consequence as to render the entire Stipulation null in its enforceable absence, for the lack of sufficient mutual assent overall (*see, Bellevue Builders Supply Inc. v Belmonte*, 271 AD2d 849 [3d Dept 2000] [absence of dollar amount for guarantee deemed failure in "meeting of the minds on all essential terms"]; *Levine v Segal*, 174 Misc 2d 998 [Sup Ct App Term 1st Dept 1997] [guaranty obligation found to be a material term], *affd* 256 AD2d 199 [1st Dept 1998]). This is patently so, in this court's view, given the fact that the hoped-for guarantee ($20,000) constituted nearly 28 percent of the entire settlement amount ($75,000).

Accordingly, the Stipulation must be considered a nullity, for the lack of sufficient mutual assent and, therefore, the plaintiff's motion for enforcement of the Stipulation must be denied.

Accordingly, it is

ORDERED that plaintiff's motion for enforcement of the Stipulation is denied; and it is further

ORDERED that a discovery conference will be held in this matter on June 5, 2024, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

5/15/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE