Funding Metrics, LLC v D & V Hospitality, Inc.

Supreme Court of New York, Westchester County

January 7, 2019, Decided

66431/16

Reporter
2019 N.Y. Misc. LEXIS 311 *; 2019 NY Slip Op 29008

Funding Metrics, LLC d/b/a QUICK FIX CAPITAL, Plaintiff, against D & V Hospitality, Inc. and CARL VITELLINO, Defendant.

Core Terms

Merchant, confession, entry of judgment, vacate, confession of judgment, defendants', non-payment, ***usurious***, plenary action, circumstances, accounts receivable, state of emergency, hurricane, default, debit, law law law, Memorandum, criminally, products, Funding, terms, affirmation, conditioned, contingency, receivables, calculated, operations, customers, emergency, severally

Counsel: [*1] For Plaintiff: Eric Solomon, Esq., New York, New York; Christopher R. Murray, Esq., Stein Adler Dabah & Zelkowitz, LLP, Tarrytown, New York.

For Defendants: Shane R. Heskin, Esq., White and Williams LLP, New York, New York.

Judges: HON. DAVID F. EVERETT, J.S.C.

Opinion by: DAVID F. EVERETT

Opinion

David F. Everett, J.

The following papers were read on the motion:

Notice of Motion/Affidavit in Supp/Memorandum of Law/Exhibits A-B (docs 10-14)

Memorandum of Law in Opp/Affirmation in Opp (docs 17-18)

In this matter, where the entry of a judgment by confession is challenged on the basis that the accompanying affidavit of non-payment submitted to the County Clerk lacks information which is a prerequisite to such entry, and the plaintiff has failed to respond to the defendant's motion in a legally sufficient manner, the judgment by confession must be vacated on due process grounds. Separately, the entry of a judgment based on a loan agreement that is ***usurious*** on its face and does not involve questions of fraud or fact, does not require a plenary action to vacate the judgment. Further, the fact that the loan agreement is denominated by another name does not shield it from a judicial determination that such agreement contemplates [*2] a criminally ***usurious*** transaction, which the Court finds is the case here, rendering the Merchant Agreement void and mandating vacatur of the judgment by confession.

Defendant Carl Vitellino (Vitellino), a principal, owner and officer of D & V Hospitality, Inc. (D & V), moves for orders: vacating the confession of judgment filed on October 19, 2016 against D & V and on behalf of plaintiff Funding Metrics, LLC d/b/a Quick Fix Capital (FM/QFC); voiding the Merchant Agreement between FM/QFC and D & V dated September 23, 2016; enjoining prosecution on the Merchant Agreement; and cancelling the Merchant Agreement on the ground that the agreement was a loan for which defendants were charged a criminally ***usurious*** interest rate well above 25% per annum,[1]

[1] In New York, while the defense of civil ***usury*** is unavailable to corporate entities, the defense of criminal ***usury*** may lie in situations where the lender knowingly charges a corporate entity annual interest in excess of 25% on a loan (*see* *Penal Law § 190.40*).

and on the ground that D & V was forced to shut down due to the state of emergency declared by Florida Governor Rick Scott, preventing it from fulfilling its agreement obligations.

The following facts are taken from the motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

On October 19, 2016, plaintiff filed an affidavit of nonpayment in support of the entry of a judgment by confession [*3] in the Office of the Westchester County Clerk. The affidavit was accompanied by copies of the Merchant Agreement, which Vitellino executed on behalf of D & V on September 23, 2016, an Addendum of Agreement to Purchase and Sell ***Future Receivables*** (Addendum), and a Merchant Security Agreement and Guaranty (Guaranty) by which Vitellino personally guaranteed D & V's performance under the Merchant Agreement. The Merchant Agreement provides, in relevant part, that:

> "contemporaneously with the execution of this agreement, Merchant [D & V] shall execute and deliver to QFC a duly notarized affidavit of confession of judgment, which affidavit shall be held in escrow by QFC pending a default by the merchant under this agreement. In the event of a default thereunder, the affidavit of confession of judgment shall automatically be released from escrow, and QFC may proceed to enter judgment against the Merchant in accordance with the New York CPLR."

In the notarized Affidavit of Confession of Judgment (Affidavit) executed by Vitellino on September 23, 2016, he confessed judgment "individually and personally, jointly and severally," and authorized the entry of judgment in favor of FM/QFC in the sum [*4] of $29,200.00, less any payments timely made under the terms of the secured Merchant Agreement, plus legal fees calculated at 25% of the total of the sums, costs expenses and disbursements, and interest at the rate of 16% from September 23, 2016, or the highest amount allowed by law, whichever is greater.

In an affidavit of non-payment submitted in support of the entry of the judgment by confession, John Eckstein (Eckstein), an underwriter for FM/QFC, explains that D & V entered into a secured purchase agreement (the Merchant Agreement) pursuant to which FM/QFC agreed to buy all rights to D & V's ***future*** accounts ***receivable*** having a face value of $29,200.00, the purchase price for which was $20,000.00. He explains that, under the terms of the purchase agreement/Merchant Agreement, D & V authorized FM/QFC to debit from its bank account, by online Automated Clearing House (ACH) debit, a percentage of D & V's accounts receivable (the Specified Percentage) until the purchased amount of receivables, that being $29,200.00, was paid in full, and that Vitellino personally guaranteed payment, and executed the Affidavit authorizing FM/QFC to enter judgment against defendants in the event of default. [*5] Eckstein asserts in his affidavit of non-payment that, after making payments totaling $1,858.15, D & V stopped making payments, on or about October 6, 2016, despite the fact that it was still conducting regular business operations and was receiving accounts receivable. Without elaborating further, Eckstein declared defendants' failure to make further payments to be as a default under the Merchant Agreement, entitling FM/QFC to the entry of judgment against defendants, jointly and severally, in the amount of $27,341.85, plus interest from October 6, 2016, costs, and legal fees in the amount of $6,835.46.

The judgment by confession, as entered by the County Clerk on November 1, 2016, adjudged FM/QFC entitled, with execution thereof, to recover from defendants, jointly and severally, the sum of $27,341.85, plus interest at 16% in the amount of $311.62, plus costs and disbursements in the amount of $225.00, plus attorneys' fees in the amount of $6,835.46, for a total sum of $34,713.93.

In support of his motion, Vitellino argues that the facts underlying the entry of the confession of judgment, and which support his current motion to vacate, establish that the Merchant Agreement is actually [*6] a ***usurious*** loan, denominated as a purchase agreement for D & V's accounts receivable, and is, therefore, void as a matter of law. Vitellino points out that the Merchant Agreement contains a purchase percentage (also referred to as the Specified Percentage) of daily income of 24.62%, and what is referred to as the purchase price of $20,000.00, for a purchased amount of $29,200.00. Vitellino alleges that the Merchant Agreement required payments to FM/QFC "[i]n daily increments of: $265.45" are mathematically inconsistent with the stated Specified Percentage of 24.62%. Vitellino posits that the Merchant Agreement is, in reality, a loan for $20,000.00 that is repayable over a period of 100 days by way of fixed payments of $265.45, with an annual interest rate of 213%. The Court calculates the annual simple interest rate at 109%, which, while less than 213%, is nevertheless, a criminally ***usurious*** rate (*see* *Penal Law § 190.40*).

Also problematic, and evidence that this is a ***usurious*** loan, rather than a purchase agreement for accounts receivable, is the lack of risk and contingency of repayment. The Merchant Agreement requires defendants to stay in business under the same conditions as when the agreement was [*7] made. There is a provision in the Merchant Agreement that provides that FM/QFC "may upon [D & V's] request, adjust the amount of any payment due under this Agreement at QFC's sole discretion and as it deems appropriate." Yet, when unforeseen circumstances arose, which prevented D & V from making the

required payments, via ACH debit or otherwise, FM/QFC sought and obtained the entry of the judgment by confession.

In his sworn affidavit, Vitellino reports that, in early October 2016, weather forecasters were predicting the path that an approaching life-threatening category three hurricane, Hurricane Matthew, was likely to follow. He further reports that, on or about October 3, 2016, Florida Governor Rick Scott declared a state of emergency throughout the state, and ordered mandatory evacuations, which included Palm Beach County, where D & V was located. Vitellino explains that, on the morning of October 5, 2016, when, as part of the declared state of emergency, he was forced by the state to close his business, he called the telephone number listed in the Merchant Agreement and advised the plaintiff's agent that the business would be closed and that there would be no daily receipts. He [*8] asserts that, despite his telephone call advising it of the situation, FM/QFC continued to withdraw, by ACH, the fixed $265.45 payments throughout the declared state of emergency, and continued to do so, even though the receivables were, as a result of the emergency and the mandatory closure of D & V, $0. Vitellino avers that, as a result of the hurricane emergency, D & V lost all of its perishable items, and that, after first trying to operate at a sub-sustainable level, it was forced to close entirely. This, he contends, constituted the type of emergency situation that, if the Merchant Agreement truly contemplated risk, and entertained the possibility that FM/QFC might not, under certain circumstances, be paid in full, would meet that criteria.

Nowhere in Eckstein's affidavit of nonpayment is there an explanation of what he means by "Defendant D & V has since stopped making payments to FM on or about October 6, 2016, although they are still conducting regular business operations and still in receipt of accounts-receivable." Since D & V authorized FM/QFC to debit funds from its bank account by online ACH debit, an explanation of the circumstances surrounding how and/or why D & V "stopped [*9] making payments" should have been included in his affidavit of nonpayment, rather than the ambiguous and unrevealing statement above. Moreover, this issue should certainly have been addressed in response to defendants' challenge to the entered judgment by confession via the instant motion, but it was not.

Plaintiff's own memorandum of law states that:

"The Merchant Agreement contained an explicit reconciliation and adjustment provisions [sic] by which Funding Metrics assumed the risk that it might not collect anything from Defendants (Section 3.17).

> Moreover, the Merchant Agreement mandated that Payments made to Quick Fix Capital in respect to the full amount of the Receipts shall be conditioned upon the Merchant's sale of products and the payment therefore by Merchant's customers (Section 3.1)"

(plaintiff's memorandum of law, at 11).

Yet, the affirmation in opposition submitted by plaintiff's counsel merely states:

> "I am the attorney for Plaintiff, Funding Metrics, d/b/a Quick Fix Capital. I make this affirmation in opposition to Defendants' motion to vacate the judgment by confession upon a review of the file maintained by my office.
>
> WHEREFORE, it is respectfully requested that this Honorable Court issue an Order [*10] denying Defendants' Order to Show Cause in its entirety and granting Plaintiff such other and further relief as the Court deems just and proper."

The Merchant Agreement provides, in unambiguous terms, that payments to FM/QFC were conditioned upon D & V's sale of products and payment thereon by D & V's customers. Therefore, it was essential that FM/QFC provide a statement in its affidavit of non-payment to the effect that the affiant had access to, and had reviewed, the business records relevant to establishing that D & V was, in fact, still selling products and receiving payment from its customers for such products at the time it was seeking entry of the judgment by confession. Further, when FM/QFC had an opportunity to address this issue and to provide competent evidence, by sworn affidavit or otherwise, as part of its opposition papers to the instant motion to rebut the facts set forth in Vitellino's sworn affidavit, it chose not to do so. This includes FM/QFC's troubling failure to refute Vitellino's claim that he called the telephone number listed in the Merchant Agreement and advised an FM/QFC agent as to the emergency circumstances and reasons why there would be no daily receipts. [*11]

Contrary to plaintiff's contention, not all efforts to vacate a judgment require a plenary action. Where there are sharply contested issues of fact, or allegations of fraud, a plenary action is an appropriate vehicle (*Midtown Acquisitions L.P. v Essar Global Fund Ltd., 162 A.D.3d 583, 583, 75 N.Y.S.3d 900 [2d Dept 2018]*; *Scheckter v Ryan, 161 A.D.2d 344, 345, 555 N.Y.S.2d 99 [1990])*. However, where the circumstances underlying the default are such that the entry of judgment is so unfair as to violate defendants' due process rights, a plenary action might not be required. As stated in New York Practice, Sixth Edition, a debtor can use the simple motion procedure "if the judgment has been entered in violation of the affidavit's terms, such as where it states a time that has not arrived or a contingency that has occurred" (Siegel Connors, NY Prac § 302 at 565 [6th ed 2018]). Such is the situation in the case

before the Court. Here, the contingency that should have been addressed was the inability of defendants to conduct regular business operations due to factors beyond their control, Hurricane Matthew and the declared state of emergency, preventing defendants from fulfilling their obligations under the Merchant Agreement.

It has long been held that "[c]onfessions of judgment are always carefully scrutinized and, in judging them, a liberal attitude [*12] should be assumed in favor of judgment debtor . . . [and that a] [c]onfession of judgment entered without authority may be vacated on motion" (*Ripoll v Rodriguez, 53 AD2d 638, 384 N.Y.S.2d 504 [2d Dept 1976]*).

Here, the Court agrees with defendants' argument that, if FM/QFC actually acknowledged a risk of loss in the context of its financial arrangement with defendants, then it would recognize that the hurricane event and declared emergency might present the type of circumstances which would affect its right and ability to collect anything from D & V, as secured by Vitellino. But it has failed to even address the issue. Therefore, given its refusal to contemplate, let alone acknowledge, the possibility of not being repaid in this instance, the financial arrangement cannot be deemed to be anything short of a loan, and based upon mathematical calculations, a criminally ***usurious*** loan as it significantly exceeds the legal interest rate of 25% for a corporate entity (*see Donatelli v Siskind, 170 AD2d 433, 565 N.Y.S.2d 224 [2d Dept 1991]*).

By recognizing the lack of necessity for a plenary action in cases where it is clear from the submissions attendant to the motion that a judgment has been entered in violation of the Merchant Agreement's terms, and the rate of interest reaches that of criminal ***usury***, the [*13] Court finds that defendants may proceed by motion, so as to be spared the needless cost in time and money of pursing a plenary action, the outcome of which would be the same.

Accordingly, it is

ORDERED that defendants' motion is granted; and it is further

ORDERED that the confession of judgment, under index number 66431/16, entered in the Office of the Westchester County on October 19, 2016, is vacated; and it is further

ORDERED that the Judgment Clerk mark the judgment records accordingly.

This constitutes the decision and order of the Court.

Dated: January 7, 2019

White Plains, New York

HON. DAVID F. EVERETT, J.S.C.