

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

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|---------------------------------------|---|-------------------------|
| COMPLETE BUSINESS SOLUTIONS | : | June Term 2017 |
| GROUP, INC., | : | |
| | : | |
| Plaintiff, | : | No. 2692 |
| | : | |
| v. | : | |
| BOREAL WATER COLLECTION INC., ET.AL., | : | Commerce Program |
| Defendants. | : | |
| | : | Control Number 17081180 |
| | : | |
| | : | 3372 EDA 2017 |

Complete Business Solutions Group, Inc. Vs B-OPFLD



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OPINION

McInerney, S.J.,

November 2, 2017

This appeal is submitted relative to this court's order dated September 8, 2017, denying defendants Boreal Water Collection and Francine Lavoie's Petition to Open Judgment by Confession. For the reasons discussed below, this court's order should be affirmed.

On April 4, 2017, defendants Boreal Water Collection, Inc. ("Boreal") and Francine Lavoie (hereinafter "Lavoie") entered into a factoring agreement ("agreement") with Complete Business Solutions Group, Inc. ("Plaintiff") for the sale of Boreal's future account receivables.¹ The agreement provided that defendant Boreal would sell \$136,000.00 of its future receivables to plaintiff for \$100,000. Plaintiff would retrieve the receivables purchased directly from a bank account designated by Boreal. The retrieval of the receivables would occur daily over a 176 business day period in the amount of \$772.73 until such time as plaintiff receives payment in full of the receipts purchased amount. The agreement was "with recourse". Lavoie personally guaranteed the agreement. The agreement and the guaranty contained a confession of judgment

¹Factoring is "the buying of accounts receivable at a discount. The price is discounted because the factor (who buys them) assumes the risk of delay in collection and loss on the accounts receivable." *See, In re Dryden Advisory Group, LLC*, 534 B.R. 612 (M.D. Pa. 2015) citing Black's Law Dictionary (10th ed. 2014).

provision in favor of plaintiff. Additionally, defendants consented to and submitted to the jurisdiction of any court sitting in Pennsylvania and agreed that the law of Pennsylvania would apply without regards to the any applicable conflict of laws.²

After nine weeks, plaintiff was unable to retrieve the agreed upon amount from Boreal's bank account. On June 23, 2017, plaintiff filed a complaint in confession of judgment against defendants Boreal and Lavoie in the amount of \$104,231.69. Defendants filed a Petition to Open the Confessed Judgment. The court denied the petition to open on September 8, 2017. On October 9, 2017, defendants filed this timely appeal.

DISCUSSION

A petition to open a confessed judgment is committed to the sound discretion of the court and will not be disturbed absent a manifest abuse of that discretion. Ordinarily, if a petition to open a judgment is to be successful, it must meet the following test: (1) the petition to open must be promptly filed; (2) the failure to appear or file a timely answer must be excused; and (3) the party seeking to open the judgment must show a meritorious defense.³ In adjudicating a petition to open a confessed judgment, the trial court is charged with "determining whether the petitioner presented sufficient evidence of a meritorious defense to require submission of that issue to a jury."⁴ "When determining a petition to open a judgment, matters *dehors* the record filed by the party in whose favor the warrant is given, *i.e.*, testimony, depositions, admissions, and other

² Factoring Agreement, ¶ 4.5. Binding Effect; Governing Law. Venue and Jurisdiction.

³ *Century Surety Co. v. Essington Auto Center, LLC*, 140 A.3d 46, 53 (Pa. Super. 2016) (quoting *Mother's Restaurant, Inc. v. Krystkiewicz*, 861 A.2d 327, 336 (Pa. Super. 2004) (*en banc*)); *Neducsin v. Caplan*, 121 A.3d 498, 505 (Pa. Super. 2015), *appeal denied*, 131 A.3d 492 (Pa. 2016).

⁴ *Ferrick v. Bianchini*, 69 A.3d 642, 647 (Pa. Super. 2013) (citing *Homart Development Co. v. Sgrenci*, 662 A.2d 1092 (1995)).

evidence, may be considered by the court.”⁵ A judgment of confession will be opened if a petitioner seeking relief therefrom produces evidence which in a jury trial would require issues to be submitted to a jury. The standard of sufficiency here is similar to the standard for a directed verdict; the court must view the facts most favorably to the moving party, must accept as true all the evidence and proper inferences in support of the defense raised, and must reject all adverse allegations.⁶

Defendants argued that the confessed judgment should be opened because plaintiff violated New York’s criminal usury statute by charging a 145.6% rate of interest, a rate well above the maximum legal rate of 25%.⁷ This defense is not meritorious. Before addressing the question of whether New York law should govern, despite the parties’ choice to apply Pennsylvania law, the court must first determine if the transaction is a sale or a loan. Usury can exist only where there is a loan.⁸ Courts have set forth a useful list of some factors to consider when determining whether a transaction is a loan or a sale which this courts finds helpful.⁹ The most common factors are: (1) whether the buyer has a right of recourse against the seller; (2) whether the seller continues to service the accounts and commingles receipts with its operating funds; (3) whether there was an independent investigation by the buyer of the account debtor; (4)

⁵ *Graystone Bank v. Grove Estates, LP*, 58 A.3d 1277, 1282 (Pa. Super. 2012).

⁶ *Neducsin*, supra. 121 A.3d at 506–507 (internal citations and quotation marks omitted).

⁷ Although a corporation, under New York law and Pennsylvania law, is prohibited from asserting the defense of usury in an action, see General Obligations Law 5-521 (1) and 15 Pa. C. S. C. § 1510, in New York, the prohibition is not applicable to any action where the corporation asserts a defense of criminal usury under the Penal Law. See General Obligation 5-521 (3). N.Y. Penal Law § 190-40 provides in part that “a person is guilty of criminal usury in the second degree when ...he knowingly charges...as interest on the loan or forbearance ...a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.”

⁸ See, *Travelers Indemnity Company v. Edward R. Burka, M.D.*, 1992 WL 1071381 (1992) citing *Heist v. Blaisdell*, 198 Pa. 377, 48 A. 259 (1901).

⁹ This court’s research did not uncover any Pennsylvania case law on point on this issue and the parties did not provide the court with any citations to Pennsylvania law.

whether the seller has a right to excess collections; (5) whether the seller retains an option to repurchase accounts; (6) whether the buyer can unilaterally alter the pricing terms; (7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and (8) the language of the agreement and the conduct of the parties.¹⁰ Courts use some or all of these factors as well as the circumstances surrounding the transaction to determine whether a purported sale should be characterized as a loan.¹¹

Here, it is clear that the transaction between the parties was not a loan.¹² Since this transaction was not a loan, usury does not apply and a violation of New York criminal usury statute cannot exist. Boreal sold, assigned and transferred to plaintiff for the price of \$100,000 all of its future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies from Boreal's customers until such time as the receipts purchased are delivered to plaintiff. The purchase price paid by plaintiff was not intended to be a loan. As a result of the transaction, plaintiff is now the absolute owner of the accounts.¹³ Defendants argue that the designation of the transaction as "with recourse" is evidence that the transaction was not a sale but a loan. A characterization of this transaction as "with recourse" does not automatically convert the transaction into a loan. The whole transaction needs to be examined. For instance, here, Boreal had the ability to request adjustments to the payment amount and created separate accounts from which the plaintiff withdrew funds. Moreover, the parties' intent should not be

¹⁰ See, *In re Dryden Advisory Group, LLC*, 534 B.R. 612, 620 (M.D. Pa. 2015) citing Robert D. Aicher, William J. Fellerhoff, Characterization of A Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor, 65 Am. Bankr. L.J. J. 181, 186-95 (1991) (collecting cases).

¹¹ *Id.*

¹² Since this transaction was not a loan, *Merchant Funding Services, LLC v. Volunteer Pharmacy Inc.*, 55 Misc. 3d 316, 44 N.Y.S. 3d 876 (2016) which characterized the transaction as a loan is distinguishable.

¹³ Factoring Agreement ¶ 1.10 Sale of Receipts.

minimalized. Here, the parties classified this transaction as a sale not a loan.¹⁴ Based on the foregoing, the court found that the transaction was not a loan. As such, defendants' defense of violation of the New York penal code for criminal usury is not meritorious and the motion to open was denied.¹⁵

CONCLUSION

For the forgoing reasons, this court order dated September 8, 2017 denying defendants petition to open confessed judgment should be affirmed.

Date: 11/2/17

BY THE COURT,


PATRICIA A. McINERNEY, S.J.

¹⁴ Id.

¹⁵ Moreover, defendants relied upon New York law to assert its meritorious defense. Defendants, a corporation with a principal place of business in New York, made a decision that it needed cash. As a solution, they entered into this agreement with plaintiff, a corporation doing business in Pennsylvania. The agreement specifically and unambiguously stated that Pennsylvania law shall govern without regards to the applicable principles of conflicts of law. Factoring Agreement ¶ 4.5. Defendants submitted to the jurisdiction of Pennsylvania. Id. Pennsylvania law not New York law governs this dispute.