

Afco Credit Corp. v Kenard Constr. Co., Inc,
2010 NY Slip Op 32399(U)
August 31, 2010
Supreme Court, New York County
Docket Number: 100074/10
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: Index Number : 103094/2009

PART 15

AFCO CREDIT CORP.

103094/09

vs KENARD CONSTRUCTION CO INC

INDEX NO. _____

Sequence Number : 002

MOTION DATE _____

DISMISS

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

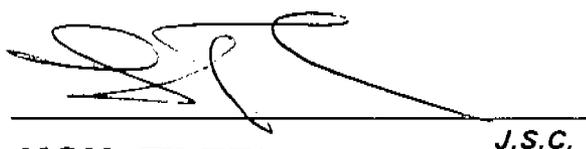
SEP 03 2010

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 8/31/10



J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

FILED

SEP 03 2010

NEW YORK
COUNTY CLERKS OFFICE

AFCO CREDIT CORPORATION, a/a/o
AFCO ACCEPTANCE CORPORATION,

Plaintiff,

Index No.
100074/10

Seq No.: 001

- against -

Decision and
Order

KENARD CONSTRUCTION COMPANY, INC.

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action to recover money on a loan agreement, dated September 26, 2007.¹ Plaintiff is seeking reimbursement in the total amount of \$17,066.41 from Kenard Construction Company, Inc. ("Kenard") in New York, based upon a venue selection clause in the loan agreement. Kenard now moves to dismiss the action based on, among other things, lack of personal jurisdiction. Plaintiff does not oppose.

Kenard is a construction company located in San Diego, California. Plaintiff, AFCO Credit Corporation (AFCO), is the assignee of AFCO Acceptance Corporation, a "California Industrial Loan Company and licenced as a premium finance company." AFCO previously moved for summary judgment in lieu of the complaint in the Supreme Court of the State of New York, New York County. Justice Walter Tolub denied the motion without prejudice based solely upon movant's failure to prove the assignment of the claim.

¹Kenard also submits three previous finance agreements, dated October 1, 2004, October 5, 2005 and October 2, 2006, respectively.

Plaintiff then brought the instant action. Robert Ratner, AFCO's Senior Vice President, submitted an affidavit in support of the original motion for summary judgment in lieu of a complaint, stating that "it would appear that this broker [James Henry Sim, a broker for Westland Insurance Brokers ("Westland")], defendant's agent, stole the monies advanced by the plaintiff." Indeed, an order was issued by the Insurance Commissioner of the State of California, prohibiting Mr. Sim from "participating in any manner in the business of insurance."

Kenard argues, in support of its motion, that AFCO cannot obtain personal jurisdiction over it because Kenard is a California Business which is not licensed to do business in New York and does not conduct any business in New York. Further, Kenard asserts that the instrument AFCO sues upon was negotiated, executed and performed wholly within California, and the alleged non-payment occurred in California. Kenard asserts that the "venue selection clause" contained in the loan agreement is invalid because that document was forged.

CPLR 3211(a)(8) states:

. . . A party may move for judgment dismissing one or more caused of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant . . .

On page "3" of the September 26, 2007 agreement, the clause titled "Entire Document-Government Law-Enforcement Venue," states, in relevant part:

the laws of the state of California will govern this Agreement unless otherwise stated. AFCO may, at its option, prosecute any action to enforce its rights hereunder in the Supreme Court of the State of New York, and the insured (i) waives any objection to such venue . . .

"Forum selection clauses, which are prima facie valid . . . are enforced because they provide certainty and predictability in the resolution of disputes . . . and are not to be set aside unless a party demonstrates that the enforcement of such would be unreasonable and unjust . . . such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical

* 4]
purposes, be deprived of his or her day in court.” (*Sterling National Bank as Assignee of Norvergence, Inc. v. Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 [1st Dept. 2006]).

The loan agreement expressly waives “any objection” to venue in New York, if so chosen by plaintiff. However, where the agreement containing the consensual venue provision is forged, the venue clause is unenforceable. (see *U.S. Fidelity and Guar. Co. v. Ragusa*, 195 AD2d 313[1st Dept. 1993]). Here, Kenard alleges that the loan documents were forged by Sim, and AFCO’s Vice President concedes that the subject loan appears to have been falsely obtained.

As the forum selection clause is unenforceable, the question becomes whether plaintiff obtained personal jurisdiction over Kenard, a California based company, through its contacts with New York. Pursuant to CPLR §302(a)(1), New York courts have jurisdiction over a non-domiciliary if that entity “transacts any business within the state or contracts anywhere to supply goods or services in the state . . .” “A non-domiciliary . . . may . . . reasonably foresee the prospect of defending a suit there if it purposefully avails itself of the privilege of conducting activities within the forum State.” (*LaMarca v. Pak-Mor Manufacturing Co.*, 95 NY2d 210,216[2000])(internal citations omitted). “The focus is on the contacts between the nonresident defendant and the business centered in New York . . . the salient consideration . . . is whether the assertion of jurisdiction comports with due process . . .” (*Pramer S.C.A. v. Abaplus International Corporation*, 2010 WL 2302367(N.Y.A.D. 1 Dept.).

Kenard submits the affidavit of its president, Kenneth A Ray, who states:

Kenard is and has been a corporation duly organized and existing under the laws of the State of California. Kenard’s principal and only place of business is located in the County of San Diego, State of California. Kennard [sic] has no employees, offices, leases, bank accounts or other property located within the State of New York. Kenard is not authorized to do business within the State of New York. Kenard operates a construction business wholly within the County of San Diego, State of California

Based on Mr. Ray’s sworn affidavit, Kenard has established that it has no minimum contacts with New York, and plaintiff fails to oppose the motion. This is

consistent with Justice Tolub's decision, wherein he states

there is no question that both AFCO Acceptance and Kenard Construction are California entities. There is also no question that the subject contract was negotiated and signed in California, premiums due under the subject contract were paid in California, and the claim that certain premiums were unpaid arises in California. The papers further reflect that Kenard Construction is not licensed to do business in New York, and does not conduct business in New York.

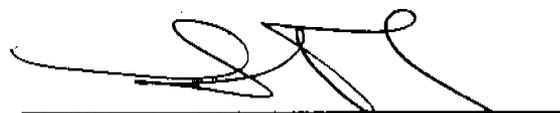
Wherefore it is hereby

ORDERED that plaintiff's motion is granted without opposition; and it is further

ORDERED that the complaint is hereby dismissed in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 31, 2010


EILEEN A. RAKOWER, J.S.C.

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