| **Professional Merchant Advance Capital, LLC v Your Trading Room, LLC** |
| --- |
| 2012 NY Slip Op 33785(U) |
| November 28, 2012 |
| Supreme Court, Suffolk County |
| Docket Number: 17469-12 |
| Judge: Thomas F. Whelan |
|  |
|  |

[* 1]

SHORT FORM ORDER **ORIGINAL** INDEX No. 17469-12

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/16/12
ADJ. DATES 10/19/12
Mot. Seq. # 002 - MD
P.C. Scheduled: 2/1/13
CDISP Y___ N X

| | |
|---|---|
| PROFESSIONAL MERCHANT ADVANCE CAPITAL, LLC,<br><br>Plaintiff,<br><br>-against-<br><br>YOUR TRADING ROOM, LLC, LESLIE FREEMAN and RICHARD H. WARYN,<br><br>Defendants. | JOHN H. GIONIS, ESQ.<br>Atty. For Plaintiff<br>90 Merrick Ave.<br>East Meadow, NY 11554<br><br>TWOMEY, LATHAM, SHEA ET AL<br>Atty for Defendant Waryn<br>PO Box 9398<br>Riverhead, NY 11901<br><br>LESLIE FREEMAN &<br>YOUR TRADING ROOM, LLC<br>Defendants Pro Se<br>520 Broadway<br>Santa Monica, CA |

Upon the following papers numbered 1 to 12 read on this motion by defendant Waryn to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 5-6; Replying Affidavits and supporting papers ____; Other 7-8 (plaintiff's memorandum); 9-10 (defendant's memorandum); 10-12 (defendant's reply memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#002) by defendant, Richard H Waryn, for an order dismissing the amended complaint in so far as it asserts claims against him is considered under CPLR 3211(a)(7) and (a)(8) and is denied; and it is further

***ORDERED*** that a preliminary conference shall be held on Friday, **February 1, 2013** at 9:30 a.m. in Part 45 in the courtroom of the undersigned located in the Supreme Court Annex Building at One Court Street, Riverhead, New York 11901.

This action arises out of the corporate defendant's purported breach of a September 29, 2011 sales agreement and the individual defendants' purported breaches of the terms of their written guarantees of the corporate defendant's performance under such agreement. The defendants are also charged with causing damage to the plaintiff by reason of the defendants' engagement in acts of fraud which purportedly induced the plaintiff to enter into the agreement. The material facts advanced on this motion are outlined below.

In 2010, the corporate defendant, Your Trading Room, LLC [hereinafter "YTR"] was engaged in the business of teaching and training people to be successful traders in the foreign exchange currency markets ["FOREX"]. YTR's business model included an on-line professional FOREX trading room from which teachers and advisors interfaced with student members enrolled in YTR and a financial brokerage division that engaged in servicing new traders at reduced brokerage acquisition costs. Following the 2010 opening of its first office in the United States in Santa Barbara, California, defendant Freeman, an Australian native and a principal operative in YTR, met with moving defendant Waryn, a resident of Colorado. In January of 2011, the defendants negotiated a distributor agreement whereby Waryn would develop a cash flow stream from the sale of YTR business products in a six state territory consisting of Colorado, Utah, Arizona, New Mexico, Hawaii and Alaska. In April of 2011, Waryn agreed to serve as CEO of YTR and to concentrate his efforts on raising private equity to be used in the expansion of YTR's customer base.

In June of 2011, Waryn contacted PROMAC, a company seemingly related to the plaintiff, both having offices in Hauppauge, New York. PROMAC offers business financing by, among other things, the lump sum cash purchase of a company's future electronic receivables by the plaintiff, LLC. Waryn completed a PROMAC application form dated June 22, 2011, wherein he listed himself as an 8% owner of defendant YTR. On June 30, 2011, the plaintiff, LLC, as Purchaser, defendant, YTR as Seller, and the individual defendants as "Owners", entered into a Future Receivables Purchase Agreement. Pursuant thereto, the plaintiff paid YTR the discounted sum of $100,000.00 for its credit card and other future receivable financing payments in exchange for the defendants' designation of a certain Citibank account as the sole account for the deposit of all of YTR's future receivable financing payments. Under the terms of the agreement, the plaintiff had the right to retain 38% of the daily deposits into such account until the contract price or "specified amount" of $138,000.00 had been received by the plaintiff.

On August 17, 2011, the parties entered into an Amended and Restated Future Receivables Agreement whereby the plaintiff paid an additional $100,000 for the purchase of additional future receivables which amount was added to the then existing $105,949.23 balance under the terms of the original purchase agreement. The retention rate on such balance was increased from 38% to 45% of the daily deposits into the specified Citibank bank account at a branch in New York. On September 29, 2011, the parties entered into a second Amended and Restated Future Receivables Agreement whereby the plaintiff paid an additional $207,000.00 for the purchase of additional future receivables adding to the existing balance of $176,184.16 for a total of $383,184.16. The plaintiff's retention rate under this agreement remained at 45% of the daily deposits into the specified account with Citibank in New York.

Defendant Waryn alleges that his interaction with PROMAC was rather limited after his initial discussions with it, all of which Waryn conducted by telephone, e-mail and fax from Colorado or California. Defendant Waryn did, however, travel to New York at the invitation of PROMAC who arranged a meeting with Metropolitan Equity Partners, a private equity group in Manhattan to discuss other ways in which YTR might raise capital (*see* ¶ 20 of Waryn's affidavit in support).

In January of 2012, Waryn became alarmed at what he perceived to be fraudulent and other actionable conduct on the part of defendant Freeman and others with respect to security sales to dummy shareholder accounts and other acts aimed at syphoning monies from YTR. After conveying his

concerns to defendant Freeman, Waryn and other executives resigned from YTR and informed authorities of the purportedly wrongful conduct. YTR allegedly collapsed shortly after the resignations.

In June of 2012, the plaintiff commenced this action to recover damages by reason of the defendants' failures to repay the monies due under the terms of the last purchase agreement. In its amended complaint, served shortly after defendant Waryn's service of his first motion to dismiss, the plaintiff added a second breach of contract claim and a tort claim sounding in fraudulent inducement against the defendants.

By the instant motion (#002), defendant Waryn seeks dismissal of the plaintiff's amended complaint on several grounds, including: 1) lack of personal jurisdiction; 2) usury; 3) failure to state claims for breach of contract due to the absence of an enforceable contract and/or payment obligation on the part of defendant Waryn; and 4) failure to state cognizable claims for fraud. For the reasons stated below, the motion is denied.

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1997]; *see* ***Bua v Purcell & Ingrao, P.C.***, 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Jannetti v Whelan***, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]); ***Bokhour v GTI Retail Holdings, Inc.***, 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]). Upon a court's consideration of evidentiary material, a motion to dismiss pursuant to CPLR 3211(a)(7) should be granted only when: (1) it has been shown that a material fact alleged in the complaint is not a fact at all; and (2) there is no significant dispute regarding it (*see* ***Cucco v Chabau Cafe Corp.***, 99 AD3d 965, 952 NYS2d 463 [2d Dept 2012]; ***Norment v Interfaith Ctr. of New York***, 98 AD3d 955, 951 NYS2d 531 [2d Dept 2012]; ***Basile v Wiggs***, 98 AD3d 640, 950 NYS2d 148 [2d Dept 2012]).

The court is permitted to consider evidentiary material submitted by a moving defendant, and where it does so, the criterion becomes whether the plaintiff has a cause of action, not whether he has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, *supra*). However, the burden never shifts to the nonmoving party to rebut a *defense* asserted by the moving party *(see* ***Quiroz v Zottola,*** 96 AD3d 1035, 948 NYS2d 87 [2d Dept 2012]; ***Sokol v Leader***, 74 AD3d 1180 , *supra*). "Thus, a plaintiff 'will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint' " (*id.* at 1181, 904 NYS2d.2d 153, quoting ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635, 389 NYS2d 314 [1976]). Affidavits submitted by a defendant "will almost never warrant dismissal

under CPLR 3211(1) unless they establish conclusively that the plaintiff has no cause of action" (***Sokol v Leader***, 74 AD3d 1180, *supra*, quoting ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]).

Defendant Waryn's claims of legal insufficiency with respect to the plaintiff's FIRST cause of action sounding in breach of Waryn's guaranty of corporate defendant's performance of covenants under the terms of the purchase agreement are rejected as unmeritorious. A claim of breach of a guaranty of performance gives rise to, among other things, a claim for damages by reason of the failure to perform on the part of the obligor or its guarantor (*see* ***Bank of Tokoyo-Mitsubishi, Ltd. v Kaverner***, 243 AD2d 1, 671 NYS2d 905 [1st Dept 1998]). Waryn's claim that the plaintiff may not recover money damages because there was no guaranty of payment under the terms of the written guaranty is thus unavailing. Likewise unavailing are Waryn's claims that the plaintiff's THIRD cause of action which sounds in breach of certain of the specific obligations imposed upon the corporate defendant under Paragraph II of the purchase agreement and upon Waryn under his guaranty. None of the defendant's submissions included proof that the factual averments upon which the THIRD cause of action are based are not facts at all and that there is no dispute with respect thereto (*see* ***Cucco v Chabau Cafe Corp.***, 99 AD3d 965, *supra*; ***Bokhour v GTI Retail Holdings, Inc.***, 94 AD3d 682, *supra*).

Equally lacking in merit are Waryn's claims that the plaintiff's SECOND cause of action sounding in fraud in the inducement is legally insufficient. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (***Introna v Huntington Learning Ctrs., Inc.***, 78 AD3d 896, 898, 911 NYS2d 442 [2d Dept 2010]). Corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally (*see* ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). The plaintiff alleges that Waryn fraudulently represented that he maintained a New York residence address and as proof thereof produced a New York drivers' license bearing such an address. Such production allegedly served as an inducement for the plaintiff's execution of the purchase agreement as guaranteed by War yn which included terms by which any false representation or warranty would constitute a fraud against the plaintiff. Waryn now denies that he gave PROMAC agents the New York license that reflected a New York residence address and denies that he otherwise represented that such address was current. However, these denials do not establish that the allegations of fact advanced in the SECOND cause of action of action are not facts at all and that there is no dispute with respect thereto (*see* ***Cucco v Chabau Cafe Corp.***, 99 AD3d 965, *supra*; ***Bokhour v GTI Retail Holdings, Inc.***, 94 AD3d 682, *supra*).

Waryn additionally contends that the plaintiff's fraud claim is legally insufficient since the element of justifiable reliance is missing. In support of this contention, Waryn points to portions of the record evidencing the plaintiff's knowledge that Waryn was a residing in Colorado when the first purchase agreement was negotiated. Such evidence includes proof of the plaintiff's receipt of documents which reflected Waryn's residence address in Colorado. However, this claim is unavailing since a person may have multiple residences. Waryn thus failed to establish that a factual averment upon which the SECOND cause of action of action rest is not a fact at all and that there is no dispute with respect thereto (*see* ***Cucco v Chabau Cafe Corp.***, 99 AD3d 965, *supra*; ***Bokhour v GTI Retail Holdings, Inc.***, 94 AD3d 682, *supra*).

The moving defendant's claims that all of the plaintiff's claims against him are subject to dismissal because his signature on the September 29, 2011 purchase agreement was not affixed thereto by him but instead, was the product of a forgery is also unavailing. Forgery is a legal defense which, like other fraud based claims, must be established by clear and convincing proof (*see* ***Simcuski v Saeli***, 44 NY2d 442, 406 NYS2d 259 [1978]). Such a defense is more properly the subject of a CPLR 3211(a)(1) motion rather than a 3211(a)(7) motion, since under 3211(a)(7), the burden never shifts to the nonmoving party to rebut a *defense* advanced by the moving party seeking dismissal (*see* ***Quiroz v Zottola,*** 96 AD3d 1035, *supra*; ***Sokol v Leader***, 74 AD3d at 1181, *supra*). Waryn's conclusory claims that he did not sign the agreement failed to establish that the allegations of fact which underlie the plaintiff's pleaded claims for relief are not facts at all and that there is no dispute with regard thereto (*see* ***JPMorgan Chase Bank, N.A. v. Bauer,*** 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***North Fork Bank Corp. v Graphic Forms Assoc.***, 36 AD3d 676, 828 NYS2d 194 [2d Dept 2007]; ***JPMorgan Chase Bank v Gamut-Mitchell, Inc.***, 27 AD3d 622, 811 NYS2d 777 [2d Dept 2006]; Waryn's further claims that his lack of an ownership interest in the corporate defendant at the time of the execution of the contract vitiates any personal liability on his part since only "Owners" are guarantors are similarly lacking in merit and insufficient to warrant dismissal of the plaintiff's complaint (*see* ***211-54 Realty Corp. v Schneider***, 77 A.D3d 915, 910 NYS2d 108 [2d Dept 2010]).

Defendant Waryn's usury defense is similarly unavailing. Like his forgery defense, the defense of usury is more properly asserted on a motion pursuant to CPLR 3211(a)(1) to dismiss based upon documentary evidence rather than on a motion to dismiss for legal insufficiency under CPLR 3211(a)(7) due to the differing legal standards applicable in determining such motions. For example, a motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see* ***AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.***, 5 NY3d 582, 590–591, 808 NYS2d 573 [2005]; ***Bua v Purcell & Ingrao, P.C.*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Fontanetta v Doe,*** 73 AD3d 78, 898 NYS2d 569, [2d Dept 2010]). In contrast, evidentiary submissions considered by the court on a motion to dismiss pursuant to CPLR 3211(a)(7) will warrant dismissal of the complaint only when: (1) it has been shown that a material fact alleged in the complaint is not a fact at all; and (2) there is no significant dispute regarding it (*see* ***Cucco v Chabau Cafe Corp.***, 99 AD3d 965, *supra*; ***Norment v Interfaith Ctr. of New York***, 98 AD3d 955, *supra*). In light, however, of the parties' advancement of contentions and argument regarding whether the subject purchase agreement is a loan that is usurious and thus unenforceable upon application of in Waryn's criminal usury defense[1], the court shall consider them under CPLR 3211(a)(1) and (a)(7).

---

[1] Neither corporations nor limited liability companies may interpose a defense of civil usury (*see* GOL § 5-521[1]; LLC Law § 1104; ***Arbuzova v Skalet***, 92 AD3d 816, 938 NYS2d 811 [2d Dept 2012]). "An individual guarantor of a corporate obligation is also precluded from asserting such a defense... However, the prohibition against asserting such a defense does not apply to a defense of criminal usury where interest in excess of 25% per annum is knowingly charged .." (***Tower Funding, Ltd. v David Berry Realty, Inc.***, 302 AD2d 513, 755 NYS2d 413 [2d Dept 2003]).

Section 190.40 of New York's Penal Law prohibits persons from knowingly charging interest on a note or loan at a rate which exceeds 25% per annum. The defense afforded by this statute imposes a heavy burden on the party raising the defense to establish that the lender knowingly charged, took or received annual interest exceeding 25% on a loan or forbearance (*see* ***Ujueta v Euro-Quest Corp.***, 29 AD3d 895, 814 NYS2d 551 [2d Dept 2006]). The rudimentary element of usury is the existence of a loan or forbearance of money and where there is no loan there can be no usury (*see* ***Feinberg v Old Vestal Rd. Assocs., Inc.***, 157 AD2d 1002, 550 NYS2d 482 [3d Dept 1990]). In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character (*see* ***Min Capital Corp. Retirement Trust v Pavlin***, 88 AD3d 666, 930 NYS2d 475 [2d Dept 201]); ***O'Donovan v Galinski***, 62 AD3d at 769, 878 NYS2d 443 [2d Dept 2009]).

Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see* ***Rubenstein v Small***, 273 AD 102, 75 NYS2d 483 [1st Dept 1947]; ***Lynx Strategies, LLC v Ferreira***, 28 Misc.3d 1205(A), 2010 WL 2674144 [Sup Ct New York Cty. 2010]; ***Ideas v 999 Rest. Corp.***, 2007 WL 3234747 [Sup. Ct. New York Cty. 2007]; ***Zoo Holdings, LLC v Clinton***, No. 107415/04, 2006 WL 297730 [Sup. Ct. New York Cty. 2006]; ***Transmedia Rest. Co., Inc. v 33 E. 61st St. Rest. Corp.***, 184 Misc.2d 706, 710 NYS2d 756, 760 [Sup. Ct. New York Cty. 2000]; ***O'Farrell v Martin***, 161 Misc. 353, 292 NYS 581, 583–84 [New York City Ct. 1936]). Where payment or enforcement rests upon a contingency, the agreement is valid even though it provides for a return in excess of the legal rate of interest (*see* ***Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.***, 35 Misc3d 1205(A), 950 NYS2d 723 [Sup. Ct. Suffolk Cty. 2012]; ***First Funds, LLC v Yoshi Trading Co., LLC***, [Sup Ct. New York Cty. Index No. 650030/2011; Edmead, J., 9/28/11]).

Upon review of the record adduced on this motion, the court finds that Waryn failed to establish that the subject agreement to purchase credit card receivables was a loan and not an agreement to purchase future receivables for a lump sum discounted purchase price payable in advance by the plaintiff in exchange for a contingent return. Waryn thus failed to establish his usury defense as a matter of law and/or that the plaintiff has no cognizable claim for breach of the purchase agreement and Waryn's written guarantee of performance. Dismissal of the breach of contract claims set forth in the plaintiff's complaint pursuant to either CPLR 3211(a)(1) or (a)(7) is, therefore, denied.

The moving defendant's alternate ground for dismissal rests upon the claim that he is not amenable to suit here in New York since he engaged in no acts which would subject him to the jurisdiction of this court under traditional jurisdictional concepts or under New York's long arm statute which is codified in CPLR 302. For the reasons stated, the court finds a sufficient basis for the exercise of jurisdiction over the defendant pursuant to CPLR 302(a).

Under CPLR 302(a)(1), "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state" ( *id.*). "CPLR 302(a) is a 'single act statute [and] ... proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'" (***Daniel B. Katz & Assoc. Corp. v Midland***, 90 AD3d 977, 937 NYS2d 236 [2d Dept 2011]; quoting ***Kimco Exch. Place Corp. v Thomas Benz, Inc.***, 34 AD3d 433, 434, 824 NYS2d 353, quoting ***Deutsche Bank Sec., Inc. v Montana Bd. of Invs.***, 7 NY3d

65, 71, 818 NYS2d 164 [2006], cert. denied 549 U.S. 1095, 127 S.Ct. 832 [2006]). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws' " (***Fischbarg v Doucet***, 9 NY3d 375, 380, 849 NYS2d 501 [2007]; quoting ***McKee Elec. Co. v Rauland–Borg Corp.***, 20 NY2d 377, 382, 283 NYS2d 34 [1967]). Thus, a defendant need not be physically present in New York to transact business there within the meaning of the first clause of section 302(a)(1) (*see* ***Deutsche Bank Secs., Inc. v Montana Bd. of Invs.***, 7 NY3d 65, *supra*).

Here, there is sufficient evidence in the record to conclude that defendant Waryn's activities in negotiating the several purchase agreements on behalf of YTD and Waryn's execution of the personal guaranty of performance were both purposeful and substantially related to the claims asserted herein by the plaintiff in its amended complaint. Moreover, Waryn may fairly be considered to have availed himself of the benefits and protections of New York law when he purposely submitted the loan application to PROMAX in New York on behalf of YTR, thereby establishing sufficient minimum contacts with New York to justify personal jurisdiction even in the absence of a continuing relationship within the state (*see* ***Vaughan Co. v Global Bio-Fuels Tech., LLC***, 1:12-CV-1292, NYLJ 1202578598630, at *1 [NDNY, November 15, 2012] citing ***Chloe v Queen Bee of Beverly Hills, LLC***, 616 F.3d 158 [C.A.2d N.Y., 2010]). Moreover, because Waryn's performance guarantee included YTR's performance of its obligation to deposit daily credit card receivables into a specified bank account in the state of New York, Waryn's conduct may fairly be characterized as falling within the penumbra of the "contracts anywhere to supply good or services in the state" provisions of CPLR 302(a)(1) (*see* ***Summit Constr. Serv. Group, Inc. v Act Abatement LLC***, 34 Misc3d 823, 935 NYS2d 499 [Sup. Ct Westchester Cty. 2011]). Waryn's demand for dismissal of the complaint pursuant to CPLR 3211(a)(8) due to a purported lack of personal jurisdiction over him is thus denied.

In view of the foregoing, the instant motion (#002) by defendant Waryn for dismissal of the plaintiff's amended complaint is denied. Counsel are directed to appear on **February 1, 2013** for the preliminary conference scheduled above, by which date, answers to the amended complaint are expected to have been served by the defendants.

DATED: 11/28/12

THOMAS F. WHELAN, J.S.C.