

Retail Capital, LLC v Spice Intentions Inc.
2016 NY Slip Op 32614(U)
December 9, 2016
Supreme Court, Queens County
Docket Number: 713376/15
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
RETAIL CAPITAL, LLC d/b/a CREDIBLY,

Plaintiff,

Index No.: 713376/15

Mot. Date: 9/22/16

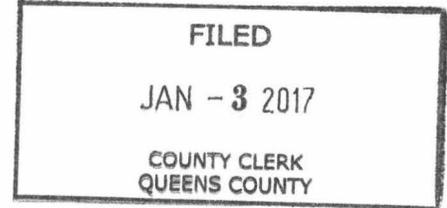
-against-

Mot. Cal. No. 126

Mot. Seq. 4

SPICE INTENTIONS INC. d/b/a CURRY
HEIGHTS, and AK M KARIM,

Defendants.



-----X
The following papers read on this motion by plaintiff for an order dismissing the defendants' affirmative defenses and counterclaims ; and the cross-motion by defendants to hold the plaintiff in default for failure to respond to affirmative defenses and counterclaims.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits	EF 37-39
Notice of Cross-Motion- Affirmation in Opposition and In Support-Exhibits	EF 49
Reply Affirmation-Exhibits.....	EF 56

Upon the foregoing papers, it is ordered that the motion is determined as follows.
Plaintiff Retail Capital, LLC. d/b/a Credibly (Credibly) is engaged in the business of purchasing future receivables and sales proceeds from other commercial entities for an up front payment. Defendant Spice Intentions d/b/a Curry Heights entered into an agreement with the plaintiff on or about July 13, 2015. Credibly purchased hundred and \$43,028 of the defendants' future sales proceeds and receivables for an up front payment of \$104,400. Pursuant to the agreement, Credibly would collect 14.14% of the defendants' daily revenue until such time as the plaintiff received the full purchased

amount or the defendants failed to generate sufficient revenue to continue operating and rendering the purchased accounts and sales proceeds uncollectible to the plaintiff and defendants. The agreement explicitly stated that the parties agreed that the purchase price under the agreement is in exchange for the purchased amount and that the purchase price is not intended to be, nor shall it be construed as a loan from the plaintiff to the defendants. The defendants were required to deposit all sales proceeds and revenue into a designated bank account, from which the plaintiff and defendants would each collect their respective portion of the purchased sales proceeds. The agreement provided a reconciliation on demand provision whereby the parties will reach permitted to demand the monthly reconciliation of funds from the other to ensure that neither entity collected more or less of the sales proceeds than they were contractually entitled to collect from the designated bank account. The agreement does not provide for a fixed payment term and provides for the plaintiff's collection of sales proceeds to fluctuate with the actual revenue of the defendants' business. Thus at the time the agreement was entered into, it was impossible for the parties to determine when, if ever, the plaintiff would receive the full purchased amount because the defendants future revenue was variable, and outside the control of the plaintiff. The agreement does not provide the plaintiff with any recourse in the event that the sales proceeds are not generated by the defendants unless the defendants took specific enumerated acts that were calculated to prevent the plaintiff from collecting the purchased receivables in contravention of the defendants' representations, warranties, and covenants, and in breach of the agreements express terms. As part of the agreement, the defendants retained no rights to the purchased receivables and sales proceeds, and plaintiff became the sole and exclusive owner of the purchased receivables and sales proceeds.

On July 14, 2015, the plaintiff paid the purchase price less any agreed-upon amounts to the defendants into an account designated by the defendants pursuant to the agreement. On or about October 23, 2015, the plaintiff claims that the defendants and its principal began interfering with the plaintiff's collection of the purchased receivables and sales proceeds so as to deprive the plaintiff of the benefit bargained for in the agreement. The plaintiff also claims that the defendants continue to generate receivables and collect sales proceeds while continuing to actively prevent the plaintiff from collecting its portion of the purchased receivables.

A party may move to dismiss a defense "on the ground that a defense is not stated or has no merit" (CPLR 3211 [b]). When moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "'without merit as a matter of law'" (*Galasso, Langione & Botter, LLP v. Liotti*, 81 AD3d 880, 88 quoting, *Greco v Christoffersen*, 70 AD3d 769 quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723]; see *Courthouse Corporate Ctr. LLC v Schulman*, 74 AD3d 725, 727). "If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741)

The affirmative defenses and counterclaims for fraud and conversion are hereby dismissed. It is settled that "[n]either fraud nor conversion can be predicated upon breach of contract" (*Parekh v Cain*, 96 AD3d 812; *Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 2016 N.Y. App. Div. LEXIS 7889). In substance, "a cause of action will be found to sound in tort rather than in contract only when the legal relations binding the parties are created by the utterance of a falsehood, with fraudulent intent and reliance thereon, and the cause of action is entirely independent of contractual relations between the parties" (*Lee v Matarrese*, 17 AD3d 539). Here, the defendants' fraud allegations are predicated upon, and arise out of, the same operative facts relied upon in connection with the plaintiff's breach of contract cause of action (*Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 914-915). These allegations do not establish the existence of a duty collateral or extraneous to that created by the parties' alleged contract; rather, they merely recast, as "an alternative theory of liability," the complaint's previously interposed breach of contract claim (*A. Montilli Plumbing & Heating Corp. v Valentino*, 90 AD3d 961, 962). Hence these defenses must be dismissed.

Moreover, these affirmative defenses, as well as that of misrepresentation, falter since the circumstances constituting the wrong are not stated in detail, as required by CPLR 3016[b]. "A cause of action to recover damages for fraud requires allegations of (1) a false representation of fact, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages" (*Greenberg v Blake*, 117 AD3d 683 quoting *Stein v Doukas*, 98 AD3d 1024, 1025. "Pursuant to CPLR 3016(b), a cause of action alleging

fraud must be pleaded with particularity so as to inform the defendant of the alleged wrongful conduct and give notice of the allegations the plaintiff intends to prove" (*Greenberg v Blake, supra* quoting *McDonnell v Bradley*, 109 AD3d 592,593). "Although there is certainly no requirement of 'unassailable proof at the pleading stage under CPLR 3016(b), 'the complaint must' allege the basic facts to establish the elements of the cause of action' " (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 at 559 quoting from *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486,491-492). "CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct." (*Eurycleia Partners, LP v Seward & Kissel, LLP, supra*; see *Pace v Reisman & Associates, Esq., LLP*, 95 AD3d 1185 [2d Dept 2012]). The misrepresentation and fraud defense fail to satisfy the requirements of CPLR 3016 (b) because they contain only bare and conclusory allegations against the movants without any supporting detail. Hence dismissal of the defenses and counterclaims as to frauds and misrepresentation is warranted.

The affirmative defenses of illegality and usury are also dismissed. Usury is an affirmative defense, and a heavy burden rests upon the party seeking to impeach a transaction based upon usury (*see Hochman v. LaRea*, 14 A.D.3d 653, 654; *Gandy Mach. v Pogue*, 106 A.D.2d 684). The maximum per annum interest rate for a loan or forbearance of money is 16%, under New York's civil usury statute, and 25% under the state's criminal usury statutes (*see* General Obligations Law § 5-501 [civil usury]; Penal Law §§ 190.40, 190.42 [criminal]). With some exceptions that do not apply here, a corporation may assert criminal usury as a defense where the amount of the loan or forbearance is more than \$250,000.00 and less than \$2,500,000.00 (*see* General Obligations Law § 5-521 [3]; *Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178). To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate (*see Giventer v Arnow*, 37 NY2d 305, 309). If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law (*see Fareri v Rain's Intl.*, 187 AD2d 481, 482). Usury must be proved by clear and convincing evidence as to all its elements and usury will not be presumed (*see Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 261). Not only do the

defendants fail to properly allege the existence of a loan, but the clear terms of the agreement state explicitly that the transaction between the parties was not a loan. Receivables purchasing is an accepted form of business transaction, and is not a loan.

Defendants' breach of contract counterclaim and defense is improperly plead. Moreover, the defendants have failed to allege that it sustained any damages from the plaintiff's breach of contract. Hence, it is dismissed.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that the plaintiff's motion seeking to dismiss the defendants' affirmative defenses is granted, and the 10th, 14th, 19th and 23rd affirmative defenses in the defendants' answer are dismissed; and it is further,

ORDERED, that the defendants' cross-motion to enter a default as against the plaintiff on its affirmative defenses and counterclaims is denied as academic, and otherwise without legal basis; and it is further,

ORDERED, that all other applications not specifically addressed herein are denied in all respects.

Dated: December 9, 2016



TIMOTHY J. DUFFICY, J.S.C.

