LG Funding, LLC v Balsamo
2017 NY Slip Op 32686(U)
December 21, 2017
Supreme Court, Nassau County
Docket Number: 602680-17
Judge: Jerome C. Murphy

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

LG FUNDING, LLC,

Plaintiff,

- against -

RONALD BALSAMO and LOUIS CORBO,

Defendants.

TRIAL/IAS PART 18
Index No.: 602680-17
Motion Date: 10/23/17
Sequence No.: 003 MG

DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affidavit, Affirmation and Exhibits.....1
Memoranda of Law in Support (2).....2
Affirmation in Opposition, Memorandum of Law in Opposition and Exhibits.....3
Reply Affidavit in Support.....4

PRELIMINARY STATEMENT

Plaintiff brings this application for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing defendants' counterclaim, and pursuant to CPLR § 3212, granting summary judgment and directing the entry of a judgment against defendants, jointly and severally, in the sum of $50,206.98 with interest thereon from December 19, 2016, plaintiff's reasonable attorney's fees in the sum of $12,551.75, and the costs and disbursements of this action, together with any such other and further relief as the Court deems just. Defendants have submitted opposition to this application.

BACKGROUND

On May 9, 2016, plaintiff, LG Funding, LLC ("LG") and non-party Cardinal Sales, Inc. ("Cardinal") entered into a written Merchant Agreement ("Agreement") pursuant to which Cardinal sold LG $98,966.00 ("Purchased Amount") of Cardinal's accounts, contract rights, and other obligations arising from or relating to the payment of monies from Cardinal's customers and other third party payors ("Receivables") for the sum of $70,690.00 ("Purchase Price") to be paid to LG from 10% of Cardinal's daily revenue with the payments to LG to be capped at $2,750.00 per week. Cardinal also agreed that in the event of its default under the contract, the full uncollected Purchased Amount plus all fees due under the Agreement would become immediately due and payable in full to LG.

Notably, defendants, Ronald Balsamo and Louis Corbo, executed guarantees of performance of all the representations, warranties and covenants made by Cardinal in the Merchant Agreement.[1]

On May 11, 2016, LG paid Cardinal the Purchase Price.

Ultimately, Cardinal breached the Merchant Agreement by defaulting on its representations and warranties to LG and by failing to direct Cardinal's payments to LG by blocking LG's access to a designated bank account ("Designated Account") from which Cardinal agreed to permit LG to withdraw Receivables. Cardinal also breached the Agreement by failing to deposit Receivables into the Designated Account, by disposing of Cardinal's assets without LG's prior express written

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[1]Insofar as is pertinent to this determination, the Guarantee stated as follows:
***
Joint and Several Liability: The obligations hereunder of the persons or entities constituting Guarantor under this Agreement are joint and several.
***
(Motion, Ex. A).

consent and/or by depositing Receivables into a bank account other than the Designated Account.

As a result, on December 19, 2016, LG held Cardinal in breach of the Agreement. According to LG, Cardinal owes $47,256.98 of the Purchased Amount and $2,500 for a default fee. Together with the various "Not Sufficient Fees" ("NSF"), it is claimed that Cardinal owes LG $50,206.98 under the Merchant Agreement and as guarantors, Balsamo and Corbo are responsible to LG for this amount.

In bringing this suit against the guarantors, Ronald Balsamo and Louis Corbo, plaintiff asserts claims for: (1) breach of guarantee; and, (2) attorneys' fees.

In their Verified Answer and Counterclaim, the defendants deny the material allegations of the complaint and assert a counterclaim for fraud essentially claiming that any personal guarantees alleged on the loan at the heart of the Complaint were procured by fraud.

Upon the instant motion, plaintiff seeks an Order dismissing the counterclaim and for summary judgment as a matter of law. In sum, the plaintiff argues that the counterclaim should be dismissed because the Agreement that is the subject of this action is a legal transaction for the purchase of receivables that is not a loan and is not usurious. Plaintiff also argues that the defendants' alleged reliance on oral representations that the document they signed was not a guarantee was not reasonable and that summary judgment should be granted because there is no issue of fact as to plaintiff's claim for breach of contract, attorneys fees and breach of guarantee.

The defendants oppose the instant application and argue that there remain issues of fact as to whether the Agreement is an enforceable contract or an unenforceable criminal loan, whether the defendants were fraudulently induced to sign the Agreement and whether there was mutual assent when the defendants' signed the Agreement.

DISCUSSION

The law is clear. CPLR 3211(a)(1) permits the defendant to seek and obtain a dismissal of one or more causes of action asserted against it on the ground that the defendant has a defense founded upon documentary evidence. When a motion to dismiss based upon documentary evidence is made pursuant to CPLR 3211(a)(1), the defendant must show that "the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim" (*Unadilla Silo Co. v. Ernst & Young*, 234 AD2d 754 [3rd Dept. 1996]; *see also*, *Leon v. Martinez*, 84 NY2d 83 [1994]; *Sheridan v. Town of Orangetown*, 21 AD3d 365 [2nd Dept. 2005]).

CPLR 3211(a)(7) permits the defendant to seek a dismissal of a cause of action asserted against it when the plaintiff allegedly fails to state a cause of action in the pleading.

In deciding a motion made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action (*Leon v. Martinez*, *supra*; *Well v. Yeshiva Rambam*, 300 AD2d 580 [2nd Dept. 2002]). In so doing, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true (*Well v. Yeshiva Rambam, supra; 511 West 232nd Street Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Morad v. Morad*, 27 AD3d 626 [2nd Dept. 2006]). If, from the facts alleged in the complaint and the inferences which can be drawn from the opposition to the motion, the court determines that the pleader has a cognizable cause of action, the motion to dismiss must be denied (*Sokoloff v. Harriman Estates Dev. Corp*, 96 NY2d 409 [2001]; *Stucklen v. Kabro Assoc.*, 18 AD3d 461 [2nd Dept. 2005]).

Furthermore, it is clear that under the common law, a loan generally means a contract whereby one party transfers to another money or its equivalent that the latter agrees to repay later (*In*

re Renshaw, 222 F3d 82, 84 [2nd Cir. 2000]). Notably, unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*Rubenstein v. Small*, 273 AD 102 [1st Dept. 1947]). In addition, "[u]sury must be proved by clear and convincing evidence as to all its elements and will not be presumed (*Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 261 [1984]). The elements of a usury claim are (1) that a loan or forbearance of money; (2) requiring interest in violation of a usury statute; (3) was charged by the holder or payee with the intent to take interest in excess of the legal rate (*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178 [1st Dept. 2013]). There can be no usury in the absence of a loan or forbearance of money (*Seidel v 18 E. 17th St. Owners*, 79 NY2d 735 [1992]). "In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character" (*Min Capital Corp. Retirement Trust v Pavlin*, 88 AD3d 666 [2nd Dept. 2011]). Where the terms of an agreement are at issue and the evidence is conflicting, there is a presumption that the transaction is not usurious (*Giventer v. Arrow*, 37 NY2d 305 [1975]).

Notably, a corporation is prohibited from asserting a defense of civil usury (*Schneider v Phelps*, 41 NY2d 238, 242 [1977]). Nor can it assert a defense of criminal usury under the penal law for loans less than $425,000 (*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc., supra* at 182). The same is true of individual guarantors of loans to corporations (*Davis v. Platinum Rapid Funding Group, Ltd*, 2016 NY Slip Op. 31826(U) [Sup. Ct. Nassau 2016]; *Merchant Cash & Capital, LLC v. Avtar Trucking, Inc.*, 2017 NY Slip Op 31123(U) [Sup. Ct. Nassau 2017]).

Given the foregoing and based upon the papers submitted herewith, including the Agreement at issue, this Court finds that the Agreement herein is a complete, clear and unambiguous document and is entitled to enforcement according to the plain meaning of its terms. The language evidences

a clear intent by the parties to enter into a transaction for the purchase of receivables and is not a loan. Indeed, the Agreement itself states that the transaction is not intended to be a loan. Nor is there any indication that defendants believed that the Agreement was loan or that they were paying interest thereunder. Moreover, given that there is evidence on this record that the plaintiff fully performed under the Agreement by paying for the receivables and that the defendant partially performed by delivering plaintiff part but not all of the receivables, or for that matter that the defendants objected to the terms of the Agreement, this Court finds that the conduct of the parties after entering into the transaction was also that of the purchase of receivables rather than a loan.

As to the defendants' counterclaim for fraud, this Court finds said claim to be meritless as well. Indeed, given the evidence submitted herewith, this Court simply cannot find that the defendants' alleged reliance on purported representations that the document they signed was not a guarantee, to be reasonable (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). Indeed, when a party to whom an alleged misrepresentation is made, claims that such a representation is false, a heightened degree of diligence is required of the party and it cannot reasonably rely on such representations without making additional inquiry to determine their accuracy (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043[2015]). On this record, this Court cannot find that the defendants have demonstrated reasonable reliance for their purported fraud claim. Indeed, even assuming that the plaintiff in fact made the alleged misstatement regarding the effect of the guarantee – i.e., that they defendants would not be personally bound by the document – a heightened degree of diligence is required (*Id*), which the defendants have failed herein to establish.

As noted above, the guarantee is a clear, explicit and unequivocal personal guarantee of the

obligations under the Agreement. In the end, this Court finds that in executing the guarantee, the defendants reliance on any representation flies in the face of the explicit language of the guaranty itself and therefore renders any reliance thereupon unreasonable. Accordingly, this Court finds that any purported counterclaim for fraud fails to so state a cause of action.

Insofar as defendants claim that they were defrauded into guaranteeing a usurious loan, such argument is also entirely unavailing because, as stated above, their reliance on alleged statements that the document they signed was not a guarantee was not reasonable in view of the document's clear language and because of the fact that the Agreement was not a loan, *supra*.

Notably, in opposition, the defendants fail to substantiate their claim that their reliance on the alleged statements (that the document they signed was not a guarantee) is reasonable. In particular, the unmistakably clear guarantee language contained in the document, proves otherwise. Furthermore, this Court cannot find that the defendants have failed to make any demonstration to rebut the presumption of conscionability in the commercial setting in which they guaranteed the Agreement. Thus, for this Court to permit the defendants herein to avoid their contractual responsibilities in reliance on the bare assertion that they were "tricked" into signing the guarantees, does not, without more, permit this Court to allow the defendants to avoid their obligations thereunder.

The defendants' argument that the Agreement had a one-year fixed term for repayment is also erroneous. To the contrary, a more complete reading of the Agreement at Section 1.2 states that it "shall automatically renew for successive one year terms" and it further states in relevant part that "said termination of this Agreement shall not affect the Merchant's [Cardinal's] responsibility to satisfy all outstanding obligations to LG at the time of termination."

Under these circumstances, the plaintiff's application pursuant to CPLR 3211(1)(1) and (7) dismissing the defendants' counterclaim is herewith granted.

The plaintiffs' motion for summary judgment is also granted.

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."
>
> (*Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

With respect to plaintiff's breach of contract claim, it is plain to this Court that, on this record, the plaintiff and Cardinal (the Merchant) entered into a contract for the plaintiff to pay an up front sum to purchase the merchant's receivables, that the plaintiff performed its obligations by paying for the receivables and that the merchant breached the contract by failing to turn over the receivables to the plaintiff and otherwise breached the covenants and warranties made in the contract (*Meyer v. North Shore-Long Is. Jewish Heath Sys., Inc.*, 137 AD3d 878, 879 [2nd Dept. 2016]).

Similarly, this Court finds that the plaintiff has also established its entitlement to judgment as a matter of law on its breach of guaranty claim. Indeed, it is plain to this Court that there is no issue of fact relating to the primary obligation under the contract. Nor is there any issue of fact as to the guarantees by the guarantors of performance of all the representations, warranties and covenants made by the obligor in the contract. Thus, given the finding of this Court, *supra*, that the parties to the contract breached the contract as well as the guarantees and given the guarantor's

agreement to waive any defenses, this Court finds that the plaintiff is herewith entitled to a judgment as a matter of law on its breach of guaranty (*Valley Natl. Bank v. INl Holding LLC*, 95 AD3d 1108, 1108 [2nd Dept. 2012]; *RMP Capital, Corp. v. Victory Jet LLC*, 2013 NY Slip Op. 30875(U) [Sup. Ct. Suffolk 2013]).

Finally, this Court also finds that the plaintiff has established its entitlement to judgment as a matter of law on its claims for attorneys fees which are plainly provided for in the parties' contract (*Hooper Assoc.v. AGS Computers*, 74 NY2d 487, 491 [1989]).

Notably, in opposition, the defendants have failed to demonstrate the existence of any issue of fact precluding an award of summary judgment. First and foremost, this Court cannot overlook the fact that the defendants have not submitted any affidavits in opposition to this motion. The law is clear. An affirmation of counsel is of no evidentiary value or effect (*Roche v. Hearst Corp.*, 53 NY2d 767 [1981]; *Columbia Ribbon & Carton Mfg. Co. v. A-1-A Corp*, 42 NY2d 496 [1977]). Nor have the defendants provided any proof that the plaintiff took more from Cardinal than was permitted under the Agreement.

In the end, given that there is no issue of fact that the defendants signed the guarantee provisions of the Agreement, that Cardinal received funding from the plaintiff or that Cardinal failed to pay plaintiff in accordance with the terms of the Agreement, this Court also grants the plaintiffs' motion for summary judgment in its claims for breach of contract, breach of guaranty and attorneys fees.

The parties remaining contentions have been considered and do not warrant discussion.

The issue of reasonable attorneys fees is respectfully referred to the Calendar Control Part (CCP) for hearing.

Subject to the approval of the Justice there presiding, and provided that a note of issue has been filed at least ten days prior thereto, this matter shall appear on the calendar of CCP for March 8, 2018, at 9:30 a.m.

A copy of this order shall be served on the calendar clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 21, 2017

ENTERED
DEC 29 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.