SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

LG FUNDING, LLC,

Plaintiff,

- against -

GRACE PLASTICS, INC. and HAROLD JOHNSON a/k/a HAROLD J. JOHNSON,

Defendants.

TRIAL/IAS PART 18
Index No.: 606948-17
Motion Date: 10/4/17
Sequence No.: 001
MG
DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmations and Exhibits.....1
Memorandum of Law in Support.....2
Memorandum in Opposition.....3
Reply Memorandum of Law in Further Support.....4

PRELIMINARY STATEMENT

Plaintiff brings this application for an Order, pursuant to CPLR § 3211(a)(1) and (7), dismissing defendants' affirmative defenses and counterclaims, and pursuant to CPLR § 3212, granting summary judgment and directing the entry of a judgment against defendants, jointly and severally, in the sum of $58,448.90 with interest thereon from June 8, 2017, plaintiff's reasonable attorney's fees in the sum of $14,612.23, and the costs and disbursements of this action, together with any such other and further relief as the Court deems just. Defendant has submitted opposition to this application.

BACKGROUND

As best as can be determined from the papers submitted herein, the facts are as follows:

On December18, 2015, plaintiff, LG Funding, LLC ("LG") and defendant Grace Plastics, Inc. ("Grace") entered into a written Merchant Agreement pursuant to which Grace sold LG $79,503.90 ("Purchased Amount") of Grace's accounts, contract rights, and other obligations arising from or relating to the payment of monies from Grace's customers and other third party payors ("Receivables") for the sum of $60,690.00 ("Purchase Price") to be paid to LG for 15% Grace's daily revenue with the payments to LG to be capped at $9,000.00 per month. Grace agreed that in the event of its default under the agreement, the full uncollected Purchased Amount plus all fees due under the Merchant Agreement would become immediately due and payable in full to LG.

Defendant Harold Johnson a/k/a Harold J. Johnson ("Johnson") executed a guarantee of performance of all the representations, warranties, and covenants made by Grace in the Merchant Agreement. In pertinent part, the Guaranty stated in pertinent part as follows:

> ***
> Personal Guaranty of Performance: The undersigned Guarantor(s) hereby guarantees to LG, Merchant's performance of all of the representations, warranties, covenants made by Merchant [LG] in this Agreement and the Merchant Agreement, as each agreement may be renewed, amended, extended or otherwise modified (the "Guaranteed Obligations"). Guarantor's obligations are due (i) at the time of any breach by Merchant of any representation, warranty, or covenant made by Merchant in this Agreement and the Merchant Agreement, and (ii) at the time Merchant admits its inability to pay its debts, or makes a general assignment for the benefits of creditors, or any proceeding shall be instituted by or against Merchant seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts.
> ***

On December 21, 2015, LG paid Grace the Purchase Price. On June 8, 2017, LG held Grace in breach of the Merchant Agreement.

On July 17, 2017, LG commenced this suit asserting four causes of action; to wit, (1) breach of contract; (2) reasonable attorneys' fees by Grace for breach of contract; (3) enforcement of guarantee; and (4) reasonable attorneys' fees by Johnson based upon the guarantee. In bringing this complaint, LG claims that Grace breached the Merchant Agreement by, *inter alia*:

- defaulting on its representations and warranties to LG under the Merchant Agreement and by failing to direct Grace's payments to LG;

- by blocking LG's access to a designated bank account ("Designated Account") from which Grace agreed to permit LG to withdraw Receivables;

- by failing to deposit Receivables into the Designated Account;

- by disposing of Grace's assets without LG's prior express written consent; and/or

- by depositing Receivables into a bank account other than the Designated Account.

On September 5, 2017, the defendants filed their answer asserting 19 affirmative defenses and three counterclaims. The affirmative defenses are as follows: (1) failure to state a claim upon which relief can be granted; (2) unclean hands; (3) Agreement is illegal and violates New York State and/or Ohio's usury and criminal laws; (4) Agreement is void as it violates public policy of the State of New York and/or Ohio; (5) Agreement is void and illegal due to the fact that the plaintiff is not a licensed lender under the law of the State of New York and/or Ohio; (6) unjust enrichment; (7) causes of action pleaded by plaintiff fails to accord properly with the UCC; (8) unconscionability; (9) defendants' alleged actions or omissions were not the proximate cause of any alleged injury, loss and/or damages incurred by plaintiff; (10) statute of frauds; (11) statute of limitations; (12) failure to mitigate damages; (13) failure to satisfy a condition precedent; (14) fraud; (15) lack of consideration; (16) failure of consideration; (17) improper notice of breach; and, (18) breach of

implied covenant of good faith and fair dealing. In their 19th affirmative defense, the defendants reserve the right to amend their Answer to assert additional affirmative defenses and to supplement, alter or change their Answer and affirmative defenses.

The defendants' three counterclaims are as follows: (1) fraud; (2) unjust enrichment; and (3) declaratory judgment that the Agreement is a loan in violation of New York State's usury laws and therefore unenforceable and/or void ab initio.

Upon the instant application, the plaintiff seeks an order pursuant to CPLR § 3211(a)(1) and (7), dismissing defendants' affirmative defense and counterclaims, and pursuant to CPLR § 3212, granting summary judgment and directing the entry of a judgment against defendants, jointly and severally, in the sum of $58,448.90 with interest thereon from June 8, 2017, and plaintiff's reasonable attorney's fees in the sum of $14,612.23, and the costs and disbursements of this action.

DISCUSSION

The law is clear. On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the Court is to determine only whether the facts as alleged fit within any cognizable legal theory (CPLR 3026; *Thompson Bros. Pile Corp. v. Rosenblum*, 121 AD3d 672 [2nd Dept. 2014]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2nd Dept. 2006]; *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the

complaint's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v. 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2nd Dept. 2017]).

This Court begins by noting that there is no dispute herein that the subject Merchant Cash Agreement was an agreement. That is, it was a contract. While the defendants submit herein that the MCA was in fact a loan agreement (rather than a purchase and sale agreement of defendants' receivables), there is no dispute that the MCA is entitled to enforcement according to the plain meaning of its terms. Indeed, the fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*Slatt v. Slatt*, 64 NY2d 966, 967 [1985], *rearg. denied* 65 NY2d 785 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g., R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002], *rearg. denied* 98 NY2d 693 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162 [1990]).

To that extent, and based upon a plain and simple reading of the MCA, this Court finds that the language of the MCA evidences a clear intent by the parties to enter into a transaction for the purchase of receivables and not a loan. Indeed, the Merchant Agreement itself states that the transaction is not intended to a be a loan. Nor is there any indication on this record that the defendants believed that the Merchant Agreement was a loan or that they were paying interest thereunder.

In addition, this Court finds no evidence on this record that at any point did the defendants

object to the terms of the Merchant Agreement. To the contrary, the conduct of the parties after entering into the Merchant Agreement evidences an intent by the parties to enter into a transaction for the purchase of receivables because not only did the plaintiff perform under the agreement by paying for the receivables, but the merchant (defendant) also partially performed under the Agreement by delivering to the plaintiff part (but not all) of the receivables.

Inasmuch as the defendants contend that said agreement is really a loan, this Court does not find this argument to be persuasive. Indeed, this Court cannot overlook the fact that if the parties truly intended this to be a loan transaction rather than a purchase and sale of receivables, the parties' failure to document several key and material terms that typically define a loan, renders it unenforceable as such. For instance, there is no promissory note. There is no maturity date. There are no scheduled payments or a fixed repayment term. The money advanced by the plaintiff is not repayable in the absolute. The merchants' payments under the MCA are wholly contingent upon the performance of its own business – indeed, it is apparent that the plaintiff assumed the risk that there would be no receivables and therefore no payment.

In the end, this Court finds that the express language of the Merchant Agreement, the attendant circumstances, and the business relationship between the parties, all establish that the parties intended the Merchant Agreement to constitute a purchase of receivables and not a loan.

Having determined that the subject transaction was a purchase and sale agreement rather than a loan, this Court herewith grants the plaintiff's instant application to dismiss the defendants' affirmative defenses and counterclaims each of which is predicated on the defendants' contention that this transaction was a loan.

In addition, this Court also grants the plaintiff's application for summary judgment, *inter*

alia, directing the entry of a judgment against the defendants, jointly and severally in the sum of $58,448.90 with interest thereon from June 9, 2017.

The law is settled. Summary judgment is the "procedural equivalent of a trial" (*Falk v. Goodman*, 7 NY2d 87, 91 [1959]), and, as such, it is a "drastic remedy" which should not be granted where there is any doubt as to the existence of a triable and "bona fide" issue of fact (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 [1978]). Ultimately, the purpose of the motion is to sift out evidentiary facts and determine from them whether an issue of fact exists (*Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 NY2d 178 [1994]). As such, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (*Stukas v. Streiter*, 83 AD3d 18, 22 [2nd Dept. 2011]; *Pearson v. Dix McBride, LLC*, 63 AD3d 895 [2nd Dept. 2009]).

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Investment Retrievers, Inc. v. Fox*, 150 AD3d 1090 [2nd Dept. 2017]; *see also, Gawrych v. Astoria Fed. Sav. & Loan*, 148 AD3d 681 [2nd Dept. 2017]; *Meyer v. North Shore–Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2nd Dept. 2016]; *Carione v. Hickey*, 133 AD3d 811 [2nd Dept. 2015]). As stated above, there is no issue of fact that the parties entered into a contract for the plaintiff to pay an up front sum to purchase the defendant's receivables, that the plaintiff performed its obligations by paying for the receivables, and that the defendant breached this agreement by failing to turn over the receivables to the plaintiff and otherwise breached the covenants and warranties made in the contract.

Similarly, the law surrounding the plaintiff's claim for a breach of a guaranty is clear.

Execution of an unqualified guaranty, such as in the care at bar, supra, makes the guarantor personally liable for the obligations of an obligor under a contract to the same extent as the obligor (*Desiderio v. Devani*, 24 AD3d 495, 497 [2nd Dept. 2005]). A *prima facie* entitlement to judgment as a matter of law on claims to recover damages by reason of a breach under the terms of a written guaranty is made upon proof of the existence of a primary obligation under a contract, the guarantee of such obligations by a guarantor and a default on the part of the obligor and the guarantor (*Valley Natl. Bank v. INI Holding, LLC*, 95 AD3d 1108 [2nd Dept. 2012]). A waiver of defenses in a guarantee is enforceable as it does not violate public policy (*RMP Capital, Corp. v. Victor Jet LLC*, 2013 NY Slip Op. 30875(U) [Sup. Ct. Suffolk 2013]).

Here, there is no issue of fact of a primary obligation under the contract, the guarantee by the guarantor of performance of all the representations, warranties and covenants made by the obligor in the contract, and the breach of the contract and the guarantees. In addition, the guarantor agreed to waive defenses, presenting an insurmountable obstacle to overcome plaintiff's claims. Therefore, it is plain to this Court that the plaintiff is entitled to summary judgment on its breach of guaranty claims.

Similarly, this Court recognizes that "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v. AGS Computers, Inc.*, 74 NY2d 487, 491 [1989] [internal citations omitted]). Here, the parties' contract specifically provided for reasonable attorney's fees. Therefore, that part of plaintiff's motion which seeks summary judgment on its reasonable attorneys' fees is also granted.

Notably, in opposition, the defendants have failed to produce any evidentiary proof, let alone

in admissible form, sufficient to establish the existence of a material issue of fact requiring a trial.

Therefore, the plaintiff's application, for an Order, pursuant to CPLR § 3211(a)(1) and (7), dismissing defendants' affirmative defenses and counterclaims, and pursuant to CPLR § 3212, granting summary judgment and directing the entry of a judgment against defendants, jointly and severally, is granted in its entirety.

The issue of the amount of plaintiff's judgment and the reasonable attorney's 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 February 27, 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 11, 2017

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.

ENTERED

DEC 20 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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