

Davis v Platinum Rapid Funding Group, Ltd.

2016 NY Slip Op 31826(U)

September 26, 2016

Supreme Court, Nassau County

Docket Number: 604029/2016

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
LARRY DAVIS,

Plaintiff,

-against-

**PLATINUM RAPID FUNDING GROUP, LTD, ABC
CORPORATIONS 1-10 AND JOHN DOES 1-15**

Defendants.

-----X
The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2

TRIAL PART: 7

NASSAU COUNTY

INDEX NO: 604029/2016

MOTION SEQ #: 2

SUBMIT DATE: 9/19/16

Defendant Platinum moves herein to dismiss Plaintiff's complaint in its entirety, pursuant to CPLR §3211(a)(7) and (a)(1). Plaintiff opposes the application; however, has failed to cite to any relevant authority to establish the sufficiency of his claims. Based on the following, the Defendant's motion is granted to the following extent and the complaint is dismissed against Defendant Platinum in its entirety.

On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Clarke v Laidlaw Tr., Inc., 125 AD3d 920 (2nd Dept. 2015). Thus, a motion to dismiss made pursuant to CPLR §3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. Id.

A motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes Plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Goshen v. Mutual

Life Ins. Co. of New York, 98 NY2d 314, 746 NYS2d 858 (2002). In order for evidence to qualify as documentary, such as may provide bases for dismissal of complaint, it must be unambiguous, authentic, and undeniable. Sunset Café, Inc. v. Mett's Surf & Sports Corp., 103AD3d 707, 959 NYS2d 700 (2nd Dept., 2013). If documentary proof disproves an essential allegation of the complaint, dismissal based upon documentary evidence is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. Mill Financial, LLC v. Gillett, 122 AD3d 98, 992 NYS2d 20 (1st Dept., 2014).

In the instant case, Plaintiff has alleged five causes of action: three causes of action sounding in usury (first, third, and fourth causes of action); one sounding in fraud (second cause of action); and one sounding in contract, alleging the contract is illegal (fifth cause of action). The Court notes that in New York, there is no available claim for usury or illegal contract; rather, these are available defenses on a breach of contract claim. Thus, Plaintiff's first, third, fourth, and fifth causes of action must fail.

Even assuming, *arguendo*, that such causes of action did exist independent of a breach of contract claim, these causes of actions still must fail. A usurious contract is void and relieves the party challenging the contract of the obligation to repay principal and interest thereon. Bouffard v. Befese, LLC, 111 AD3d 866, 976 NYS2d 510 (2nd Dept., 2013). An agreement is usurious under civil law when it imposes an annual interest rate in excess of sixteen percent (16%), and is usurious under criminal law when it imposes an annual interest rate in excess of twenty-five (25%). O'Donovan v. Galinski, 62 AD3d 769, 878 NYS2d 443 (2nd Dept., 2009); Abir v. Malky, Inc., 59 AD3d 646, 873 NYS2d 350 (2nd Dept., 2009). Corporations generally cannot interpose the defense of usury under the civil law, and cannot assert the defense of criminal usury under the penal law for loans less than two hundred fifty thousand dollars (\$250,000.00). Pepin v. Jani, 101 AD3d 694, 955 NYS2d 371 (2nd Dept. 2012); Blue Wolf Capital Fund II, LP v. American Stevedoring, Inc., 105 Ad3d 178, 961 NYS2d 86 (1st Dept., 2013). The same is true of individual guarantors of loans to corporations. Schneider v. Phelps, 41 NY2d 238, 391 NYS2d 568 (1977).

Defendant has attached to the moving papers an unauthenticated copy of the alleged contract between Plaintiff as owner of Larrand, LLC, and Defendant. It should be noted that Plaintiff has not argued as to the authenticity of this document; additionally, the facts alleged in

the complaint confirm the transaction between the parties as indicated in the contract. When taken together, it is clear that Plaintiff's three claims for usury must fail, as the contract was between two corporations, with Plaintiff as the guarantor, and thus civil usury is unavailable to the Plaintiff who is challenging the contract; moreover, as both the principal amount and the aggregate amount are less than two hundred thousand dollars (\$200,000.00), the usury under the penal law is also unavailable to the Plaintiff. Therefore, pursuant to both CPLR §3211(a)(7) and CPLR §3211(a)(1), Plaintiff's first, third, and fourth cause of action must fail and are properly dismissed.

Next, turning to Plaintiff's claims of fraud, a claim for fraud requires a showing of material misrepresentation of an existing fact, made with the knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages. Introna v. Huntington Learning, 78 AD3d 896, 911 NYS2d 442 (2nd Dept., 2010). Conduct that amounts to active concealment can give rise to an action for fraud, but only upon a showing that defendant thwarted plaintiff's efforts to perform the necessary due diligence. Mancuso v. Rubin, 52 AD3d 580, 861 NYS2d 79 (2nd Dept., 2008); Bernardi v. Spyrtatos, 79 AD3d 684, 912 NYS2d 627 (2nd Dept., 2010). A claim for fraudulent concealment requires plaintiff to allege that the defendant had a duty to disclose material information. E.B. v. Liberation Publications, Inc., 7 AD3d 566, 777 NYS2d 133 (2nd Dept., 2004). Concealment, with intent to defraud, of facts which one is duty bound to disclose is of the same legal effect and significance as affirmative misrepresentation. Miele v. American Tobacco Co., 2 AD3d 799, 770 NYS2d 386 (2nd Dept., 2003). Evidence of active concealment alone will not support a fraud action where the plaintiff should have known of the defect. Richardson v. United Funding, Inc., 16 Ad3d 570, 792 NYS2d 511 (2nd Dept., 2005).

Here, given the facts alleged in Plaintiff's complaint as well as the contract attached to the moving papers, there is no question that Plaintiff was sufficiently apprised of the terms of his loan in full. Plaintiff, acting on behalf of his corporation, clearly was apprised of all of the terms of the loan, as indicated by initialing or signing twelve of the thirteen pages of the purported contract. It is the opinion of this Court that Plaintiff's failure to calculate effectively his actual cost of the loan after making all of the required payments is insufficient to overcome the full disclosure of all of the material terms of the agreement by Defendant. Based upon the facts


alleged in Plaintiff's complaint, there does not appear to this Court to be any concealment by Defendant, and thus Plaintiff's claim for fraud in his second cause of action must be dismissed.

Finally, as to Plaintiff's claim that the contract between the parties was illegal, it is unquestioned that an illegal contract will not be enforced, which is normally asserted as a defense in a breach of contract action. Melius v. Breslin, 46 AD3d 524, 846 NYS2d 645 (2nd Dept., 2007). Plaintiff has likened the within loan agreement between the parties as a pay day loan; however, aside from the unauthenticated contract submitted by Defendant, Plaintiff has offered nothing to establish that the contract is a pay day loan or is an illegal loan agreement between the parties. Plaintiff has not alleged sufficient facts in order to establish a viable claim for declaratory relief that the contract was illegal; therefore, Plaintiff's fifth cause of action is dismissed pursuant to CPLR §3211(a)(7).

This hereby constitutes the decision and order of this Court.

ENTER

DATED: September 26, 2016



HON. ARTHUR M. DIAMOND

ENTERED

J. S.C.

**SEP 29 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE**