SUPREME COURT OF THE S TATE OF NEW YORK
COUNTY OF NASSAU

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LG FUNDING, LLC,

IAS Part 17
Index No.: 606786/2017
Mot. Seq. No.: 001

Plaintiff,

-against-

DECISION AND ORDER

CITY NORTH GRILL CORP. D/B/A RIVERDALE GRILL HOUSE AND IGOR BIRZH,

Defendants.

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LEONARD D. STEINMAN, J.

The following papers, in addition to any legal memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Plaintiff's Notice of Motion, Affidavit & Exhibits..... 1
Defendants' Reply Affidavit & Exhibits.....2
Plaintiff's Reply Affidavit in Support & Exhibits 3

In this action, plaintiff LG Funding, LLC, seeks to recover from defendants for an alleged breach of a February 8, 2017 Merchant Agreement between LG Funding and defendant City North Grill Corp. ("City North"). Pursuant to the terms of the agreement, City North sold and plaintiff purchased certain City North accounts receivable for a sum of $45,690. In exchange for the purchase, City North agreed to pay plaintiff 15% of its daily revenue until plaintiff received $64,879.80. Pursuant to the agreement, if a default were to occur, the $64,879.80 was due to plaintiff immediately. The individual defendant, Igor Birzh, guaranteed performance of City North.

Plaintiff contends that it performed under the contract but that City North breached its agreement by failing to pay amounts due. Plaintiff seeks $50,879 owed on the

receivables, $150 for insufficient funds fees pursuant to the contract, and $2,500 for a default fee under the contract.

Plaintiff commenced this action with the filing of the Summons and Verified Complaint on July 12, 2017. Defendants appeared in the action and asserted various affirmative defenses and counterclaims. Defendants contend that the Merchant Agreement at issue is a usurious loan. Plaintiff seeks to dismiss the seventh affirmative defense and each counterclaim (one through six), all of which rely on the usurious loan argument, except as set forth below.

Pursuant to CPLR § 3211(a)(7), the court "[w]hen assessing a motion to dismiss a complaint or counterclaim .... for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *V Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722 (2d Dept. 2013); *see also Dorce v. Gluck*, 140 A.D.3d 1111 (2d Dept. 2016).

Notably, on a motion to dismiss, a party is not obligated to demonstrate evidentiary facts to support the allegations contained in the pleadings. *See Aurora Loan Services, LLC v. Cambridge Home Capital, LLC*, 12 Misc.3d 1152(A)(Supreme Ct. Nassau Co. 2006). And "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 (2d Dept. 2006). "[A] court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects." *See Quimones v. Schaap*, 91 A.D.3d 739 (2d Dept. 2012); see also CPLR 3211(c). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83 (1994).

Pursuant to the Penal Law, a party raising a claim of criminal usury must demonstrate that the lender "knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate

exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period." Penal Law § 190.40. "There is a strong presumption against the finding of usury." *Giventer v. Arnow*, 37 N.Y.2d 305 (1975). A "heavy burden rests upon the party seeking to impeach a transaction based upon usury. Thus, usury must be proved by clear and convincing evidence as to all its elements and usury will not be presumed." *Hochman v. LaRea,* 14 A.D.3d 653 (2d Dept. 2005), *see also Freitas v. Geddes Sav. Loan Assn.,* 63 N.Y.2d 254, 261 (1984).

Plaintiff asserts first that the Merchant Agreement does not contain usurious terms but in all events it is not a loan but instead the purchase of accounts receivable and therefore would not be covered by the statute. Defendants contends that the transaction is a loan agreement and points to the Addendum page which defendants read to require it to pay $2,000 per week until the loan is paid. Defendants calculate that the interest rate could be 56% percent. However, a careful review of the agreement reflects that the most defendants could be responsible each week to pay is 15% of the weekly revenue – capped at $2,000. There is no term in the agreement that would require 56% interest as defendants would suggest. Therefore, even assuming this court were to determine that said agreement is a loan, which it does not, there is no evidence that the amount of interest charged is usurious.

In all events, there is no basis to deem the transaction a loan but instead, as courts in this county have repeatedly held, the transaction is an agreement to purchase receivables and not a loan. *See LG Funding, LLC v. Christenbury Eye Center, P.A.,* 2017 WL 6550160 (Sup. Ct. Nassau Co. 2017); *see also LG Funding, LLC v. Balsamo*, 2017 WL 6806304 (Sup. Ct. Nassau Co. 2017); *Merchant Cash and Capital LLC v. Yohowa Medical Services, Inc.*, 2016 WL 4458806 (Sup. Ct. Nassau Co. 2016) ("Under the terms of the subject Agreement, if Seller/Defendant produces no daily revenue, no payments are required, and there is no absolute obligation of repayment.")

Based upon the determinations above, the Seventh Affirmative Defense and the First Counterclaim, Second Counterclaim, Third Counterclaim, Fifth Counterclaim and Sixth Counterclaim are dismissed.

The remaining counterclaim (Fourth Counterclaim) seeks a declaration that defendant Igor Birzh did not have the authority to bind City North and therefore City North is not bound by the agreement. This counterclaim is similar to the Second through Fourth Affirmative Defenses, which also challenge Birzh's authority to enter into the agreement and whether the agreement is binding on City North. Plaintiff has not sought to dismiss these affirmative defenses. Because City North may litigate the issue of whether it is bound by the agreement as a result of its affirmative defenses and because its obligations will not be in doubt after the merits of the affirmative defenses are determined --it will either be obligated to pay all of the sums under the contract or nothing --the Fourth Counterclaim is dismissed as mere surplusage.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: February 26, 2018
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED
MAR 02 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE