Platinum Rapid Funding Group, Ltd. v H D W of Raleigh, Inc.
2018 NY Slip Op 32500(U)
September 25, 2018
Supreme Court, Nassau County
Docket Number: 605890-17
Judge: Jerome C. Murphy

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

PLATINUM RAPID FUNDING GROUP, LTD.,

Plaintiff,

- against -

H D W OF RALEIGH, INC., d/b/a PURE MED SPA, a/k/a PURE COSMETIC AND SURGICAL CENTER and HOLLY DONIELLE WYBEL, a/k/a HOLLY D. WYBEL,

Defendants.

TRIAL/IAS PART 14
Index No.: 605890-17
Motion Date: 7/11/18
Sequence Nos.: 002, 003
MG, MOD
DECISION AND ORDER

The following papers have been read on this motion:

Sequence No. 002:
Notice of Motion, Affirmation and Exhibits.....1
Memorandum of Law in Support.....2

Sequence No. 003:
Notice of Motion, Affirmation in Support and Exhibits.....3

PRELIMINARY STATEMENT

In Sequence No. 002, plaintiff makes this application for an order pursuant to CPLR §§ 3211(a), (b) and 3014 dismissing the defendants' counterclaims and affirmative defenses for failure to state a claim or defenses, and based upon documentary evidence that utterly refutes the defendants' counterclaims and defenses as a matter of law, and awarding plaintiff such other and further relief as may be just and proper. There is no opposition to this motion.

In Sequence No. 003, plaintiff makes this application for an order granting summary judgment against the defendants, jointly and severally, in the amount of $83,755.28 plus pre-

judgment interest at 9 percent from the date of the defendants' breach, June 16, 2017, to the date of entry of judgment, post-judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees, and such other, further and different relief as may be just and proper. The motion is unopposed.

BACKGROUND

Plaintiff and defendant H D W of Raleigh, Inc., d/b/a Pure Med Spa, a/ka Pure Cosmetic and Surgical Center, entered into a Purchase and Sale Agreement whereby defendant sold $324,000.00 of business revenue to Platinum Rapid Funding Group Ltd. (Platinum) for an upfront sum of $225,000.00. The Merchant Agreement is dated January 4, 2017 (Exh. "A" to Motion). It provides that H D W of Raleigh, Inc. ("H.D.W.") will provide access to Platinum to its primary business account into which business receipts are deposited. The estimated future daily receipts was $7,109.94 from which Platinum was entitled to 31% per day, for a daily amount, of $2,204.08. Merchant was to provide monthly bank statements, so as to permit a reconciliation which results in the receipt by Platinum of 31% of the receipts of H.D.W. for the month, until Platinum received $324,000.00.

The Complaint alleges that H.D.W. delivered revenue totaling $240,244.72 under the Agreement, leaving an unpaid balance of $83,755.28 (the "Balance") as of June 16, 2017. Platinum claims entitlement to this amount, together with a default fee of $2,500.00 as provided for in the Agreement. In the Third Cause of Action, Platinum alleges that the personal guarantor, Holly Donielle Wybel, is personally responsible for the foregoing amounts. In the Fourth Cause of Action, Platinum alleges that the Business Defendant and the Defendant Personal Guarantor are liable to plaintiff for plaintiff's expenses in regard to the litigation, including attorneys' fees, in an amount to be determined. The Fifth Cause of Action alleges that Business Defendant is unlawfully in possession of the balance due Platinum, and is therefore indebted to Platinum for the Balance, with interest at the statutory rate of interest from the date of the breach.

Defendant's Answer includes twenty-one Affirmative Defenses, and Counterclaims against plaintiff for Fraud, Unjust Enrichment, Declaratory Judgment. The counterclaims are premised upon the premise that the Agreement for the Purchase of Receivables was, in fact, a loan with a usurious rate of interest. Plaintiff submitted a Reply to the Counterclaims, primarily contending that most of

the allegations in the Counterclaims constitute legal conclusions, for which a response is not required.

By Motion Sequence No. 2, plaintiff moves to dismiss the counterclaims pursuant to CPLR § 3211 (a) and (b). Plaintiff argues that the claim of Fraud does not assert the particularity required by CPLR § 3016(b), and is fact an allegation of usury, which claim is not available to plaintiffs. The claim of Unjust Enrichment is not available because there is a written contract, and defendant is seeking to convert the claim of criminal usury to unjust enrichment. The claim for a "declaratory judgment" is simply another assertion that the Agreement was a loan with criminal usury, a defense which is unavailable to defendants.

In Motion Sequence No. 3, plaintiff seeks summary judgment in the amount of $83,755.28, with interest at 9% from June 16, 2017, the date of the alleged breach by defendants., together with costs, disbursements, and attorney's fees. There is no opposition to either motion.

DISCUSSION

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Assn., Inc.* 70 A.D.3d 928 [2d Dept. 2010]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]).

On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]).

Fraud and Fraudulent Misrepresentation

In order to sustain a cause of action for actual fraud, plaintiff must prove:

- defendant made a representation, as to a material fact;

- the representation was false;
- the representation was known to be false by defendant;
- it was made to induce the other party to rely upon it;
- the other party rightfully relied upon the representation;
- the party relying upon the representation was ignorant of its falsity;
- the party suffered injury or damage based on its reliance. (*Otto Roth & Co. Inc., v. Gourmet Pasta, Inc.* 277 A.D.2d 293 [2d Dept. 2000]). Liability can also be premised upon representations which are recklessly made. (*Jo Ann Homes at Bellmore, Inc. v. Dworetz,* 25 N.Y.2d 112 [1969]).

Recklessness imports more than mere negligence. A person is reckless when they assert that something is true within their own personal knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on their part, when in fact the person has no knowledge as to whether the statement is true or false, and the statement proves to be false, the person is equally as culpable as if they had willfully asserted something to be true which they absolutely knew to be false, and is equally chargeable with fraud. (*Daly v. Wise,* 132 N.Y. 306 [1892]).

Where, however, it appears that a party had reasonable grounds upon which to express their belief in the truth of the representation, fraud is negated. (*Kountz v. Kennedy,* 147 N.Y. 124 [1895]). One cannot be held liable for a misrepresentation which one believes to be true, provided the belief is based upon adequate information. *Id.* If, however, there is no reasonable foundation for the alleged belief, that may to be sufficient in itself to show that the truth of the statement was not truly entertained, and the representation is therefore a fraudulent one. (*State Street Trust Co. v. Ernst,* 278 N.Y. 104 [1938]).

Defendants' First Counterclaim incorporates the allegations of ¶¶ 1-60, and asserts that they constitute a claim of fraud. Those paragraphs do not set forth the seven above-mentioned components of an allegation of fraud, each of which must be alleged in detail. Moreover, the alleged fraud consists of entering into a loan agreement in which there is a usurious rate of interest. Defendants' contention that the Agreements violate General Obligation Law § 5-501[1] and Banking Law § 14-a[1], and are civilly and criminally usurious is without merit. A corporation is prohibited from asserting a defense of civil usury (*Arbozova v. Skalet*, 92 A.D.3d 816 [2d Dept. 2012]). An

individual guarantor of a corporate obligation is also precluded from raising such a defense (*Id.*). Defendants have failed to adequately allege a defense of criminal usury in violation of Penal Law § 190.40, in that they failed to allege that the lender knowingly charged, took or received annual interest exceeding 25% on a loan or forbearance of money. Defendant hypothesizes that the terms of the Agreement could result in payment of criminally excessive interest, but this is clearly insufficient under the pleading requirements.

Essentially, usury laws are applicable only to loans or forbearances, and if the transaction is not a loan, there can be no usury. (*Kaufman v. Horowitz,* 178 A.D.2d 632 [2d Dept. 1991]). As onerous as a repayment requirement may be, it is not usurious if it does not constitute a loan or forbearance.

The Agreement was for the purchase of future receivables in return for an up front payment. The repayment was based upon a percentage of daily receipts, and the period over which such payment would take place was indeterminate. Plaintiff took the risk that there could be no daily receipts, and defendants took the risk that, if receipts were substantially greater than anticipated, repayment of the obligation could occur over an abbreviated period, with the sum over and above the amount advanced being more than 25%. The request for the Court to convert the Agreement to a loan, with interest in excess of 25%, would require unwarranted speculation, and would contradict the explicit terms of the sale of future receivables in accordance with the Merchant Agreement.

In *Merchant Cash & Capital v. Edgewood Group, LLC,* 2015 WL 4451057 (U.S.D.C., S.D.N.Y, Koeltl, J.), the Court adopted the Report and Recommendation of Magistrate Judge Freeman, 2015 WL 4430643. Magistrate Freeman undertook an extensive examination of the enforceability of an Agreement of June 21, 2013, whereby Edgewood Group sold $163,726.00 of its business receivables/revenue to plaintiff, for an upfront payment of $115,300.00. Edgewood Group agreed that the "business receivables/revenue" would be paid from a percentage of its daily revenue, but no percentage was set forth in the agreement.

She nevertheless concluded that the Court cannot conclude, as a matter of law, that the transaction at issue was a loan, citing *Express Working Capital, LLC v. Starving Students, Inc.* 28 F. Supp.3d 660, 669 (N.D. Tex. 2014). In analyzing the contractual language, and noting that usury was an affirmative defense which can be waived, based upon defendant's default, the Court accepted

plaintiff's characterization of the agreement as a sale of receivables, rather than a loan.

Even if the Agreement had constituted a usurious loan, the business entity, and its guarantor, are barred from asserting an affirmative claim for usury. (*Arbuzova v. Skalet,* 92 A.D.3d 816 [2d Dept. 2012]; *Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc.,* 252 F.Supp. 3d 274 [S.D.N.Y. 2017]). The Court in *Colonial Funding* proceeded to enunciate that " '[t]he rudimentary element of usury is the existence of a loan or forbearance of money' ", quoting *Feinberg v. Old Vestal Rd. Assocs.,* 157 S/F/2d 1002, 1003 [3d Dept. 1990]). In addition, citing *Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp,* 184 Misc. 2d 706, 711, there can be no usury unless the obligation to repay is unconditional. In this case the obligation to repay is conditioned upon the receipt by the merchant receiving receivables, and Platinum assumed the risk that the merchant would cease receiving payments.

Defendants' Counterclaims are dismissed for failure to allege a cause of action pursuant to CPLR § 3211(a)(7). In addition to failing to allege with particularity the alleged fraud, the corporation and its individual guarantor are precluded from affirmatively claiming usury, and the claim for unjust enrichment is not available when the claim is based upon a written contract. The Affirmative Defense of Usury, is unsubstantiated. The Agreement among the parties does not constitute a loan, but, as in *Colonial Funding, supra,* constituted a purchase agreement with no unconditional obligation on the part of the merchant to repay.

In addition, the Counterclaims and Affirmative Defenses of Usury must be dismissed pursuant to CPLR § 3211(a)(1) since the Agreement utterly refutes the claim that the arrangement constituted a loan, with an unconditional obligation to repay (*Platinum Rapid Funding Group Ltd. v. VIP Limousine Servs., Inc.*, 2016 WL 4478807 [Sup.Ct., Nass. 2016]).

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449—450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the

existence of a triable issue *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial." (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Plaintiff's motion for summary judgment against H D W of Raleigh, Inc. and Holly Donielle Wybel is granted in the amount of $83,755.28 and $2,500 as default payment, with statutory interest from June 16, 2017, together with plaintiff's attorney fees, costs and expenses, as provided for in the Agreement, and plaintiff shall have execution therefor.

Plaintiff has not submitted billing records upon which the Court could award legal fees, as provided for in ¶ 3.3 of the Agreement. In the absence of billing records, a hearing is necessary to determine the legal fee to which plaintiff is entitled (*Mulholland v. Moret,* 161 A.D.3d 883 [2d Dept. 2018]). The Court schedules a hearing on the issue of legal fees for October 17, 2018 in Part 14 at 9:30 A.M. If plaintiff chooses to waive counsel fees, it is requested that counsel advise the Court.

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
September 25, 2018

ENTER:

Jerome C Murphy

JEROME C. MURPHY,
J.S.C.

ENTERED
SEP 26 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE