SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 25
NASSAU COUNTY

LG FUNDING, LLC,

Plaintiff,

-against-

FILTON LLC and YELENA VORONOVA,

Defendants.

MOTION # 01 MG
INDEX # 606949/17
MOTION SUBMITTED: SEPTEMBER 17, 2018

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The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2
Reply Affidavits.....3
Memorandum of Law.....4

Plaintiff, LG Funding LLC, moves pursuant to CPLR 3211(a)(1) and (7) to dismiss defendants' affirmative defenses, and pursuant to CPLR 3212, for summary judgment.

Plaintiff's Contentions

On November 3, 2016, LG and Filton LLC entered into a written agreement entitled "Merchant Agreement." Under the terms of that agreement, Filton sold Filton's accounts receivable and other payments due. The accounts were valued at $75,255.60 and purchased for the discounted sum of $60,690.00, to be paid to LG in sums equal to 20% of Filton's daily revenue. The Merchant Agreement provided that in the event of a default the uncollected portion of the purchase price would become immediately due and payable.

Plaintiff contends that Filton breached the Merchant Agreement by not forwarding the payments due LG; by blocking LG's access to a designated bank account from which Filton agreed to permit LG to withdraw such payments; by failing to deposit receivables into that designated account; by disposing

of assets without LG's prior consent; and by depositing receivables into a bank account other than the designated account. On February 9, 2017, LG declared Filton in breach of the Merchant Agreement.

Plaintiff alleges that Filton owes a total of $60,705.60 comprised of the remainder of the purchase price in the sum of $58,155.60; a $2,500.00 default fee and $50.00 for checks issued with insufficient funds. In addition, LG seeks attorney's fees pursuant to paragraph 3.3 of the Merchant Agreement in the sum of $15,176.50. Gene W. Rosen, Esq. submitted an affirmation with respect to attorneys fees. Rosen states that his hourly rate for legal services is $500.00 and that he spent 24 hours on the case to date. However, the retainer for the matter is on a contingency basis under which the legal fee is 25% of all sums recovered which totals $15,176.49. A contingency fee of 25% on a collection matter of this nature is reasonable.

Defendant's Contentions

Defendants submit the affidavit of Yelena Voronova. She claims that the Merchant Agreement is a loan with an interest rate that was criminally usurious. Voronova also states that the signatures on both the Merchant Agreement and Guaranty are not hers and that she did not authorize anyone to sign those documents on her behalf.

Discussion

On a motion for summary judgment, the moving party has the burden to establish "a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Voss v Netherlands Ins. Co.*,22 NY3d 728 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320,324 [1986]). If the moving party meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

"In moving to dismiss, CPLR 3211(a)(1) and (a)(7) may be used to seek dismissal of the counterclaim, while a party may move to dismiss a defense pursuant to CPLR 3211(b) "on the ground that a defense is not stated or has no merit." "In reviewing a motion to dismiss an affirmative defense,

the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Bank of N.Y. v. Penalver,* 125 A.D.3d 796, 797, 1 N.Y.S.3d 825 [2d Dept.2015] [internal quotation marks and citations omitted]). "If there is any doubt as to the availability of a defense, it should not be dismissed" (*Id.*). Dismissal may be warranted under CPLR 3211(a)(1) "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez,* 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). The question is whether the terms of the Merchant Agreement conclusively establishes the invalidity of the claim that the transaction was actually a loan, on terms that were criminally usurious *Rapid Capital Fin., LLC v. Natures Mkt. Corp.*, 57 Misc. 3d 979, 981, 66 N.Y.S.3d 797, 799 [N.Y. Sup. Ct. 2017], *reargument denied* [N.Y. Sup. Ct. 2018]).

A defendant raising the defense of criminal usury must prove that the lender: 1) knowingly charged, took or received; 2) annual interest exceeding 25%; 3) on a loan or forbearance (Penal Law Section 190.40). The fundamental element of usury is the existence of a loan or forbearance of money. Where there is no loan there can be no usury (*Seidel v. 18 E. 17th St. Owners, Inc.*, 79 NY2d 735, 744 [1992]; *Feinberg v. Old Vestal Rd. Assoc. Inc.*, 157 AD2d 1002 [3rd Dept. 1990]). In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character (*see Min Capital Corp. Retirement Trust v. Pavlin,* 88 AD3d 666 [2d Dept 2011]; *O'Donovan v. Galinski,* 62 AD3d 769 [2d Dept. 2009]). "There is a strong presumption against the finding of usury" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]) and 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 AD3d 653 [2d Dept 2005]; *Freitas v Geddes Sav. & Loan Assn*, 63 NYS2d 254 [1984]; *Lehman v. Roseanne Investors Corp.*, 106 A.D.2d 617 [2d Dept 1984]).

Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*Rubenstein v Small*, 273 AD 102 [1st Dept 1947]). Where payment or enforcement rests on a contingency, the

contract is valid even though it provides for a return in excess of the legal rate of interest (*Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.*, 35 Misc 3d 1025[4.] [Sup Ct Suffolk County 2012]; *Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 2012 WL 12284924, at *5 [Sup Ct, Suffolk County 2012]; *see also Lehman v Roseanne Investors Corp.*, 106 AD2d at 617, supra ["loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest"]).

Under the terms of the Merchant Agreement, if Filton receives no daily revenue, no payments are required. There is no absolute obligation of repayment. The defendants' characterization of the Merchant Agreement as a loan is without merit. Courts in this county have repeatedly held that a transaction such as the one at issue in this case is an agreement to purchase receivables and not a loan (*see LG Funding v. City N. Grill Corp.*, 2018 NY Slip Op 30372(U)[Sup. Ct., Nassau Co., 2018]; *see also LG Funding, LLC v. Balsamo*, 2017 NY Slip Op 32686(U) [Sup. Ct., Nassau Co., 2017]; *LG Funding, LLC v. Grace Plastics, Inc.*, 2017 NY Slip Op 32750(U)[Sup. Ct. Nassau Co., 2017]).

Voronova's forgery defense is also insufficient to overcome plaintiff's *prima facie* case. The duty of a party who raises the affirmative defense of forgery is to put forth something more than a bald assertion of forgery in order to create an issue of fact contesting the authenticity of a signature (*Banco Popular N. Am. v. Victory taxi Mgt.* 1 NY3d 381 at 384 [2004]). "Averments merely stating conclusions, of fact or of law, are insufficient" to "defeat summary judgment" (*Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y. 2d at 290; *see Ehrlich v. American Moninger Greenhouse Mfg. Corp.* 26 N.Y.2d 255, 259 [1970]). In *Heller v. Murray,* the burden of proving the authenticity of a signature, where the purported signer testified that the signature was forged, was not met even by the testimony of a handwriting expert, which contradicted the purported signers (*Heller v. Murray*, 112 Misc.2d 745 at 751 [1981]).

Plaintiff made a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact with respect to its claims. Since

plaintiff demonstrated *prima facie* entitlement to summary judgment, the burden shifted to defendants to demonstrate an issue of fact which precludes summary judgment (*see Zuckerman v. City of New York*, *supra*). Defendant did not meet that burden offering only a legally insufficient usury argument and a bald assertion of forgery.

Plaintiff's motion for dismissal of the answer and counterclaim; and for summary judgment, is hereby **GRANTED.**

ORDERED that plaintiff is directed to submit a judgment against defendants, jointly and severally, in the sum of $60,705.60, with interest thereon from February 9, 2017 together with attorney's fees in the sum of $15,176.49, plus costs and disbursements of this action.

ENTER

DATED: December 14, 2018

HON. JACK L. LIBERT
J.S.C.

ENTERED
DEC 18 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE