SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

KENNETH SALAMONE,

Plaintiff,

-against-

EIP GLOBAL FUND LLC, SRIDHAR CHITYALA, SHREYAS CHITYALA, VEDAS GROUP, LLC and CKL PARTNERS, LLC,

Defendants.

DECISION AND ORDER
Index No.: 650374/2020

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

The complaint (NYSCEF Doc. No. 002) relates to a loan by plaintiff Kenneth Salamone to defendants Sridhar Chityala (Sridhar) and EIP Global Fund, LLC (EIP) for $2,000,000. As this is a motion to dismiss, the following facts are taken from the complaint (NYSCEF Doc. No. 2) and assumed to be true.

I. FACTS

EIP and the other defendant entities, Vedas Group, LLC (Vedas), and CKL Partners, LLC (CKL) have only two managing members, officers, managers and/or partners, Sridhar and defendant Shreyas Chityala (Shreyas). Salamone, Sridhar, and Shreyas are involved in a variety of personal and business ventures.

On October 10, 2019, Sridhar and EIP asked Salamone for an emergency loan of $5M. Salamone offered a $2M loan, if he got certain information and assurances. Salamone made the loan on October 11, 2019, pursuant to a thirty-day demand note (the Demand Note) which was signed by Sridhar for EIP and personally. The Demand Note provided for 10% interest, with the principal to be paid back either on November 10, 2019, or on demand. The Demand Note was not paid. On November 11, 2019, Salamone made a written demand for repayment.

Sridhar and EIP asked Salamone to forebear from taking further action, promising payment on November 21, 2019. Over the next weeks, payment was not tendered but promises were made about the availability of funds. On November 27, 2019, Salamone, Sridhar, and EIP entered into a Forbearance and Security Agreement (the Forbearance Agreement) by which

Sridhar and EIP agreed to pay Salamone $2,369,918.50 plus interest on or before December 17, 2019, in exchange for Salamone forbearing from exercising his rights under the Demand Note. Sridhar signed the Forbearance Agreement for EIP and individually. Salamone also received a security interest in Sridhar's interests in EIP, Vedas, and CKL (the Membership Interests) pursuant to a Pledge Agreement dated November 22, 2019 (the Pledge Agreement). Sridhar and EIP did not pay the money required by the Forbearance Agreement on December 17, 2019. On December 18, 2019, Salamone notified Sridhar and EIP of the default and demanded payment and delivery of the Membership Interests. Neither was done.

Plaintiff asserts claims for:

Claim 1- Declaratory Judgment- that Salamone is entitled to certain financial disclosure pursuant to the Forbearance Agreement.

Claim 2- Declaratory Judgment- that Salamone is entitled to delivery of the Membership Interests and an order instructing Sridhar to turn over the Membership Interests.

Claim 3- Fraudulent Inducement- Sridhar and Shreyas fraudulently induced Salamone to enter into the Demand Note and the Forbearance Agreement by making false statements about their need for the loan, the ability of funds to repay it, and their intent to do so.

Claim 4- Breach of Contract- against Sridhar and EIP for breach of the Demand Note and Forbearance Agreement by failing to repay the loan and the amount required by the Forbearance Agreement and by failing to deliver the Membership Interests.

Claim 5- Attorneys' Fees- against Sridhar and EIP for fees, costs, and expenses, pursuant to the Forbearance Agreement.

Claim 6- Permanent Injunction- against Sridhar and Shreyas regarding future obligations for which plaintiff lacks a remedy at law, enjoining them from "taking any action, including but not limited to any financial decision concerning distributions and loan repayment, borrowing, or lending" (Complaint at 13).

Defendants move to dismiss. Plaintiff opposes and cross-moves to convert the motion to a partial motion for summary judgment on the contract claims.

II. DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st

Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the Demand Note, the Forbearance Agreement and the Pledge Agreement. The authenticity of these documents is undisputed. They are proper documentary evidence.

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

A. Breach of Contract Claims

1. Motion to Dismiss

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

As far as defendants argue Shreyas, Vegas Group, and CKL Partners are not proper defendants for any contract-based claims because they are not party to any of the agreements at issue (Memo at 12), plaintiff agrees that the contract claims are only pled against EIP and Sridhar (Opp at 13).

Defendants argue the breach of contract claims (four and five) against EIP and Sridhar should be dismissed because the interest rate charged is usurious, making the agreement void (Memo, NYSCEF Doc. No. 21, at 9). Plaintiff claims it loaned $2 million on October 11, 2019 and defendants owed plaintiff $2,369,918.50 on November 27, 2019, constituting 143.6% interest per annum. Interest is deemed criminal usury when it exceeds 25% (*id.* at 10). Defendants also argue the Demand Note is superseded by the subsequent agreements, so a breach of the Demand Note is no longer actionable (*id.* at 11-12).

Plaintiff opposes the motion to dismiss and asks this portion of the motion be converted to a motion for summary judgment pursuant to CPLR 3211(c). Plaintiff argues neither EIP nor Sridhar may assert a civil usury defense because of the value of the loan (*see* General

Obligations Law § 5-501 [6.a] ["No law regulating the maximum rate of interest which may be charged, taken or received . . . shall apply to any loan or forbearance in the amount of two hundred fifty thousand dollars or more"]). Further, "[n]o corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations, and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships" (General Obligations Law § 5-521). Plaintiff also argues the criminal usury law does not apply because the Demand Note and the Forbearance Agreement do not charge a criminally usurious rate of interest (Opp at 8, citing NY. Penal Law § 190.40). The interest charged on the face of the Demand Note is merely 10% (Opp at 9). The Forbearance Agreement charges 20% interest (*id.* at 10). The Forbearance Fee is additional principal in the Forbearance Agreement, not interest. Defendants bear the burden of establishing any additional fees, such as the Forbearance Fee, should be considered "a ruse to collect additional interest in excess of that allowed by law" (Sur-reply at 9, citing *Freitas v Geddes Sav. and Loan Ass'n*, 63 NY2d 254, 264 [1984]).

According to the plaintiff, even if the Forbearance Agreement were void as usurious, the Demand Note would still stand and should be enforced (*id.* at 11-12, Sur-reply, NYSCEF Doc. No. 57, at 7). The Demand Note is not superseded by the Forbearance Agreement and the subsequent agreement does not extinguish the underlying obligation (Sur-reply at 7, citing *Eikenberry v Adirondack Spring Water Co., Inc.*, 65 NY2d 125, 129 [1985] ["[w]hen a contract for money, legal and innocent in itself, is once made and consummated, it cannot be made usurious and illegal by any subsequent transactions of the parties. These subsequent transactions may of themselves be illegal, and forbidden by law, but they cannot impart the taint and the consequences of usury to an antecedent agreement, fair, and just, and upright in itself. If the obligation under it is to pay a debt, the obligation, with the legal rights resulting from it, remain in all their force, and cannot be discharged by ingrafting upon it some subsequent agreement obnoxious to the charge of usury"] [quoting *Lesley v Johnson*, 41 Barb 359, 362, 1864 WL 3856 [NY Gen Term 1864]).

As the amount of the loan is too large to permit a civil usury defense, the court must consider whether the Forbearance Fee should be considered interest for the purpose of determining the rate of interest charged on the loan.

Plaintiff takes the position that the Forbearance Fee is proper consideration for its forbearing to seek payment of the original Demand Note, and relies on *Halliwell v Gordon* for the premise that "forbearance to do an act that a person has a legal right to do constitutes consideration" (61 AD3d 932, 934 [2d Dept 2009] [discussing that plaintiff's forbearance from leaving his employment in exchange for the promise of money]). However, it is longstanding law that "where money is owing upon a contract for the repayment of a loan, and forbearance is given for such debt upon the condition of receiving more than the legal rate of interest, such forbearance is as much usury as if the sum of money had been absolutely loaned upon a contract to pay more than legal interest, has been established so long as to render further discussion wholly unnecessary" (*Gantz v Lancaster*, 169 NY 357, 365 [1902]) "The amount charged, taken or received as interest includes any and all amounts paid or payable, directly or indirectly, by any person to or for the account of the lender in consideration for making the loan or forbearance, excepting certain costs and fees" (*Rubin v George*, 136 AD3d 447, 448 [1st Dept 2016], citing General Obligation Law § 5–501[2]).

Accordingly, the Forbearance Fee constitutes interest for the purpose of usury law, and the Forbearance Agreement is void as usurious. Therefore, claim five, for attorneys' fees pursuant to that agreement, fails. Nonetheless, plaintiff's fourth cause of action, for breach of both the Forbearance Agreement and the underlying Demand Note, survives as far as it relates to the Demand Note because "[t]he validity of an indebtedness, originally valid, is not affected by the fact that it forms a part of the consideration for a subsequent usurious security which was substituted therefor, or by the fact that the subsequent transaction is a mere cover for a usurious contract of forbearance" (*Stitz v Stevens*, 70 AD2d 588, 589 [2d Dept 1979], *affd,* 48 NY2d 957 [1979] quoting 32 NY Jur, Interest and Usury, § 38, p. 71).

2. Motion for Summary Judgment

Plaintiff also seeks to transform the contract claims portion of the motion to one for summary judgment on the ground that there are no issues of material fact that the Demand Note and Forbearance Agreement are valid and enforceable, that plaintiff performed under those agreements, that defendants EIP and Sridhar breached their obligations under those agreements by failing to make payments, and that defendants' breach injured plaintiff (Opp at 15-17). Upon

a motion to dismiss, "either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment" (CPLR 3211). Defendants note the court has not yet informed the parties of its intention to convert the motion, so they have not laid bare their proof, and they object to such a decision, as they need discovery (Reply at 7-8). The portion of this claim which survives this motion, the claim for breach of the Demand Note, is converted to a Motion for Summary Judgment pursuant to CPLR 3211(c). Plaintiff may file an opposition to this portion of the motion, along with its proofs, if any, within 30 days of the date of this decision and order.

B. Declaratory Judgment Claims

Claims 1 and 2 are presented as seeking declaratory judgment that (1) Salamone is entitled to certain financial disclosure pursuant to the Forbearance Agreement, and (2) Salamone is entitled to delivery of the Membership Interests and an order instructing Sridhar to turn over the Membership Interests, pursuant to the Forbearance Agreement and Pledge Agreement.

Defendants assert the declaratory judgment claims should be dismissed because the contracts are void and because plaintiff has a contract remedy, based on the same facts (Memo, NYSCEF Doc. No. 21, at 13-14). Plaintiff argues the declaratory judgment claims are intended to "establish[] the parties' right to a contract [sic] to prevent Defendants from taking any actions contrary to Plaintiff's interest in the pledged membership interests of EIP, Vedas Group and CKL Partners as requested as part of Plaintiff's Fifth Cause of Action (Permanent Injunction)" (Opp, NYSCEF Doc. No. 52 at 18).

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (Civil Practice Law and Rules 3001). A court "may decline to hear the matter if there are other adequate remedies available" (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]). The first claim relies upon the Forbearance Agreement, which is unenforceable, as discussed above. Accordingly, Claim 1 fails, and is dismissed. As to the second claim, there are adequate remedies available in damages for breach of contract and in injunctive relief, should plaintiff amend the complaint to seek the injunctive

relief to which it claims it is entitled. Accordingly, the court declines to hear the declaratory judgment claims.

C. Fraud Claim

Defendants argue Claim 3, for fraudulent inducement, fails because it is duplicative of the contract claim, fails to allege facts with the required particularity, and fails to plead a misrepresentation of present fact, since the alleged misrepresentation was about the intent to repay plaintiff in the future (Memo at 15-17). Nor has plaintiff specified what duty defendants are alleged to have breached (Reply at 12). Particularly, plaintiff fails to allege any specific statements by Shreyas which could have induced plaintiff to enter into either the original loan or the Forbearance Agreement (*id.* at 12).

Plaintiff points out that a fraud claim can survive along with a contract claim where the fraud alleged is independent of the obligations in the contract (Opp at 18-19). Plaintiff claims the "then present and undisclosed intent not to perform under the Demand Note and Forbearance Agreement" was collateral to the contracts at issue, along with various false statements that the money was being sent (*id.* at 19-20). Plaintiff argues it has alleged each of those statements with the required specificity regarding who said what to whom (*id.* at 20).

"In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). As this claim is based on an undisclosed intent not to perform, this claim is also dismissed.

D. Injunctive Relief

Defendants argue the claim for a permanent injunction should be dismissed because an injunction is not a cause of action but a form of relief (Memo at 17). Further, the relief sought is extreme, to prevent the Chityalas from taking any action at all concerning the loan, which would

include repaying it (Reply at 10-11). Further, plaintiff lacks the clean hands required for the equitable relief he seeks, since plaintiff has charged such high interest (*id.* at 11). Nor has plaintiff shown a present or imminent violation without remedy at law (*id.*).

Plaintiff correctly contends New York law allows a claim for permanent injunction (*id.* at 21-22, citing cases). However, there must be an underlying cause of action giving rise to the relief. Here, the and this claim appears to be a breach of contract claim requesting injunctive relief as a remedy. The relief requested is described as "a declaration of [plaintiff's] rights under the relevant agreements, including but not limited to, the Operating Agreements and Membership Agreements of EIP Global Fund LLC, Vedas Group, LLC, and CKL Partners, LLC," and plaintiff also demands an injunction preventing Shreyas and Sridhar from "taking any action, including but not limited to any financial decision concerning distributions and loan repayment, borrowing, or lending" (Complaint, 12-13).

"To establish, prima facie, entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring, or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction; and (d) that the equities are balanced in his or her favor" (*Intl. Shoppes v At the Airport*, 131 AD3d 926, 938 [2d Dept 2015]). Plaintiff has only alleged in vague and conclusory fashion that he would be irreparably harmed without the requested injunctive relief. He has failed to allege facts to show an award of damages could not fully compensate him (*see Zodkevitch v Feibush*, 49 AD3d 424, 425 [1st Dept 2008]). Accordingly, this claim also fails.

E. Sanctions

Defendants also seek sanctions for improper joinder and harassment, since the complaint asserts no viable claims, and makes only conclusory allegations against defendants Shreyas Chityala, Vegas Group, and CKL Partners (Memo at 18). They are included in this action only to harass them, and defendants claim sanctions should be granted.

Plaintiff argues sanctions are inappropriate because

> "Shreyas was an instrumental figure in the negotiation of, and agreement to, the Forbearance Agreement. Shreyas made numerous false representations to induce Plaintiff to enter into the Forbearance Agreement. Vedas Group and CKL Partners are managed solely by Sridhar and their member interests are the subject of the Pledge Agreement and for which affirmative relief is sought as part of the Contract Claims"

(Opp at 23). Since the complaint contains valid claims, as discussed above, and the Membership Interests are at issue, this portion of the motion is denied.

Accordingly, it is hereby:

ORDERED that the motion to dismiss is granted in part and denied in part. Claims 1 and 2, for declaratory judgment, are dismissed. Claim 3, for fraudulent inducement, is dismissed. Claim 4, for breach of contract, is dismissed as far as it seeks damages for breach of the Forbearance Agreement and survives as far as it alleges breach of the Demand Note. Claim 5, seeking attorneys' fees pursuant to the Forbearance Agreement is dismissed and Claim 6, for an injunction or declaratory judgment related to the Demand Note and the LLC Membership Pledge also fails. And it is further:

ORDERED that the plaintiff's request to convert the defendants' motion to a Motion for Summary Judgment is granted. Defendants may file their opposition and proofs within 30 days of the date of this order. And it is further:

ORDERED that counsel shall appear for a conference at 9:30am on August 25, 2020. Counsel shall reach out to chambers the week before the conference to determine if the conference will be in person or by Skype for Business.

This constitutes the decision and order of the court.

DATED: July 13, 2020

ENTER

O. PETER SHERWOOD J.S.C.