Newco Capital Group VI LLC v La Rubia Rest. Inc.
2023 NY Slip Op 34038(U)
November 14, 2023
Supreme Court, New York County
Docket Number: Index No. 157353/2023
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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NEWCO CAPITAL GROUP VI LLC,

Plaintiff,

- v -

LA RUBIA RESTAURANT INC. D/B/A LA RUBIA, LA RUBIA RESTAURANT INC., LA RUBIA BAR AND GRILL RESTAURANT, EL NUEVO TROPICAL RESTAURANT, and EDUARDA LORA,

Defendants.

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INDEX NO. 157353/2023

MOTION DATE 11/8/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion for SUMMARY JUDGMENT.

Berkovitch & Bouskila, PLLC, Pomona, NY (Ariel Bouskila of counsel), for plaintiff.
Usher Law Group P.C., Brooklyn, NY (Mikhail Usher of counsel), for defendants.

Gerald Lebovits, J.:

Plaintiff, Newco Capital Group VI LLC, entered into a revenue purchase agreement (the "Agreement") in which it agreed to purchase the future receivables of defendants La Rubia Restaurant Inc., La Rubia Restaurant Inc., La Rubia Bar and Grill Restaurant, and El Nuevo Tropical Restaurant (collectively, "La Rubia"). Specifically, the Agreement provided for Newco to pay La Rubia $100,000;[1] in exchange, La Rubia would remit to Newco $140,000 of its future receivables, to be paid at a rate of 16% of La Rubia's weekly receipts. (NYSCEF No. 2.) The Agreement also provided that defendant Eduarda Lora would guarantee La Rubia's performance under the Agreement and thus would be fully responsible for all unremitted payments in the event of La Rubia's breach.[2] (*Id.*)

Newco sued for breach of the Agreement, alleging that after remitting only $18,480, La Rubia stopped payments to Newco despite still conducting business and collecting receivables.

[1] $26,462 of this sum was to be used for paying off the remaining balance of a prior agreement between the parties. (NYSCEF No. 19 at ¶ 1.)

[2] The precise nature of Lora's relationship with La Rubia is not completely clear. On the one hand, Newco characterizes Lora as the owner of these businesses. (*See e.g.* NYSCEF No. 17 at ¶ 5.) On the other hand, defendants' filings consistently refer to Lora merely as the "authorized agent" of La Rubia. (*See e.g.* NYSCEF No. 30 at ¶ 1.)

Newco argues that defendant Lora is responsible for paying it the money owed under the Agreement's guaranty provision. In response, defendants deny Newco's allegations and raise several affirmative defenses, including that the Agreement was a loan with an interest rate in violation of New York's usury laws. (NYSCEF No. 3 at ¶ 43.)

Newco now moves for summary judgment against the defendants, seeking, jointly and severally, $124,555 in damages (plus interest).[3] The motion is granted in part and denied in part.

DISCUSSION

As an initial matter, defendants argue that this summary-judgment motion is premature under CPLR 3212 (f) because they have not obtained discovery from Newco.[4] But a party opposing summary judgment on CPLR 3212 (f) grounds must "demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." (*Williams v Spencer-Hall*, 113 AD3d 759, 760 [2d Dept 2014].) Defendants have not made that showing. Indeed, this is a straightforward breach-of-contract case involving alleged non-payment. Defendants are already aware of all the relevant facts to form the basis of an opposition—*i.e.*, whether they entered the Agreement; what its terms are; whether defendants were paid the $100,000 purchase price; whether they remitted the receivables they owed to Newco; and whether La Rubia was still conducting business).[5]

I. Defendants' Usury Defense

Defendants in their answer argued that the Agreement is not enforceable because the $100,000 purchase price paid by Newco is a usurious loan. In their opposition to the summary judgment motion, defendants articulated this argument again with more factual specificity—*i.e.*, that Newco "loaned $100,000.00 to [d]efendant at a shockingly high yearly interest rate of 57.7772%." (NYSCEF No. 29 at ¶ 1.)

As an initial matter, it appears that La Rubia comprises a group of corporations; in the Agreement, under the companies' names, the box "Corp." is checked for "Type of Entity." (NYSCEF No. 2.) And the affidavit of one of Newco's managers, submitted on this motion,

[3] In addition to the $121,520 in unpaid receivables, Newco seeks a default fee of $3,000 and a non-sufficient-funds fee of $35 because Newco was allegedly blocked from withdrawing money from La Rubia's authorized bank account. (NYSCEF No. 18 at ¶¶ 15, 16; *see also* Appendix A of the Agreement.)

[4] Defendants also assert that the motion should be denied as premature because defendants had not yet responded to *Newco's own* discovery requests when Newco filed the motion. This assertion is groundless.

[5] There is no merit to defendants' argument that Newco was required to serve its motion papers on them by mail or email. Interlocutory filings in an e-filed and counseled case need not be served by means other than e-filing on NYSCEF (which automatically generates an e-mail transmitting the filings to all appearing counsel). For that same reason, e-filing a separate affidavit of service of the motion itself, though permissible, would be redundant.

represents that La Rubia consists of corporate entities. (*See* NYSCEF No. 17 at ¶ 4.) General Obligations Law § 5-521 (1) provides that corporations cannot raise the usury defense. However, the Court of Appeals has clarified that "this bar does not preclude a corporate borrower from raising the defense of 'criminal usury' (*i.e.*, interest over 25%) in a civil action." (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 326 [2021]; *see also* Penal Law § 190.40.) The alleged 57.7772% interest rate in this case permits La Rubia to raise a usury defense.

The only pertinent issue here, then, is whether the $100,000 purchase price constitutes a *loan* by Newco to La Rubia. (*See LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] ["The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be."].) The core feature of a loan transaction is that the "principal sum advanced is repayable absolutely." (*Id.*) In turn, "courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy." (*Id.*)

All three factors weigh in Newco's favor. *First*, the Agreement contains reconciliation provisions. Section 1.3 provides that "[a]s long as an Event of Default, or breach of this agreement, has not occurred, Merchant [*i.e.*, La Rubia], at any time, may request a retroactive reconciliation of the total Remittance Amount"; section 1.4 provides that "[a]s long as an Event of Default, or breach of this agreement, has not occurred, Merchant may give notice to NCG [*i.e.*, Newco] to request a decrease in the Remittance, should [it] experience a decrease in its future receipts." (NYSCEF No. 2.)

It is not fatal to Newco's case that these provisions contain permissive "may" language. (*See e.g. Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507, 507 [1st Dept 2018] [affirming the trial court's determination that an agreement with similar "may" language did not, as a matter of law, provide for a usurious loan transaction].) In fact, the Agreement stands on stronger legal ground than the one in *Champion Auto Sales*; the reconciliation provisions in the Agreement also contain some mandatory "shall" language. For instance, Section 1.4 provides that "[t]he Remittance *shall* be modified to more closely reflect the Merchant's actual receipts by multiplying the Merchant's actual receipts by the Purchased Percentage divided by the number of business days in the previous (2) calendar weeks." (NYSCEF No. 2 [emphasis added]; *see also Vernon Capital Group LLC v Walnut Spring Farms LLC*, 2022 WL 3336140, at *13-16 [Sup Ct, Kings County 2022] [finding no "triable issue of fact as to whether the Agreement was in fact a usurious loan" in part because "the reconciliation provision contains mandatory language that the Daily Remittance rate 'shall' be a good faith estimation of the Purchased Percentage multiplied by Company Defendants' gross revenues during the previous two weeks divided by the number of business days in the previous two weeks."].)

Second, "as the amount of the [weekly] payments [to Newco] could change, the term of the agreement [is] not finite." (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022].) Indeed, in the Agreement, Newco "acknowledges that it may *never* receive the Purchased

Amount [*i.e.*, the $140,000 in future receivables] in the event that the Merchant does not generate sufficient revenue." (NYSCEF No. 2 [emphasis added].)

Third, "no contractual provision [exists] establishing that a declaration of bankruptcy would constitute an event of default." (*Principis*, 201 AD3d at 754.) To the contrary, the Agreement provides that "Merchant going bankrupt or going out of business, or experiencing a slowdown in business, or a delay in collecting its receivables, in and of itself, does not constitute a breach of this Agreement." (NYSCEF No. 2.) According to § 3.1 (d) of the Agreement, it is only a default if La Rubia does not request reconciliation or remittance adjustments at least one business day in advance of La Rubia's authorized bank account failing to remit payment to Newco due to insufficient funds. (*Id.*; *Vernon Capital Group*, 2022 WL 3336140, at *13-16 [finding no triable issue of fact on the issue of usurious loans in part because defendants' declaration of bankruptcy did not constitute a default under the agreement; rather, "it [was] the failure to notify plaintiff 24 hours in advance of the insufficient funds that [was] listed as an event of default."].)

Finally, the mere inclusion of a guaranty provision in the Agreement does not render the underlying purchase price to be a loan when the Agreement, taken as a whole, suggests otherwise. (*See e.g. Principis*, 201 AD3d at 753-754; *Vernon Capital Group*, 2022 WL 3336140, at *13-16 [finding no triable issue of fact on the issue of usurious loans even where the agreements contained guaranty provisions].)

Thus, no triable issue of fact exists about whether the $100,000 purchase price paid by Newco constitutes a loan. Defendants' usury defense fails as a matter of law.

II. Newco's Proof of its Breach-of-Contract Claim

On the merits of Newco's contract claim, Newco provides an affidavit of one of its principals (NYSCEF No. 17), accompanied by documentation assertedly showing that Newco paid La Rubia the purchase price for its receivables, that La Rubia stopped making receivables payments before the full contractual of receivables had been paid, and that La Rubia remains in business (*see* NYSCEF Nos. 20-26). La Rubia raises hearsay and foundation challenges to the admissibility of much of this evidence. (*See* NYSCEF No. 28 at 4-8.)

Regardless of the merits of those challenges, however, La Rubia's counter-statement of material facts under 22 NYCRR 202.8-g expressly admits the key facts at issue: (a) La Rubia entered the Agreement (NYSCEF No. 29 at ¶ 1); (b) Newco paid the $100,000 purchase price (*id.* at ¶ 3); (c) defendants only remitted $18,480 and have since intentionally stopped making payments (*id.* at ¶¶ 4-5.); and (d) La Rubia is "still in operation" (*id.* at ¶ 6). And the Agreement expressly provides at § 3.2 that Lora is liable for losses Newco suffered. (NYSCEF No. 2 at 5.)

The record thus establishes that Newco is entitled to the unpaid-receivables balance of $121,520. This court reaches a different conclusion, however, with respect to the $3,000 default fee and the $35 insufficient-funds fees. Newco has not shown—or attempted to show—that these fees constitute a reasonable advance estimate of difficult-to-calculate damages, as required for the fees to be collectible liquidated damages, rather than impermissible penalties. *(See Forever*

Funding LLC v S.F. Meats, Inc., 2022 NY Slip Op 513056[U], at *2-3 [Sup Ct, NY County Dec. 22, 2022]; *Irwin Funding, LLC v Dexter Young Cattle Feeding*, 2022 NY Slip Op 51035[U], at *2 n 1 [Sup Ct, NY County Oct. 21, 2022].) And this court concludes that Newco has not sufficiently established that the transaction history submitted on this motion (NYSCEF No. 21) is an admissible business record, as required to show the date of La Rubia's breach for interest purposes. Because the interest-accrual date cannot be determined on this record, the court declines to award Newco prejudgment interest.

Accordingly, it is:

ORDERED that Newco's motion for summary judgment is granted in part and denied in part, and Newco is awarded a judgment against defendants, jointly and severally, for $121,520, with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Newco serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

11/14/2023
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☐ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE