Fora Fin. Asset Securitization 2021, LLC v Hialeah FL Parts Inc
2024 NY Slip Op 31503(U)
April 3, 2024
Supreme Court, Nassau County
Docket Number: Index No. 616730/2022
Judge: Danielle M. Peterson

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable Danielle M. Peterson
Justice of the Supreme Court

----------X FORA FINANCIAL ASSET SECURITIZATION 2021, LLC,	TRIAL/IAS, PART 23 NASSAU COUNTY
Plaintiff,	Index No. 616730/2022 XXX
-against-	Motion Submitted: 1/16/24
HIALEAH FL PARTS INC d/b/a HIALEAH FL PARTS INC and FIDEL LOPEZ AVILA,	Motion Seq. Nos.: 001, 002
Defendants. ----------X	

The following papers read on this motion (NYSCEF Doc. Nos. 11 - 16, 19 - 20, 33 - 35, 37 - 45, 54 - 60, 63, 64 - 66):

Motion Seq. 001: Plaintiff's Notice of Motion/
Memorandum of Law/
Affirmation in Support/Exhibits.....1

Defendants' Affirmation in Opposition/Exhibit.....2

Plaintiff's Reply Affirmation/
Memorandum of Law/Exhibit.....3

Motion Seq. 002: Plaintiff's Notice of Motion/
Affirmation in Support/Exhibits
Statement of Material Facts.....4

Defendants' Affirmation in Opposition[1]/
Memorandum of Law/Exhibits.....5

Plaintiff's Reply Memorandum of Law/
Reply Affidavit/Exhibit.....6

[1]The Court declined to read, review, or otherwise consider NYSCEF Document Numbers 47 through 53, and 61, which were electronically filed by the Defendants. The Defendants previously submitted opposition to Plaintiff's motion to dismiss Defendants' counterclaims (*see* Motion Seq. 001, NYSCEF Doc. Nos. 19 -20), and did not seek leave of the court to supplement the record or submit a sur-reply on that motion sequence.

Plaintiff, Fora Financial Asset Securitization 2021, LLC ("Plaintiff" or "Fora Financial"), moves this Court (**Motion Seq. 001**) for an order, pursuant to CPLR § 3211(a)(7), dismissing the Defendants, Hialeah FL Parts Inc d/b/a Hialeah FL Parts Inc ("Company Defendant"), and Fidel Lopez Avila's (collectively "Defendants") counterclaims for failure to state a claim. Plaintiff also moves this Court (**Motion Seq. 002**) for an order, pursuant to CPLR §3212, granting it summary judgment against the Defendants, jointly and severally, in the principal amount of $134,676.96, together with statutory interest from July 5, 2022, plus costs and disbursements, and post-judgment statutory interest from the date of entry of judgment. Defendant opposes Plaintiff's applications. The Plaintiff's motions are determined as hereinafter set forth.

Background

Plaintiff commenced this action by electronically filing a summons and complaint on November 29, 2022. The Defendants interposed an answer with counterclaim on December 21, 2022. The complaint alleges that on or about May 18, 2022, Plaintiff and Company Defendant entered into an agreement whereby Plaintiff agreed to purchase 11.30% of the Company Defendant's future receivables having an agreed value of $146,388.00 for a purchase price of $110,900.00. Thereafter, on or about May 31, 2022, Plaintiff remitted the purchase price, less the agreed upon processing fee of $2,772.50, to the Company Defendant. The terms of the parties' agreement specified that Plaintiff would receive payment of the $146,388.00 by withdrawing 11.30% of Company Defendant's receivables from a designated business bank account until Plaintiff received its payment in full. In addition, Defendant, Fidel Lopez Avila, personally and unconditionally guaranteed the performance by Company Defendant of its obligations under the agreement.

On or about June 1, 2022, the originating entity, Fora Financial Advance LLC, sold and assigned the future receivable agreement to Plaintiff, and as such, Plaintiff acquired all rights, title and interest to said agreement and receivables. Thereafter, on July 5, 2022, the complaint alleges that the Company Defendant interfered with Plaintiff's right to obtain the purchased amount by placing a stop payment on the designated remittance account despite continuing to operate its business and generate sales proceeds. The complaint asserts four causes of action for breach of contract, breach of performance guaranty, conversion, and account stated, and demands judgment in the amount of $134,676.96.

Motion to Dismiss Counterclaim (Motion Seq. 001)

"On a motion to dismiss a counterclaim pursuant to CPLR 3211(a)(7), the court 'must accept as true the facts as alleged in the [pleading] and submissions in opposition to the motion, accord [the pleading party] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Davydov v. Youssefi*, 205 AD3d 879 [2d Dept 2022] [citations omitted]). "[H]owever, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Shah v. Mitra*, 171 AD3d 971, 973 [2d Dept 2019] [citations omitted]). "Dismissal of the [counterclaim] is warranted if the [counterclaimant] fails to assert facts in support of an element of the [counterclaim], or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Id.* quoting *Connaughton v.*

Chipotle Mexican Grill, Inc., 29 NY3d 137 [2017]).

Here, Defendants asserts a counterclaim seeking a declaration that the agreement is criminally usurious. However, usury arguments are generally disfavored as "[t]here is a strong presumption against the finding of usury" (*Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706, 710 [Sup Ct, NY County 2000] citing *Giventer v. Arnow*, 37 NY2d 305 [1975]). Indeed, "court[s] will not assume that the parties entered into an unlawful agreement" (*Giventer*, 37 NY2d at 309). Nevertheless, "[u]sury laws apply only to loans or forbearances. . . . If the transaction is not a loan, there can be no usury, however unconscionable the contract may be" (*Seidel v. 18 E. 17th St. Owners, Inc.*, 79 NY2d 735 [1992]).

"To determine whether a transaction constitutes a usurious loan: 'The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan'" (*Principis Capital, LLC v. I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]). When assessing whether repayment is absolute or contingent, courts weigh the following three factors: "(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" (*LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 AD3d 664, 666 [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" (*LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] [ciations omitted]).

Applying the governing three-part test set forth in *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020], the parties' contract contains a reconciliation clause, it is for an indefinite term, and it contains no provision providing for any recourse to Plaintiff in the event the Company Defendant files for bankruptcy. Therefore, the transaction set forth in the parties' agreement is not a loan, and Defendants' counterclaim asserting criminal usury is ripe for dismissal as a matter of law (*see Principis Capital, LLC v. I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]; *Fora Fin. Asset Securitization 2021 LLC v Ideal Comfort Heating & Cooling Corp., 2023 NY Slip Op 32185[U]*, *4 [Sup Ct, Nassau County 2023] ["After reviewing the subject Agreement, the Court finds that the Agreement is not a usurious loan, as there was a reconciliation provision in the Agreement, there was no fixed period for repayment provided in the Agreement, and no remedy existed in the event of a declaration of bankruptcy"). In addition, while Defendants "may assert criminal usury as an affirmative defense, they may not assert criminal usury as the basis for a counterclaim" (*LG Funding, LLC*, 181 AD3d at 667; *and see Intima-Eighteen, Inc. v. A.H. Schreiber Co.*, 172 AD2d 456 [1st Dept 1991]). In light of the foregoing, Defendants' counterclaim asserting criminal usury is dismissed.

Summary Judgment (Motion Seq. 002)

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur*

Mfrs., 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J. C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992]), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Here, the complaint asserts four causes of action for breach of contract, breach of performance guaranty, conversion, and an account stated. A party seeking to recover for breach of contract must establish: (1) the existence of a contract between the parties; (2) performance by the plaintiff; (3) failure to perform by the defendant; and (4) resulting damages *(see, e.g., JP Morgan Chase v. J.H. Elec.*, 69 AD3d 802 [2d Dept 2010]; *Brualdi v. Iberia*, 79 AD3d 959 [2d Dept 2010]). Further, "[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*H.L. Realty, LLC v Edwards*, 131 AD3d 573, 574 [2d Dept 2015]) quoting *City of NY v. Clarose Cinema Corp.*, 256 AD2d 69 [1st Dept 1998]).

In support of the motion, Plaintiff submits, *inter alia*, the parties' agreement, the Company Defendant's account statement and transaction history, a stipulation dated February 24, 2023, and the affidavit of Jonathan Headley, the Director of Collections and Servicing for Fora Financial. The contract, annexed to Plaintiff's moving papers as Exhibit E, sets forth the terms of the agreement and contains the guaranty of performance. Plaintiff has annexed the Company Defendant's transaction history to its moving papers as Exhibit F demonstrating that the agreed upon purchase price was remitted by Plaintiff, that the Company Defendant made payments totaling $11,711.04, and that there is an outstanding balance of $134,676.96. The affidavit proffered by Plaintiff confirms the terms of the agreement and the details related to the breach. According to the affidavit of Jonathan Headley, Plaintiff performed under the contract by delivering the purchase price, less any agreed upon fees, into the designated bank account in exchange for a specified percentage of the Company Defendant's future receivables. The affidavit of Mr. Headley further indicates that while the Company Defendant initially made payments totaling $11,711.04, it subsequently breached the agreement on July 5, 2022, leaving a balance of $134,676.96. In his affidavit, Mr. Headley attests that

> Defendants breached the Agreement and the personal guarantee of performance on 7/5/2022 because Defendants placed a stop payment on all of Plaintiff's debits and blocked Plaintiff's review access to the designated deposit account so as to deprive Plaintiff of its purchased percentage of future accounts receivable despite the Business Defendant continuing to generate and collect no less than $1,191,831.50 in receivables in the ordinary course between July 1, 2022, and December 31, 2022.

The stipulation dated February 24, 2023, which is annexed to Plaintiff's moving papers as Exhibit D, further confirms that the Company Defendant generated and collected at least $1,191,831.50 during the aforementioned time period.

Plaintiff, having supplied proof of a contract, its performance thereunder, Defendants' breach, and resulting damages, has established its entitlement to summary judgment as a matter of law on its cause of action for breach of contract, and on the personal guarantee. The burden now shifts to Defendants to raise an issue of fact requiring a trial of the action.

In opposition, Defendants argue, among other things, that the Court lacks subject matter jurisdiction pursuant to BCL 1314(b). This argument, however, is unavailing as the BCL governs corporations, and it is undisputed that Plaintiff is a limited liability company (*see Mitchell v. Kingsbrook Jewish Med. Ctr.*, 210 AD3d 887, 889 [2d Dept 2022]; *Capybara Capital, LLC v. Dixie Home Solutions, Inc.*, 2024 N.Y. Misc. LEXIS 1010, at *5 [Sup Ct, Monroe County Mar. 8, 2024, No. E2022008946]; *Libertas Funding, LLC v. Travelland RV, Inc.*, 2024 NYLJ LEXIS 425; *CFG Merchant Solutions, LLC v. Punch List Servs. LLC & Tyler Waite*, 2023 N.Y. Misc. LEXIS 18934, at *3-4 [Sup Ct, Kings County Oct. 4, 2023, No. 515599/2023]). "A limited liability company is a hybrid business entity having attributes of both a corporation and a partnership (*see Rimawi v. Atkins*, 42 AD3d 799, 801, 840 NYS2d 217 [2007]), and it is governed by the Limited Liability Company Law for its operation, conduct, duties, powers, and rights of its members" (*Garcia v. Garcia*, 187 AD3d 859, 861 [2d Dept 2020]). Consequently, BCL § 1314(b) is inapplicable to the instant matter, and it is not a valid ground upon which to object to jurisdiction.

Moreover, even *assuming arguendo* that BCL 1314(b) did apply to the instant action, BCL 1314(b)(1) allows an action against a foreign corporation to be maintained by another foreign corporation "[w]here it is brought to recover damages for the breach of a contract made or to be performed within this state . . . ." Here, it is uncontested that the agreement was entered into between the Defendants and Plaintiff's assignor, Fora Financial Advance, LLC, a limited liability company with its principal place of business in New York. Section 12 of the parties' agreement entitled "Applicable Law; Construction" provides in pertinent part that "[t]his Agreement shall be construed and enforced in accordance with the internal laws and not the conflict laws of the State of New York *applicable to agreements made and to be preformed in such state*" [emphasis added]. As the instant action was brought by Plaintiff to recover damages for breach of a contract made or to be performed within this state, said action may be maintained under BCL 1314(b).

Lastly, the parties' agreement contains a forum selection clause, which states the following:

> In the event of a controversy arising out of the interpretation, construction, performance or breach of this Agreement, the parties hereby agree and consent to the sole and exclusive jurisdiction and venue of the federal and state courts in the State of New York, to resolve any and all claims arising out of, relating to or in connection with this agreement or the relationship between the parties; and further agree and consent that personal service of process outside of

> the State of New York in any such action or proceeding shall be tantamount to service in person within New York State.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Bernstein v. Wysoki*, 77 AD3d 241, 248-249 [2d Dept 2010] [quoting another source] [citations omitted] [internal quotation marks omitted]). "Absent a strong showing that it should be set aside, a forum selection agreement will control" (*Horton v. Concerns of Police Survivors*, 62 AD3d 836, 836 [2d Dept 2009]). Here, the Defendants failed to make the requisite showing that the forum selection clause in the parties' merchant cash advance agreement, which requires disputes to be litigated in the courts of the State of New York, should be set aside (*see Fundfi Merchant Funding, LLC v BKT High Quality Healthcare Agency LLC*, ___Misc 3d___, 203 NYS3d 858, 2024 NY Slip Op 24006, *3 [2024] [" The court finds that the foregoing facts constitute an exception under GOL § 5-1402(1) as *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley*, 257 AD2d 228, 230, 690 N.Y.S.2d 57 (1st Dept 1999) gives discretion to the court when the amount is less than $1 million dollars and the court further finds the forum is appropriate as neither party addresses the convenience of the forum"]; *Bizfund LLC v. Holland & Sliger Steel, LLC*, 71 Misc 3d 1226[A], 2021 NY Slip Op 50504[U], *4 [Sup Ct, Kings County 2021] ["The defendants, as the challenging party, proffered no proof that the forum selection clause was unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court"]).

The Court further finds that the Defendants' remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion to dismiss Defendants' counterclaims (**Motion Seq. 001**) for failure to state a claim is **GRANTED**; and it is further

ORDERED, that Plaintiff's motion for summary judgment against the Defendants (**Motion Seq. 002**) is **GRANTED**. Plaintiff, Fora Financial, is entitled to judgment against the Defendants, jointly and severally, in the amount of $134,676.96, together with statutory interest from July 5, 2022, plus costs and disbursements, and post-judgment statutory interest from the date of entry of judgment.

The foregoing constitutes the Decision and Order of the Court.

Settle judgment on notice.

Dated: April 3, 2024

Hon. Danielle M. Peterson J. S. C.