

Retail Capital, LLC v Leahy
2016 NY Slip Op 32135(U)
October 11, 2016
Supreme Court, Nassau County
Docket Number: 603508/16
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

<hr/>		TRIAL/IAS PART 37
RETAIL CAPITAL, LLC d/b/a CREDIBLY,		NASSAU COUNTY
	Plaintiff,	Index No.: 603508/16
		Motion Seq. No.: 01
	- against -	Motion Date: 09/08/16
DANIEL LEAHY d/b/a DOGGY DOS and		
DANIEL LEAHY,		
	Defendants.	

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3211(a), for an order dismissing defendants' counterclaims upon the grounds of documentary evidence and for failure to state a cause of action. No opposition was submitted to the motion.

Counsel for plaintiff submits, "[i]n November of 2015, Doggy Dos solicited Credibly to sell a portion of its future sales proceeds and receivables to Credibly for an upfront payment. On or about November 18, 2015, Doggy Dos negotiated an agreement with Credibly whereby Doggy Dos would sell a portion of its future sales proceeds to Credibly for an upfront discounted payment on the face value of those sale proceeds. Doggy Dos sold \$38,364.00 of its future gross

receivables for the discounted upfront price of \$27,800.00 to Credibly.... As part of the Agreement, Credibly would collect the purchased receivables by debiting 11.94% of Doggy Dos' daily revenue from a designated commercial bank account until such time as Credibly received the full purchased amount.... Credibly negotiated the Agreement, underwrote its risks for the agreement, and accepted the Agreement at its office in Arizona.... Further, the parties expressly agreed to the application of Arizona law to govern any proceedings related to the Agreement.... As part of the Agreement, Doggy Dos' payments of the purchased receivables to Credibly were wholly contingent upon Doggy Dos actually generating the purchased receivables and the receivables actually being collected as revenue.... In the event that Doggy Dos failed to pay the agreed upon receivables/revenue because it was unable to generate sufficient revenue to operate, the Agreement provided Credibly with no recourse against Doggy Dos or Leahy.... As part of the Agreement, the total purchased amount remained the same regardless of how long it might take for Credibly to collect the purchased receivables. The Agreement did not provide for interest payments or charges for slower than anticipated payments." See Plaintiff's Affirmation in Support Exhibit 1.

Counsel for plaintiff adds that, "[a]s part of the Agreement, Doggy Dos and Leahy represented and guaranteed that Doggy Dos would not engage in certain enumerated acts that would deprive Credibly of a fair opportunity to realize all of the benefits of the Agreement, including guarantees that Doggy Dos would deposit all sale proceeds (only sale proceeds) into the designated bank account, that Doggy Dos would not cause Credibly's authorization to debit the sales proceeds from the designated business bank account to be terminated." See *id.*

Counsel for plaintiff further asserts that, “[o]n May 16, 2016, Credibly filed this action against the Defendants.... The Defendants filed an Answer with four incomprehensible and meritless counterclaims for usury.... Doggy Dos and Leahy’s counterclaims are so contrived and meritless, that the Defendants themselves do not believe them. In fact, in another case involving Credibly’s competitor, Doggy Dos and Leahy executed an affidavit admitting that an almost identical sales contract was a purchase and sale transaction and not a loan.” *See* Plaintiff’s Affirmation in Support Exhibits 3-5.

In further support of the motion, plaintiff submits the Affidavit of Joshua Creem, General Counsel for plaintiff. *See* Plaintiff’s Affidavit in Support.

As previously indicated, no opposition was submitted to the motion.

CPLR § 3211(a)(1) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence.” To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing* *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting* *Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). “[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity.” *Fotanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE COMMENTARIES, MCKINNEY’S CONS

LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. “[T]hat is, it must be ‘essentially unassailable.’” *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) quoting *Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs’ factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

“In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), “the court will 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.” *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see*

Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013).

Accordingly, based upon the above, plaintiff's motion, pursuant to CPLR § 3211(a), for an order dismissing defendants' counterclaims upon the grounds of documentary evidence and for failure to state a cause of action, is hereby **GRANTED**.

It is further ordered that the parties shall appear for a Preliminary Conference on November 28, 2016, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

ENTERED

OCT 13 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
October 11, 2016