Principis Capital, LLC v Simmons
2017 NY Slip Op 31921(U)
September 7, 2017
Supreme Court, New York County
Docket Number: 655192/2016
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon *Justice* PART 42

PRINCIPIS CAPITAL, LLC

- v -

DAVID SIMMONS, d/b/a SIMMONS LIQUOR & WINE, and DAVID SIMMONS

INDEX NO. 655192/2016

MOTION DATE 9/7/2017

MOTION SEQ. NO. 001

The following papers were read on this motion for summary judgment

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law----------	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits ----------	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits ----------	No(s). 3

In this action to recover damages for breach of contract, the plaintiff moves for summary judgment on the complaint. The defendants oppose the motion. The motion is denied.

On August 16, 2016, the defendant David Simmons, doing business as Simmons Liquor & Wine (SLW), entered into an agreement with the plaintiff, Principis Capital, LLC (Principis), pursuant to which Principis agreed to purchase $66,515.00 of SLW's future receivables for the sum of $50,200.00. In consideration of its receipt of $50,200.00 from Principis, SLW obligated itself under the agreement to authorize Principis to collect the future receivables by debiting SLW's bank account in the sum of $226.24 per day until it paid Principis the sum of $66,515.00. SLW further agreed to deposit all of its sales receipts into the designated bank account, and further agreed not to revoke the authorization to debit that bank account or change the designated bank without Principis's written consent. The agreement further provided that, if SLW defaulted under the agreement, Principis was entitled to accelerate SLW's obligation and recover the full sum of $66,515.00, less any amounts that had been debited from SLW's account and credited to Principis. The agreement also contained a provision permitting Principis to recover its attorneys' fees in the event that it successfully prosecuted an action against SLW for breach thereof. Simmons personally guaranteed the payment of SLW's obligations.

The complaint alleges that Principis tendered SLW the sum of $50,200.00 on August 16, 2016, but that, beginning on September 1, 2016, and on almost every occasion thereafter, its requests to debit SLW's account were "returned." It asserts that it was only able to recover $2,036.16, which is the equivalent of nine days of payments. In support of its motion for summary judgment, Principis submits the pleadings, an attorney's affirmation, an affidavit of its vice-president, Christopher Nassauer, a copy of the agreement and guarantee, bank statements showing the debits that were made to SLW's account, and bank statements showing which requests to debit were not honored because a stop

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

payment order had been placed on the account by SLW. In his affidavit, Nassauer authenticates the documents, and asserts that Principis paid SLW the sum of $50,200.00, that Principis has only received payment of $2,036.16 from SLW, and that despite numerous attempts to effectuate the authorization to debit SLW's bank account in accordance with the agreement, it has been unable to secure any further transfer of funds from that account, leaving a balance owed of $64,478.84.

The proof submitted by Principis establishes, prima facie, that there was "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). Hence, Principis established its prima facie entitlement to judgment as a matter of law on its first cause of action, which seeks to recover for breach of contract. The provision permitting acceleration of the debt upon SLW's default is enforceable, since it provides only for the recovery of actual damages incurred by Principis, "to wit, the debt remaining on the unpaid [obligation] at the time of default." G3-Purves St., LLC v Thomson Purves, LLC, 101 AD3d 37, 43 (2nd Dept. 2012); see generally Fifty States Mgt. Corp. v Pioneer Auto Parks, 46 NY2d 573 (1979). Principis has also established, prima facie, that Simmons is personally liable for any of SLW's obligations under the agreement. "A guaranty is a contract, and in interpreting it [a court will] look first to the words the parties used." Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc., 2 NY3d 495, 500, (2004). The guaranty here must be read in the context of the receivables sales agreement, which was executed contemporaneously. See Greenwich Capital Fin. Prods., Inc. v Negrin, 74 AD3d 413 (1st Dept. 2010). Although a guaranty must be construed in the strictest manner (see White Rose Food v Saleh, 99 NY2d 589 [2003]), a guarantor will be bound to the express terms of the written guaranty. See 665-75 Eleventh Ave. Realty Corp. v Schlanger, 265 AD2d 270 (1st Dept. 1999). Simmons personally guaranteed all of SLW's obligations under the agreement, including the obligation to pay the entire debt if it defaulted thereunder. Hence, Principis established its prima facie entitlement to judgment as a matter of law on the second cause of action.

In opposition to Principis's showing, however, the defendants raise a triable issue of fact as to whether the agreement is an enforceable contract for the purchase of receivables, or void as a usurious loan agreement. The defendants submit Simmons's affidavit, in which he asserts that the transaction here was actually a loan and not a genuine contract for the purchase of receivables, since it did not identify any particular receivable, invoice, or customer's account that was to be purchased by Principis, or require the delivery of any such receivable, invoice, or account. He also contends that the agreement, as finally executed, did not fix a specified percentage of receipts or receivables that were subject to the agreement, since that preprinted provision was superseded by the provisions setting a fixed daily payment of $226.24. Simmons alleges that, in light of the purported obligation to make a fixed daily payment, the loan was usurious, since the annual interest rate SLW was obligated to pay was 28%, based on the assumption that the obligation was to be paid by debiting its account $226.24 per day ($170.75 per day in principal and $55.49 per day in interest) for the first 294 business days subsequent to the agreement, which were spread over a total of 412 days.

If the transaction here is indeed a loan, as argued by Simmons, there is no bar to the defendants' interposition of the defense of civil usury, since SLW is not a corporation prohibited by

statute from relying on that defense, but simply the assumed name under which Simmons does business. See General Obligations Law § 5-521(1); General Business Law § 130; see also Marraccini v Ryan, 17 NY3d 83 (2011). In New York, a usurious rate of interest on a loan is fixed at 16% per annum (see General Obligations Law § 5-501; Banking Law §14-a[1]), although banks and other regulated lenders may be able to charge more under certain circumstances. Even if SLW were a corporation, it would be entitled to assert the defense of criminal usury where, as here, the interest rate is greater than 25% per annum (see General Obligations Law § 5-521[3]; Penal Law § 190.40).

"In order for a transaction to constitute a loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender." Donatelli v Siskind, 170 AD2d 433, 433 (2nd Dept. 1991) (citations omitted). To constitute a loan, the transaction in issue must also "provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard" Rubenstein v Small, 273 App Div 102, 104 (1st Dept. 1947). The question here is whether the particular transaction under scrutiny "was made in good faith and not as a cover for a loan" (72 Am Jur 2d, Interest and Usury, § 85), and what effect to give to Simmons's guaranty, since the giving of a guaranty is one of the factors "to be considered in determining whether the transaction is in fact a loan or purchase and sale." Id.

Since there are triable issues of fact as to whether, applying the above factors, the transaction here constituted a usurious loan, Principis's motion must be denied.

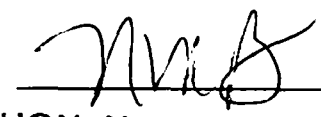
The court notes that Simmons's affidavit was executed and notarized in the State of Mississippi, but does not include the certificate of conformity required by CPLR 2309. The defect does not require that Principis's motion be granted, and may be cured by the submission of the proper certificate nunc pro tunc. See Todd v Green, 122 AD3d 831, 832 (2nd Dept 2014); see also Bank of New York v Singh, 139 AD3d 486, 487 (1st Dept 2016).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: 9/7/17



, JSC
HON. NANCY M. BANNON

1. Check one: ..... [ ] **CASE DISPOSED** [■] **NON-FINAL DISPOSITION**
2. Check as appropriate: MOTION IS: [ ] **GRANTED** [■] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**