

LG Funding LLC v Garber
2018 NY Slip Op 33135(U)
December 4, 2018
Supreme Court, Nassau County
Docket Number: 605671/18
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAUP R E S E N T : HON. JEFFREY S. BROWN
JUSTICE-----X TRIAL/IAS PART 12
LG FUNDING LLC,

Plaintiff,

-against-

INDEX # 605671/18

Mot. Seq. 3

Mot. Date 10.30.18

Submit Date 11.5.18

NATHAN GARBER a/k/a NATHAN R. GARBER,

Defendant.
-----X

The following papers were read on this motion:

Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	46
Answering Affidavit.....	61
Reply Affidavit.....	63

By decision and order dated October 9, 2018, this court denied plaintiff's motion to dismiss the defendant's affirmative defense and counterclaim, and for summary judgment and sanctions. This action arises out of a merchant funding agreement between the plaintiff and Premier Builders, LLC, for which defendant Garber was a guarantor. By his answer and counterclaim, defendant alleged that the agreement was an unenforceable usurious loan. Upon review of the agreement and the relevant factors set forth in *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 2017 WL 2219916 (Westchester County May 4, 2017), the court determined that the agreement did not bear sufficient risk to the plaintiff to warrant dismissal of the defendant's defense and counterclaim.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. (CPLR 2221[d] [2]; *see Haque v. Daddazio*, 84 AD3d 940 [2d Dept 2011]). It is not designed as a vehicle to afford the unsuccessful party with successive opportunities to argue once again the very questions previously decided. (*Ahmed v. Pannone*, 116 AD3d 802 [2d Dept 2014]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20

AD3d 388 [2d Dept 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered. (*V. Veeraswamy Realty v. Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]; *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Haque*, 84 AD3d 940). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked. (*Hoffmann v. Debello-Teheny*, 27 AD3d 743 [2d Dept 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion. (*Barrett v. Jeannot*, 18 AD3d 679 [2d Dept 2005]).

In addition, “[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation’ (*Elder v. Elder*, 21 A.D.3d 1055, 1055, 802 N.Y.S.2d 457; *Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 A.D.3d 727, 872 N.Y.S.2d 146). A motion for leave to renew must be based upon new facts, not offered on the original application, ‘that would change the prior determination’ (CPLR 2221[e][2]; see *Matter of Korman v. Bellmore Pub. Schools*, 62 A.D.3d 882, 884). The new or additional facts must have either not been known to the party seeking renewal (see *Matter of Shapiro v. State of New York*, 259 A.D.2d 753) or may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion (see *Cole-Hatchard v. Grand Union*, 270 A.D.2d 447). However, in either instance, a ‘reasonable justification’ for the failure to present such facts on the original motion must be presented (CPLR 2221[e][3]; see *Matter of Korman v. Bellmore Pub. Schools*, 62 A.D.3d at 884, 879 N.Y.S.2d 194). (*Rowe v. NYCPD*, 85 A.D.3d 1001, 1003 [2d Dept. 2011]).

On this motion, plaintiff relies on loans and guarantee agreements issued by other companies which, although similar, are not identical. As it must, the court considered the import of the provisions of the agreement at issue in this action. The provisions of agreements utilized by other companies, though informative, are not controlling. Plaintiff’s contention that the new exhibits were not included on the prior motion because “[p]laintiff’s motions for the type of relief sought are routinely granted” and “including the additional items would have placed a burden on the Court to review them had the prior motion been decided in accordance with the numerous other motions made on behalf of the [p]laintiff dealing with the exact same issue” are not adequate grounds for renewal.

However, in its prior order, the court noted that the “import of the reconciliation provision is not clear as the court has not found a daily debit amount in the contract and the parties have not indicated one.” Without explanation by the parties, the court misapprehended the meaning of the “Addendum to Future Receivables Sale Agreement,” which provides that

Provided that the above specified percentages add up to an amount greater than \$9,000.00 each month and LG Funding received this amount each month, then LG

Funding agrees not to take more than \$9,000.00 per month, of the purchased receivables, even if the above percentages add up to a higher amount. It is agreed that Merchant will promptly notify LG if the above specified amount \$9,000.00 exceed the above specified percentage of future receivables 15%, ***at which time LG will immediately decrease/adjust the specified amount.*** (Motion Exh. A - Addendum to Future Receivables Sale Agreement)

As explained by counsel for the plaintiff, a merchant funding agreement such as plaintiff's "that does not require a specified periodic payment places less of a burden on the merchant than one that does with a reconciliation provision" because the payments will fluctuate with the merchant's receipts. Accordingly, the court finds that the adjustment (or reconciliation) requirement of the Addendum, together with the lack of a definite term, renders the agreement sufficiently risky so as to avoid characterization as a loan and reargument is warranted. The affidavit of Joseph Lerman, Managing Member of LG Funding establishes plaintiff's entitlement to summary judgment. Defendant submits only a legal argument in opposition but makes no factual showing to withstand summary judgment.

Nonetheless, the court again denies plaintiff's request for sanctions in its discretion.

Accordingly, for the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion to reargue its prior motion to strike and for summary judgment is **granted**; and it is further

ORDERED, that the plaintiff's motion to strike the defendant's affirmative defenses and counterclaim based upon usury is **granted**; and it is further

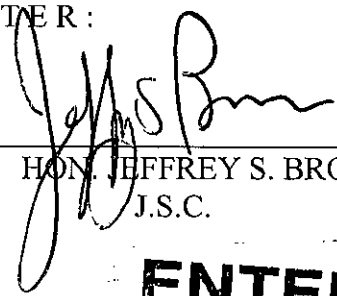
ORDERED, that plaintiff's motion for summary judgment is **granted**.

Submit judgment on notice.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
December 4, 2018

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

ENTERED

DEC 04 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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