FCI Enters. Inc. v Richmond Capital Group, LLC
2019 NY Slip Op 30711(U)
March 18, 2019
Supreme Court, Kings County
Docket Number: 520934/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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FCI ENTERPRISES INC., & CHAIM FREUND,
Plaintiffs, Decision and order

- against - Index No. 520934/18

ms # 2 & 3

RICHMOND CAPITAL GROUP, LLC, GTR SOURCE, LLC, MZEED INC., d/b/a/ MEGA CORP FUNDING, and INFLUX CAPITAL, LLC,
Defendants, March 18, 2019
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PRESENT: HON. LEON RUCHELSMAN

The defendants Richmond Capital Group LLC and Mzeed Inc., d/b/a Mega Cap Funding have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has filed a motion seeking to amend the complaint. Although the motions were submitted on different dates they will be decided together for the sake of judicial economy. The motion to amend has been opposed by all defendants. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff entered into numerous Merchant Cash Agreements with the defendants on October 10, 2018. According to the Verified Complaint each defendant was authorized, pursuant to the agreements, to withdraw $5,999 a day. The plaintiff alleges that on October 17, 2018 "each of the defendants withdrew, <u>without authorization</u> a "double payment" of $11,998" (<u>see</u>, Verified Complaint, ¶ 14, emphasis added). The plaintiff thereupon ceased allowing any further withdrawals which prompted the defendants to

file confessions of judgement. The Complaint alleges that filing confessions of judgement reveals the merchant cash agreements were indeed usurious loans which are illegal. The defendants Richmond Capital Group LLC and Mzeed Inc., d/b/a Mega Corp Funding have moved seeking to dismiss the complaint. The plaintiff moved seeking to amend the complaint to add causes of action for RICO violations, conspiracy, breach of 18 USC §1343, usury, fraud and other claims.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]). Moreover,

to succeed on a motion to dismiss based upon documentary evidence such evidence must utterly refute the plaintiff's allegations (Gould v. Decolator, 121 AD3d 845, 994 NYS2d 368 [2d Dept., 2014]). Thus, a contract, which is "unambiguous, authentic and undeniable" is documentary evidence which can support a motion to dismiss (Attias v. Costeria, 120 AD3d 1281, 993 NYS2d 59 [2d Dept., 2014]). Moreover, affidavits are not documentary evidence (see, Fontanetta v. Doe, 73 AD3d 78, 898 NYS2d 569 [2d Dept., 2010]). The defendants Richmond Capital Group and Mzeed Inc., d/b/a Mega Corp Funding have produced bank records which conclusively establish they did not act in the manner alleged in the Verified Complaint. Specifically, the bank statement reveals these defendants did not withdraw double the amount on the date noted in the Verified Complaint. Therefore, the motion seeking to dismiss the Verified Complaint is granted.

As noted, the plaintiff has moved seeking to amend the complaint to add eleven causes of action. All the defendants have opposed the motion. While generally motions to amend are freely given, the opposition is essentially a motion to dismiss the eleven causes of action and will be treated as such for the sake of judicial economy. Further, all parties have adequately briefed these issues.

The first cause of action is a RICO claim pursuant to 18 USC §1962(c). While generally to succeed on a RICO claim a plaintiff

must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" (Defalco v. Bernas, 244 F.3d 286 [2d Cir. 2001]) that is not the only basis to establish a RICO claim. Thus, pursuant to §1962(c) "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt" (id). For purposes of this lawsuit unlawful debt is defined as any debt "which was incurred...in connection with the business of...lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate" (18 USC §1961((6)(B)).

The plaintiff's attempt to establish the defendants violated these statutes is contained in various paragraphs of the proposed amended complaint. Thus, ¶¶179 and 180 allege that "when an MCA funder fails to abide by the reconciliation provision, it subjects the agreement to Civil and Criminal Usury Laws. The interest rate of the MCA agreements described herein, upon removal of Plaintiffs' reconciliation right, is at least twice the enforceable rate" (id). Again, ¶190 alleges that the MCA Agreements issued by defendants are unlawful because the defendants "prohibits [sic] the merchants from exercising its

right to reconcile its account thereby accelerating the amount due to the funder subjecting the MCA agreement to New York civil and criminal usury statutes" (id).

To maintain an action for unlawful debt it must be established that (1) the debt was unenforceable in whole or in part because of state or federal laws relating to illegal usury, (2) the debt was incurred in connection with "the business of lending money ... at a [usurious] rate," (3) the usurious rate was at least twice the enforceable rate, and (4) as a result of all the above factors the plaintiff was injured in his or her business or property (Durante Bros. & Sons Inc., v. Flushing National Bank, 755 F2d 239 [2d Cir. 1985]).

In this case the money afforded to the plaintiff was not a loan, rather it was a cash advance. Moreover, the agreements contained reconciliation provisions which determined the agreements were not usurious (see, K9 bytes, Inc., v. Arch Capital Funding LLC, 56 Misc3d 807, 57 NYS2d 625 [Supreme Court Westchester County 2017]). The mere fact the complaint alleges the defendants failed to honor the reconciliation provisions of the agreement does not thereby render the debt as unenforceable under the RICO statute. If the agreement was not usurious at the outset no subsequent conduct can *ab initio* render the agreement usurious for purposes of violations of RICO. Moreover, the proposed amended complaint does not describe how any usury

alleged was twice the permitted usury rate as required by the statute (Dae Hyuk Kown v. Santander Consumer USA, 742 Fed. Appx. 537 [2d Cir. 2018]). Therefore, the motion seeking to amend the complaint to add count one is denied. Since the plaintiff failed to allege a RICO claim any claim for conspiracy must likewise fail (see, Daskal v. Tyrnauer, 123 AD3d 652, 998 NYS2d 412 [2d Dept., 2014]). Therefore, the motion seeking to amend the complaint to add count two is denied. Likewise, concerning the fifth count, it is well settled that there can be no private right of action for criminal usury pursuant to Penal Law §190.40 (Scantek Med. Inc., v. Sabella, 58 DF.Supp2d 472 [S.D.N.Y. 2008]). Regarding civil usury pursuant to General Obligations Law 5-§501 there can be no usury absent a loan. As noted, the agreements in this case were not loans thus there can be no cause of action for usury (NY Capital Asset Corp. v. F & B Fuel Oil Co., Inc., 58 Misc3d 1229(A), _NYS3d_ [Supreme Court Westchester County 2018]). Therefore, the motion seeking to amend the complaint to add the fifth count is denied.

The third count alleges a violation of 18 USC §1343 the Federal mail or wire fraud statute. It is well settled that to plead this cause of action the plaintiff must allege a scheme to defraud, to get money or property, furthered by the use of interstate mail or wires (United States v. Autuori, 212 F3d 105 [2d Cir. 2000]). Further, the allegations must be pled with

particularity (Lundy v. Catholic Health System of Long Island Inc., 711 F3d 106 [2d Cir. 2013]). Thus, "the complaint must detail the specific statements that are false or fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent" (Williams v. Affinion Group LLC, 889 F3d 116 [2d Cir. 2018]).

In this case the proposed amended complaint states that "defendants voluntarily and intentionally devised or participated in a scheme to defraud Plaintiffs out of money" (see, Paragraph 226 of the Proposed Amended Complaint). That is wholly insufficient to allege any fraud and consequently the motion seeking to amend the complaint to add count three is denied.

The motion to amend the complaint to add the fourth count is granted.

The sixth cause of action alleges fraud. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). The facts substantiating the fraud claim is contained

within paragraphs 243 through 255 of the proposed amended complaint. Those allegations contain specific and detailed instances of misrepresentation which are deemed true for purposes of a motion to dismiss. The motion to amend the complaint to add this cause of action is granted. Likewise, the motion seeking to amend the seventh cause of action, namely breach of contract is granted.

The eight cause of action is a breach of good faith and fair dealing. That cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). The motion to amend the complaint to add this cause of action is granted.

The ninth cause of action is for conversion. It is well settled that to establish a claim for conversion the plaintiff must show the legal right to an identifiable item or items and that the defendant has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As noted, the defendants Richmond Capital and Mzeed have provided sufficient evidence they did not engage in any conversion. Thus, the motion seeking to add this cause of action is granted only as to defendants GTR and Influx.

The tenth cause of action is tortious interference with

contract. It is well settled, the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017]). Further, the complaint must establish the defendants acted out of malice, a necessary requirement (Kenneth H. Brown & Co., Inc., v. Dutchess Works et., al, 73 AD3d 984, 904 NYS2d 75 [2d Dept., 2010]). In this case the complaint asserts the defendant's conduct "caused the Plaintiffs to violate and breach the terms of their contracts with the others" (see, Proposed Amended Complaint, ¶286). That conduct does not establish this casue of action since there are no facts alleged the defendants s ought to incur breaches by any third party. Therefore, the motion seeking to amend the complaint to add the tenth cause of action is denied.

The eleventh cause of action does not describe any claim at this time. The claim seeks the disgorgement of funds held by some of the defendants and a mandatory injunction ordering the defendants to desist from any concealment of any funds. These requests are premature and the motion seeking to amend the complaint to add this cause of action is denied.

Thus, in conclusion the motion of the plaintiff seeking to amend the complaint is granted to the extent that counts 3, 4, 6, 7 8, and 9 regarding defendants GTR and Influx are hereby amended to the complaint.

So ordered.

ENTER

DATED: March 18, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

KINGS COUNTY CLERK
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