LG Funding, LLC v Caribbean Linked Shipping, Inc.
2020 NY Slip Op 31726(U)
June 3, 2020
Supreme Court, Kings County
Docket Number: 515992/2016
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 3rd day of June 2020.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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LG FUNDING, LLC,

Plaintiff(s),

Index No. 515992/2016
MS 2, 4, 5, 6

against

DECISION AND ORDER

CARIBBEAN LINKED SHIPPING, INC. d/b/a RED HOOK SHIPPING, GERALD FRANTZ JULES and CHARDEN DELISME,

Defendant(s).

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Whereas, these motions were previously pending before a different Justice, were argued and marked submitted before same, and reassigned to Justice Boddie on May 21, 2020, now upon the foregoing cited papers, the decision and order on plaintiff's motion for default judgment, plaintiff's motion to dismiss, defendant's motion for summary judgment and defendant's motion for leave to file a late answer is as follows:

Plaintiff commenced this action alleging breach of contract, or, in the alternative, fraud and unjust enrichment, damages in the amount of $99,874.80, plus interest from July 26, 2016,

and attorneys fees. Plaintiff alleged it entered into a Merchant Agreement with defendants on December 17, 2015, whereby it purchased $107,479.80 of defendants' future account receivables, contract rights, and any other obligation arising from the payment of funds from the defendants' customers to defendants. Plaintiff tendered $75,690.00 in consideration for the defendant entering into this agreement.

Plaintiff further alleged the individual defendants, Gerald Frantz Jules (Jules) and Charden Delismo (Delismo), personally guaranteed that the corporate defendant, Caribbean Linked Shipping, Inc. d/b/a Red Hook Shipping (RHS) would perform its obligations under the contract, and that the individual defendants would be personally liable for any loss suffered by plaintiff in the event of RHS's breach. Pursuant to the agreement, defendants agreed to have one bank account approved by plaintiff from which defendants authorized plaintiff to withdraw twelve percent (12%) of the defendants' account receivables, per day, until $107,479.80 was fully paid to plaintiff.

Plaintiff contended that defendant initially met its obligations under the agreement. Plaintiff alleged defendant subsequently breached by failing to direct its payments to plaintiff, blocking the specified bank account, failing to deposit its receivables into the agreed upon authorized account, selling and otherwise disposing its assets without the prior written consent of the plaintiff, and depositing its receivables into a bank account other than the agreed upon authorized account.

Plaintiff alleged that, pursuant to the terms of the agreement, additional fees were assessed in the amount of $2,500.00 as a result of defendant blocking its withdrawals from the specified bank account or defaulting on its obligations under the agreement, and $195.00 for the UCC lien on the defendants' inventory. Plaintiff also alleged that due to the defendants' failure

to maintain sufficient funds in the authorized bank accounts, plaintiff was charged $300.00 in insufficient funds charges, which the defendants are liable for pursuant to the agreement. In total, plaintiff alleged defendants owed $99,874.80, plus interest and attorneys fees as a result of their breach.

RHS's answer asserted as a defense that the merchant agreement is unenforceable. RHS alleged the agreement was actually a loan rather than an agreement to purchase receivables, and as such, is criminally usurious because calculations based on the agreement's repayment provisions establish the agreement actually imposed an annual interest rate of 54%. RHS also alleged that Jules and Delisme resigned from RHS on November 2, 2015, and were not authorized to enter into a contract on behalf of RHS. RHS alleged they fraudulently executed the loan documents and converted the funds for use in their company, Global Linked Shipping, LLC. RHS also alleged plaintiff had unclean hands, including its negligence in failing to verify the authority of the individual defendants to execute the instruments on behalf of the corporate defendant and in origination, execution, funding and administration of the loan. The counterclaims, on the same grounds, sought a declaratory judgment. Defendant conceded, to the extent it is granted summary judgment on its separate defenses, it consents to withdraw its counterclaims.

Plaintiff sought dismissal (MS 4) of all counterclaims and the following affirmative defenses asserted by RHS in its verified second amended answer: seventh (lack of in personam jurisdiction), eighth (unclean hands in origination, funding, and administration of the loan), eleventh (illegality – usury), and twelfth (illegality – acting as commercial lender without being duly licensed). Plaintiff argued RHS's seventh affirmative defense for lack of in personam jurisdiction lacks merit because RHS did not make a motion to dismiss within 60 days after

serving its answer to the complaint and there is no basis for a ruling that this Court lacks jurisdiction over a corporation duly authorized to do business in the State of New York with its principal office located in Kings County in the State of New York. Plaintiff further argued RHS's eighth, eleventh, and twelfth affirmative defenses and all of its counterclaims are premised on the argument that the transaction that is the subject of this action is a usurious loan and should be dismissed as they lack merit.

In seeking to dismiss an affirmative defense, a plaintiff may argue either that the pleaded defense is without merit as a matter of law since it does not apply under the factual circumstances of the case or that it fails to state a cognizable defense (*see e.g. Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018]). If there is any doubt regarding the availability of a defense, the court will give defendant the benefit of every reasonable inference from the pleading (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]).

CPLR 3211 (a) (8) states in relevant part that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction over the person of the defendant." CPLR 3211 (e) provides that an objection to service of process is waived if a motion to dismiss is not made within 60 days after raising the objection, stating that: an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

Here, RHS served its answer to the original complaint on October 6, 2016. RHS did not make a motion to dismiss within 60 days thereafter. Accordingly, any objection by RHS pursuant

to CPLR 3211 (a) (8) has been waived. The court further notes, RHS is a corporation duly authorized to do business in the State of New York, with its principal office located in Kings County in the State of New York, and has not demonstrated how this Court would lack jurisdiction over it or opposed this branch of plaintiff's motion. Accordingly, RHS's seventh affirmative defense for lack of in personam jurisdiction is dismissed.

Plaintiff also argued for dismissal of defendant's eighth (unclean hands in origination, funding, and administration of the loan), eleventh (illegality – usury), and twelfth (illegality – acting as commercial lender without being duly licensed) affirmative defenses and all of its counterclaims. As to defendant's eleventh affirmative defense (usury), *LG Funding, LLC v United Senior Props. of Olathe, LLC* (181 AD3d 664, 665 [2d Dept 2020]), a recent Second Department decision, provides concise guidance:

> "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020], quoting *Bank of N.Y. v Penalver*, 125 AD3d 796, 797 [2015] [internal quotation marks omitted]). "[I]f there is any doubt as to the availability of a defense, it should not be dismissed" (*LG Funding, LLC*, 181 AD3d at 665, quoting *Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2018]). Dismissal may be warranted under CPLR 3211 (a) (1) "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*LG Funding, LLC*, 181 AD3d at 665, quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). "When assessing a motion to dismiss a complaint or counterclaim . . . for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*LG Funding, LLC*, 181 AD3d at 665, quoting *V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 722 [2013]; *see* CPLR 3211 [a] [7]; *Dorce v Gluck*, 140 AD3d 1111, 1112 [2016]).
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> 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*, 181 AD3d at 665, citing *see Seidel v 18 E. 17th St. Owners*, 79 NY2d 735 [1992]; *Abir v Malky, Inc.*, 59 AD3d 646, 649 [2009]). To determine whether a transaction constitutes a usurious loan, it "must be 'considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to

> give it'" (*LG Funding, LLC*, 181 AD3d at 665, citing *Abir v Malky, Inc.*, 59 AD3d at 649, quoting *Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895 [2006] [internal quotation marks omitted]). The court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" (*LG Funding, LLC*, 181 AD3d at 665-666, quoting *K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 816 [Sup Ct, Westchester County 2017]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*LG Funding, LLC*, 181 AD3d at 665-666, citing *see Rubenstein v Small*, 273 App Div 102, 104 [1st Dept 1947]). Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (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*, 181 AD3d at 665-666, citing *see K9 Bytes, Inc.*, 56 Misc 3d at 816-819 [Sup Ct, Westchester County 2017]; *see also Funding Metrics, LLC v D & V Hospitality, Inc.*, 62 Misc 3d 966, 970 [Sup Ct, Westchester County 2019]).
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> Here, with respect to a reconciliation provision, the agreement provided that plaintiff

"may, upon [RHS's] request, adjust the amount of any payment due under this Agreement at LG's *sole discretion* and as it deems appropriate" (emphasis added). The agreement also contained provisions suggesting that RHS's obligation to repay was absolute and not contingent on its actual accounts receivable. In this regard, the agreement, pursuant to paragraphs 1.11, 2.8 and 3.1, provided that RHS's written admission of its inability to pay its debt or its bankruptcy constitute events of default under the agreement, which entitled the plaintiff to the immediate full repayment of any of the unpaid purchased amount (*see LG Funding, LLC*, 181 AD3d at 666, citing *cf. Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 207 [2018]). The agreement, pursuant to paragraph 2.8, further provided that in the event RHS filed for bankruptcy or is placed under an involuntary filing, plaintiff, pursuant to paragraph 1.11, would be entitled to enforce the provisions of the personal guaranty executed by Jules and Delisme, RHS would be required to deliver to plaintiff a confession of judgment in the amount of the purchased amount, and plaintiff would be allowed to enter the confession of judgment as a judgment. These provisions suggest that plaintiff did not assume the risk that RHS would have less-than-expected or no revenues (*see LG Funding, LLC*, 181 AD3d at 666). Accordingly,

plaintiff's motion, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the affirmative defense alleging that the transaction at issue is a criminally usurious loan is denied.

Plaintiff also argued for dismissal of RHS's eighth affirmative defense (unclean hands) on the ground that the defense was premised on the argument that the transaction which is the subject of this action is a usurious loan and therefore lacks merit. For the reasons previously stated, the Court finds this argument without merit and dismissal of this defense is denied.

RHS sought summary judgment on this affirmative defense, alleging plaintiff's claim is barred by plaintiff's unclean hands, including but not limited to, its failure to verify the authority of the individual defendants to execute the instruments for the corporate defendant and negligence in origination, execution, funding and administration of the loan. RHS argued that plaintiff's predatory lending practices and the bank fraud committed by Jules and Delisme establish its entitlement to summary judgment on this affirmative defense.

RHS proffered the August 11, 2018 affidavit of Jules to establish that he and Delisme acted without agency or authority to bind RHS. In this affidavit, Jules indicated that even after he and Delisme resigned from RHS, they not only retained access to RHS's account and password at TD Bank, but he was the only person that had access to the account. However, the August 24, 2018 affidavit of Lou Spano failed to address how or why Jules and Delisme were still in control of this bank account seven weeks after they resigned.

Under the doctrine of unclean hands, "one who has executed an agreement to perpetrate a fraud has 'forfeited his right, in law or equity, to protection or recourse in a dispute involving his accomplices in that very scheme'" (*Welch v Di Blasi*, 289 AD2d 964, 965 [4th Dept 2001], citing *Smith v Long*, 281 AD2d 897, 898 [4th Dept 2001], quoting *Ta Chun Wang v Chun Wong*, 163 AD2d 300, 302 [2d Dept 1990], *lv. denied* 77 NY2d 804, *cert denied* 501 US 1252]). Here,

questions of fact preclude summary judgment on this defense. Accordingly, RHS is denied summary judgment on its eighth affirmative defense.

Plaintiff also sought dismissal of RHS's twelfth affirmative defense (illegality – acting as a commercial lender without a license). The complaint alleged plaintiff was and still is a New York limited liability company with its principal office located in Kings County. However, no documentary evidence was proffered to rebut defendant's allegation that plaintiff acted as a lender without a license. Accordingly, dismissal of this affirmative defense is denied.

Defendant RHS sought summary Judgment (MS 5) on its First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh separate defenses set forth in its verified second amended answer to the first amended complaint and to dismiss plaintiff's amended complaint and this action with prejudice, and to amend its verified second amended answer to conform to proof the extent necessary in the within proceedings.

As an initial matter, RHS sought to conform its second verified answer to the proof to clarify the threshold interest rate at which a loan becomes criminally usurious. The second amended answer incorrectly stated an interest rate exceeding 24% is criminally usurious. Penal Law § 190.40 provides that interest "at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period" is criminally usurious. Plaintiff opposed this branch of RHS's motion on the ground that RHS failed to attach an amended pleading to its motion papers. CPLR 3025 (c) provides, "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise (*Bryant v Broadcast Music, Inc.*, 60 AD3d 799, 800 [2d Dept 2009], quoting *Alomia v New York City Tr. Authority*, 292 AD2d

403, 406 [2d Dept 2002]; *see Thailer v LaRocca*, 174 AD2d 731 [2d Dept 1991]). Here, RHS sought to conform its pleading to the statute, of which the Court may take judicial notice (CPLR 4511). Accordingly, as there is no prejudice to plaintiff, this branch of RHS's motion is granted.

RHS's eleventh affirmative defense alleged plaintiff's claim is barred by illegality as the interest on the loan was criminally usurious in violation of Penal Law § 190.40 and General Obligations Law § 511 and the loan is either facially void, or void as there were no "actual accounts receivable" "assigned." RHS argued the papers, called "accounts receivable loan," were used as a device and manipulation to conceal the predatory 52% interest rate, including imputed interest, and circumvent the usury statute.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

Here, defendant asserted the defense that the transaction was a loan and not a merchant agreement as alleged by plaintiff. Specifically, defendant alleged the terms of the contract demonstrate that this transaction was a loan as LG funding did not assume the appropriate risk associated with a merchant agreement. A loan, unlike a merchant agreement, is subject to the laws governing usury (*Seidel v 18 E. 17th St. Owners*, 79 NY2d at 744, citing General Obligations Law 5-501 [1], [2]; *see also LG Funding, LLC*, 181 AD3d at 665; *Abir v Malky, Inc.*,

59 AD3d 646, 649 [2009]). Accordingly, the documentary evidence, here, established that this transaction was a loan rather than a merchant agreement and, as a matter of law, is subject to the laws governing usury.

". . . [A] transaction is usurious under criminal law when it imposes an annual interest rate exceeding 25%" (*Venables v Sagona*, 85 AD3d 904, 905 [2d Dept 2011], quoting *Abir v Malky, Inc.*, 59 AD3d at 649 [citations omitted]). A usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon (*id.*). Here, defendant argued that this contract imposed a 52% interest rate on the loan in violation of the criminal usury laws and is therefore void.

In opposition, plaintiff failed to address the calculation of interest and raise a triable question of fact as to whether the loan imposed a criminally usurious interest rate or rebut defendant's contention with evidence in admissible form that no accounts receivable were assigned in consideration for the loan. Rather, plaintiff argued that

1) the subject transaction was a merchant cash advance, and not a loan, and therefore not usurious,

2) there are material issues of fact as to whether the individuals who signed the contract for RHS were authorized to do so,

3) summary judgment is premature because discovery has not yet been conducted,

4) leave should not be granted to amend the answer because the cross-motion is not accompanied by a proposed amendment, and

5) Louis Spano (Spano), the purported current president of RHS, was convicted of a felony for the botched burglary of a bank in Queens in 2007, and on June 4, 2018, Jules indicated to plaintiff's counsel that Spano threatened to have Jules killed if Jules would not cooperate with

Spano. Jules denied this interaction took place in a supplemental affidavit, dated October 22, 2018, and non-party witness Michael Stamatis attested to Spano's good character in an October 22, 2018 affidavit.

"On a motion for summary judgment, the court's function is to determine if a factual issue exists, and the court does not weigh the credibility of the affiants unless untruths are clearly apparent" (*French v Cliff's Place*, 125 AD2d 292, 293 [2d Dept 1986] [citations omitted]). Therefore, the Court finds there are questions of fact as to the credibility of the witnesses. However, the salient issue here is the terms of the contract. A contract for a criminally usurious loan, as here, is, as a matter of law, void and unenforceable (*see Venables v Sagona*, 85 AD3d at 905, quoting *Abir v Malky, Inc.*, 59 AD3d at 649 [citations omitted]). Accordingly, RHS is granted summary judgment on its eleventh affirmative defense and plaintiff's breach of contract claim is dismissed.

Plaintiff sought to dismiss RHS's three counterclaims which sought declaratory judgment. RHS alleged there was no contract between it and LG Funding as a result of defects in the loan documents and Jules and Delisme lacking corporate authority to bind RHS. RHS further alleged, to the extent there was an enforceable contract, LG Funding negligently breached a duty to the borrower in that it failed to investigate, properly and adequately conduct due diligence, originate, execute, and administer the loan in a manner in accordance with the standard of care in the commercial lending industry. Last, RHS alleged LG Funding breached the implied covenant of good faith and fair dealing. To the extent that these counterclaims arise from RHS's contract defenses and it was previously determined the plaintiff's breach of contract claim was dismissed, plaintiff's motion to dismiss is granted on the ground that these counterclaims are moot.

To the extent RHS's first, second, third, fourth, fifth and sixth affirmative defenses involve the actions of Jules and Delisme, summary judgment is denied. Jules and Delisme have not answered or appeared, although there is a motion by Jules for leave to interpose a late answer. Moreover, these allegations necessarily require credibility determinations, which is, in a case like this, the province of the trier of fact. Having neither argued it is entitled to summary judgment as a matter of law or eliminated questions of fact, RHS is denied summary judgment on its affirmative defenses numbered one through six.

Plaintiff's motion (MS 2), pursuant to CPLR 3215, sought entry of a default judgment in favor of plaintiff and against defendants, jointly and severally, in the sum of $99,874.80 with interest thereon from July 26, 2016, and plaintiff's attorney's fees in the sum of $24,968.70.

Plaintiff established defendant Delisme was served with the summons and complaint, pursuant to CPLR 308 (2), on September 20, 2016. The affidavit of service was filed on February 23, 2017. By Order entered on February 16, 2018, the Court deemed the late filing of the affidavit of service on Delisme timely nunc pro tunc. This order also granted plaintiff leave to file an amended complaint. The Order and notice of its entry was served on Defendants on March 26, 2018. The verified amended complaint was filed on March 26, 2018. On March 26, 2018, counsel for plaintiff served an additional copy of the summons by mail on defendant Delisme in accordance with the additional notice requirements of CPLR 3215 (g) (3). Plaintiff also submitted an affidavit of defendant Delisme's non-military status. The record demonstrates that defendant Delisme has failed to timely answer or appear. Accordingly, plaintiff's motion is granted to the extent the clerk shall enter a default judgment against defendant Delisme on the issue of liability. An inquest shall be held at the time of trial on the joint and several liability of defendants for damages.

Plaintiff's motion for a default against RHS is denied as moot based on Justice Wooten's August 8, 2018 order granting RHS's leave to file a late answer. Plaintiff's motion for default is also denied as moot as to defendant Gerald Frantz Jules, whose motion to vacate his default in filing a timely answer and for leave to file a late answer (MS 6) is granted.

In conclusion, plaintiff's motion for default judgment (MS 2) is granted to the extent the clerk shall enter a default judgment against defendant Delisme on the issue of liability with inquest at the time of trial on the joint and several liability of defendants for damages. Plaintiff's motion to dismiss (MS 4) is granted to the extent RSH's seventh affirmative defense is dismissed and the counterclaims are dismissed as moot. Defendant RHS's motion for summary judgment (MS 5) is granted to the extent RHS is granted summary judgment on its eleventh affirmative defense and plaintiff's breach of contract claim is dismissed. Defendant Jules' motion for leave to file a late answer (MS 6) is granted. Defendant Jules shall file his answer within 30 days of service of a copy of this order with notice of entry. Plaintiff shall serve a copy of this order with notice of entry on all parties within 10 days.

E N T E R:

RAB

Honorable Reginald A. Boddie
Justice, Supreme Court