Quicksilver Capital, LLC v All Around Off. Installation, LLC
2021 NY Slip Op 31929(U)
February 1, 2021
Supreme Court, Queens County
Docket Number: 709815/20
Judge: Robert I. Caloras
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice

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QUICKSILVER CAPITAL, LLC,
Plaintiff,

Index No. 709815/20
Seq. No. 1

-against-

ALL AROUND OFFICE INSTALLATION, LLC DBA ALL AROUND OFFICE INSTALLATION and WILLIAM THOMAS,
Defendants.

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The following papers numbered EF6 to EF21 read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211 [a][7], for failure to state a cause of action; pursuant to CPLR 3211[a][8], for lack of jurisdiction; and on the ground that the fees charged in the Merchant Agreement are excessive.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF6 - EF13
Answering Affidavits - Exhibits	EF14 -EF18
Reply Affidavits	EF19 -EF21

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

This is a breach of contract action. Plaintiff is engaged in the business of providing merchant cash advances. In or around December 9, 2019 in exchange for an upfront purchase price of $15,000.00 (the "Purchase Price"), Plaintiff purchased 11% of the Company Defendant's total future accounts receivables up to the sum of $21,450.00 (the "Purchased Amount") subject to various provisions contained within the Merchant Agreement including, but not limited to, guaranteed reconciliation and accompanying fees. Pursuant to the terms of the Merchant Agreement, the Company Defendant agreed to remit daily payments in the amount of $135.00 to Plaintiff, which was a good faith approximation of the specified percentage of Merchant's receivables. A guaranty was executed by Williams J. Thomas simultaneously with the Merchant Agreement. Defendant made payments totaling $5,400.00 leaving a balance of $16,050.00. In addition, pursuant to the Agreement, Company Defendant incurred NSF fees in the amount of $80.00, a default fee in the amount of $2,500.00, and a blocked account fee in the amount of $2,500.00. Despite due demand, Company Defendant has failed to pay the amounts due and owing by Company Defendant to Plaintiff under the Agreement. Additionally, Guarantor is responsible for all amounts incurred as a result of any default of the Company Defendant. On or about February 7, 2020, the Company Defendant defaulted under the Merchant Agreement by restraining Plaintiff from debiting any of the Merchants' accounts. There remains a balance due and owing to Plaintiff on the Agreement in the amount of $21,130.00 plus interest, costs, disbursements and attorney's fees. On July 10, 2020, Plaintiff commenced this action.

The complaint asserts four (4) causes of action: breach of contract; personal guarantee; unjust enrichment and conversion. In moving to dismiss the complaint, defendants contend that the causes of action are duplicative of one another. Specifically, defendants argue that the cause of action for conversion is duplicative of the cause of action for breach of contract. Defendants also argue that plaintiff may not proceed on a theory of unjust enrichment when there is a valid and enforceable contract governing the issue. Defendants also contend that the court lacks jurisdiction over them as an out of state company; and that the action should be dismissed because the fees charged by plaintiff are excessive. The motion is opposed by plaintiff.

Generally, the standard of review on a motion to dismiss, pursuant to CPLR §

3211(a)(7), is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzberg*, 43 NY2d 268, 274-75 [1977]). The Court of Appeals held in considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), our well-settled task is to determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" (*Campaign for Fiscal Equity, Inc. v State,* 86 NY2d 307, 318 [1995]).

The branch of the motion which is to dismiss the cause of action for unjust enrichment is granted. It is well settled under New York law that an unjust enrichment or *quantum meruit* claim may not be maintained where a valid, enforceable contract governs the subject matter in question (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] (unjust enrichment); *Sheiffer v Shenkman Capital Mgmt., Inc.*, 291 AD2d 295, 295 [1st Dept 2002] (quantum meruit). Here, there is clearly a contract governing the subject matter in question.

The branch of the motion which is to dismiss the cause of action for conversion is also granted. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [internal citation omitted]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Id.* [internal citations omitted]). Where, as here, the conversion claim pertains to money, "the funds must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Matter of Clark*, 146 AD3d 495, 496 [1st Dept 2017] [internal citation omitted]). "A cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]). Here, plaintiff's conversion claim "allege[s] no independent facts sufficient to give rise to tort liability" (*id.*) and, thus, is nothing more than a restatement of its breach of contract claim (*see Fesseha v TD Waterhouse Inv. Services, Inc.*, 305 AD2d 268, 269 [1st Dept 2003]; *Interstate Adjusters v First Fid. Bank,* 251 AD2d 232, 234 [1st Dept 1998]).

The branch of the motion which is to dismiss pursuant to CPLR 3211[a][8], on the ground of lack of jurisdiction is denied. Here, the Agreement between the parties contains the following provision "Seller [defendant] consents to the jurisdiction of the federal and state courts located in the State of New York…and waives any and all objections to jurisdiction and venue." The "very point" of forum selection clauses, which render the designated forum convenient as a matter of law, is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute (CPLR 302 [a]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 397-398 [1st Dept 1996]; *and see VOR Assoc. v Ontario Aircraft Sales & Leasing*, 198 AD2d 638, 639 [3d Dept 1993]), and it is the well-settled "policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum

for litigation" (*Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]; *see also Boss v American Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005], *affd* 6 NY3d 242 [2006]). Forum selection clauses, which are prima facie valid (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Koko Contr. v Continental Envtl. Asbestos Removal Corp.*, 272 AD2d 585, 586 [2d Dept 2000]), are enforced "because they provide certainty and predictability in the resolution of disputes" (*Brooke Group*, *supra*; *see also Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006]), and are not to be set aside unless a party demonstrates that the enforcement of such "would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court" (*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991]; *see also Boss*, 15 AD3d at 307-308).

In the matter at bar, defendants have failed to advance any grounds upon which this Court might disregard the forum designation contained in the Agreement. The forum selection clause itself clearly provides that the parties consent to jurisdiction in New York. Moreover, defendants have not alleged any fraud or overreaching, on the part of plaintiff, with respect to the provision itself (*British W. Indies Guar. Trust Co.*, *supra*; *Di Ruocco v Flamingo Beach Hotel & Casino*, 163 AD2d 270, 271-272 [2d Dept 1990]), and there has been no demonstration that defendants, if the provision is enforced, would, for all practical purposes, be deprived of their day in court. Indeed, defendant company, a sophisticated business entity, agreed when it originally entered into the Agreement that venue would be placed in New York and, in this court's view, cannot now be heard to argue that venue in New York, is so oppressive as to warrant rendering the provision void. Finally, where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on forum non conveniens grounds (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 232 [1st Dept 1999]; *Concord Assets Fin. Corp. v Radebaugh*, 172 AD2d 446, 448 [1st Dept 1991]. Defendants, in any event, have failed to shoulder their burden of demonstrating that New York is an inconvenient forum (*Sterling Nat. Bank as Assignee of NorVergence, Inc. v E. Shipping Worldwide, Inc.*, 35 AD3d 222, 222-23 [1st Dept 2006]; *see generally Continental Ins. Co. v Garlock Sealing Tech., LLC*, 23 AD3d 287 [1st Dept 2005]; *Korea Exch. Bank v A.A. Trading Co.*, 8 AD3d 344 [2d Dept 2004]).

Finally, defendants contend, without citing any legal or factual support, that the complaint should be dismissed on the ground that the two $2500 fees charged in the Agreement are excessive. While it is not clear from defendants' submissions whether they are claiming usury in this case, the court finds no other ground under which the Agreement *might* be unlawful based upon its fees.

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 (*Seidel v 18 E. 17th St. Owners, Inc.*, 79 NY2d 735 [1992];*Feinberg v Old Vestal Rd. Assoc., Inc.*, 157 AD2d 1002 [3d Dept. 1990]; *Colonial Funding Network, Inc.for TVT Capital, LLC v Epazz*, Inc., 252 F.Supp.3d 274 [SDNY 2017];

IBIS Capital Group, LLC v Four Paws Orlando, LLC, 2017 NY Slip Op. 30477(U)[Sup.Ct., Nassau County 2017]; *Merchant Cash and Capital, LLC v Sogomonyan*, 2017 NY Slip Op. 31111 [Sup. Ct., Nassau County 2017]).

"In New York, there is a presumption that a transaction is not usurious. As a result, claims of usury must be proven by clear and convincing evidence, a much higher standard than the usual preponderance" (*K9 Bytes, Inc.v Arch Capital Funding, LLC,* 56 Misc 3d 807 [Sup. Ct., Westchester Co. 2017]; *see Giventer v Arnow*, 37 NY2d 305, 309 [1975]). Usury will not be presumed from facts equally consistent with a lawful purpose (*Merchant Cash and Capital, LLC v Transfer International Inc.*, 2016 NY Slip Op. 32395 [Sup. Ct., Nassau County 2016];*Kaufman v Horowitz*, 178 AD2d 632 [2d Dept 1991]).

Usury laws therefore apply only to loans or forbearance, not investments. Of import, if the transaction is not a loan, there can be no usury, however unconscionable the contract may be (*Rabid Capital Finance, LLC v Natures Market Corp.*, 57 Misc 3d 979 [Sup. Ct., Westchester County 2017];*Seidel v 18 E. 17th St. Owners*, *supra*; *K9 Bytes, Inc.v Arch Capital Funding, LLC, supra*; *IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra*). In determining whether a transaction is usurious, the law looks not to its form, but to its substance, or real character (*see IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra; Min Capital Corp. Retirement Trust v Pavlin, supra*).

Importantly, purchases and sales of future receivables and sales proceeds such as alleged to be present here are common commercial transactions expressly contemplated by the Uniform Commercial Code (*Rapid Capital Finance, LLC v Natures Market Corp., supra; K9 Bytes, Inc.v Arch Capital Funding, LLC, supra; IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra*). Moreover, a number of trial-level decisions have considered and rejected arguments that agreements to purchase receivables and sales proceeds were loans *(see, e.g., Rapid Capital Finance, LLC v Natures Market Corp., supra; K9 Bytes, Inc.v Arch Capital Funding, LLC, supra; IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra; Merchant Cash & Capital, LLC v Yehowa Med. Servs., Inc.*, 2016 NY Slip Op. 31590[U] [Sup.Ct., Nassau County 2016]; *Merchant Cash & Capital, LLC v Ethnicity Inc.*, 2016 NY Slip Op. 32593(U) [Sup.Ct., Nassau County 2016]).

As previously stated, in determining whether a transaction is usurious, the law looks not to its form, but to its substance, or real character (*see Min Capital Corp. Retirement Trust v Pavlin, supra*; *IBIS Capital Group LLC v Four Paws Orlando, LLC, supra*). It is not dispositive, therefore, that an Agreement is not called a loan and that it affirmatively states that it is not a loan (*Rapid Capital Finance, LLC v Natures Market Corp., supra*), although a clause in a document expressly providing that the document is not a loan is relevant to the deciphering of the true nature of the agreement (*K9 Bytes, Inc.v Arch Capital Funding, LLC, supra; see IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra*).

Moreover, when evaluating whether a transaction is a loan or not, the court must examine, among other things, whether or not plaintiff is absolutely entitled to repayment under all circumstances. "For a true loan it is essential to provide for repayment absolutely and at all

events or that the principals in some way be secured as distinguished from being put in a hazard" (*K9 Bytes, Inc.v Arch Capital Funding, LLC, supra, quoting, Rubenstein v Small,* 273 App Div 102, 104 [1st Dept 1947]). Hence, there can be no usury unless the principal sum advanced is repayable absolutely (*K9 Bytes, Inc.v Arch Capital Funding, LLC, supra*; *IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra; Transmedia Rest. Co. v 33 E. 61st St. Rest. Corp.,* 184 Misc 2d 706, 711 [Sup. Ct., New York County 2000]).

When payment or enforcement rests on a contingency, therefore, the agreement is valid though it provides for a return in excess of the legal rate of interest (*see Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.,* 35 Misc 3d 1205(A) [Sup. Ct., Suffolk County 2012];*Colonial Funding Network, Inc.for TVT Capital, LLC v Epazz, Inc., supra*). Further, a loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest *(Lehman v Roseanne Inv'rs Corp.,* 106 AD2d 617 [2d Dept 1984];*Colonial Funding Network, Inc.for TVT Capital, LLC v Epazz, Inc., supra*).

Courts examine certain factors in determining whether repayment is absolute or contingent. Recent decisions on the issue have focused on the court weighing, among other things, whether the contract has a reconciliation provision, a finite term and the purchaser is granted recourse in the event of a Bankruptcy (*see e.g. Rapid Capital Finance, LLC v Natures Market Corp., supra; K9 Bytes, Inc.v Arch Capital Funding, LLC, supra; IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra*).

Having weighed all of the above cited factors and applying the legal principles set forth herein, the court finds that plaintiff has demonstrated that: under the Agreement and the Guaranty, repayment is not absolute; the transaction is sufficiently risky such that it cannot be considered a loan as a matter of law (*K9 Bytes, Inc.v Arch Capital Funding, LLC, supra*). Here, the Merchant Agreement is labeled a "purchase and sale" agreement, contains a reconciliation provision and is of an indefinite term. In light of these factors, the court finds the risk of loss such that the transaction is not a loan, but is for the sale and purchase of accounts receivables as a matter of law(*Merchant Cash and Capital, LLC v Sogomonyan, supra; K9 Bytes, Inc.v Arch Capital Funding, LLC, supra; Rapid Capital Finance, LLC v Natures Market Corp., supra; IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra; Merchant Cash and Capital, LLC v Transfer International Inc., supra; Merchant Cash and Capital, LLC v Liberation Land Co.,LLC,* 2016 NY Slip Op. 32589[U] [Sup. Ct., Nassau County 2016]; *Merchant Cash and Capital, LLC* v *Wett Plumbing, LLC*, 55 Misc 3d 1220(A) [Sup. Ct., Nassau County 2017];*Merchant Cash & Capital, LLC v Yehowa Med. Servs., Inc., supra*).

Accordingly, the branch of the motion which is to dismiss the complaint on the ground that the fees are excessive, is denied (*Merchant Cash and Capital, LLC v Sogomonyan, supra*).

Conclusion

The branch of the motion which is to dismiss the unjust enrichment cause of action is granted.

The branch of the motion which is to dismiss the conversion cause of action is granted.

The branch of the motion which is to dismiss the complaint on the ground of lack of jurisdiction is denied.

The branch of the motion which is to dismiss the complaint on the ground that the fees charged in the Merchant Agreement are excessive, is denied.

DATED: February 1, 2021

ROBERT I. CALORAS, J.S.C.

FILED
2/2/2021
3:26 PM
COUNTY CLERK
QUEENS COUNTY