110% Effort, 1000% of the Time LLC v High Roller Rentals LLC
2021 NY Slip Op 32678(U)
December 13, 2021
Supreme Court, Kings County
Docket Number: Index No. 508032/2021
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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110% EFFORT, 1000% OF THE TIME LLC,

Plaintiff,

-against-

HIGH ROLLER RENTALS LLC and WILLIAM CASEY PENN,

Defendants.
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Index No.: 508032/2021
Motion Date: 9-20-21
Mot. Seq. No.: 1

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 12-26, the motion is decided as follows:

In this breach of contract action, defendants HIGH ROLLER RENTALS LLC ("High Roller") and WILLIAM CASEY PENN move for an order pursuant to CPLR 3211(a)(1) dismissing the two causes of action alleged in the Verified Complaint on the ground that the agreement between the parties is unenforceable as a matter of law because it requires payment of criminally usurious interest.

Background:

The parties entered into a contract on January 30, 2020 whereby High Roller agreed to sell and the plaintiff agreed to buy $129,000.00 worth of High Roller's future receivables (the "Purchase Agreement"). The purchase price for High Roller's future receivables was $100,000. Defendant Penn personally guaranteed defendant High Roller's obligations under the Purchase Agreement.

The Purchase Agreement obligated High Roller to deposit all of its receipts into a designated bank account and authorized the plaintiff permission debit and retain 12% of all future receipts until the sum of $129,000.00 was paid back to the plaintiff. Specifically, the Purchase Agreement provided:

> Seller hereby authorizes 110 to initiate electronic checks or ACH debits from the Approved Bank Account (which as of the Effective Date of this Agreement shall be the account listed on Appendix A

> hereto) in the amount of the Initial Daily Installment on each Workday commencing on the Effective Date until 110 receives the full Purchased Amount. Seller shall provide 110 with all access code(s) for the Approved Bank Account.

The Purchase Agreement further provided that:

> Seller shall not change its Approved Processor, add terminals, change its Approved Bank Account(s) or take any other action that could have any adverse effect upon Seller's obligations or impede 110's rights under this Agreement, without 110's prior written consent.

A default occurs under the Purchase Agreement includes when:

> Merchant shall close its depositing account used for ACH debits without the prior written consent of 110.

Plaintiff alleges that High Roller breached the Purchase Agreement on April 3, 2020 by changing the designated bank account without its authorization. Defendant now moves to dismiss plaintiff's Verified Complaint claiming that Purchase Agreement was in actuality a criminally usurious loan and is therefore unenforceable under NY Gen Oblig. Law § 5-521.

Discussion:

"A transaction ... is usurious under criminal law when it imposes an annual interest rate exceeding 25%" (*Abir v. Malky, Inc.*, 59 A.D.3d 646, 649, 873 N.Y.S.2d 350; *see* Penal Law § 190.40). General Obligations Law § 5–521 bars a corporation such as the plaintiff from asserting usury in any action, except in the case of criminal usury as defined in Penal Law § 190.40, and then only as a defense to an action to recover repayment of a loan, and not as the basis for a cause of action asserted by the corporation for affirmative relief (*see Paycation Travel, Inc. v. Glob. Merch. Cash, Inc.*, 192 A.D.3d 1040, 141 N.Y.S.3d 319, 320; *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309; *Intima–Eighteen, Inc. v. Schreiber Co.*, 172 A.D.2d 456, 457, 568 N.Y.S.2d 802).

As the Appellate Division, Second Department recently stated in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312:

> 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 (*see Seidel v. 18 E. 17th St. Owners*, 79 N.Y.2d 735, 586 N.Y.S.2d 240, 598 N.E.2d 7; *Abir v. Malky, Inc.*, 59 A.D.3d 646, 649, 873 N.Y.S.2d 350). 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' " (*Abir v. Malky, Inc.*, 59 A.D.3d at 649, 873 N.Y.S.2d 350, quoting *Ujueta v. Euro–Quest Corp.*, 29 A.D.3d 895, 895, 814 N.Y.S.2d 551 [internal quotation marks omitted]). The court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" (*K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807, 816, 57 N.Y.S.3d 625 [Sup. Ct. Westchester County]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v. Small*, 273 App.Div. 102, 75 N.Y.S.2d 483). 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 (*see K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d at 816–819, 57 N.Y.S.3d 625; *see also Funding Metrics, LLC v D & V Hospitality, Inc.*, 62 Misc.3d 966, 91 N.Y.S.3d 678, 970 [Sup. Ct. Westchester County]).

Applying these three factors, the Court concludes that the Purchase Agreement was not a loan. With respect to the first factor, plaintiff entitlement to repayment was not absolute and was contingent upon several factors. Paragraph 16(b) provides in relevant part:

> Furthermore, 110 hereby acknowledges and agrees that Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations exclusively due to the following reasons (collectively, the "Valid Excuses"):
>
> i. adverse business conditions that occurred for reasons outside Seller's control and not due to Seller's willful or negligent mishandling of its business;
> ii. ii. loss of the premises where the business operates (but not due to Seller's breach of its obligations to its landlord), provided however that Seller does not continue and/or resume business operations at another location;
> iii. bankruptcy of Seller; and/or
> iv. iv. natural disasters or similar occurrences beyond Seller's control.

With respect to the second factor, paragraph 1[c], in relevant part, provides:

> Seller and 110 further agree that, based upon the information provided by Seller to 110 concerning Seller's most recent accounts receivables, including representations by the Seller to 110 regarding the Seller's estimated Future Receipts, and subject to Seller's right of adjustment/reconciliation set forth in this Agreement, as of the Effective Date the Initial Daily Installment shall be $ 511.91.

The fact that High Roller has no right of adjustment/reconciliation of this amount under the Purchase Agreement militates in favor of deeming the transaction a loan. However, this is just one of the three factors that must be weighed in determining the true nature of the transaction at issue.

With respect to the third factor, High Roller's obligations under the Purchase Agreement terminate if High Roller is declared bankrupt (Paragraph 16(b)(iii)). In other works, bankruptcy is not a default under the Purchase Agreement, entitling plaintiff to an immediate judgment against High Roller.

Based upon careful review of the Purchase Agreement, particularly the above-mentioned language reflecting that the plaintiff's entitlement to repayment was not absolute and was contingent upon several factor (see *also Colonial Funding Network, Inc. for TVT Capital, LLC v Epazz, Inc.*, 252 F Supp 3d 274, 283 [SDNY 2017]; *see also K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d at 816), the Court concludes that the agreement is not a loan and is therefore not subject it to New York's usury statutes because "[i]t is well established that there can be no usury in the absence of a loan ..." (*Donatelli v Siskind*, 170 AD2d 433, 434; *see also Transmedia Rest. Co., Inc. v 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706, 710).

Accordingly, it is hereby

ORDRED that defendants' motion to dismiss the Verified Complaint is **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 13, 2021

PETER P. SWEENEY, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020