SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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LAW BUCKS, LLC,

Plaintiff,

- v -

MONACO & MONACO, LLP, THERESA GUSS, AIRMONT ASSOCIATES, LLC

Defendant.

INDEX NO. 654987/2017

MOTION DATE 01/17/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 97, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for DISMISSAL

Defendants Monaco & Monaco, LLP, Theresa Guss[1], Airmont Associates, LLC (collectively "Defendants") move to dismiss the Complaint in its entirety with prejudice pursuant to CPLR §§3211(a)(1) and (7) because Plaintiff Law Bucks' alleged and purported contracts, on their face, are unenforceable as a matter of law on a variety of grounds including unconscionability, violative of General Business Law §349 as deceptive, impossibility, and ambiguity. They further argue that any of these grounds standing alone is sufficient to support a Judgment dismissing Law Bucks' action in its entirety.

[1] Ms. Guss passed away on January 18, 2018 and Marc Mueller as Administrator of the Estate of Theresa Guss, has been substituted as defendant for Ms. Guss.

In opposition, Plaintiff contends that the funding agreements are enforceable and valid. Plaintiff further cross moves to have Monaco & Monaco LLP disqualified as counsel for Ms. Guss.

Background

The Attorney General has raised concerns that companies that specialize in providing cash advances, generally $1,000 to $7,000, to consumers with pending personal injury litigation could exploit consumers due to the complex nature of the transactions (*see* ag.ny.gov/press-release/2005, "Personal Injury Cash Advance Firms Agree To Reforms"). In exchange for the funds, these companies obtain the right to receive a share of the claim proceeds, an amount which significantly exceeds the advance. The Attorney General and these personal injury cash advance firms have agreed to specific requirements that must be present in all agreements to protect consumers (*see also* NYSCEF Doc. No. 32).

Factual Allegations

On November 5, 2005 Ms. Guss was seriously injured when she stepped in a large, rectangular, deep hole while exiting a taxicab in front of 116 and 118 Ainslie Street, Brooklyn. New York City Department of Environmental Protection had excavated in the area approximately six weeks prior to Ms. Guss's injury. Ms. Guss sustained a fractured hip as a result of the fall. The case was tried before a Kings County Jury, and on June 11, 2013, a jury verdict was rendered in favor of Ms. Guss and against the City of New York in the amount of $2,798,500.00, of which $2,025,600.00 was for future medical costs. Due to her poor health, Ms. Guss was unable to testify or appear at the trial. On February 1, 2017, liability was upheld on appeal to the Second Department, but future medical costs were reduced to $681,600.00. On

March 15, 2017, Ms. Guss and the City of New York orally settled the case for $2,100,000.00 with a reduction of the Medicaid lien to $137,426.00.

On or about February 19, 2017, PIF Portfolio Acquisition I, LLC d/b/a MFL CaseFunding (herein "CaseFunding") contacted Defendants' counsel claiming a lien in the amount of $2,838,487.65 for two loans of $1500.00 and $2500.00, allegedly made on February 3, 2006 and February 21, 2006. Ms. Guss was represented by another attorney at that time. On May 18, 2017, Defendants' counsel was notified by CaseFunding that it was assigning any rights it had to the nominal defendant, Airmont. Prior to the execution of formal settlement documents, on June 22, 2017, Plaintiff Law Bucks contacted Defendants' counsel and the City of New York by letter, Supreme Kings Index number 8353-2006, and alleged that Law Bucks was owed an amount in excess of the 2.1 million dollar settlement for three alleged loans totaling $16,816.77 ($11,186.77 on July 5, 2007, $2815.00 on August 14, 2007 and $2815.00 on September 12, 2007).

On July 18, 2017 Airmont e-filed the previously mentioned action in New York County under Index Number 654858-2017, and on July 24, 2017, Law Bucks e-filed the present action.

Ms. Guss became bedridden in 2012 and resided in a nursing home until entering hospice and passing away on January 18, 2018.

The Funding Agreements

Plaintiff contends that on or about July 5, 2007, Plaintiff's employee Marvin Blue met with Ms. Guss and her counsel Antonio Monaco, Esq. at Monaco's office and provided the Funding Agreement (hereinafter "Funding Agreement #1) to them for review, along with an Attorney Security Interest Payment and Acknowledgement (hereinafter "Attorney Agreement #1). (NYSCEF Doc. No. 67; ¶¶3-11). Mr. Blue states that he had previously dealt with Antonio

Monaco, Esq. regarding various other clients of Monaco that had obtained monetary advances from Plaintiff and therefore, Mr. Blue claims that Monaco was generally familiar with Plaintiff's form agreements. (*Id.* at ¶6). At the meeting Ms. Guss signed Funding Agreement #1, and both Ms. Guss and Antonio Monaco signed Attorney Agreement #1. (*Id.* at ¶¶7-8).

Per the terms and conditions of Funding Agreement #1, Ms. Guss accepted the total sum of $11,186.77 (hereinafter referred to as "Advance #1") from Plaintiff. (NYSCEF Doc. No. 31 at ¶9; and see Exhibit 1 to Verified Complaint, Funding Agreement #1, ¶1). Advance #1 is comprised of net advance proceeds of $10,621.77, together with an application fee and a case monitoring fee. (NYSCEF Doc. No. 31 at ¶10). Plaintiff contends that as directed by Ms. Guss, $7,621.77 of Advance #1 was used to pay off amounts that Ms. Guss owed to a company that had previously provided Ms. Guss with funds. (*Id.* at ¶11). The remaining amount of the net advance, $3,000, was paid to Ms. Guss on July 5, 2007, the time that Ms. Guss executed Funding Agreement #1. (*Id.* at ¶12; see also NYSCEF Doc. No. 67 at ¶11).

An additional agreement, titled "Attorney Security Interest and Payment Acknowledgment" (herein "Attorney Agreement #1") was also executed by, or on behalf of Defendant Monaco on July 5, 2007 (NYSCEF Doc. No. 31 at ¶41).

On or about August 14, 2007, Ms. Guss entered into a second Funding Agreement with Plaintiff (herein "Funding Agreement #2") (*Id.* at ¶55). Per Funding Agreement #2, Ms. Guss accepted the total sum of $2,815 (herein "Advance #2") from Plaintiff (Id. at 57). Advance #2 is comprised of net advance proceeds of $2,500 together with an application fee and a case monitoring fee (Id. at 58). An additional agreement, titled "Attorney Security Interest and Payment Acknowledgment" (herein "Attorney Agreement #2") was also executed by or on behalf of Defendant Monaco on August 14, 2007 (NYSCEF Doc. No. 31 at ¶66).

On or about September 12, 2007, Ms. Guss entered into a third Funding Agreement with Plaintiff (herein "Funding Agreement #3") (*Id.* at ¶72). Per the terms and conditions of Funding Agreement #3, Ms. Guss accepted the total sum of $2,815 from Plaintiff, which is comprised of net advance proceeds of $2,500 together with an application fee and a case monitoring fee (*Id.* at ¶74-75). An additional agreement, titled "Attorney Security Interest and Payment Acknowledgment" (herein "Attorney Agreement #3") was also executed by or on behalf of Defendant Monaco on September 12, 2007 (NYSCEF Doc. No. 31 at ¶83).

All three Funding Agreements and Attorney Agreements contained identical terms. Paragraph 2 of each document states as follows:

> 2. Use fee. In consideration of the Advance to be made to me under this Funding Agreement and the risks that Law Bucks will assume, I agree to pay to Law Bucks a use fee in an amount equal to 5.9% monthly of the total amount of the Advance (the "Use Fee"). I understand that the Use Fee will compound monthly. (NYSCEF Doc. No. 31 at ¶2).

Paragraph 5 of the Funding Agreements sets forth the following:

> Obligation to be Paid Only Out of Claim Proceeds; No Personal Liability. Until there are Claim Proceeds, I will not owe anything to Law Bucks. If I do not recover any money from the Claim, I will not owe Law Bucks anything. If the Claim Proceeds are insufficient to pay the full amount of the Obligation, Law Bucks' recovery will be limited to the Claim Proceeds and I will not have any obligation to pay the deficiency to Law Bucks. (NYSCEF Doc. No. 31, ¶5).

Paragraph 14 of the agreements states that "Law Bucks is in no way acquiring my right to sue, either in connection with the Claim or otherwise, and that I am not assigning my cause of action, but only a portion of the Claim Proceeds from the Claim". (NYSCEF Doc. No. 31 at ¶14). Further, the "Disclosure Statement" attached to each of the three agreements states an

interest rate of 5.9%, but does not specify whether that is the monthly or annual interest rate (*Id.*).

Paragraph 22 of the funding agreements states,

> Consider Other Sources of Funding. I have been advised that I should not accept the Advance, assign an interest in the Claim Proceeds, or grant the Security Interest as setforth in this Funding Agreement if I have alternative means to meet my immediate economic needs, and that Law Bucks is a source of capital of last resort. (NYSCEF Doc. 31, ¶22).

Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that "conclusory allegations fail"]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a complaint should be dismissed pursuant to §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" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes*

Depot, 97 NY2d 46, 54 [2001][motion must be denied if "from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]; *see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]).

Defendants contend that Plaintiff's alleged contracts on their face are unenforceable as a matter of law on a variety of grounds such as unconscionability, violative of General Business Law §349 as deceptive, impossibility, and ambiguity any of which standing alone is sufficient to support a Judgment of dismissal with prejudice. In opposition, Plaintiff argues that the funding agreements are valid and enforceable, and that Defendants must provide payment pursuant to the funding agreements' terms.

General Business Law §349

General Business Law §349 prohibits consumer-oriented deceptive practices (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24-25 [1995]). The statute, "much like its federal counterpart, the Federal Trade Commission Act (15 USC § 45), is intentionally broad, applying 'to virtually all economic activity' " (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 323-24 [2002]). To give rise to liability, "the allegedly deceptive acts, representations or omissions must be misleading to 'a reasonable consumer' " (*id.* at 324; *see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 345 [1999]). A "private contract dispute," however, does not "affect the consuming public at large, and therefore falls

outside the purview of (GBL) §349" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 309 [2017]). Moreover, "to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York" (*id.* at 325).

Further, consumer-oriented conduct does not require a repetition or pattern of deceptive behavior, nor does it require recurring conduct. However, the acts or practices must have a broader impact on consumers at large (*Benetech, Inc. v Omni Fin. Group, Inc.*, 116 AD3d 1190, 1190 [2014]. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute (*see, e.g., Genesco Entertainment v Koch*, 593 F Supp 743, 752 [1984]).

Defendants argue that Law Buck's failure to clearly state an Annual Percentage Rate of Return is designed to deceive consumers as it purposefully lists 5.9% as the interest rate, as opposed to an annualized interest rate. In opposition, Plaintiff contends that no reasonable consumer could assert that from a review of the repayment schedule contained in the Funding Agreements he or she believed that the yearly interest rate was 5.9%. Defendants have not met their burden to demonstrate that the funding agreements were sufficiently consumer-oriented in their impact to fall under GBL ¶349.

Unconscionability

"[A]t common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other" (*King v Fox*, 7 NY3d 181, 191 [2006]; *B.D. Est. Plan. Corp. v Trachtenberg*, 114 AD3d 477, 478, 980 NYS2d 90 [2014]). The Court in *Gillman v Chase Manhattan Bank* (73 NY2d 1, 10-11, 12 [1988]) defines an unconscionable agreement stating:

> An unconscionable contract has been defined as one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms. (Citation omitted.) (Citation omitted.)

> The doctrine, which is rooted in equitable principles, is a flexible one and the concept of unconscionability is intended to be sensitive to the realities and nuances of the bargaining process (*Matter of State of New York v Avco Fin. Serv.*, 50 NY2d 383, 389-390 [1980]). A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made-- i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (citation omitted). (Citations omitted.)

Procedural and substantive unconscionability operate on a sliding scale in that the heavier the substantive unconscionability is, the less procedural unconscionability is needed for the agreement to be held unconscionable (*Simar Holding v GSC*, 87 AD3d 688, 690, 928 NYS2d 592, 595 [2d Dept 2011]).

Defendants contend that the funding agreements are unconscionable, arguing that a person would have to be delusional to accept a "$16,816.77 loan in 2007 knowing payoff would far exceed a 2.1-million-dollar settlement made in February 2017." Defendants further argue that there was no meaningful choice on the part of Ms. Guss as paragraph 22 of the funding agreements states,

> Consider Other Sources of Funding. I have been advised that I should not accept the Advance, assign an interest in the Claim Proceeds, or grant the Security Interest as setforth in this Funding Agreement if I have alternative means to meet my immediate economic needs, and that Law Bucks is a source of capital of last resort. (NYSCEF Doc. 31, ¶22).

Defendants have not sufficiently demonstrated that the funding agreements are unconscionable.

Impossibility

Defendants contend that performance under the funding agreements is impossible and accordingly, performance under the funding agreements must be excused. Defendants maintain

that the settlement of Ms. Guss's personal injury case for approximately $2.1 million, which is less than the amount Plaintiff is asserting is due under the agreements, was an unforeseen event that the parties could not have anticipated in 2007 when entering into the funding agreements.

Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract (*see Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 519 NE2d 295, 296 [1987]). Defendants' contentions as to impossibility are unpersuasive and insufficient to support their motion to dismiss.

Ambiguity

"A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings' " (*Feldman v National Westminster Bank*, 303 AD2d 271, 760 NYS2d 3 [2003], *lv. denied* 100 NY2d 505, 763 NYS2d 811 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (Ruttenberg v Davidge Data Sys. Corp., 215 AD2d 191, 193, 626 NYS2d 174 [1995]; *New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177–78, 809 NYS2d 70, 73 [2006]).

Defendants contend that the funding agreements are ambiguous because paragraph 2 states:

> Use fee. In consideration of the Advance to be made to me under this Funding Agreement and the risks that Law Bucks will assume, I agree to pay to Law Bucks a use fee in an amount equal to 5.9% monthly **of the total amount of the Advance** (the "Use Fee"). I understand that the Use Fee will compound monthly. (emphasis added) (NYSCEF Doc. 31, ¶2).

Paragraph 5 of the Funding Agreements sets forth the following:

> Obligation to be Paid Only Out of Claim Proceeds; No Personal Liability. Until there are Claim Proceeds, I will not owe anything to Law Bucks. If I do not recover any money from the Claim, I will not owe Law Bucks anything. If the Claim Proceeds are insufficient to pay the full amount of the Obligation, Law Bucks' recovery will be limited to the Claim Proceeds and I will not have any obligation to pay the deficiency to Law Bucks. (NYSCEF Doc. No. 31, ¶5).

Paragraph 14 of the funding agreements states that "Law Bucks is in no way acquiring my right to sue, either in connection with the Claim or otherwise, and that I am not assigning my cause of action, but **only a portion of the Claim Proceeds** from the Claim". (emphasis added) (NYSCEF Doc, 31, ¶14). Despite Defendants' arguments, the use of the terms "total" and "portion" in conjunction with paragraph 5 do not create ambiguity sufficient to invalidate the funding agreements.

Further, Defendants contend that the disclosure statements attached to each funding agreement state an interest rate of 5.9%, but do not specify whether that rate is monthly or annual. In opposition, Plaintiff argues that no reasonable person could view the amounts listed in the disclosure statement and think that the 5.9% was a monthly interest rate, or that the amounts stated in the disclosure statement are a cap to repayment amounts that could be due under the contract. Defendants have not demonstrated that the terms of the contract are ambiguous and accordingly, the motion to dismiss is denied.

Cross Motion

Plaintiff cross moves to disqualify Monaco from representing Ms. Guss because Antonio Monaco, Esq. (Monaco's principal), and possibly other employees of the Monaco firm, will be witnesses in the instant action.

The Rules of Professional Conduct, 22 N.Y.C.R.R. §1200.0 prohibit an attorney who expects to be a witness on a significant factual issue in the case, or that attorney's firm, from acting as counsel for a party to the action. Rule 3.7 of the New York Rules of Professional Conduct states as follows:

> Rule 3.7: Lawyer as witness.
> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that
> substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.
>
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Movant must meet a heavy burden of establishing that testimony of the subject attorney would be both necessary and prejudicial to defendants (*see Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013]; *Dishi v Federal Ins. Co.*, 112 AD3d 484 [1st Dept 2013]; *Orbco Advisors LLC v 400 Fifth Realty LLC*, 134 AD3d 448, 19 NYS3d 745 [2015]). Testimony may be relevant and even highly useful, but that alone does not raise to the level of strictly necessary (*see Kim v New York Group For Plastic Surgery, LLP*, No. 158068/2014, 2015 WL 400188 [2015]). Further, disqualification of an attorney based upon Rule

3.7 rests within the sound discretion of the trial court (*see Gould v Decolator*, 131 AD3d 448, 15 NYS3d 145 [2nd Dept 2015]).

Plaintiff has failed to identify specific issues requiring employees of the Monaco firm to testify or to demonstrate the significance of the matters such employees would testify to, the weight of such testimony, and the unavailability of other sources of such evidence (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445-446 [1987]; *Campbell v McKeon*, 75 AD3d 479, 481, 905 NYS2d 589 [2010]). Accordingly, Plaintiff's motion is denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the cross motion to disqualify is denied.

10/21/2021
DATE

SHAWN KELLY, J.S.C.
HON. SHAWN T. KELLY
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE