SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

BANK OF AMERICA, N.A.,

Plaintiff, Decision and order

- against - Index No. 518380/2021

DOLLAR PHONE CORP., MOSES GREENFIELD, DOLLAR PHONE ENTERPRISE, INC., GLOBAL SWITCHING, INC., DPE LABEL HOLDING CORP., DOLLAR PHONE SERVICES, INC. and PINMONSTER, INC.,

Defendants, November 15, 2022

PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to reargue a decision and order dated May 23, 2022 which dismissed the defendant's second counterclaim. The plaintiff has moved seeking summary judgement. The motions have been opposed respectively. Papers were submitted and after reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, according to the amended complaint, on June 2013 the plaintiff extended a line of credit to the defendants in the amount of $2,000,000. Pursuant to the loan agreement executed in connection with the line of credit, the line expired on June 30, 2014 when all principal and interest had to be paid. On April 22, 2014 an amended agreement was executed between the parties and the line of credit was increased by a further one million dollars and the line was extended to June 30, 2015. Further amendments extended the terms of the loan and finally the loan was extended to September 28, 2020. On

October 8, 2020 the plaintiff declared the defendants in default based upon non-payment and other defaults. This action was commenced and the amended complaint seeks recovery of $2,254,572.07 consisting of the principal amount of $2,200,000.00, plus interest in the amount of $54,572.07 that remains outstanding. The defendants answered and asserted counterclaims alleging the plaintiff breached the implied covenant of good faith and fair dealing and breach of contract. The court dismissed the counterclaim the plaintiff improperly withdrew $88,597.79 from the defendants account without authorization and in breach of a contract. The court held the defendants could not point to any contract that was breached. The court further noted that, on the contrary, pursuant to Paragraph 9.9(a) of the Loan Agreement dated June 20, 2013 the plaintiff had the right to set off and apply any deposits to satisfy any obligations owed the bank. The defendants seek to reargue that determination on the grounds the bank never informed the defendants they had engaged in that set-off and that they were required to notify the defendants of such set-off. To the extent no set-off took place the defendants argue there are surely questions of fact how those sums were withdrawn from the account.

Conclusions of Law

A motion to reargue must be based upon the fact the court

overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

The plaintiff admits that it did not withdrawn the funds pursuant to any set-off provision and in fact did not argue that at all. Rather, the plaintiff argues the "defendants failed to identify: (1) the date of the alleged breach of contract, (2) the specific contract that BofA purportedly breached, (3) the provisions or terms of the contract that BofA purportedly breached, and/or (4) the item or transaction associated with the $88,597.79 purported damages" (see, Affirmation in Opposition, ¶6 [NYSCEF Doc. No. 166]).

However, the defendants presented evidence that on November 6, 2020 a deposit was made into the account in an amount of $88,597.79 for services rendered to a third party and that the plaintiff placed a hold on those funds and then subsequently withdrew those funds. Upon considering the evidence in the prior order the court pointed to Paragraph 9.9 of the contract which would have permitted such action by the plaintiff and would have been a sufficient reason to dismiss the counterclaim. However, the plaintiff concedes it did not act pursuant to Paragraph 9.9 at all, yet the plaintiff does not offer any explanation why the sum was withdrawn. Thus, the defendants have presented evidence

the plaintiff breached the contract by withdrawing those funds for no apparent reason in violation of the contract. Of course, there may be a reasonable explanation regarding this withdrawal and further discovery or a trial might provide a basis for such explanation. However, at this juncture, considering the plaintiff's admission no set-off was undertaken, the defendants have raised a valid counterclaim. Therefore, the motion seeking reargument is granted and upon reargument the motion seeking to dismiss the second counterclaim is now denied.

Turning to the motion seeking summary judgement it is well settled that summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

Thus, to succeed on a motion for summary judgement it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating

the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

It is well settled that where a party introduces evidence of the existence of a line of credit, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept., 2012]). In this case, the plaintiff submitted the affidavit of Tiffany Higgins a vice president and senior portfolio officer of the plaintiff who stated that she reviewed the bank's records in connection with the loans extended (see, Affidavit of Tiffany Higgins [NYSCEF Doc. No. 127]). She further stated that all the documents she reviewed were maintained in the regular course of business and all such records were made near their occurrence with someone who had knowledge at that time and that the bank's standard practice is to keep such records in the ordinary course of business. Thus, the plaintiff has established the admissibility of the records relied upon since Ms. Higgins had knowledge of the bank's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017]). Therefore, the plaintiff established its entitlement to summary judgement.

In opposition, the defendants argue summary judgement cannot be granted because the plaintiff relies upon inadmissible hearsay

to substantiate any loan defaults. In Bank of N.Y. Mellon v. Gordon, 171 AD3d 197, 97 NYS3d 286 [2d Dept., 2019] the court denied summary judgement where an affidavit from Rosalind Carroll a document coordinator for the plaintiff, Bayview, reviewed certain documents but no such documents were attached to her affidavit. The court explained that "although Carroll adequately described the record-keeping practices and procedures utilized by Bayview, and adequately stated her familiarity with those practices, she did not actually attach or otherwise incorporate any of Bayview's business records to her affidavit. Accordingly, to the extent that Carroll's purported knowledge of Gordon's default was based upon her review of unidentified business records created and maintained by Bayview, her affidavit constituted inadmissible hearsay and lacked probative value" (id). However, in this case all the loan documents including the amendments, extension letters and guaranties are attached to her affidavit. Thus, there are no grounds, based upon hearsay, in which to question the affidavit of Ms. Higgins. Moreover, the fact the loan originated before Ms. Higgins' employment is not a basis to question her ability to present uncontroverted evidence as to the defaults of the defendant.

Therefore, based on the foregoing, other than the issue of the withdrawal of $88,597.79 there are no questions of fact and the plaintiff's motion seeking summary judgement is granted to

this extent.

Concerning the $88,597.79, that counterclaim, as noted, has been reinstated. Therefore, the nature of this withdrawal must be explored before final judgement can be entered.

So ordered.

ENTER:

DATED: November 15, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC