Brickstone Group LLC v Arizona Native Bldrs., LLC
2022 NY Slip Op 34260(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 655388/2021
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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BRICKSTONE GROUP LLC,

Plaintiff,

- v -

ARIZONA NATIVE BUILDERS, LLC DBA ARIZONA NATIVE BUILDERS, and GEORGE AARON ALPER,

Defendants.

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INDEX NO. 655388/2021

MOTION DATE 01/05/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ORDERED that so much of the plaintiff's motion seeking summary judgment on the complaint is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 29-30), in which the court concurs to the extent set forth below. Plaintiff seeks summary judgment on its claims for breach of a Merchant Cash Advance Agreement (the "Agreement") and accompanying Personal Guarantee. In opposition, defendants essentially raise two arguments: first, that the Agreement between the parties is in fact a criminally usurious loan, and second, that plaintiff failed to allow defendants to reconcile the daily amount debited from defendants' account as required by the Agreement.

"A party raising a usury defense must satisfy a heavy burden" (*Pirs Capital, LLC v D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc 3d 457, 460 [Sup Ct, NY County 2020], *judgment entered sub nom. Pirs Capital, LLC v D&M Truck, Tire & Trailer Repair Inc.* [Sup Ct, NY County 2020]). Usury only applies to a "loan or forbearance of any money, goods or things in action" (General Obligations Law § 5-501; *Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept

1991]). In other words, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli*, 170 AD2d at 434). "The court will not assume that the parties entered into an unlawful agreement . . . when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]). In the case of the agreement herein, there are three factors to consider in determining whether the transaction should be considered a loan or a sale of receivables: "(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 v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]).

Here, the Agreement satisfies all three factors suggesting that it is a purchase of future receivables rather than a usurious loan. The Agreement includes a mandatory reconciliation provision (Agreement, NYSCEF Doc. No. 2, § 4), is for a non-finite term *(id.*, § 7), and specifically exempts defendant Arizona Native Builders, LLC's filing for bankruptcy from the specified events of default (*id.*, § 34[5] ["Any Merchant transports, moves, interrupts, suspends, dissolves, or terminates its business without the prior written consent of PBF other than a bankruptcy filing"]). Accordingly, defendants cannot show that the Agreement is a criminally usurious loan (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]). Defendants suggest that because the Agreement fixes a daily debit amount, it actually has a finite term, but the Agreement in fact provides that there shall be a daily cap on collection rather than a fixed amount, and the actual amount to be collected is based on a percentage of defendants'

receivables for that day and subject to reconciliation (NYSECF Doc. No. 2, §§ 3-4). For all these reasons, defendants' usury defense is unavailing.

Defendants do, however, raise a triable issue of fact as to whether plaintiff performed under the Agreement entitling them to claim a breach of contract. The complaint alleges that defendants' blocked plaintiff from debiting defendants' account, which is an event of default under the Agreement. In opposition to the motion, defendant George Alper, defendant Arizona Native Builders, LLC's principal, avers that on August 26, 2021, he asked for a reconciliation of the daily debit amount, only for his request to be denied (Alper aff., NYSCEF Doc. No. 29, ¶ 9). Alper further claims that plaintiff informed him he would need to continue making payments at the specified amount or be held in default (*id.*). The Agreement requires plaintiff to conduct a reconciliation upon request, and "[i]f such reconciliation determines that [plaintiff] collected more than it was entitled to, then [plaintiff] *will* credit to the Account all amounts to which [plaintiff] was not entitled within seven days thereafter" (NYSCEF Doc. No. 2, § 4 [emphasis added]). If plaintiff refused to conduct a reconciliation as required, that raises an issue of fact as to plaintiff's performance under the agreement, a necessary element of all breach of contract claims (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Other than denying the allegation, plaintiff does not demonstrate that there are no issues of fact in this regard; and it is further

ORDERED that so much of plaintiff's motion seeking summary judgment dismissing defendants' affirmative defenses is granted. The affirmative defenses are stated in conclusory fashion and without any factual allegations to substantiate them, rendering them subject to dismissal (*e.g. Katz v Miller*, 120 AD3d 768, 769 [2d Dept 2014]). Moreover, save for the usury defense, defendants raise none of the affirmative defenses in opposition to the motion. (*Steffan v*

Wilensky, 150 AD3d 419, 420 [1st Dept 2017] ["By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed"]); and it is further

ORDERED that defendants' affirmative defenses are severed and dismissed.

This constitutes the decision and order of the court.

Louis L. Nock

12/15/2022
DATE

LOUIS L. NOCK, J.S.C.

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