

Strategic Funding Source, Inc. v Johnson

2023 NY Slip Op 31068(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 655183/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

against the defendant for only two months (August 2015 to October 2015) and that annualized, it is approximately 300% per year, which is void as against public policy. (*id.*, at pg. 4). Moreover, defendant asserts that the account stated claim fails because it is indistinguishable from the breach of contract claim, in that both of those claims seek the same damages, and therefore, the account stated claim is duplicative of the breach of contract claim and should be dismissed. (*id.*, at pg 5).

In opposition, plaintiffs argue that the agreements were a purchase, as per the express language of the agreements, which use terminology including “purchase,” “sale,” “sells,” “purchased amount,” and “purchase price” on their first pages, while lacking any nomenclature characterizing the transactions as loans, and as such, the transaction does not violate the civil usury statute. (NYSCEF Doc. No. 11, *affirmation in opposition to defendant's motion to dismiss*, ¶ 30). Plaintiffs maintain that the agreements allocated risk to plaintiffs, as payment was dependent on a crucial contingency—the continued collection of receivables by Aliehs Hawk from its customers. Therefore, the uncertainty of plaintiff's ability to receive the complete receipts purchased amounts indicates that the agreements constituted a sales transaction rather than a loan. (*id.*, at ¶ 24). Plaintiff further argues that defendant implicitly assented to the balance owed by making successive payments under the terms of the agreements and also were provided with default letters indicating the amount owed under the agreements which it never contested. (*id.*, at ¶ 30).

Defendant has filed no reply with respect to this application.

In determining a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) Furthermore, “[a] cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.’” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014], quoting *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002].)

“To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate (*see Giventer v Arnow*, 37 NY2d 305, 309, 333 NE2d 366, 372 NYS2d 63 [1975]) . . . If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law (*see Fareri v Rain's Intl.*, 187 AD2d 481, 482, 589 NYS2d 579 [2d Dept 1992]).” (*Blue Wolf Capital Fund II, L.P. v Am. Stevedoring Inc.*, 105 AD3d 178, 182 [1st Dept 2013].) “It is a fundamental doctrine governing the law of usury that the defense must be founded upon a loan or forbearance of money. If neither of these elements exists there can be no

usury, however unconscionable the contract may be.” (*Orvis v Curtiss*, 157 NY 657, 661 [1899]; see *Seidel v 18 E. 17th St. Owners, Inc.*, 79 NY2d 735, 744 [1992]; *Cash4Cases, Inc. v Brunetti*, 167 AD3d 448, 448 [1st Dept 2018] [“The defense of usury is applicable only where the underlying transaction constitutes a loan”].)

“When determining whether a transaction is 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 AD3d 646 [App. Div. 2009], quoting *Ujueta v. Euro-Quest Corp.*, 29 AD3d 895 [2d Dept. 2006].) “To constitute a loan, the agreement must “provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard.” (*Cash4Cases, Inc. v Brunetti*, 167 AD3d at 448, citing *Rubenstein v Small*, 273 App Div 102, 104 [1st Dept 1947].) “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” (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 666 [2d Dept 2020] [citations omitted]; see *Davis v Richmond Capital Group*, 194 AD3d 516, 517 [1st Dept 2021].)

Now considering the branch of the motion seeking dismissal pursuant to CPLR 3211(a)(1), defendant’s arguments are unavailing. “The transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it” (*Rubenstein v. Small*, 273 AD 102, 104 [1st Dept 1947]). First and foremost, it is clear from the language of the agreement that the parties intended for the transaction to be for sale of future receivables and not a loan. The subject agreement entitled “Purchase and Sale of Future Receivables” expressly states the “[m]erchants hereby sells, assigns and transfers to SFS, as the lead purchaser ...all of Merchant’s future receipts, accounts, contract rights...” (NYSCEF Doc. No. 2, *redacted contract*). Secondly, “there can be no usury unless the principal sum advanced is repayable absolutely.” (*Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706, 711 (Sup Ct, NY County 2000). Here, the agreements allocated risk to plaintiffs. Plaintiffs’ payment was contingent upon the continued collection of receivables by defendant from its customers into the specified account. A review of the documentary evidence evinces that not only does the agreement lack the necessary elements of a loan transaction but also the parties themselves agreed that plaintiff paid a purchase price for future credit receivables. “[I]n the absence of a loan, there can be no usury.” (*Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706, 711 [Sup Ct, NY County 2000].)

Based on the foregoing, that branch of the motion seeking dismissal of the entire complaint based on CPLR 3211(a)(7) also fails. However, this court grants the dismissal of the cause of action for account stated on the ground that it is duplicative of the breach of contract claim. An account stated is duplicative of a breach of contract claim where the account stated claim is being utilized simply as another means of collection under the contract. (see *Vanpoy Corp., S.R.L. v. Soleil Chartered Bank*, 204 AD3d 486, 487-488 [1st Dept 2022].) Here, it is undisputed that the parties entered into a valid written contract (NYCEF Doc. No. 7 at pg 5), and the enforceability of that contract has been established above; therefore, plaintiffs’ account stated cause of action is dismissed. (see *Hagman v Swenson*, 149 AD3d 1, 7 [1st Dept 2017] citing *Martin H. Bauman Assoc., Inc. v. H & M Int’l Transport, Inc.*, 171 AD2d 479, 485 [1st Dept

1991].) All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that defendant's motion seeking dismissal of the complaint is granted solely to the extent it seeks dismissal of the account state claim, and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order with notice of entry upon defendants; and it is further

ORDERED that defendant shall interpose an answer to the remaining causes of action within twenty (20) days after service of this decision and order with notice of entry.

This constitutes the decision and order of this court.

March 31, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE