

West Coast Bus. Capital, LLC v ISO Intl., LLC

2023 NY Slip Op 31521(U)

April 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 501921/2021

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of April 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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WEST COAST BUSINESS CAPITAL, LLC,

Index No. 501921/2021

Plaintiff,

-against-

DECISION AND ORDER

ISO INTERNATIONAL, LLC D/B/A ISO INTERNATIONAL,
MARCOS S AGRAMONT and ANDREW S ALVIS,

Motion Sequence #3, 4

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	31-35, 57-58, 60-67,
Opposing Affidavits (Affirmations).....	45-46, 69-70, 73-75,
Reply Affidavits (Affirmations)	51-53
Memorandum of Law	36, 47, 50, 59, 71-72, 76-77, 78

After a review of the papers, the Court finds as follows:

Plaintiff West Coast Business Capital, LLC (hereinafter the "Plaintiff") has commenced this action against Defendants ISO International, LLC d/b/a ISO International ("ISO") Marcos S. Agramont ("Agramont") and Andrew S. Alvis ("Alvis") (hereinafter referred collectively as the "Defendants"). The dispute concerns a contract by and between the Plaintiff and the Defendant ISO (the "Contract" or "Agreement"), personally guaranteed by Defendants Agramont and Alvis, pursuant to which Defendants sold to Plaintiff its future receipts having a value of \$104,300.00 for the sum of \$70,000.00. Defendant ISO allegedly defaulted in making payments to Plaintiff as required in the Contract. Plaintiff subsequently commenced this action. The Plaintiff raises causes of action for breach of contract, enforcement of guarantee, and attorney's fees. The Plaintiff now

moves (motion sequence #3) for an Order pursuant to CPLR 3211(a)(7) and (b), dismissing Defendants' counterclaims and defenses for failure to state a claim or defense. The Plaintiff also moves (motion sequence #4) for an Order pursuant to CPLR 3212 granting it summary judgment on its claims. Plaintiff seeks \$86,433.00, plus reasonable attorneys' fees, plus statutory pre-judgment interest in the amount of 9% from December 24, 2020.

The Defendants oppose the motions. The Defendants argue that the Plaintiff has failed to meet its *prima facie* burden and that the motion is premature. The Defendant also argues that the agreement between the parties is unenforceable and constituted a usurious loan. Defendants failed to appear at oral argument.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

As an initial matter, the Court finds that the instant motion is not premature. The Defendants do not suggest any further discovery which is solely within the control of the movant is needed to support its prematurity argument, and the mere hope of a deposition to confirm an affidavit is insufficient. *See Brewster v. Five Towns Health Care Realty Corp.*, 59 AD3d 483, 484, 873 N.Y.S.2d 199 [2d Dept 2009], quoting *Conte v. Frelen Assocs., LLC*, 51 AD3d 620, 621, 858 N.Y.S.2d 258 [2d Dept 2008].

The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach (*see Arnell Const. Corp. v. New York City Sch. Const. Auth.*, 144 A.D.3d 714, 715, 41 N.Y.S.3d 101, 103; *Legum v. Russo*, 133 A.D.3d 638, 639, 20 N.Y.S.3d 124).

The Plaintiff established its *prima facie* entitlement to summary judgment by showing that: (1) the parties entered into a contract for the assignment of future receivables together with a related Guaranties; (2) Plaintiff performed its obligations under the contract by tendering the purchase price, subject to fees provided for in the agreement, and (3) Defendants breached their contractual obligations under the contract starting on or about August 18, 2022, by failing to tender the receivables as required and as such, defaulted on the Contract.

The Plaintiff, as contended by the Defendants, is not precluded from recovery on the basis that the transaction between the parties was a usurious loan. The Appellate Division, Second Department has been clear in its holding 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]).

The Defendants allege that the reconciliation is unachievable pursuant to the terms of the Contract. However, there is no evidence that the Defendants ever sought reconciliation in support of this allegation. The Agreement contains a reconciliation provision providing for mandatory adjustments in payments the Defendant merchant is obligated to make under the Contract based on changes in its sales. Further, as the amount of the weekly payments could possibly change if a reconciliation took place, the term of the Contract was not finite. See Agreement Paragraphs 2

and 10. Finally, there were no provisions in the Contract to the effect that a declaration of bankruptcy would constitute a default under the Contract.

Although the papers are unclear as to a request for a default fee, the Plaintiff, in any event, is not entitled to recover a default fee. A default fee constitutes an unenforceable penalty and not recoverable liquidated damages. In *Truck Rent-A-Center Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425, the Court of Appeals held:

The rule is now well established. A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. (*City of Rye v Public Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 473, *supra*; *Wirth & Hamid Fair Booking v Wirth*, 265 N.Y. 214, 223, *supra*; *Curtis v Van Bergh*, 161 N.Y. 47; *Ward v Hudson Riv. Bldg. Co.*, 125 N.Y. 230, *supra*; Restatement, Contracts, § 339.) If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced. (*Equitable Lbr. Co. v IPA Land Dev. Corp.*, 38 N.Y.2d 516, 521-522, *supra*; *Seidlitz v Auerbach*, 230 N.Y. 167, 172-173; 14 NY Jur, Damages, § 155.) In interpreting a provision fixing damages, it is not material whether the parties themselves have chosen to call the provision one for "liquidated damages", as in this case, or have styled it as a penalty. (*E.g.*, *Wirth & Hamid Fair Booking v Wirth*, 265 N.Y. 214, 225, *supra*; *Ward v Hudson Riv. Bldg. Co.*, 125 N.Y. 230, 234, *supra*.)

In *Perseus Telecom, Ltd. v Indy Research Labs, LLC*, 41 N.Y.2d 420, 425, the Court of Appeals held:

A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.

With respect to attorneys' fees, the Contract provided for reasonable fees upon default. In *Kamco Supply Corp. v. Annex Contracting, Inc.*, 361 A.D.2d 363, 365, the Court addressed a

situation where, as here, a written agreement between the parties provided that if the plaintiff prevailed, plaintiff would be entitled a percentage of the amount sought as attorneys' fees. The Court held that "the award of an attorneys' fee based solely on the fixed rate set forth in the agreement and guarantee was improper...[and that] "[a]n award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." *Kamco Supply Corp.*, 261 A.D.2d at 365, 689 N.Y.S.2d 189 [2d Dept 2017], citing *Industrial Equip. Credit Corp. v Green*, 62 NY2d 903; *Matter of First Natl. Bank v Brower*, 42 NY2d 471 [1984]. *Kamco* held that from the record before it, a determination of reasonable attorneys' fees could not be made, and remitted the matter for such a determination. As in *Kamco*, a determination of plaintiff's reasonable attorneys' fees cannot be determined on the record before the Court.

For the above reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted solely to the extent that Plaintiff is entitled to an award of partial summary judgment on the issue of liability as to breach of contract and enforcement of the guarantees.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.