

Blade Funding Inc. v Zothex Flooring Inc.

2023 NY Slip Op 33074(U)

September 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 503534/2023

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 6th day of September 2023.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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BLADE FUNDING INC,

Plaintiff,

Index No. 503534/2023

-against-

Cal. No. 4 MS 3

ZOTHEX FLOORING INC and ZOTHEX FLOORING,
CABINETS & MORE LLC and CLAYTON FERREIRA
RODRIGUES,

Defendants.

**Amended Decision &
Order**

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The following e-filed papers read herein:
MS 3

NYSCEF Doc Nos.
35-50

Upon the foregoing papers, plaintiff’s summary judgment motion is decided as follows:

On January 5, 2023, plaintiff Blade Funding Inc (“plaintiff”) and defendants Zothex Flooring Inc, d/b/a/ Zothex Flooring (“Zothex”), entered into a merchant cash agreement (“Agreement”), pursuant to which plaintiff purchased an interest in defendant’s future receivables for the sum of \$750,000 (“purchase price”). In exchange for the purchase price, defendants authorized plaintiff to debit from a designated bank account a percentage of future receivables, until plaintiff received the sum of \$1,057,500.00 (“purchased amount”). Defendant Clayton Ferreira Rodrigues (“Rodrigues”) executed a personal guaranty of performance for all the representations, warranties, and covenants made by defendants under the Agreement. On January 6, 2023, plaintiff paid defendants the purchase price (Exhibit B. NYSCEF Document No. 40).

On February 2, 2023, plaintiff commenced this action against Zothex and Rodrigues (collectively “defendants”) asserting claims for breach of contract, breach of guaranty and unjust enrichment. Plaintiff seeks a judgment against each defendant in the amount of \$1,023,750.00, plus interest at the statutory rate, costs, disbursements and attorneys’ fees. Plaintiff alleges that defendants defaulted under the Agreement by (a) blocking plaintiff’s access to the designated bank account for the agreed upon ACH withdrawals; and (b) failing to make payments of \$998,750 and default account fees of \$25,000 (leaving a total balance of \$1,023,750.00). Additionally, plaintiff alleges that Rodrigues breached the personal guaranty by failing to perform Zothex’s obligations under the Agreement. In their answer, defendants denied plaintiff’s allegations and asserted affirmative defenses. On July 18, 2023, plaintiff moved, under motion sequence three, for summary judgment and dismissal of defendants’ affirmative defenses.

Motion for summary judgment

In support of its motion, plaintiff argues that it has established a prima facie entitlement to summary judgment by submitting proof of an enforceable contract, plaintiff’s performance, defendants’ breach, and damages. Specifically, plaintiff submits the executed Agreement, a wire transfer confirmation of plaintiff’s funding, and a printout of payment history as well as an affidavit showing defendants’ outstanding balance. In addition, plaintiff argues that defendants’ affirmative defenses must be dismissed for failure to allege sufficient facts. Plaintiff further waives the third cause of action for unjust enrichment and claim for attorneys’ fees.

In opposition, defendants argue that plaintiff has not provided sufficient, verifiable, or admissible evidence of defendants’ breach of the Agreement. Specifically, that the only evidence plaintiff submitted is an internal payment history printout and a self-serving affidavit. Defendants contend that plaintiff’s affidavit does not meet the New York Rules of Evidence as it fails to

authenticate provided documents or verify their creation within a reasonable time of the events. Although plaintiff claims that defendants blocked its access to the designated bank account, defendants contend that there is no verifiable communication or documentation proving this claim. Thus, defendants argue that, at a minimum, further discovery is needed, and the motion for summary judgment should be denied because plaintiff fails to establish a prima facie case. Furthermore, defendants argue that the Agreement is in violation of New York State's usury statute.

In reply, plaintiff argues that it has established its claims, however, defendants fail to raise any triable issues of fact. Plaintiff points out that defendants have not contested (a) the existence of the Agreement; (b) plaintiff's fulfillment of its part by paying the purchase price minus fees; (c) their cessation of remittance to plaintiff; and (d) the calculation of damages. Additionally, that defendants fail to provide counter evidence to plaintiff's claims or any legal issues to dispute the facts. Moreover, plaintiff submits that the affidavit is sufficient and admissible under CPLR 4518(a)¹. Plaintiff further argues that defendants' opposition contains a conclusory statement that the Agreement is in violation of the New York's usury statute without any details or caselaw support.

¹ (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

Discussion

Where a moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a triable issue of fact or tender an acceptable excuse for his failure so to do (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). 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 (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). A merchant cash agreement is considered not to be a usurious loan when repayment is found to be contingent rather than absolute (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752 [2d Dept 2022]). 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 (*id.*).

Here, plaintiff established its prima facie entitlement to judgment as a matter of law by demonstrating the existence of an agreement, its performance and defendants' breach. Upon the Court's review of the affidavit, it is admissible under CPLR 4518(a). In opposition, defendants failed to raise a triable issue of fact or establish its defense based on the claim that the Agreement is a usurious loan. Upon the Court's review of the Agreement, the Court finds that it satisfies the *Principis* test insofar as the Agreement contains a reconciliation provision, the term is indefinite, and there is no recourse in the event of merchant's bankruptcy. Defendants' remaining affirmative defenses are deemed conclusory. Accordingly, plaintiff's motion for summary judgment on the

causes of action for breach of contract (first cause of action) and breach of guaranty (second cause of action) is granted. Plaintiff is directed to submit a proposed judgment on notice within 30 days.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.