SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

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PEARL DELTA FUNDING, LLC,

Plaintiff,

-against-

ASTRA, LLC, and ERNEST EZUE,

Defendants.

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IAS/TRIAL PART 18

Motion Seq.: 001, 002
Submission Date: 5/30/23

Index No.: 616028/22

DECISION AND ORDER

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Upon the foregoing papers, the following motions are determined herein:

Motion Sequence 001. Plaintiff's motion for an Order pursuant to CPLR §3211(a)(1) and (b), dismissing the Defendants' affirmative defenses.

Motion Sequence 002. Defendants' motion for an Order pursuant to CPLR §3025 amending the Answer as set forth in the attached proposed Amended Answer.

This is an action in which plaintiff seeks to recover damages for breach of a commercial agreement for the sale of future receivables. The following facts are taken from the parties' submissions, and are undisputed, unless otherwise noted.

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On or about October, 2022, defendant ASTRA, LLC (the "Merchant") entered into an agreement with plaintiff entitled the Revenue Purchase Agreement (the "Agreement"), wherein the Merchant agreed to sell to plaintiff future receivables in the amount of $43,750.00 for a discounted purchase price of $31,250.00. The Agreement required the Merchant, upon receiving the purchase price, to deposit all of its receipts into a designated bank account, out of which plaintiff was authorized to receive, through an Authorized Clearing House debit, a daily remittance in the sum of $337.00 until the $43,750.00 was received in full. The remittance represented an approximation of the purchased percent (10%) of the Merchant's future receipts calculated on a daily basis. The remittance was subject to mandatory reconciliation and adjustment provisions, which, upon the request of the Merchant and upon the terms set forth therein, provided for modification of the amounts debited by plaintiff to accurately reflect the purchased percentage of the receipts. The Merchant's obligations under the Agreement were guaranteed by its principal, defendant ERNEST EZUE (the "Guarantor"), pursuant to the "Security Agreement and Guaranty of Performance" contained in the Agreement (the "Guaranty").

Plaintiff commenced the instant action on November 15, 2022 with the electronic filing of the Summons and Verified Complaint (the "Complaint"). The Complaint alleges that plaintiff performed its obligations under the Agreement by paying the up front purchase price as agreed, and that the Merchant defaulted under the terms of the Agreement by blocking plaintiff's access to the designated bank account, thereby preventing plaintiff from making the agreed upon ACH withdrawals. According to plaintiff, the Merchant made payments totaling $6,066.00, leaving a balance due of $37,684.00, plus an additional $2,500.00 default fee. Based upon the foregoing, plaintiff asserts three causes of action: the FIRST, against the Merchant for breach of contract; the SECOND, against the Guarantor for breach of the Guaranty; the THIRD, against both defendants for unjust enrichment.

In response to the Complaint, the defendants filed an Answer on December 14, 2022 (the "Answer"). The Answer consists of general denials (with the exception of an admission to paragraphs 1-4 of the Complaint) and twenty (20) affirmative defenses. Defendant now seeks to dismiss the affirmative defenses pursuant to CPLR §3211(b), on the grounds that: (1) Defendant's usury defense (twentieth affirmative defense) fails as a matter of law, insofar as the subject Agreement is not a loan; and (2) the remaining affirmative defenses must be dismissed insofar as they consist solely of bare legal conclusions without any supporting facts.

Defendants oppose the motion, but their Memorandum of Law does not address the plaintiff's motion to dismiss the affirmative defenses. Rather, it addresses generically a motion for

summary judgment which has not been made in this case. Defendants also cross move for leave to amend their Answer, and submit a proposed amended answer (the "Proposed Amended Answer"), consisting of general denials (with the exception of an admission to paragraphs 1-7 of the Complaint) and twenty-one (21) affirmative defenses. In support of their cross-motion, defendants argue that leave to amend should be granted because the proposed amendment is meritorious, and granting leave to amend would not result in prejudice or surprise to the plaintiff.

Plaintiff opposes the cross-motion on the grounds that (1) the cross-motion is fatally defective on its face, because it fails to attach a proposed pleading that clearly shows the changes made to the existing pleading; and (2) the proposed amendment fails to cure the defects cited by plaintiff in its initial motion papers – that is, it fails to plead facts, but merely "supplements [defendants'] legal conclusions with more bare assertions and more legal conclusions that make conclusory reference to the elements of a defense." See Reply Memorandum of Law, p.4-5.

Motions to dismiss affirmative defenses are governed by CPLR 3211(b), which authorizes a plaintiff to make such a motion on grounds that "a defense is not stated or has no merit." On a motion pursuant to CPLR 3211(b), the court should apply the same standard as it applies to motions to dismiss pursuant to CPLR 3211(a)(7). *Tenore v. Kantrowitz, Goldhamer & Graifinan, P.C.*, 76 A.D.3d 556, 557 - 58 (2d Dept. 2010); *Fireman's Fund Ins. Co v. Farrell*, 57 A.D.3d 721, 723 (2d Dept. 2008). Affirmative defenses that are contradicted by the documentary evidence or merely plead conclusions of law without any supporting facts are properly dismissed. See *Katz v. Miller*, 120 A.D.3d 768, 769-770 (2d Dept. 2014); *Moran Enterprises Inc., v Hurst*, 96 A.D.3d 914 (2d Dep't 2012).

At the outset, the Court notes that the defendants did not attempt to defend their pleading but instead sought to amend it. Accordingly, the Court considers the plaintiff's motion to dismiss as directed to the proposed Amended Answer.[1] See *DiPasquale v. Sec. Mut. Life Ins. Co. of New York*, 293 A.D.2d 394, 395 (1st Dept. 2002). The Court notes further that defendants have abandoned their usury defense, insofar as they neither discussed it in opposition to the motion to dismiss, nor included it in the proposed amended answer.

[1] The Court declines to reject the proposed answer on the basis that defendants failed to provide a version that clearly shows the changes made to the existing pleading. Insofar as no substantial right of a party is prejudiced by such defect, the Court opts to disregard it. See CPLR §2001.

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Upon review of the proposed amended answer, the following affirmative defenses are dismissed for the reasons stated below:

The 2nd, 5th, 6th, 8th, and 9th Affirmative Defenses are wholly conclusory and devoid of factual support. See *Katz*, 120 A.D.3d at769-770.

The 3rd Affirmative Defense (statute of limitations) is without merit, insofar as the complained of breach occurred on or about November 3, 2022, and the action was filed less than two weeks from that date.

The 4th Affirmative Defense (lack of personal jurisdiction/defective service of process) has been waived insofar as defendants failed to move for dismissal of the action on that basis within sixty days of filing their Answer. CPLR §3211(e).

The 7th Affirmative Defense of unclean hands is insufficiently pled. The defense relies upon allegations that plaintiff "falsely promised flexibility and leniency in repayment terms in the event of a default" and "failed to disclose the impact of funding costs and broker fees on the net funding Defendants would receive." To the extent that this defense sounds in fraudulent inducement, it is unsustainable for several reasons, including lack of particularity (CPLR §3016), failure to plead a knowing misrepresentation of material present fact (*Tsinias Enterprises Ltd. v. Taza Grocery, Inc.*, 172 A.D.3d 1271, 1272–73 [2d Dept. 2019]), and lack of justifiable reliance, insofar as the terms of the Agreement are unambiguously disclosed on its face (*Id.*).To the extent that the defense sounds in violation of consumer protection law, it is inapplicable insofar as the defendants are not consumers. To the extent that the defense is based upon a failure to highlight certain terms of the Agreement, defendants fail to identify any legal duty to do so on the part of plaintiff. Moreover, "[a] party who executes a contract is presumed to know its contents and to assent to them." *Prompt Mortg.Providers of North America. LLC v. Zarour*, 155 A.D.3d 912, 914 (2d Dept. 2017).

These palpably insufficient allegations are not saved by virtue of their having been asserted together, under the rubric of unclean hands. The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct. The doctrine bars relief to the plaintiff, "not as a protection to a defendant, but as a disability to the plaintiff . . . , and as a matter of public policy in order to protect the integrity of the court." *Toobian v. Golzad*, 193 A.D.3d 784, 787 (2d Dept. 2021), leave to appeal dismissed, 37 N.Y.3d 1174 (2022). Here, defendants allege no facts or circumstances which, if true, would justify application of this doctrine.

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The 10th, 11th, and 14th Affirmative Defenses fail to state proper affirmative defenses.

The 12th Affirmative Defense is without merit insofar as it is contradicted by the documentary evidence (i.e., the Complaint itself).

The 13th Affirmative Defenses purports to assert a defense of payment in full, but to the extent that it is based upon an accounting of actual receivables and actual income earned, it is without merit. The Agreement requires payment of the Purchased Amount in accordance with its terms. An assertion of payment in full based upon any other calculation or terms fails to constitute a defense to plaintiff's breach of contract claim, as it is essentially contradicted by the documentary evidence (i.e., the Agreement itself).

The 15th, 16th and 19th Affirmative Defenses fail to state proper affirmative defenses, insofar as they essentially constitute denials of the alleged breach. To the extent that the 16th Affirmative defense also alleges a failure to provide notice of default, it is deficient insofar as it fails to identify the source of any notice requirement or condition precedent, and, in fact, appears to be contradicted by the language of the Agreement itself, which provides: "The following Protections 1 through 8 may be invoked by Purchaser immediately and without notice to Merchant." Agreement, ¶1.12. To the extent that the 19th Affirmative Defense seems to imply that defendant is entitled to some offset based upon plaintiff's own breach, it fails to identify the terms of the Agreement that were allegedly breached. See *Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751 (2d Dept. 2011).

The 17th, 18th, 20th and 21st Affirmative Defenses exhibit the same deficiencies discussed in connection with the 7th Affirmative Defense. That is, to the extent that the predicate allegations sound in fraudulent inducement, they are insufficient to support such a defense for the reasons discussed above, and to the extent that they appear to implicate certain consumer protection laws, they fail to state a viable defense insofar as such laws are inapplicable to these commercial defendants.

In part, these affirmative defenses collectively appear to hint at a defense of unconscionability. Nonetheless, such defense is not clearly and adequately pled. The Court cannot "be compelled to wade through a mass of verbiage and superfluous matter" to divine a defense which might apply to the case. See *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 (1st Dept. 2015).

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Only the 1st Affirmative Defense (failure to state a cause of action) is viable. "No motion by the plaintiff lies under CPLR 3211(b) to strike the defense of failure to state a cause of action, as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" *Ochoa v. Townsend*, 209 A.D.3d 867, 868 (2d Dept. 2022) (internal citations and quotation marks omitted).

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

Based upon the foregoing, it is

ORDERED, that plaintiff's motion for an Order pursuant to CPLR §3211(a)(1) and (b), dismissing the Defendants' affirmative defenses (*Mot. Seq. 001*) is ***granted***, to the extent that the 2nd through 21st proposed affirmative defenses are hereby dismissed; with respect to the proposed 1st Affirmative Defense, the motion is ***denied***; and it is further

ORDERED that defendants' motion for an Order pursuant to CPLR §3025 amending the Answer as set forth in the attached proposed Amended Answer (*Mot. Seq. 002*) is ***denied*** with respect to the 2nd through 21st proposed affirmative defenses; with respect to the 1st Affirmative Defense, the motion is ***granted.***

Any requests for relief not specifically addressed herein are ***denied.***

This constitutes the Decision and Order of this Court.

Dated: October 2, 2023
Mineola, NY, 11501

ENTER:

HON. ERICA L. PRAGER, J.S.C.

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