

Medallion Fin. Corp. v EDE Serv. Corp.

2023 NY Slip Op 34450(U)

December 15, 2023

Supreme Court, New York County

Docket Number: Index No. 651422/2021

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X
INDEX NO. 651422/2021
MOTION DATE 08/11/2021
MOTION SEQ. NO. 001

MEDALLION FINANCIAL CORP., and MEDALLION
 FUNDING LLC, SUCCESSOR BY MERGER TO
 MEDALLION FUNDING CORP.,

Plaintiffs,

- v -

EDE SERVICE CORP., N.Y. DIPLOMA TAXI CORP., REAL
 CAB CORP., SLO CAB CORP., YOSI TRANSIT INC., and
 EDGAR WEINGARTEN,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X
 The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 58, 59, 60, 61, 62,
 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, and 85
 were read on this motion to DISMISS

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 59, 77) and the exhibits attached thereto, in which the court concurs, as summarized herein.

Plaintiffs commenced this action for nonpayment of certain loans issued to the entity defendants (defendant Edgar Weingarten is the guarantor thereof), and for permission to foreclose on certain collateral, namely the taxi medallions held by defendants. Defendants interposed eleven counterclaims for breach of contract, rescission, breach of the duty of good faith and fair dealing, promissory estoppel, a declaratory judgment and breach of contract on grounds of usury, frustration of purpose/impossibility, fraud, deception and/or negligent misrepresentation, recession based on unjust enrichment, violation of the New York City Consumer Protection Law ("CPL"), and improper lending. In sum and substance, defendants

allege that plaintiffs orally agreed to modify the underlying loans before their maturity date but then refused to do so and demanded full payment, made loans to defendants that plaintiffs knew defendants would be unable to pay, wrongfully assigned the loans, and made unreasonable demands in exchange for an agreement to modify the loans. Plaintiff now brings the instant motion to dismiss the counterclaims.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

The first counterclaim for breach of contract, second counterclaim for rescission, fourth counterclaim for promissory estoppel, and eighth counterclaims for fraud, deception and/or negligent misrepresentation all are based solely on the alleged oral agreement to modify the loans, which the entity defendants’ principal argues was made in 2017 (Weingarten aff., NYSCEF Doc. No. 71, ¶ 21). To the extent that such an agreement was made, it is barred by the statute of frauds. The General Obligations Law provides that any contract which cannot be

performed within a year of its making must be memorialized in a writing (General Obligations Law § 5-701[a][1]). Assuming for purposes of deciding the motion that Weingarten's affidavit is correct, any agreement would have extended the amortization of the loans as well as their maturity dates well beyond a year (Weingarten aff., NYSCEF Doc. No. 71, ¶¶ 26-27).

Moreover, Weingarten also suggests that the parties were in agreement that a written agreement was necessary to formalize the terms of the proposed modification (*id.*, ¶ 28). Where the parties state that a written agreement is necessary to bind them fully, an oral agreement is not enforceable (*Jordan Panel Sys., Corp. v Turner Const. Co.*, 45 AD3d 165, 169-70 [1st Dept 2007]). Moreover, the parties did in fact subsequently enter into written modifications and deferrals of each of the underlying loan documents (*e.g.* NYSCEF Doc. No. 4 at 7-18). The record does not indicate any allegations of an oral agreement subsequent to said modifications. The existence of the modifications and deferrals precludes any of the claims which rest upon an earlier oral modification agreement (*Prestige Foods, Inc. v Whale Sec. Co., L.P.*, 243 AD2d 281, 281-82 [1st Dept 1997]). Accordingly, the first, second, fourth, and eighth counterclaims must be dismissed.

The third counterclaims for breach of the implied covenant of good faith and fair dealing must also be dismissed. Implicit in every contract is a covenant of good faith and fair dealing (*Dalton v. Educational Testing Serv.*, 87 NY2d 384 [1995]). The implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties" (*Murphy v Am. Home Products Corp.*, 58 NY2d 293, 304 [1983]). The covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]). As plaintiffs had the absolute right to enforce the terms of

the agreements and no duty to modify them, defendants' claim would effectively nullify the express terms of the contract.

The fifth and sixth counterclaims relating to the allegation that the loans are criminally usurious are defective. Criminal usury may only be raised as an affirmative defense, and may not be used affirmatively to recover allegedly illegally charged or conveyed interest or property (*see Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 184 [1st Dept 2013]). The counterclaims seek affirmative relief in the form of a declaratory judgment and monetary damages, and are thus impermissible.

The seventh counterclaim seeks rescission of the loans on the grounds of frustration of purpose or impossibility of performance due to the COVID-19 pandemic. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused" (*407 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]; *see also 558 Seventh Avenue Corp. v Times Square Phot Inc.*, 194 A.D.3d 561, 561-62 [1st Dept 2021] [holding that reduced revenues due to the COVID-19 pandemic did not render performance impossible]).

To the extent that defendants cite the COVID-19 pandemic (distinct of "economic hardship" in general) and state they were unable to operate their taxicabs, the court notes that Executive Order 202.6 deemed as essential all businesses under the category "transportation

infrastructure,” and such businesses were allowed to continue to operate without restriction (9 NYCRR 8.202.6). “That defendant may have counted on the continued viability of the taxicab market to repay the loan is not a viable affirmative defense nor is it an issue of fact” (*Medallion Bank v Makridis*, 2021 NY Slip Op 30033[U], 4-5 [Sup Ct, NY County 2021]).

The ninth counterclaim for rescission based on unilateral mistake is insufficiently pled. “While a unilateral mistake induced by fraud will support a claim for rescission, plaintiff’s claims of fraud are insufficient” (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-70 [1st Dept 2007] [internal citation omitted]). The tenth cause of action for violation of the NYC Consumer Protection Law fails because that law applies only to unconscionable or deceptive trade practices regarding “goods, services, credit and debts which are primarily for personal, household or family purposes” (NYC Administrative Code § 20-701[c]). Finally, the court finds no authority for a cause of action based on “improper lending,” the title of the eleventh counterclaim. Moreover, the eleventh counterclaim arises out of the same facts and seeks the same damages as defendants’ other counterclaims, and therefore must be dismissed as duplicative (*e.g. Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Soni v Pryor*, 102 AD3d 856, 858 [2d Dept 2013]).

Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the counterclaims are severed and dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference on January 10, 2024, at 2:15 PM in Room 1166, 111 Centre Street, New York, New York.

This constitutes the decision and order of the court.

ENTER.

Louis L. Nock

LOUIS L. NOCK, J.S.C.

12/15/2023
DATE

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