

EBF Partners, LLC v GRA Group, Inc.

2023 NY Slip Op 34453(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 655160/2020

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

EBF PARTNERS, LLC, d/b/a EVEREST BUSINESS
FUNDING,

Plaintiff,

- v -

GRA GROUP, INC., and DAVID ASRAF,

Defendants.

-----X

INDEX NO. 655160/2020

MOTION DATE 04/01/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44

were read on this motion for SUMMARY JUDGMENT.

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. 12-13, 17, 38, 40) and the exhibits attached thereto, in which the court concurs, as summarized herein.

In this breach of contract action, plaintiff has established *prima facie* entitlement to summary judgment on its two causes of action for breach of the purchase agreement between the parties and defendant Asraf’s guarantee of said agreement by submission of the contract documents (NYSCEF Doc. No. 14); the affidavit of Laura Jackson of plaintiff’s parent company setting forth the details of defendants’ default (NYSCEF Doc. No. 13); the remittance history between the parties (NYSCEF Doc. No. 16); and the transcript of the prefunding call between the parties in which defendant Asraf states that he understands and confirms that he will guarantee the agreement (NYSCEF Doc. No. 15 at 6) (*Gard Entertainment, Inc. v Country in N.Y., LLC*, 96 AD3d 683, 683 [1st Dept 2012] [“Here, plaintiff established its entitlement to

summary judgment as against Block by demonstrating proof of the guarantee he made in connection with a note executed by Country and his failure to make payments called for by its terms”]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [“The elements of such a claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages”]). The court notes that, contrary to defendants’ claim, the transcript is certified by the reporter (NYSCEF Doc. No. 15 at 11).

In opposition, defendants fail to raise a material issue of fact requiring trial. Defendants raise a variety of technical procedural issues which the court does not find persuasive. Substantively, defendant Asraf asserts that he does not recall signing a guarantee, did not intend to personally guarantee the agreement, and furthermore, is dyslexic and a non-native English speaker (Asraf aff., NYSCEF Doc. No. 28). These arguments are belied by Asraf’s participation in the prefunding call without difficulty and his initials and signature on the contract documents. Asraf’s *post facto* claim that he did not understand what he was signing is insufficient (*see, Kassab v Marco Shoes Inc.*, 282 AD2d 316, 316 [1st Dept 2001]).

Defendants also argue that the agreement is in reality a usurious loan, but the terms of the agreement prove otherwise. “A party raising a usury defense must satisfy a heavy burden” (*Pirs Capital, LLC v D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc 3d 457, 460 [Sup Ct, NY County, 2020], *judgment entered sub nom. Pirs Capital, LLC v D&M Truck, Tire & Trailer Repair Inc.* [Sup Ct, NY County, 2020]). Usury only applies to a “loan or forbearance of any money, goods or things in action” (General Obligations Law § 5-501; *Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]). In other words, “it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender”

(*Donatelli*, 170 AD2d at 434). “The court will not assume that the parties entered into an unlawful agreement . . . when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate” (*Giventer v Arnov*, 37 NY2d 305, 309 [1975]).

In the case of the agreement herein, there are three factors to consider in determining whether the transaction should be considered a loan or a sale of receivables: “(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 Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). These factors are not dispositive, since ultimately if the advanced sum is repayable absolutely then the agreement is a loan (*LG Funding, LLC*, 181 Ad3d at 666). In addition, courts may consider factors such as a discretionary reconciliation provision, default provisions entitling the lender to immediate repayment, and collection on the personal guaranty in the event of default or bankruptcy finding in determining whether such agreements “were loans subject to usury laws” (*Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

Here, the agreement appears to be what it states on its face, a purchase of future receivables. The agreement lacks a finite term, contains a reconciliation provision, and does not provide that defendant GRA Group’s filing for bankruptcy protection is a default under the agreement. Accordingly, defendants cannot show that the Agreement is a criminally usurious loan (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]). The remainder of defendants’ affirmative defenses are pled in conclusory fashion without supporting factual allegations, and are, therefore, subject to dismissal (*Robbins v Grownney*, 229 AD2d 356, 358 [1st Dept 1996]) (“bare legal conclusions are insufficient to raise an affirmative defense”).

Finally, defendants' assertion that discovery is necessary to resolve this matter is unsupported by the record. Defendants do not establish that facts "essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212[f]; *Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016] [The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion"]).

Accordingly, it is hereby

ORDERED that the motion is granted; and it is further

ORDERED that defendants' affirmative defenses are dismissed

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$83,208.33, with interest thereon at the statutory rate from November 14, 2019, through entry of judgment, as calculated by the Clerk, and continuing to so accrue thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed as to the remaining balance of plaintiff's claims.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

<u>12/14/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE