

Newco Capital Group VI, LLC v Kost

2024 NY Slip Op 30655(U)

February 25, 2024

Supreme Court, Rockland County

Docket Number: Index No. 035441/2023

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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NEWCO CAPITAL GROUP VI, LLC

DECISION AND ORDER

Plaintiff,

-against-

Index No.035441/2023

(Motions # 1-2)

DAVID KOST II DBA DFW ATV; DFW-ATV; DFW ATV
WORLD HEADQUARTERS AND DAVID ALLEN KOST II,

Defendants.

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Sherri L. Eisenpress, J.

The following papers, electronically filed on the NYSCEF system as documents numbered 13-49, were considered in connection with (i) the Plaintiff’s Notice of Motion pursuant to Civil Practice Law and Rules § 3211(a)(7) and (1) dismissing Defendant’s Counterclaims (Motion #1) and (ii) Plaintiff’s Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment against defendants, in the amount of \$144,850.20 plus pre-judgment interest at 9% from the date of the defendants’ breach to the date of entry of judgment, post-judgment interest, costs, disbursements and attorneys’ fees (Motion #2).

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiff filed a Summons and Complaint through the NYSCEF system on October 31, 2023, sounding in breach of contract with respect to a purchase and sales agreement entered into on September 28, 2023, with David Kost II d/b/a DFW ATV/DFW ATV World Headquarters (“Defendants” or “Merchants”), wherein Defendants sold \$117,000.00 (“Purchase Amount”) of its future business receivables/revenue to Plaintiff, to

be paid to Plaintiff from a percentage of Defendants' weekly revenue (9%), for an up-front sum of \$90,000.00 ("The Purchase Price") from Plaintiff.

Pursuant to the Agreement, a portion of the Purchase Price was to be utilized to satisfy the balance remaining on a prior receivables purchase agreement. The remaining balance of the purchase price, specifically \$80,672.00, was remitted to the Merchant on or about September 28, 2023. In the Agreement, Defendants agreed that they would not alter their business, interfere with payments to Newco, terminate Newco's access to the designated business bank account, or divert funds from the designated business bank account until after the Merchant had fully performed under the Agreement. Additionally, the Agreement states that in the event of any action constituting a breach or default, the entire outstanding balance owed by the Defendants at the time of the breach or default would become immediately due and payable to Newco, including attorney's fees of 30% of the balance owed.

Defendants filed an Answer with Counter-Claims on November 2, 2023, in which they generally denied the allegations in the Complaint and asserted various affirmative defenses including that the contract lacks consideration, is grossly unreasonable, unclean hands, statute of frauds, rescissions because any such contract was entered into under economic duress/undue influence or fraud, and that the contract is unenforceable. Additionally, Defendants asserted various counter-claims including breach of contract for failure to provide a reconciliation. Plaintiff moved to dismiss these counter-claims (Motion #1); however, on November 30, 2023, Defendants discontinued any and all counter-claims (NYSCEF Doc. No. 36). Accordingly, Motion #1 is denied as moot.

Plaintiff moves for summary judgment on its breach of contract claim and submits an affidavit from Phillip Scaglione, a Manager of Newco Capital Group VI LLC ("Newco"), in addition to various business records including the contract, a transaction

history as set forth in a statement dated October 31, 2023, proof of funding, and disbursement authorization. Plaintiff asserts that on September 28, 2023, it performed its part of the Agreement by depositing the remaining \$80,672.00 to the Merchant in accordance with the Merchant's instructions. After Newco paid the Purchase Price, the Merchant partially performed its part of the Agreement between September 28, 2023 and October 25, 2023, permitting Newco to collect \$8,046.00. It is alleged that on October 25, 2023, Newco was denied access to the account by the Merchant and was consequently deprived of 9% of the weekly sale proceeds, thus breaching the contract.

Defendants oppose the summary judgment motion and argue that they entered into the loan agreement with plaintiff under economic duress and in reliance on the fraudulent misrepresentations of the plaintiff and plaintiff's agent-broker. Defendants assert that "communicated with plaintiff to request an adjustment or reconciliation of the weekly remittance pursuant to the loan agreement," but were rejected. Defendants further argue that the agreement constitutes a usurious loan.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 487 N.Y.S.2d

316 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

The essential elements of a breach of contract cause of action are “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.” Liberty Equity Restoration Corporation v. Park, 160 A.D.3d 628, 630, 75 N.Y.S.3d 47 (2d Dept. 2018). Here, Plaintiff has established its prima facie entitlement to summary judgment on its breach of contract cause of action. There is no dispute that the parties entered into a contract; Plaintiff deposited the initial monies into Defendants’ account; Defendants’ failed to pay the full amount of monies owed pursuant to the contract and/or otherwise comply with the notice provisions; and Plaintiff was damaged as a result of the breach. Plaintiff demonstrated its entitlement to summary judgment by virtue of the contract, Affidavit of Philip Scaglione and the account statements.

In opposition thereto, Defendants have not demonstrated a triable issue of fact sufficient to deny summary judgment. Defendants have made no showing that the transaction was entered into due to fraud or duress. Nor is the Agreement considered to be a loan. In New York, there is a presumption that a transaction is not usurious and as a result, claims of usury must be proven by clear and convincing evidence, a much higher standard than the usual preponderance. Giventer v. Arnou, 37 N.Y.2d 305, 372 N.Y.S.2d 63, 67 (1975). Significantly, usury laws apply only to loans or forbearance, not investments. NY Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op. 50310(u)(Sup Ct. Westchester County 2018). Thus, if the transaction is not a loan, there can be no usury, however unconscionable the contract may be. Id.; Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d 735, 744, 586 N.Y.2d 240 (1992).

Whether a transaction constitutes a usurious loan requires the agreement to

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." Ujueta v. Euro-Quest Corp., 29 A.D.3d 895, 814 N.Y.S.2d 551 (2d Dept. 2006). In determining whether a transaction is a loan or not, the Court must examine whether or not defendant is absolutely entitled to repayment under all circumstances. K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc.3d 807, 57 N.Y.S.3d 625, 632 (Sup. Ct. Westchester County 2017). "For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." Id.; Rubenstein v. Small, 273 App.Div. 102, 104, 75 N.Y.S.2d 483 (1st Dept. 1947). Hence, there can be no usury unless the principal sum advanced is repayable absolutely. Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op. 50310(u)(Sup Ct. Westchester County 2018). When payment or enforcement rests on a contingency, the agreement is valid though it provides for a return in excess of the legal rate of interest. Id.

Purchases and sales of future receivables and sales proceeds are common commercial transactions expressly contemplated by the Uniform Commercial Code. NY Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op. 50310(u)(Sup. Ct. Westchester County 2018). Id. Lower Courts addressing such agreements have considered and rejected similar arguments as have been made here, and found that the agreements to purchase receivables were not loans. See Ibis Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071, 2017 N.Y.Slip Op. 30477(u)(Sup. Court, Nassau County 2017); Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op. 50310(u)(Sup Ct. Westchester County 2018); Rapid Capital Finance, LLC v. Natures Market Corp., 66 N.Y.S.3d 797, 2017 N.Y.Slip Op. 27340 (Sup. Ct. Westchester Co. 2017); K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc.3d 807, 57 N.Y.S.3d 625, 632 (Sup. Ct. Westchester County 2017). Here, the Agreement does not have a specified

time for repayment and the daily amounts to be received are contingent in nature. Therefore, considering the Agreement itself, and the factors which various Courts have considered when determining whether an agreement is a loan, this Court finds that the Agreement at issue is not a loan subject to charges of usury.

Accordingly, Defendant is entitled to \$108,954.00 (the balance remaining on the contract) plus \$3,000.00 (default fee as per the Agreement), totaling \$111,954.00. The \$210.00 request appears to be related to the Index Fee which will be taxed as a cost by the Rockland County Clerk and thus will not be included in the amount awarded at this time. Plaintiff is also requesting a fixed attorney's fee award of 30% of the balance of the amount due. However, the Supreme Court is not bound by the fixed percentage set forth in the contract but has the inherent authority to determine reasonable attorneys' fees. Orix Credit Alliance Inc. v. Grace Industries, Inc., 261 A.D.2d 521, 521-522, 690 N.Y.S.2d 651 (2d Dept. 1999); Prince v. Schacher, 125 A.D.3d 626, 628, 2 N.Y.S.3d 585 (2d Dept. 2015). Thus, an award of attorneys' fees pursuant to 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. v. Annex Contracting Inc. 261 A.D.2d 363, 689 N.Y.S.2d 189 (2d Dept. 1999); Lupo v. Anna's Lullaby Café, LLC, 189 A.D.3d 1205, 138 N.Y.S.3d 103 (2d Dept. 2020); Coffey v. Tretola, 179 A.d.3d 889, 890, 119 N.Y.S.3d 179 (2d Dept. 2020).

Accordingly, a fixed percentage fee, as requested here, is viewed only as a maximum fee, limiting the amount of reasonable attorney's fees which the plaintiff may charge upon proving the extent of the necessary services. Mead v. First Trust & Deposit Co., 60 A.D.2d 71, 78, 400 N.Y.S.2d 936 (4th Dept. 1977). An award of reasonable attorneys' fees is within the sound discretion of the court, based upon such factors as the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel. SO/Bluestar LLC v. Canarsie Hotel Corp., 33 A.D.3d 986, 825 N.Y.S.2d 80, 82

(2d Dept. 2006).

Stated another way, the plaintiff may be entitled to recover an attorney's fee of a fixed percentage if it can demonstrate that the quality and quantity of the legal services rendered were such as to warrant, on a quantum meruit basis, that full percentage. Industrial Equipment Credit Corp. v. Green, 92 A.D.2d 838, 460 N.Y.S.2d 337 (1st Dept. 1983). If the plaintiff does not make that demonstration, then a reasonable attorney's fee should be set by the court upon a quantum meruit basis. Id. Where the value of the legal services rendered by Plaintiff's counsel is not evident from the record, the matter may be remanded for an assessment of those damages. Id. Here, Plaintiff has offered absolutely no evidence, by way of billing statements or otherwise, the amount of time expended by counsel related to its pursuit of this debt. The Court doubts very much, however, that Plaintiff has expended more than 80 hours of work at \$400/hour so as justify an attorney's fee award in the amount of \$32,686.20, as requested.

Since a quantum meruit award cannot be issued on this record, Plaintiff is accorded thirty (30) days from today's date to provide an affirmation and billing statements to this Court as proof of the time spent to litigate this action if it intends to seek attorney's fees. Otherwise, Plaintiff may enter judgment against Defendants in the amount of \$111,954.00, plus pre-judgment interest at 9% from the October 25, 2023, to the date of entry of judgment, post-judgment interest, costs and disbursements as taxed by the Rockland County Clerk.

Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion (#1) is DENIED as moot; and it is further


ORDERED that Plaintiff's Notice of Motion (#2) for summary judgment against defendants is GRANTED; and it is further

ORDERED that Plaintiff may submit an affirmation and billing statements as proof of time spent in connection with its request for an award of attorney's fees within thirty (30) days from the date of this Order and, upon failure to do so, the request for an award of attorney's fees will be deemed to be waived; and it is further

ORDERED that Plaintiff may enter judgment against Defendants jointly and severally in the amount of ONE HUNDRED ELEVEN THOUSAND NINE HUNDRED FIFTY-FOUR DOLLARS AND 00/100 CENTS (\$111,954.00) plus pre-judgment interest at 9% from October 25, 2023, to the date of entry of judgment, with costs and expenses as taxed by the Rockland County Clerk, without further leave of Court.

The foregoing constitutes the Decision and Order of this Court on Motions # 1-2.

Dated: New City, New York
February 25, 2024



HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO: (All parties via NYSCEF)