Lendr.Online, LLC v Professional Corp. Salt Riv. Bldrs. Inc
2024 NY Slip Op 34666(U)
April 1, 2024
Supreme Court, Nassau County
Docket Number: Index No. 619168/2023
Judge: Gary F. Knobel
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SUPREME COURT – STATE OF NEW YORK

Present:

HON. GARY F. KNOBEL
Justice of the Supreme Court

LENDR.ONLINE, LLC.

Plaintiff,

-against-

PROFESSIONAL CORPORATION SALT RIVER BUILDERS INC d/b/a SALT RIVER BUILDERS and HERCSON ROMERO CADENA

Defendant(s).

IAS/TRIAL PART 18

NASSAU COUNTY

INDEX NO. 619168/2023

DECISION & ORDER

MOTION SEQ #: 001

Papers Considered:

Plaintiff's Memorandum of Law in Support.....1
Defendant's Affirmation in Opposition.....2
Defendant's Memorandum of Law in Opposition.....3
Plaintiff's Reply Memorandum.....4

Upon the foregoing papers, the motion by plaintiff for an order dismissing the counterclaims and affirmative defenses asserted by defendants is granted to the extent detailed below.

BACKGROUND

Plaintiff filed a summons and verified complaint (NYSCEF Doc. No 1) on November 27, 2023, alleging breach of contract (first cause of action) and personal guarantee (second cause of action). Plaintiff alleges that Professional Corporation Salt Rivers Builders Inc ("Corporate Defendant") failed to remit Plaintiff's shares of receivables under the contact, resulting in damages of $68,518.75 plus interest and that Hercson Romero Cadena ("Defendant") is liable as a guarantee.

On December 19, 2023, Defendants filed an answer (NYSCEF Doc. No. 4) with thirteen affirmative and counterclaims alleging breach of contract. Defendant's affirmative defenses are:

> "26. Plaintiff lacks personal jurisdiction over defendants.
> 27. To the extend that this contract lacks consideration. A Transaction that fails to establish consideration is not an enforceable contract.
> 28. To the extent that this contract is unconscionable. This contract is grossly unreasonable that is should be deemed unenforceable.
> 29. To the extent established in discovery, Plaintiff's Complaint fails to set forth claims upon which relief can be granted.
> 30. To the extent established in discovery, each cause of action in the Complaint is barred because the Defendants have not breached any obligation that they may have had with Plaintiffs.
> 31. to the extent established by discovery, all or part of Plaintiff's claims are barred in whole or in part by one or more equitable doctrines, including accord and satisfaction, unconscionability, waiver, release, estoppel, laches and unclean hands.
> 32. To the extent established in discovery, all or part of Plaintiff's claims are barred in whole or in party by the statute of frauds.
> 33. To the extent established in discovery, all or part of Plaintiff's claims are barred in whole or in part and any contract entered into by Defendants with Plaintiff's entitled to a rescission because any such contract was entered into by the Defendants under economic duress and/or through undue influence or fraud on behalf of Plaintiff.
> 34. To the extent established in discovery, upon information and belief the Defendants dispute any and all amounts set forth in the documents referenced in the complaint.
> 35. To the extent established in discovery, upon information and belief Plaintiff's claims are barred as a result of payment having been made to Plaintiff's by Defendants.
> 36. To the extent established in discovery, upon information and belief, the contract is unenforceable due to fraud.
> 37. To the extent established in discovery, upon information and belief, the contract is usurious and unenforceable pursuant to General business Law, sec 5-521, and Penal Law, see. 190.40.
> 38. Defendants presently have insufficient knowledge or information upon which to form a belief as to whether they may have additional affirmative defenses. On that basis, the Defendants reserve the right to amend this Answer to asset[sic] additional affirmative defenses in the event discovery indicates the additional defenses appropriate."

(NYSCEF Doc. No. 4).

Defendants' counterclaims allege a breach of contract against the Plaintiff both individually and as a corporation (*id.*). Defendants contend that pursuant to the subject agreement,

the corporate defendant was to receive $75,000.00 and was obligated to repay the amount of $108,750.00, that "defendant performed pursuant to the agreement" and "[p]ursuant to *Section 2: Changes to the Delivery Amount* of the Agreement, defendants had the right to request a reconciliation to more closely reflect their receivables, [and] requested a reconciliation. Plaintiff denied defendants request for reconciliation, thereby plaintiff breached the contract causing defendant to "suffer[] money damages as a result of Plaintiff's breach of the agreement" (*id.*).

Plaintiff now moves (1) pursuant to CPLR § 3211(a)(7), to dismiss defendants counterclaims for failure to plead facts sufficient to state a claim and, (2) pursuant to CPLR § 3211(b), to dismiss all of defendants' affirmative defenses for failure to plead with facts and to dismiss defendants' usury defenses as a matter of law.

DEFENDANTS' COUNTERCLAIMS DISMISSED

"On a motion to dismiss a counterclaim pursuant to CPLR § 3211(a)(7), the court 'must accept [the] facts as alleged . . . and submissions in opposition [as true], accord [the pleading party] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Wells Fargo Bank, N.A. v. Mitselmakher*, 197 A.D.3d 781, 782 [2d Dept. 2021] *quoting Whitebox Concentrated Convertible Arbitrage Partners, L.P., v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 [2012] [internal quotation marks omitted]). "At the same time, however allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Simkin v. Blank*, 19 N.Y.3d 46, 52 [2012]; *see Davydov v. Youssefi*, 205 A.D.3d 879, 880 [2d Dept. 2022] *Shah v. Mitra*, 171 A.D.3d 971, 973 [2d Dept. 2019]). "Furthermore, dismissal of a counterclaim is warranted if the counterclaimant fails to assert facts in support of an element of the counterclaim" (*Davydov v. Youssefi*, 205 A.D.3d at 880; *see Connaughton v. Chipotle Mexican Grill, inc.*, 29 N.Y.S.3d 137, 142 [2017]; *Shah v. Mitra*, 171

A.D.3d at 973; *see also Godfrey v. Spano*, 13 N.Y.3d 358, 373 [2009]["Although on a motion to dismiss plaintiff's allegations are presumed to be true and accorded every favorable inference, conclusory allegations-claims consisting of bare legal conclusions with no factual specificity-are insufficient to survive a motion to dismiss."]).

"To recover damages for breach of contract, a [pleading party] must demonstrate the existence of a contract, [his or her] performance pursuant to the contract, [the opposing party's] breach of its contractual obligations, and damages resulting from the breach" (*All Seasons Fuels, Inc. v. Morgan Fuel & Heating Co., Inc.*, 156 A.D.3d 591, 594 [2d Dept. 2017]; *see Halcyon Constr. Corp. v. Strong Steel Corp.*, 199 A.D.3d 898, 899 [2d Dept. 2021].

Here, defendants do not offer any specifics or factual statements to support their position. Defendants simply allege that they "performed pursuant to the agreement" and "requested a reconciliation of the specified payment to more closely reflect their receivables at that time" but "Plaintiff denied Defendants request for reconciliation and demanded payment in full of all remaining receivables" (NYSCEF Doc. No. 4 ¶¶ 41, 43-44). Defendants have not provided any dates of requests, if they were requested prior to the alleged default, or any facts to support the basis of the reconciliation. Defendant continues and broadly states "Defendant has suffered money damages as a result of Plaintiffs breach of the agreement" without any claimed amount (*id.* ¶ 46). Defendants' vague and conclusory allegations contained in both counterclaims are insufficient to state a breach of contract cause of action (*see Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d at 142; *see e.g. Sikorsky v. City of Newburgh*, 188 A.D.3d 1112, 1115 [2d Dept. 2020]). Defendants do not submit any factual submissions in their affirmation or in their opposition to

remedy the defects.[1] Thus, defendants' counterclaims are dismissed pursuant to CPLR § 3211(a)(7).

AFFIRMATIVE DEFENSES DISMISSED IN PART

CPLR § 3211(b) states that "[a] party may move for judgment dismissing one or more defenses, on the grounds that a defense is not stated or has no merit." When a plaintiff moves to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defenses "are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (*Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC,* 78 A.D.3d 746, 748 [internal quotation marks omitted]; *see Lewis v. U.S. Bank, N.A.*, 186 A.D.3d 694, 697 [2d Dept. 2020]; *Shas v. Mitra*, 171 A.D.3d at 971). "On a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR§ 3211(a)(7), and the factual assertions of the defense will be accepted as true" (*Wells Fargo Bank, N.A. v. Rios*, 160 A.D.3d 912, 913 [2d Dept. 2018] *see LG Funding LLC v. United Senior Props. Of Olathe, LLC*, 181 A.D.3d 664, 665 [2d Dept. 2020]).

A. Lack of Personal Jurisdiction Waived and Dismissed

"[A]n objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleadings, unless the court extends the time upon the grounds of undue hardship" (CPLR § 3211[e]; *see Bank of New York Mellon v. Shurko*, 209 A.D.3d 949, 950 [2d dept. 2022]; *Wells Fargo Bank, N.A., v. Gross*, 202 A.D.3d 882, 885 [2d

[1] It is important to note that defendants' submissions in this matter are near identical filings to those submitted in *Cloudfund LLC, v. Broughton Construction Company LLC et al*, Nassau County Index No. 609177/2023, where the Hon. Jerome C. Murphy J.S.C. wrote a decision that addresses these exact issues. The decision is dated December 4, 2023, 15 days prior to Defendants' answer and counterclaims in this matter, and over a month prior to Defendants' opposition to the instant motion.

Dept. 2022]). Defendants raised the affirmative defense of lack of personal jurisdiction in their answer dated December 19, 2023. After filing their answer, defendants never made a motion to dismiss the complaint based on lack of personal jurisdiction. Therefore, the affirmative defense in paragraph 26 of the answer has been waived by defendants and is dismissed (*see* CPLR § 311[e]).

B. Lack of Consideration

"To establish the existence of an enforceable agreement, there must be consideration, among other things" (*Keller-Wala v. Coello*, 2024 N.Y. App. Div. Lexis 1080 *2 [2d Dept. 2024]; *citing Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 464, 443 N.E.2d 441, 457 N.Y.S.2d 193; *Matter of Civil Serv. Empls. Assn., Inc. v. Baldwin Union Free School Dist.*, 84 A.D.3d 1232, 1233-1234, 924 N.Y.S.2d 126; *Beitner v. Becker*, 34 A.D.3d 406, 407, 824 N.Y.S.2d 155). "Consideration consists of either a benefit to the promisor or a detriment to the promise" (*Nassau County v. New York State Urban Dev. Corp.*, 157 A.D.3d 805, 807 [2d Dept. 2018][internal question marks omitted]). "Under the contemporary definition of consideration, '[i]t is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him' or her" (*Coello*, at *2-3; *citing Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 464 [internal quotation marks omitted]; *see Nassau county v. new York State Urban Dev. Corp.*, 157 A.D.3d at 807).

Here, the subject agreement (Complaint Exhibit A) shows that plaintiff agreed to pay $75,000.00 in exchange for the future earnings of $108,750.00. Defendants concedes this in their "Counter-Facts" section of their verified answer (NYSCEF Doc. No. 2; NYSCEF Doc. No. 4 ¶ 40). Since, defendants have conceded through their own answer that there was consideration in the contract, defendants affirmative defense contained within paragraph 27 is dismissed.

C. Unconscionable

"In general, an unconscionable contract has been defined as one which is grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (*King v. Fox*, 7 N.Y.3d 181 [2006]; *citing Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10, 534 N.E.2d 824, 537 N.Y.S2d 787 [1988]). "An unconscionable agreement is 'one such as no person in his or her own senses not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense'" (*Shah v. Mitra*, 171 A.D.39 971 at 977; *citing Christian v. Christian*, 42 N.Y.2d 63, 71 [1977] [internal quotation marks omitted] *see Matter of Hennel*, 29 N.Y.3d 487, 495, 58 N.Y.S.3d 271, 80 N.E.3d 1017 [2017]; *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1 at 10-12).

Defendants provide no factual basis more than mere legal conclusions to support their affirmative defense that the contract is unconscionable. Defendants do not make any allegations as to what portion or specific section of the agreement is unconscionable, but instead, merely conclude that the contract in unenforceable as unconscionable (*see Katz v. Miller*, 120 A.D.3d 768, 769-770 (2d Dept. 2014); *Commrs. Of the State Ins. Fund v. Ramos*, 63 A.D.3d 453 [1st Dept. 2009]). Therefore, the affirmative defense contained within paragraph 28 is dismissed.

D. Failure to State a Cause of Action

"[N]o 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" (*Butler v. Catinella*, 58 A.D.3d 145, 150 [2d Dept. 2008]; *see Lewis v. U.S. Bank, N.A.*, 186 A.D.3d at 697; *Jacob Marion, LLC v. Jones*, 168 A.D.3d 1043, 1044 [2d Dept.

2019]). Therefore, Plaintiff's motion to strike the affirmative defense for failure to state a cause of action set forth in paragraph 29 is denied.

E. Fraud

"Generally, to state a counterclaim or affirmative defense sounding in fraud, a defendant must allege that (1) the plaintiff made a representation or a material omission of fact which was false and the plaintiff knew to be false, (2) the misrepresentation was made for the prupose of inducing the defendant to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (3) injury (*Shah v. Mitra*, 171 A.D.3d at 975).

Additionally, "[a] contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will" (*Austin instrument v. Loral Corp.*, 29 n.Y.2d 124, 130 [1971]; *see Ascentium Capital LLC v. Automotive Fleet Leasing Co.*, 175 A.D.3d 1468, 1469 [2d Dept. 2019]). "The aggrieved party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain rom performing" (*Polito v. Polito*, 121 A.D.2d 614, 615 [2d Dept. 1986]).

To invalidate a contract based on undue influence "there must be evidence that [the person exerted such] influence which 'amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [other party] to do that which was against his free will and desire, but which he was unable to refuse or too week to resist'" (*Hearst v. Hearst*, 50 A.D.3d 959, 961-962 [2d Dept. 2008]; *quoting Matter of Walther*, 6 N.Y.2d 39, 52 [1959]).

Defendants have submitted no particularized allegations of fraud in their answer, in their motion, or provided any evidence to support the bare allegations of fraud, undue influence, or duress. Thus, the affirmative defenses contained in paragraphs 33, 34, 35, and 36 are dismissed.

F. Usury

"The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (*LG Funding LLC v. United Senior Props. Of Olathe, LLC*, 181 A.D.3d at 665). "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 it give it" (*id.* [internal quotation marks omitted]). "The court must examine whether the plaintiff 'is absolutely entitled repayment under all circumstances'" (*id.*). "Unless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*id.* at 666). "Usually, 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.*).

The subject agreement (Complaint Exhibit A) provides "Sale of Future Receipts (THIS IS NOT A LOAN): Seller is selling a portion of a future revenue stream to Buyer at a discount, *not borrowing money* from Buyer. There is *no interest rate* or payment schedule and *no time period* during which the Purchase d Amount must be collected by Buyer." (NYSCEF Doc. 2 at ¶ 4 [emphasis added]). The agreement further delineates:

> Buyer assumes the risk that Future Receipts may be remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down, and the risk that the full Purchased Amount may never be remitted because Seller's business went bankrupt or Seller otherwise ceased operations in the ordinary course of business. Buyer is buying the Purchased Amount of Future Receipts knowing the risks that Seller's business may slow down or fail, and Buyer

> assumes these risks based on Seller's representations, warranties and covenants in this Agreement that are designed to give Buyer a reasonable and fair opportunity to receive the benefit of its bargain.

(*id.*). The agreement even states that the "Buyer assumes the risk that Future Receipts may be remitted more slowly than Buyer may have anticipated . . . and risk[s] that the full Purchased Amount may neve be remitted because Seller's business went bankrupt or . . . ceased operations in the ordinary course of business (*id.*). Defendants concede in their answer that there were provisions for to request reconciliation and prospective adjustment (*id.* ¶ 2). Since the subject agreement was not subject to a finite term, contained acknowledgments that plaintiff may never recover the anticipated full amount, and contained reconciliation and adjustment provisions, based on the documentary evidence, the subject agreement is not a loan. Thus, the affirmative defense of usury contained within paragraph 37 is without merit and dismissed (*see Prinicpis Captial, LLC v. I Do, Inc.*, 201 A.D.3d 752, 754-755 [2d Dept 2022]; *cf. LG Funding, LLC v. United Senior Props. Of Olathe, LLC*, 181 A.D.3d at 666).

G. Remaining Defenses

"[W]here affirmative defenses merely plead conclusions of law without any supporting facts, the affirmative defenses should be dismissed pursuant to CPLR § 3211(b)" (*Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 A.D.3d 746 A.D.3d 746, 750 [2d Dept. 2010] *quoting Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 723 [2d Dept. 2008]; *see Diaz v. 297 Schaefer St. realty Corp.*, 195 A.D.3d 794, 796 [2d Dept. 2021]). The remaining affirmative defenses contained in paragraphs 30, 31, 32 and 34, 35, 36, and 37 which were previously addressed, are pleaded conclusions of law without any supporting facts (*see Diaz v. 297 Schaefer St. Realty Corp.*, 195 A.D.3d at 796). Utilizing the phrase "to the extent established in discovery" and "upon information and belief" are not safety nets, but rather clear acknowledgments by Defendants that

they are not aware of any facts to support these affirmative defenses. Furthermore, a party may remedy any defects in pleadings by submitting evidence in opposition to a motion to dismiss, however, defendants have not done so in the instant matter (*see Benjamin v. Yeroushalmi*, 178 A.D.3d 650, 653 [2019]). Therefore, the affirmative defenses detailed in ¶ 30-32 are dismissed.

The Court notes that Defendants included in their memorandum of law a request to replead in the event that this Court dismisses their counterclaims and affirmative defenses.

Accordingly, it is hereby

ORDERED, that the branches of plaintiff's motion, pursuant to CPLR § 3211(a)(7), for an order dismissing defendants' counterclaims are **GRANTED;** and it is further

ORDERED, that the branches of Plaintiff's motion, pursuant to CPLR § 3211(b), for an order dismissing defendants' affirmative defenses, is **granted as to paragraphs 26, 27, 28 and 30-37,** and **DENIED as to the defenses set forth in paragraph 29, and it is further**

ORDERED that the defendants' informal application to repeal its counterclaims and affirmative defenses is denied.

The foregoing constitutes the Decision and Order of this Court.

Settle Judgment.

ENTER

DATED: April 1, 2024

Gary Knobel
HON. GARY F. KNOBEL J.S.C.

ENTERED
Apr 16 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE