Cloudfund LLC v Lay Lows LLC
2024 NY Slip Op 35222(U)
January 23, 2024
Supreme Court, Queens County
Docket Number: Index No. 703357/2023
Judge: Mojgan C. Lancman
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

IAS PART 20

---x

CLOUDFUND LLC,

Plaintiff,

-against-

LAY LOWS LLC D/B/A DISCOUNT FURNITURE WAREHOUSE AND MOISES RIVERA,

Defendants.

---x

Index No.: 703357/2023

Motion Seq. No.: 1

Motion Date: 7.26.2023

Motion Cal. No.: 14

The e-filed papers bearing NYSCEF Doc. Nos. 10-19, 30, 32, 35, and 40-44 were read on the motion filed by the plaintiff, Cloudfund LLC (the "Plaintiff"), for an Order, *inter alia*, dismissing the affirmative defenses asserted by the defendants, Lay Lows LLC d/b/a Discount Furniture Warehouse ("Lay Lows") and Moises Rivera ("Rivera") (collectively, the "Defendants").

The Plaintiff filed this cause seeking to, *inter alia*, recover damages for breach of contract. The Plaintiff alleges that in December 2022 it entered into a future receipts sale and purchase agreement (the "Agreement") with Lay Lows. Pursuant thereto, the latter sold $47,950.00 of its receivables to the former for the net sum of $32,844.00 (the purchase price, $35,000.00, minus fees).

The Plaintiff also alleges that Rivera, the principal and/or owner and/or manager of Lay Lows, breached a personal guaranty by failing to reimburse the Plaintiff for the losses caused by the breach of the Agreement by Lay Lows.

The third cause of action asserted in the complaint seeks to recover attorneys' fees incurred based upon breach of the Agreement.

The receivables that were sold to the Plaintiff, amounting to $47,950.00, were to be paid to the Plaintiff from 11% of Lay Lows' daily receivables. In essence, the Plaintiff contends that the Defendants breached the Agreement by remitting receivables that amounted to only $10,000.00.

The Plaintiff now moves to dismiss the Defendants' affirmative defenses and their counterclaim. For the following reasons, the motion is granted in part and denied in part.

A. The Counterclaim Predicated upon GBL § 349

The Plaintiff seeks to dismiss the counterclaim asserted by the Defendants, which asserts that the Plaintiff violated GBL § 349.

In *Singh v City of New York*, 40 NY3d 138, 147-148 [2023], the Court of Appeals held as follows:

> [GBL] [s]ection 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state …
>
> As we have repeatedly stated, section 349 is directed at wrongs against the consuming public. Thus, parties claiming the benefit of the section must, at the threshold, charge conduct that is consumer oriented. This element is satisfied only when the allegedly deceptive conduct has a broad impact on consumers at large [internal quotation marks, brackets and citations omitted]).

Put another way, a cause of action under GBL § 349 "must allege that: (1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co. Inc.*, 37 NY3d 169, 176 [2021]).

"The single shot transaction, which is tailored to meet the purchaser's wishes and requirements, does not, without more, constitute consumer-oriented conduct for the purposes of this statute. Rather, the defendant's acts or practices must have a broad impact on consumers at large" (*JP Morgan Chase Bank, N.A. v Hall*, 122 AD3d 576, 581 [2d Dept 2014] [internal quotation marks and citations omitted]).

A GBL § 349 cause of action must be dismissed where "the conduct alleged does not amount to consumer-oriented conduct and instead involves a private dispute unique to the parties" (*Skarzynski v ABM Mgmt. Corp.*, 217 AD3d 983, 984 [2d Dept 2023] [internal quotation marks and citations omitted]).

The affirmative defense predicated upon GBL § 349 must be dismissed because the conduct complained of is not "consumer oriented, but rather a single, private transaction" (*116 Waverly Place LLC v Spruce 116 Waverly LLC*, 179 AD3d 511, 512 [1st Dept 2020]; (*see New York Univ. v Const'l Ins. Co.*, 87 NY2d 308, 321 [1995]; *Skarzynski v ABM Mgmt. Corp.*, 217 AD3d 983. Here, the essence of the complaint is that an Agreement between the Plaintiff and Lay Lows and a personal guaranty executed by Rivera in favor of the Plaintiff were breached. This is not consumer-oriented conduct, but rather private disputes that are unique to the parties (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 [1995]; *Silver v CitiMortgage, Inc.*, 162 AD3d 812 [2d Dept 2018]).

The Defendants' counterclaim predicated upon GBL § 349 is therefore dismissed.

B. Usury

The Defendants appear to assert a counterclaim and/or affirmative defense grounded in usury. In *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, 666 [2d Dept 2020], the Second Department set forth the factors that are to be considered in determining whether a merchant cash advance agreement is a purchase of future receivables or a loan: "[u]sually, 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" [citations omitted]). Here, the Agreement sued upon contains express reconciliation and adjustment provisions, did not impose a finite term and did not explicitly provide for any recourse should bankruptcy or business failure occur. The Plaintiff is thus entitled to the dismissal of any counterclaim and/or affirmative defense predicated upon usury (*see id.*; *Cloudfund, LLC v SPS Const. LLC*, Sup Ct, Queens County, February 6, 2022, Livote, J., index No.: 709965/2022).

C. The Defendants' Remaining Affirmative Defenses

The Court shall now address the Plaintiff's request to dismiss the Defendants' remaining affirmative defenses.

The affirmative defense of failure to state a cause of action, the sixteenth asserted in the answer, cannot be dismissed "as this [would] amoun[t] to an endeavor by the plaintiff to test the sufficiency of [its] own claim" (*Lewis v US Bank N.A.*, 186 AD3d 694, 697 [2d Dept 2020]).

"Where affirmative defenses merely plead conclusions of law without any supporting facts, the affirmative defenses should be dismissed pursuant to CPLR 3211 [b]" (*Diaz v 297 Shaefer St. Realty Corp.*, 195 AD3d 794, 796 [2d Dept 2021] [internal quotation marks, brackets and citations omitted]). Here, the remaining affirmative defenses are not substantiated by factual allegations, are conclusory and plead conclusions of law. They are therefore dismissed (*see id.*).

Dismissal of affirmative defenses is also warranted when they are without merit (*see id.*). Here, the affirmative defenses of the parol evidence rule; standing; that the Plaintiff seeks to receive more money than it is entitled to; improper service of process; forum nonconveniens; lack of personal jurisdiction; statute of limitations; statute of frauds; that the "[P]laintiff lacks personal knowledge of the facts alleged in its Complaint"; improper calculations of the balance due; that the Plaintiff never "negotiate[d] reasonable settlement terms (that promote equity and fairness)"; and "a reservation of rights" to assert additional affirmative defenses and to supplement, alter or change same, are without merit based on the record or not affirmative defenses at all. The foregoing affirmative defenses are thus dismissed on the additional ground that they lack merit.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's motion is granted in part and denied in part; and it is further, ORDERED, that the Defendants' counterclaim predicated upon GBL § 349 is dismissed; and it is further,

ORDERED, that the Defendants' affirmative defense or counterclaim grounded upon usury is dismissed; and it is further,

ORDERED, that the branch of the motion to dismiss the Defendants' remaining affirmative defenses is granted to the extent the affirmative defenses other than failure to state a cause of action are dismissed.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
January 23, 2024

FILED
1/25/2024
COUNTY CLERK
QUEENS COUNTY

MOJGAN C. LANCMAN, J.S.C.