Pearl Delta Funding, LLC v Regal Auto Credit, Inc.
2024 NY Slip Op 35270(U)
March 6, 2024
Supreme Court, Nassau County
Docket Number: Index No. 604137/2023
Judge: Sarika Kapoor
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

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PEARL DELTA FUNDING, LLC,

Plaintiff,

- against -

REGAL AUTO CREDIT, INC. and JEFFREY SAMUEL WARD II,

Defendants.

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TRIAL/IAS PART 34
Index No.: 604137/2023

DECISION AND ORDER

Motion Seq. No.: 001
Motion Submission Date: 11/27/2023

NYSCEF docs. 1, 5, 9-21 were read and considered in deciding this motion.

Plaintiff moves for an Order, pursuant to CPLR §3211(a)(1) and (b), dismissing the defendants' affirmative defenses. Despite proof of proper service (22 NYCRR 202.5-b[f][2][ii]), the motion remains unopposed.

BACKGROUND

On or about January 3, 2023, plaintiff and defendants entered into a Revenue Purchase Agreement with Security Agreement and Guaranty of Performance (hereinafter the "agreement") whereby plaintiff, for an upfront payment, purchased 9% of the future receivables of Regal Auto Credit, Inc. ("merchant") in exchange for: (a) the merchant's promise to pay $43,800 ("Purchased Amount") to plaintiff; and, (b) the guaranty by Jeffrey Samuel Ward II ("personal guarantor") of the merchant's performance of the agreement.

As a purchase and sale of future receivables, payment to plaintiff from merchant was contingent upon the merchant generating and collecting receivables; however, the agreement did not allow the defendants to withhold or divert the 9% of the receivables and sales proceeds from the plaintiff.

Additionally, in accordance with the "Guaranty of Performance", the personal guarantor agreed to joint, personal and unconditional liability in the event of a breach. The Guaranty of Performance reads, in pertinent part, as follows:

> "THE TERMS, DEFINITIONS, CONDITIONS AND INFORMATION SET FORTH IN THE REVENUE PURCHASE AGREEMENT (the "RPA"), INCLUDING THE "TERMS AND CONDITIONS", ARE HEREBY INCORPORATED IN AND MADE A PART OF THIS SECURITY AGREEMENT AND GUARANTY OF PERFORMANCE…."

Indeed, pursuant to the agreement, the defendants agreed to exclusively use one bank account approved by the plaintiff (the "account') into which the merchant agreed to deposit all of its receipts and from which plaintiff was authorized to make daily ACH withdrawals until the Purchased Amount was fully paid to the plaintiff.

On June 6, 2023 (the "Date of Default"), merchant's payment was returned by its bank with a return code of R08, to wit, "Payment Stopped."

Sequence 001

In support of the instant motion, counsel for plaintiff annexes the merchant's Transaction History, which he submits was made in the regular course of plaintiff's business of purchasing receivables from other companies as a routine business practice by an employee of plaintiff who had a duty or obligation to so, reflects all payments made by or on behalf of the defendants regarding the agreement. Counsel submits that, as can be seen therefrom: (a) defendants partially performed by delivering $13,870 of the $43,800 Purchased Amount to plaintiff, but then breached the agreement on the Date of Default; and (b) the balance due and owing by defendants to plaintiff is $32,500, the same amount as was detailed in plaintiff's verified complaint, computed as follows:

$43,800.00	Purchased Amount
-$13,870.00	Payments made by or on behalf Defendants
+$70.00	NSF Fees (see agreement, page 7, section C), 2 at $35 each
+$2,500.00	Default Fee (see agreement, page 7, section D)
$32,500.00	Balance Due and Owing

Counsel for plaintiff adds that, since the Date of Default, defendants have not remitted any portion of their receivables due despite continuing to generate and collect receivables and are withholding $29,930 from plaintiff, thereby depriving plaintiff of the use, possession and enjoyment of the purchased receivables/revenue which have been plaintiff's sole and exclusive property since the date they were purchased by plaintiff. Counsel notes that although section 1.4 ("Adjustments to the Remittance") of the agreement provides merchant with a mechanism to decrease its daily remittance, the merchant never requested such a decrease.

Additionally, plaintiff's counsel adds that although the agreement provides that in the event of a breach by the defendants, plaintiff is entitled to recover its reasonable attorneys' fees from the defendants, plaintiff waives its claim for attorneys' fees so as to obtain an expedited sum certain damages judgment. Thus, plaintiff's injuries are sum certain injuries in the amount of $32,500.

This action was commenced by the filing of a Summons and Verified Complaint on March 10, 2023 to recover sum certain damages of $32,500 from the defendants, jointly and severally, arising from the defendants' breach of contract, breach of representations and warranties, and breach of a guarantee of performance.

On April 14, 2023, defendants' filed a Verified Answer denying the material allegations of the complaint, admitting various allegations[1] and asserting 18 affirmative defenses as follows: (1) failure to state a cause of action; (2) unclean hands; (3) plaintiff failed to provide adequate consideration; (4) the statute for frauds; (5) failure to mitigate damages; (6) waiver; (7) illegality; (8) laches; (9) unjust enrichment if the Court granted judgment, as demanded, against the defendants; (10) defendants did not provide an absolute guaranty of the payment of the Purchased amount under the agreement; (11) defendant did not provide a personal guarantee to plaintiff and was acting strictly in his capacity as a manager of Defendant Company; (12) the agreement contained an absolute obligation to repay by guarantor, therefore converting the Agreement to a loan; (13) contract was a loan, not a risk-laden purchase of future receivables; (14) plaintiff assumed all risks that it would not receive the full amounts set forth in the alleged agreement; (15) plaintiff agreed and assumed all risk of slowdown in defendants' business and in the collection of receivables and specifically agreed that such events would not constitute a breach of the agreement; (16) the agreement's reconciliation provision was illusionary; (17) defendants' business revenue did not support the daily ACH withdrawal amount collected by plaintiff; and (18) the amount demanded by the plaintiff includes and constitutes an unreasonable and unenforceable penalty, including "default" or "NSF" fees.

RELEVANT LAW AND DISCUSSION

A "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). "[I]f there is any doubt as to the availability of a defense, it should not be dismissed" (*id.* at 723). "However, where 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 AD3d 746, 750 [2d Dept 2010] [internal quotation marks omitted]).

Here, the defendants' affirmative defenses merely plead conclusions of law without any supporting facts and, therefore, dismissal is warranted pursuant to CPLR 3211(b).

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[1] By virtue of defendants' Verified Answer, among other things, defendants have admitted various allegations contained in plaintiff's Verified Complaint, to wit: a) that "...they signed an Agreement with plaintiff..." (doc. 1, ¶5); b) that "...they made payments to plaintiff..." (*id.*, ¶13); and c) the "allegations contained in Paragraph 17" (*id.*, ¶17). (The allegation contained in paragraph 17 of Plaintiff's Verified Complaint was that "... Merchant is still conducting business operations and still collecting receivables.")

CONCLUSION

Accordingly, it is hereby,

ORDERED that plaintiff's motion for summary judgment on the complaint and pursuant to CPLR 3211(b) to dismiss the defendants' affirmative defenses is **GRANTED**; and it is further,

ORDERED, that pursuant to the provisions of 22 NYCRR 202.19 and 22 NYCRR 202.23, the parties shall schedule a preliminary conference in this matter within thirty (30) days of this Decision and Order.

The parties' remaining arguments have been considered and do not warrant discussion.

Any applications not addressed herewith are **DENIED**.

This shall constitute the decision and order of this Court.

Dated: Mineola, New York
March 6, 2024

ENTER:

HON. SARIKA KAPOOR, A.J.S.C.

ENTERED
Mar 08 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE