Apollo Funding Co. v J&M Civ. Constr. Servs., LLC
2024 NY Slip Op 35294(U)
March 25, 2024
Supreme Court, Rockland County
Docket Number: Index No. 036594/2023
Judge: David Fried
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.

To commence the statutory time period for appeals as of right (CPLR §5513 [a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
APOLLO FUNDING CO.,

Plaintiff,

-against-

J & M CIVIL CONSTRUCTION SERVICES, LLC, et al.

Defendants.
---X

DECISION & ORDER

Index No. 036594/2023
Motion Sequence No. 1

HON. DAVID FRIED, A.J.S.C.

The papers filed electronically via NYSCEF numbered 15 through and including 27 ("Motion") were read and considered herein. Upon such reading and consideration, the Motion is disposed as follows:

BACKGROUND

This action was commenced by way of the filing of a Summons and Complaint on December 20, 2023. The underlying action seeks damages based on an alleged breach of a purported Merchant Cash Advance Agreement ("Agreement") entered into between the parties on or about December 7, 2023. Plaintiff alleges that pursuant to the Agreement, the various J&M Defendants, Expedited Hot Shots Co., and Top Quality Electrical Construction LLC (collectively, "Defendant Company") agreed to sell to Plaintiff Apollo Funding Co. ("Plaintiff") $223,500.00 of their future receivables, to be remitted to Plaintiff at a rate of 12% of the weekly collected receivables of Defendant Company. Additionally, Defendant Joseph Plata ("Guarantor" and, together with Defendant Company, "Defendants") agreed to personally guaranty Defendant Company's performance pursuant to the Agreement. The Agreement purportedly further provides that in the event that Defendant Company sought a reconciliation, and was entitled to one pursuant to the Agreements, Plaintiff was required to perform such a reconciliation.

Defendants filed an Answer with affirmative defenses to the Complaint. Plaintiff now moves for summary judgment against all Defendants. Defendants oppose said motion.

PARTIES' CONTENTIONS

Plaintiff, in support of its summary judgment motion, submits the Agreement (NYSCEF Doc. No. 19). Plaintiff also submits the Affidavit of Nick Kolesar ("Kolesar"), the manager of Plaintiff, who asserts the following: that his job duties include the maintenance of the relevant account records; that on December 7, 2023, Defendant Company and Plaintiff entered into the Agreement, which provided that Defendant Company would sell future receivables and sale proceeds, with a face value of $223,500.00, for the sum of $150,000.00 to Plaintiff; that pursuant to the Agreement, Defendant Company would pay Plaintiff by ensuring that its sale proceeds and receivables were deposited into a designated bank account, permitting Plaintiff to electronically debit from said account 12% of their weekly sales proceeds until Plaintiff collected the $223,500.00; that Plaintiff timely deposited $150,000.00, less applicable fees, into Defendant Company's account, as evidenced by the proof of funding attached to the Kolesar Affidavit (NYSCEF Doc. No. 17).

Subsequently, Kolesar contends that Defendant Company performed some of its obligations, by having remitted $15,000.00 of the sale proceeds to Plaintiff. Kolesar further contends that on December 18, 2023, Plaintiff was denied access to the authorized account. Plaintiff alleges that Defendants still owe Plaintiff the balance of $208,500.00 and that Defendants have incurred, as per the terms of their Agreement, a default fee of $3,000.00, NSF fee of $35.00, plus $62,560.50 in attorneys' fees, thus totaling $274,095.50. The Agreement is signed by Defendants. Based upon the foregoing, Plaintiff contends that it has established its *prima facie* entitlement to summary judgment on its causes of action for breach of contract and breach of the personal guarantee.

In opposition to Plaintiff's Motion for Summary Judgment, Defendants contend the following: that Plaintiff has not shown – or attempted to show – that any sort of default fee, insufficient fund fees or the like constitute a reasonable advance estimate of difficult-to-calculate damages, as required for the fees to be collectible liquidated damages, rather than impermissible penalties; that Plaintiff has failed to sufficiently establish that the transaction history submitted on this motion is an admissible business record, as required to show the date of Defendant's alleged breach for interest purposes; that the employee affidavit is insufficient to provide a proper foundation and, thus, must be disregarded as hearsay evidence; and that due to the lack of proof of the crucial elements of a breach of contract claim, that Plaintiff has failed to make a *prima facie* showing that they are entitled to judgment as a matter of law for their breach of contract claim and that, therefore, Plaintiff's motion for summary judgment should be denied.

In reply, Plaintiff contends, among other things, as follows: that Kolesar attested to his foundational knowledge of the Plaintiff's records and recordkeeping, his review of same, and that his factual assertions were made based upon that knowledge and review, including that of third parties which are regularly incorporated into the Plaintiff's own business records and relied upon similarly; that the transaction/remittance history reflects the Plaintiff's internal accounting system, which incorporates banking transactions pertaining to the Defendants; that a liquidated damage clause is enforceable; and that the parties agreed that the calculation for attorney's fees is reasonable.

DISCUSSION

The remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent "must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra.*

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dept. 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra.* However, 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 Kolesar and the transaction/remittance history.

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. Arnow*, 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). See also *LG Funding, LLC v. United Senior Props of Olathe, LLC*, 181 A.D.3d 664, 665, 122 N.Y.S.3d 309 (2d Dept. 2020).

Defendants also have not demonstrated a triable issue of fact sufficient to deny summary judgment relating to Kolesar's Affidavit. Kolesar attested to, among other things, being a manager of the Plaintiff and that in said capacity has access to the records relating to the Defendants which were maintained in the ordinary course of regularly conducted business activity. Kolesar also attested to the following: to making said affidavit based upon his review of said records relating to the Defendants and from his own personal knowledge of how they are kept and maintained; and that said records are maintained by Plaintiff during its regularly conducted business activities and are made at or near the time of the event, by or from information transmitted by a person with knowledge; further, Kolesar attached the transaction history.

Accordingly, Defendant is entitled to $208,500.00 (the balance remaining on the contract) and the NSF fee of $35.00 totaling $208,535.00. "The Default Fee, however, is an unenforceable penalty. Here, the amount of damages upon a breach is readily ascertainable: it is the sum remaining due on the factoring agreement…. Plaintiffs in this industry are unquestionably capable and able to calculate the amount due on a default, as continuously illustrated by the plethora of cases of this type filed in the [Ninth] Judicial District." See, *Byzfunder NY LLC v. Holy City Collision LLC*, 80 Misc.3d 1208(A), 194 N.Y.S.3d 924 (Sup Ct Ontario Cty, 2023).

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).

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.

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 $208,535.00, plus pre-judgment interest at 9% from December 18, 2023, to the date of entry of judgment, post-judgment interest, costs and disbursements as taxed by the Rockland County Clerk.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment against Defendants is GRANTED, to the extend provided herein; 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 TWO HUNDRED AND EIGHT THOUSAND FIVE HUNDRED AND THIRTY-FIVE DOLLARS AND 00/100 CENTS ($208,535.00) plus pre-judgment interest at 9% from December 18, 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 & Order of this Court.

Dated: New City, New York
March 25, 2024

E N T E R:

HON. DAVID FRIED, A.J.S.C.
STATE OF NEW YORK
COUNTY OF ROCKLAND