Revenued LLC v LD & W LLC
2024 NY Slip Op 35298(U)
March 25, 2024
Supreme Court, Nassau County
Docket Number: Index No. 614844/2023
Judge: Rhonda E. Fischer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - CIVIL TERM PART 47

Present: HON. RHONDA E. FISCHER
Acting Justice of the Supreme Court

REVENUED LLC,

Plaintiff,

-against-

LD AND W LLC A/K/A AVENIDAS CREMATION & BURIAL and BRANDON SOLAREZ,

Defendant(s).

INDEX NO: 614844/2023

MOTION SEQ. Nos. 001 & 002
XXX

The following papers were read on these motions:
NYSCEF Nos. 17-53

Plaintiff moves (seq. 001) for an Order: 1) pursuant to CPLR § 3211(a)(1) and (b), dismissing the defendants' affirmative defenses; 2) pursuant to CPLR § 3211(a)(1) and (a)(7), dismissing the defendants' counterclaims for failure to state a claim and based upon documentary evidence and settled law; and 3) granting plaintiff such other and further relief as the Court deems just and proper.

Plaintiff moves (seq. 002) for an Order: (1) pursuant to CPLR § 3212, granting Revenued LLC summary judgment against the defendants, LD and W LLC a/k/a Avenidas Cremation & Burial and Brandon Solarez, jointly and severally in the principal amount of $16,969.69, plus statutory interest at 9% from June 22, 2023 (the date of the breach), with costs and disbursements as taxed by the clerk; and (2) awarding Revenued LLC, such other and further relief as the Court deems just and proper.

Defendants oppose both motions.

This case arises from an alleged breach of a Revenue Purchase Agreement (the "Agreement"). Plaintiff alleges that on or about November 10, 2022, plaintiff and defendants entered into the Agreement whereby the parties agreed that in exchange for a payment of $27,421.00 by plaintiff, the company defendant agreed to sell to the plaintiff future receivables in the amount of $37,840.98, with the purchase amount to be remitted to plaintiff from a percentage of company defendant's future receivables. Defendant Brandon Solarez signed the Agreement as guarantor and owner of the company defendant, agreeing to all the obligations of company defendant under the Agreement.

It is alleged that plaintiff fulfilled its obligations and paid the purchase price. Defendants initially made payments, totaling $22,636.72 pursuant to the Agreement, but as of June 22, 2023, defendants breached the Agreement. June 22, 2023 was the sixth consecutive business day that company defendant's payments were returned for insufficient or uncollected funds, all without the advance notice to plaintiff as per the Agreement. Plaintiff alleges that as a result of the breach, the total damages sustained by plaintiff is $16,969.69, plus attorneys' fees (which plaintiff is waiving), interest, costs and disbursements.

Plaintiff seeks a judgment against defendants, jointly and severally, in the sum of $16,969.69, plus statutory pre-judgment interest in the amount of 9% from June 22, 2023, and costs and disbursements taxed by the clerk, and post-judgment statutory interest from the date of entry of judgment.

The Complaint alleges two causes of action - for breach of contract and breach of guarantee, alleging the existence of the Agreement, plaintiff's payment of the purchase price pursuant to the Agreement, and defendants' failure to remit payment pursuant to the terms of the Agreement. In support of its motion, plaintiff provides an affidavit from Elie Friedman, the Chief Underwriting Officer for Revenued LLC, who has personal knowledge as to how plaintiff's records are maintained, the Agreement, plaintiff's funding, and the company defendant's payments.

In opposition, defendants argue that plaintiff's motions must be denied because defendants have pleaded affirmative defenses and counterclaims that sufficiently fit within cognizable legal theories in accordance with plaintiff's causes of action contained in the summons and complaint. With respect to the motion for summary judgment, defendants assert that the Agreement is really a usurious loan, and that there are material issues of fact relative to plaintiff refusing defendant's request for reconciliation.

It is well established that the proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *see also, Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The evidence will be construed in a light most favorable to the one moved against. *See Weiss v. Garfield*, 21 A.D.2d 156 (3rd Dept. 1964). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Zuckerman, supra*. The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.* 180 A.D.2d 570 (1st Dept. 1992)), and it should only be granted when there are no triable issues of fact. *See Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). However, "the shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment." *See Spodek v. Park Property Development*, 263 A.D.2d 478 (2nd Dept. 1999); *see also, Seaboard Sur. v. Nigro*, 222

A.D.2d 574 (2nd Dept. 1995).

To prove a breach of contract, there must be a showing of an agreement between the parties, plaintiff's performance under the agreement, defendant's breach of that agreement, and resulting damages. *See Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804 (2nd Dept. 2011).

This Court finds that plaintiff has demonstrated its *prime facie* entitlement to judgment as a matter of law on its contract claim and guarantee claim. In response, defendant fails to allege the existence of a material fact which would require a trial. *See Spodek v. Park Property Development*, 263 A.D.2d 477 (2nd Dept. 1999); *Zuckerman, supra.*

Contrary to defendants assertions, the affidavit of plaintiff's Chief Underwriting Officer sufficiently provides defendants' payment history and default. Defendants' assertions with respect to its request for reconciliation is conclusory and contradicted by plaintiff's proof and documentation.

In evaluating defendants' affirmative defenses, the Court finds that defendants set forth such defenses without any factual particularity that would raise an issue of fact to preclude the granting of summary judgment. *See Island Life Chiropractic Pain Care, PLLC v. ZipCar*, 72 Misc. 3d 141(A) (N.Y. App. Term 2021).

Defendants' claim that the contract at issue is a usurious loan is without merit. Defendants have not set forth any legal or factual basis to support this finding. Additionally, in evaluating whether the underlying agreement is a usurious loan, the Court must review the agreement and its terms. A merchant cash advance agreement is not a loan and therefore its terms are not usurious. The criteria to determine whether or not a particular arrangement is a loan or a merchant cash advance is: (1) whether there is a properly drafted reconciliation provision; (2) whether the funder has recourse if the merchant declares bankruptcy; and (3) whether the agreement has a finite term. *LG Funding LLC v. United Senior Properties of Olathe LLC*, 181 A.D.3d 664 (2nd Dept 2020). A three-factor test outlines how agreements do not constitute loans. *See MCA Master Fund (MMF) v. Universal Scrap Motors Inc.*, 2021 WL 189635 (2021).

Here, the Court finds that the Agreement does not constitute a loan as a matter of law because it provides for reconciliation, does not include a finite term with respect to repayment, and does not provide recourse to plaintiff had defendant merchant declared bankruptcy. *See LG Funding LLC v. United Senior Properties of Olathe LLC*, 181 A.D.3d 664 (2nd Dept. 2020); *MCA Master Fund (MMF) v. Universal Scrap Motors Inc.*, 2021 WL 189635 (2021). Therefore, this is not a loan, but rather a merchant cash advance agreement. Such agreements have routinely been upheld as transactions for the purchase and sale of receivables, and not as loans. *See LG Funding, LLC v. Branson Getaways, Inc.*, 2017 NY Slip Op 32387(U) at 4 (Sup. Ct. Nassau Cty, November 13, 2017). This classification is evidenced by the structure of the Agreement, the conduct of the parties, and the unambiguous language of the contract itself.

Accordingly, defendants have failed to provide admissible evidence that raises an issue of fact as to the causes of action set forth in the Verified Complaint. The four corners of the Agreement establish the terms, and the breach has not be refuted. *See Spodek v. Park Property Development*, 263 A.D.2d 477 (2nd Dept. 1999).

Thus, it is hereby

ORDERED, that plaintiff's motion for summary judgment is GRANTED in its entirety, and it is further

ORDERED, that plaintiff's motion dismissing defendants' affirmative defenses is GRANTED; and it is further

ORDERED, that all requests for relief not expressly addressed herein are DENIED; and it is further

ORDERED, that plaintiff shall serve a copy of this Order with Notice of Entry upon defendants within thirty (30) days from the date this Order is uploaded to NYSCEF.

The foregoing constitutes the Decision and Order of this Court. Submit judgment on notice.

It is **SO ORDERED**.

Dated: March 25, 2024
Mineola, NY

Rhonda E. Fischer

HON. RHONDA E. FISCHER
A.J.S.C.

ENTERED
Mar 26 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE