Simply Funding, LLC v AEI Progas Co.
2024 NY Slip Op 35564(U)
February 26, 2024
Supreme Court, Queens County
Docket Number: Index No. 719249/2023
Judge: Robert I. Caloras
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: **HON. ROBERT I. CALORAS**
Justice

PART 36 MOTIONS

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SIMPLY FUNDING, LLC,

Plaintiff,

- v -

AEI PROGAS COMPANY, HOMESTAY VISIT LLC,CLIFTON PLAYER,

Defendants.

---X

INDEX NO. **719249/2023**

MOTION SEQ. NO. **001**

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF under the motion as: 27, 28, 29, 30, 31, 33, 37, 38, 39, 40, 41, 42, 44, were read on Plaintiff's motion for an order to dismiss the Defendants' affirmative defenses and counterclaims pursuant to CPLR 3211 (a) and (b).

Upon the foregoing papers it is ordered that the motion is determined as follows:

In June 2023, the plaintiff and the defendants AEI Progas Company DBA AEI Progas (AEI) and Homestay Visit LLC (collectively the sellers) entered into a receivables purchase agreement (the agreement) where, in exchange for $42,000, the plaintiff purchased $59,640 of the sellers' future receivables. Under the agreement, the sellers were obligated to remit 2.9% of its daily receivables to the plaintiff at a fixed rate. In addition, the defendant Clifton Player, AEI's principal, guaranteed the sellers' performance under the agreement, and agreed to be held jointly and severally liable for all amounts owed to the plaintiff in the event of the sellers' default. The agreement notes that the sellers are "selling a portion of a revenue stream to [the plaintiff] at a discount, not borrowing money from [the plaintiff], therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by [the plaintiff]." Thus, while the agreement sets forth a remittance provision at a rate of $1,863.75, the agreement also contemplates that the sellers could request that this remittance amount be modified in the event that its future receipts decrease. The agreement also contains a reconciliation provision which allowed the sellers to request a retroactive reconciliation of a prior month's remittance amount.

In September 2023, the plaintiff commenced this action against the defendants, alleging causes of action for breach of contract and enforcement of Player's personal guarantee. The plaintiff alleges that the sellers defaulted on their obligations under the agreement and that there is an outstanding balance of $58,160.53. In addition to the amount due under the agreement, the complaint asserts that the plaintiff is also entitled default fees and attorney's fees pursuant to the agreement.

The defendants' answer asserts thirty-three affirmative defenses and seven counterclaims, including allegations that the agreement was usurious. In lieu of a response to the defendants' counterclaims, the plaintiff now moves to dismiss the defendants' affirmative defenses and counterclaims pursuant to CPLR 3211(a) and (b).

"When assessing a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 722 [2d Dept 2013]; *see* CPLR 3211 [a] [7]). Similarly, "[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]). "When moving to dismiss, 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' " (*Shah v Mitra*, 171 AD3d 971, 974 [2d Dept 2019], quoting *Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]). When considering 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. . . . [I]f there is any doubt as to the availability of a defense, it should not be dismissed" (*Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018]). In opposition to a CPLR 3211 motion, a party may submit affidavits to remedy defects in the pleading and preserve claims which, while inartfully pleaded, are potentially meritorious (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]).

Dismissal of the counterclaims

As an initial matter, the court notes that, in opposition to the plaintiffs' motion, the defendants assert that they are withdrawing their counterclaims. However, as the plaintiff points out in its reply papers, the defendants have not submitted a stipulation withdrawing their counterclaims. Under these circumstances, the branch of the plaintiff's motion to dismiss the counterclaims is granted.

Dismissal of the usury defense

Turning to the branch of the plaintiff's motion pursuant to CPLR 3211 (b), the thirteenth affirmative defense alleges that the agreement is invalid because it constitutes a usurious loan. The plaintiff argues that this defense is without merit because the agreement is not a loan. In doing so, the plaintiff points out that the agreement has a mandatory reconciliation provision which permits the sellers to remit $0 if they did not collect any receivables during the remittance period. Because there was no interest rate or set period by which the future receivables must be remitted by the sellers, the plaintiff further asserts that the agreement cannot constitute a loan because it does not have a set, finite term. In opposition, the defendants rely on several cases from the Appellate Division, Second Department and Supreme Court, Nassau County to assert that their affirmative defense of usury has been properly pleaded.

"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 AD3d 664, 665 [2d Dept 2020]; *see Seidel v 18 E. 17th St. Owners*, 79 NY2d 735 [1992]; *Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009]). "When determining 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 to give it'" (*Abir*, 59 AD3d at 649, quoting *Lester v Levick*, 50 AD2d 860, 862-863 [2d Dept 1975] [Christ, J., dissenting], *revd on dissenting op* 41 NY2d 940 [1977]). For a transaction to constitute a loan, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms" (*Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]). In addition, "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*LG Funding, LLC*, 181 AD3d 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' " (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022], quoting *LG Funding, LLC*, 181 AD3d at 666).

Here, the plaintiff's submissions demonstrate that the agreement is not a loan, and thus, the defendants' affirmative defense of usury lacks merit (*see* CPLR 3211 [b]; *Principis Capital, LLC*, 201 AD3d at 754; *cf. LG Funding, LLC*, 181 AD3d at 666). First, the agreement does not provide the plaintiff with discretion in determining whether a reconciliation would occur. Section 3 of the agreement states that the sellers have the right to request a reconciliation at any time. This could be in the form of a retroactive request, whereby the sellers could request that they be credited or debited the difference in their actual receivables "so that the amount [the plaintiff] debited in the most recent calendar month (the 'Reconciliation Month') will equal the Purchased Percentage of Receivables that [the sellers] actually collected in the Reconciliation Month," and that upon verification, "[the plaintiff] *shall* refund the excess to [the sellers] within 5 business days" (emphasis added). This could also be done proactively, where "[u]pon reasonable verification of [the sellers'] actual receivables, "[the plaintiff] *shall* adjust the Periodic Amount on a going-forward basis to more closely reflect [the sellers'] actual Receivables times the Purchased Percentage" (emphasis added). Because the amount of the daily remittance could change, the agreement was therefore not finite. Finally, the agreement states that bankruptcy does not constitute a breach of the agreement.

The defendants' opposition is insufficient to demonstrate the merit of their thirteenth affirmative defense. The defendants rely on *LG Funding, LLC* (181 AD3d at 664), *Crystal Springs Capital, Inc. v Big Thicket Coin, LLC* (220 AD3d 745 [2d Dept 2023]), and *Pearl Delta Funding, LLC v Peak Title Agency Co.* (Sup Ct, Nassau County, June 22, 2023, Singer, J., index No. 600378/2023). Critically, however, the agreements which were found to be usurious in these cases are distinguishable from the agreement at issue here. For example, in each of these cases, reconciliation was left to the plaintiff's discretion (*see Crystal Springs Capital, Inc.*, 220 AD3d at 747; *LG Funding, LLC*, 181 AD3d at 666; *Pearl Delta Funding, LLC*, slip op at 7), whereas this is not the case here. Similarly, in *Crystal Springs Capital, Inc.* and *LG Funding, LLC*, declaring bankruptcy was considered an event of default under the agreements (*see Crystal Springs Capital, Inc.*, 220 AD3d at 747; *LG Funding, LLC*, 181 AD3d at 666). This is not the case here.

Finally, to the extent that the plaintiff asserts that the defendants' second, third, fourth, eighth, twenty-fourth, twenty-eighth, and thirty-first affirmative defenses are subject to dismissal because they are merely reiterations of the affirmative defense of usury, the court disagrees, as this is not evident on the face of the pleading. Nevertheless, the defendants' thirteenth affirmative defense is dismissed.

Dismissal of the defendants' jurisdiction and venue defenses

The defendants' eleventh affirmative defense alleges that the court lacks subject matter jurisdiction. In addition, the defendants' answer alleges that venue is improper. The defendants' twenty-fifth affirmative defense alleges that the court lacks personal jurisdiction over the defendant because service of process was insufficient. On its motion, the plaintiff argues that the subject matter jurisdiction and venue defenses lack merit because the agreement contains a forum selection clause designating Queens County as the proper forum. In addition, the plaintiff contends that the personal jurisdiction defense lacks merit because it does not plead specific facts.

The plaintiff's submissions do not demonstrate that the defendants' jurisdiction and venue defenses are without merit. With respect to the defendants' twenty-fifth affirmative defense, their answer sufficiently alleges that the defendants were not properly served. Moreover, "[a] contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Somerset Fine Home Bldg., Inc. v Simplex Indus., Inc.*, 185 AD3d 752, 753 [2d Dept 2020] [internal quotation marks omitted]). Therefore, "a forum selection clause will be given effect in the absence of a 'strong showing' that it should be set aside" (*U.S. Mdse., Inc. v L&R Distribs., Inc.*, 122 AD3d 613, 614 [2d Dept 2014], quoting *Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836 [2d Dept 2009] [internal quotation marks omitted]). Here, although section 17 of agreement designates the Supreme Court of the State of New York as one of the "Exclusive Venues" for enforcing its terms, the plaintiff made no effort to demonstrate that the defendants would not be able to meet their burden in demonstrating that the forum selection clause should be set aside.

These branches of the plaintiff's motion are therefore denied.

Dismissal of the remaining affirmative defenses

The plaintiff further contends that the defendants' remaining affirmative defenses should be dismissed because these defenses fail to plead sufficient facts. However, even where, as here, some affirmative defenses are subject to dismissal pursuant to CPLR 3211 (b) because they "merely plead conclusions of law without any supporting facts" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]).; *see Diaz v 297 Schaefer St. Realty Corp.*, 195 AD3d 794, 796 [2d Dept 2021]), as the defendants correctly note, such dismissal should occur without prejudice to the defendants' right to replead these defenses in the proper form (*see Moran Enters., Inc. v Hurst*, 96 AD3d 914, 917 [2d Dept 2012]; *Consolidated Constr. Group, LLC v Bethpage Union Free School Dist.*, 39 AD3d 792, 796 [2d Dept 2007]).

Accordingly, it is

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 3211 (a) to dismiss the defendants' counterclaims is granted; and it is further,

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 3211 (b) to dismiss the defendants' thirteenth affirmative defense is granted; and it is further,

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 3211 (b) to dismiss the defendants' sixth, eighth, ninth, tenth, twenty-fourth, twenty-sixth, twenty-eighth, and thirtieth affirmative defenses is granted to the extent that the defendants' sixth, eighth, ninth, tenth, twenty-fourth, twenty-sixth, twenty-eighth, and thirtieth affirmative defenses are dismissed without prejudice; and it is further,

ORDERED that the defendants are granted leave to replead their sixth, eighth, ninth, tenth, twenty-fourth, twenty-sixth, twenty-eighth, and thirtieth affirmative defenses within thirty days of service of the notice of entry of this order; and it is further,

ORDERED that the defendants' failure to timely replead the aforementioned affirmative defenses shall result in their dismissal with prejudice; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Dated: February 26, 2024

ROBERT I. CALORAS, J.S.C.

FILED
2/27/2024
COUNTY CLERK
QUEENS COUNTY