Fora Fin. Advance, LLC v Arroyos Realty & Invs., LLC
2025 NY Slip Op 31844(U)
May 19, 2025
Supreme Court, Nassau County
Docket Number: Index No. 614690/2024
Judge: Thomas Rademaker

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 11

PRESENT: HON. THOMAS RADEMAKER

X

FORA FINANCIAL ADVANCE, LLC,

Plaintiff,

-against-

ARROYOS REALTY & INVESTMENTS, LLC d/b/a IHOME REALTY, and EDUARDO ARROYOS,

Defendants

X

Index No.: 614690/2024

Mot. Seq 002, 004, 005, 006
Submitted: 4/17/2025
DECISION AND ORDER

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including e-filed documents/exhibits numbered 40 through 140, motion sequences 002, 004, 005, and 006 are decided as follows:

The Plaintiff moves the Court by Notice of Motion for an Order Pursuant to CPLR 3211(a)(1) and (b), dismissing the Defendants' affirmative defenses; (mot seq 002).

The Plaintiff moves the Court by Notice of Motion (1) pursuant to CPLR 3212, granting Fora Financial Advance, LLC summary judgment against the Defendants, Arroyos Realty & Investments, LLC d/b/a iHome Realty and Eduardo Arroyos, jointly and severally in the principal amount of $25,929.30, plus statutory interest at 9% from September 12, 2018), with costs and disbursements as taxed by the clerk. (mot 004).

The Defendants move the Court by Notice of Cross-Motion for an Order dismissing this action pursuant to CPLR 3217(c) with prejudice; and denying plaintiff's motion to dismiss defendant's affirmative defenses (mot seq 005).

The Defendants move the Court by Notice of Cross-Motion for an Order precluding the plaintiff from offering any other payment history other than the one disclosed on August 19, 2024; granting summary judgment in favor of the defendant; and denying plaintiff's motion for summary judgment. (mot seq 006).

The Plaintiff filed its Summons and Complaint with the Court on or about August 19, 2024, and subsequently filed an Amended Complaint on September 2, 2024. The Amended Complaint provides that on or about August 27, 2018, the parties entered into an agreement in which the Plaintiff and Arroyos Realty entered into a Purchase of Future Receivables Agreement ("the Agreement") in which the Plaintiff purchased 10% of the Future Sale Proceeds from Arroyos Realty until the Plaintiff received the sum of $28,224.00, in exchange for an immediate lump sum cash payment of $19,200.00. The Amended Complaint further provides that on or about September 12, 2018, Arroyos Realty failed to make a remittance, constituting an event of default under the Agreement. The Amended Complaint contains four causes of action: breach of contract, breach of performance guaranty, conversion, and for account stated. The Amended Complaint seeks damages in the amount of $25,929.30, together with interest, costs, and attorney's fees.

The Defendant filed its Answer with the Court on September 17, 2024. The version of the Answer initially filed was verified by counsel and describes Custom Runners LLC as the Defendant instead of the captioned Defendants. However, the Defendant Eduardo Arroyo adopted

the Answer through his Affirmation dated April 10, 2025, and Verification also dated April 10, 2025 (NYSCEF Docs 123- 125).

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 v. City of New York*, 49 NY2d 5557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (see also *Andre v. Pomeroy*, 35 N2d 361 [1974]).

To determine whether a transaction constitutes a usurious loan "the court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. 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 Don, Inc. 201 AD3d 752 [2nd Dept 2022]) However, a triable issue may arise in the merchant cash advance cases if the transaction at issue may be interpreted as "criminally usurious loan." (LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664 [2d Dept. 2020])

The Plaintiff argues that the Agreement at issue herein does not provide for an interest rate or payment schedule and does not specify a time period in which the Purchase Amount must be collected by the purchaser. Further, under the express terms and condition of the Agreement, the seller and purchaser acknowledged that the Agreement shall not be intended or construed as a loan. Further, the Agreement provides that the Plaintiff acknowledges risk of seller going bankrupt or going out of business, which does not in and of itself constitute a breach of the agreement.

However, the Agreement has significant design features which may in actuality present as a loan. As per the Agreement, the principal of the seller – identified in the agreement as the guarantor -- "personally and unconditionally guarantees the performance of the seller" and "the performance guarantee works to ensure the compliance of the seller/guarantor. The Agreement further provides that the guarantor "waives demand for payment, notice, and presentment and agrees that the purchaser may proceed directly against guarantor without first proceeding against the seller." Section 6.2[a] of the Agreement essentially act as an acceleration clause as it provides that "in case of breach, all amounts of the purchases amount that have not yet been delivered to purchaser and any assessed fees shall be immediately due and payable, including all receivables or future sale proceeds, until the entire balance, fees, and deficiencies are paid in full.

Further, the Defendants disputes the authenticity of the remittance provisions of the agreement as a valid reconciliation provision, and it is indeed true that the Agreement does not have a selection which explicitly describes itself as a "reconciliation process". The Defendants question the "confusing nature" of the payment history, as Defendants contend that Plaintiff never attempted to debit the Defendants' account in October 2018. Ultimately, the ability of the Plaintiff to accelerate the remittance at its discretion – and essentially to "call in the debt"– is more similar to a loan, as the Agreement will possess similar design features to a loan, including a present value and future value, along with a limited duration and an interest rate which can be calculated. Accordingly, in this matter questions of fact are raised with respect to the amount ultimately due as well as the viability of the usury defense, if the calculated interest rate exceeds the statutory limit.

Motion sequence 006 is couched as motion which seeks an "order precluding the Plaintiff from offering any other payment history other than the one disclosed on August 19, 2024, when the Plaintiff filed its Complaint with the Court. The remaining branches of the motion address the Defendants' application for summary judgment and the denial of the Plaintiff's summary judgment motion. The determination of discovery motions is addressed to the sound discretion of the trial court (*see Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010) Traditionally, a motion to preclude is prompted by bad faith discovery practices. Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the

opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7[c]. The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsche v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). The is no demonstration that the Defendants attempted to resolve the alleged dispute regarding potential conflicting payment records through a good faith correspondence or discovery request. Similarly, the demand for information was couched more to seek dispositive relief than it was to obtain all available information about the matter or prevent surprise at trial.

Upon a careful review of the papers submitted in support and in opposition to the Plaintiff's motions, along with their respective annexed exhibits, and given the factual differences between the accounts of the parties, motion sequences 002 and 004 are **DENIED**, and

With respect to motion sequences 005 and 006, the Defendants' motions for summary judgment and preclusion in its favor are **DENIED**, with the exception that the Defendants'

opposition to the Plaintiff's application to dismiss the Defendant's affirmative defenses and for summary judgment in favor of the Plaintiff and against the Defendant is **GRANTED**.

All other requested relief, not specifically addressed herein, is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: Mineola, NY
May 19, 2025

Hon. Thomas Rademaker, J. S. C.