Limelight Advance LLC v Southeast Rail Indus. Envtl. Servs. LLC
2024 NY Slip Op 32208(U)
June 13, 2024
Supreme Court, Kings County
Docket Number: Index No. 527561/2023
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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Index No.: 527561/2023
Motion Date: 4-8-24
Mot. Seq. No.: 1, 2

LIMELIGHT ADVANCE LLC,

Plaintiff,

-against-

DECISION/ORDER

SOUTHEAST RAIL INDUSTRIAL ENVIRONMENTAL SERVICES LLC D/B/A SOUTHEAST RAIL INDUSTRIAL ENVIRONMENTAL SERVICES, SERIES LLC D/B/A THE SERIES GROUP and ROBERT PAYNE,

Defendants.
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The following papers, which are e-filed with NYCEF as items 7-45, were read on these motions:

In this action for breach of a contract for the purchase and sale of future receivables, the plaintiff moves for an order, pursuant to CPLR §3212, awarding summary judgment in its favor, against the defendants, for the relief demanded in the complaint (Motion Seq. # 1). The defendants cross-move for an order dismissing the complaint, with prejudice (Motion Seq. # 2).

The court will first address the cross-motion. Defendants' contention that the Court lacks subject matter jurisdiction over this matter pursuant to B.C.L. § 1314 (b) is without merit. As plaintiff states in its memo of law in opposition, the plaintiff is a foreign limited liability company, not a foreign corporation. Therefore, B.C.L. § 1314 (b) does not apply.

Defendants' contentions that the matter should be dismissed for lack of personal jurisdiction and on the grounds of improper venue are also without merit. Pursuant to Section 4.6 of the contract between the parties (NYSCEF Doc. No. 15, Exhibit 4), which defendants do not dispute having entered, the defendants consented to both personal jurisdiction and the venue of this Court. The applicable part of the contract states in pertinent part:

> 4.6 Governing Law, Venue and Jurisdiction. This Agreement, and any suit, action or proceeding relating thereto, shall be governed by, and construed in accordance with the laws of the State of New York, without regard to any applicable principles of conflicts of law. Any suit, action or proceeding arising from or related to the

> interpretation, performance, or breach hereof, shall be instituted exclusively in a court sitting in New York (the "Acceptable Forums") or at a court in the Merchant's home state where the business is physically located or primarily engaged in conducting business and/or where the owner/guarantor of the business resides. This shall be at [Plaintiff]'s Sole Discretion. Merchant agrees that the Acceptable Forums are convenient to it, and submits to the jurisdiction of the Acceptable Forums and waives any and all objections to jurisdiction or venue.

Defendants' claims of lack of personal jurisdiction and improper venue are therefore without merit (see *Oak Rock Fin., LLC v. Rodriguez*, 148 A.D.3d 1036).

The contract between the parties is not a usurious loan agreement. "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 A.D.3d 664, 665, 122 N.Y.S.3d 309). 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" (*LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d at 665-666,122 N.Y.S.3d 309 [citations and internal quotation marks omitted]); *Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752, 754, 160 N.Y.S.3d 325, 326-27). Here, weighing these three factors, the court concludes that the defendants did not meet their burden of establishing that the contract at issue constitutes a usurious loan agreement. First and foremost, the defendants did not demonstrate that the plaintiff is absolutely entitled to the payment required under the contract in all circumstances. The Court has reviewed the reconciliation provisions contained in the contract and contrary to defendants' argument, they adequately allow for adjudgments in the daily amount the defendant merchant is required to pay if revenue is not as expected. These provisions are not "illusory." The agreement does not have a finite term when the reconciliation provisions are considered and if the defendant-merchant were forced to declare bankruptcy, plaintiff would have no recourse against

either of the defendants. The court has considered defendants remaining arguments in support of the motion and find them to be without merit.

Turning to plaintiff's motion for summary judgment, to prevail on the moiton, plaintiff first had to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the plaintiff made such a showing, in order to defeat the motion "the burden shift[s] to the part[ies] 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" (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers" (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]).

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*see El-Nahaly. FA Mgt., Inc.*, 126 A.D.3d 667, 668, 5 N.Y.S.3d 201; *Dee v. Rakower*, 112 A.D.3d 204, 208-209, 976 N.Y.S.2d 470; *Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc.*, 84 A.D.3d 122, 127, 921 N.Y.S.2d 329). Thus, to prevail on the motion, it was incumbent upon the plaintiff to submit admissible proof establishing each of these elements as a matter of law.

In support of the motion, the plaintiff submitted an affidavit from is Director of Operations who stated that on or about August 08, 2023, the parties entered into the contract giving rise to this action. Pursuant to the contract, the defendant-merchant sold to plaintiff future receivables having a value of $13,499.00 for the sum of $9,000.00. The defendant-merchant was required to pay off the $13,499.00 by depositing its future receivables into a specified bank account and by giving the plaintiff authority to automatically withdraw a specified percentage of the receivables from the account on a daily basis. The individual defendant executed a Guaranty of Performance of all the obligations of the defendant-merchant. A copy of the contract was submitted as an exhibit.

Plaintiff's Director of Operations went onto state that plaintiff performed its obligations under the contract by delivering to the defendant-merchant the net purchase price after deducting the disclosed fees to and annexed a wire confirmation of the payment as proof. He went onto stated that as of September 10, 2023, the defendants had delivered to the plaintiff receivables totaling only the amount of $8,632.00, leaving a remaining balance of $4,867.00 due and owing. The plaintiff submitted a report of defendants' account as proof of the outstanding balance. Plaintiff's Director of Operations maintains that on or about September 10, 2023, plaintiff received from its Bank a return code indicating that Defendant's payment, which is made by ACH debit that is initiated by Plaintiff, failed because the Defendant instructed its bank to stop the payment (R08), and there were non-sufficient funds in the Defendant's account (R01) for the second time without giving plaintiff prior notice that there were non-sufficient funds.

In sum, the plaintiff demonstrated that there was a contract between the parties, that the plaintiff performed all its obligations under the contract, that the defendant-merchant breached its obligations under the contract, and that the plaintiffs suffered damages as result. Specifically, the plaintiff demonstrated that as of September 10, 2023, when the defendant-merchant defaulted under the contract, the amount of $4867.00 was still due and owing. Thus, the plaintiff established its entitlement to summary judgment on its breach of contract claim as well on its claim against the defendant-guarantor. The defendants failed to raise a tribal issue of fact.

Plaintiff is not entitled to recover the default fee. Plaintiff's losses are easily calculable. Plaintiff is entitled to the total amount owed under the agreement less the amount repaid, with interest from the date of breach, as well as reasonable attorney fees and the other incidental fees. The default fee bears no relation to any loss suffered by plaintiff and can only be viewed as an unenforceable penalty (see *Truck Rent-A-Center Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425; *Perseus Telecom, Ltd. v Indy Research Labs, LLC*, 41 N.Y.2d 420, 425).

With respect to attorneys' fees, the requested amount of $ 1460.10 is reasonable.

Accordingly, it is hereby

ORDRED that the motion is **GRANTED** to the extent that the plaintiff may enter judgment against the defendants, jointly and severally, in the amount of $4,867, with interest

from September 10, 2023, together with attorney's fees in the amount of $ 1460.10, plus costs and disbursements. The cross-motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: June 13, 2024

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020