SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,
Justice

TRIAL PART: 21

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PEARL DELTA FUNDING, LLC,

Plaintiff,

-against-

PEAK TITLE AGENCY CO. AKA PEAK TITLE CO and TOBBY JABLONSKI and JUAN RUIZ JR,

Defendants.

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Index No.: 600378/2023
Motion Seq. Nos.: 001
Motions Submitted: 03/23/2023

DECISION AND ORDER ON MOTION

The following papers were read on this motion:
Notice of Motion to Dismiss and Supporting Papers [Seq. 001].....X
Affirmation in Opposition to Motion and Supporting Documents [Seq. 001] X
Memo of Law in Reply [Seq. 001].....X

Upon the foregoing e-filed papers, the motion filed by the Plaintiff, PEARL DELTA FUNDING, LLC ["Plaintiff"], for an Order pursuant to CPLR 3211(b) dismissing the Defendants' affirmative defenses is determined as hereinafter follows:

The Plaintiff commenced this action by filing a Summons and Verified Complaint on January 6, 2023. The Defendants thereafter served a Verified Answer with Affirmative Defenses.

This case arises from the alleged breach by the Defendants, PEAK TITLE AGENCY CO. AKA PEAK TITLE CO ["Merchant Defendant"] and TOBBY JABLONSKI ["JABLONSKI"] and JUAN RUIZ JR ["RUIZ JR., and when referred to collectively with JABLONSKI, "GUARANTOR DEFENDANTS"] [Merchant Defendant and Guarantor Defendants collectively referred to as "Defendants"], of an agreement entered into with the Plaintiff on or about August 10, 2022 [the "Agreement"]. Pursuant to the Agreement, the Plaintiff agreed to purchase rights to the Merchant

Defendant's receivables having an agreed upon value of $178,100.00. The Plaintiff alleges that the Merchant Defendant agreed to exclusively use one bank account approved by the Plaintiff [the "Account"] into which the Merchant Defendant agreed to deposit all its receipts and from which the Plaintiff was authorized to make periodic ACH withdrawals until the $178,100.00 was fully paid to the Plaintiff.

The Plaintiff alleges that, under the Agreement, the following would constitute a default by the Merchant Defendant: (a) if the Merchant Defendant, without the Plaintiff's prior authorization, used a bank account other than the Account or closed the Account; (b) if the Merchant Defendant failed to give Plaintiff the required advance notice to prevent an ACH withdrawal from being dishonored for insufficient funds; and/or, (c) if the Plaintiff was otherwise prevented from making any agreed upon ACH withdrawal. Each Guarantor Defendant agreed to guarantee any and all amounts owed to the Plaintiff from the Merchant Defendant upon the Merchant's breach in performance of its Agreement obligations.

The Plaintiff alleges that it fulfilled all its Agreement obligations by remitting to the Merchant Defendant the purchase price for the future receivables. The Plaintiff further alleges that on or about January 3, 2023, the Plaintiff was prevented from making the agreed upon ACH withdrawals and, as such, the Merchant Defendant defaulted under the terms of the Agreement. The Merchant Defendant is alleged to have made payments totaling $98,940.00, leaving a balance of $79,160.00, and is also alleged to have incurred a default account fee in the amount of $2,500.00.

The Defendants have asserted twenty-nine (29) [which the Defendants have mis-numbered as thirty [30] total] affirmative defenses, which are as follows:

- First Affirmative Defense: "Excessive fees charged by Plaintiff including, but not limited to various liquidated damages clauses in the contract are attempted to be charged as penalties which are contrary to law"; and
- Second Affirmative Defense: The contract is unconscionable; and
- Third Affirmative Defense: "Plaintiff being granted the relief requested would result in Unjust Enrichment on the part of the Plaintiff"; and
- Fourth Affirmative Defense: "Plaintiff violated the duty of good faith and fair dealing"; and
- Fifth Affirmative Defense: "Plaintiff is suing for the wrong amount"; and
- Sixth Affirmative Defense: "Plaintiff's filing of this matter against Defendants violates the doctrine of laches"; and
- Seventh Affirmative Defense: "The Plaintiff Fraudulently Induced the Defendants into executing the agreement"; and
- Eighth Affirmative Defense: "Plaintiff's filing of this matter against Defendants violates the doctrine of in pari delicto"; and
- Ninth Affirmative Defense: "Plaintiff failed to mitigate damages"; and
- Tenth Affirmative Defense: "There is a lack of damages in this matter, or that the damages are inconsequential and de minimis"; and
- Eleventh Affirmative Defense: "Plaintiff failed timely and properly to exhaust all necessary administrative, statutory, and/or jurisdictional prerequisites to commence this action"; and
- Twelfth Affirmative Defense: "Plaintiff failed to comply with its obligations under the agreement"; and

- Thirteenth Affirmative Defense: "Plaintiff induced Defendant into entering into an unlawful usurious loan and not an asset purchase agreement"; and
- Fourteenth Affirmative Defense: "The agreement which is the subject matter of this litigation is invalid because it lacks a legal purpose"; and
- Fifteenth Affirmative Defense: "The agreement constitutes a contract of adhesion"; and
- Sixteenth Affirmative Defense: "Plaintiff fails to state a claim upon which relief can be granted"; and
- Seventeenth Affirmative Defense: "Defendant was not served or was improperly served with the Summons and Complaint. As such, personal jurisdiction is lacking. Defendant was not served either personally or otherwise served"; and
- Eighteenth Affirmative Defense: "Defendant has paid, in whole or in part, the amounts claimed by the plaintiff"; and
- Nineteenth Affirmative Defense: "The complaint fails to state a cause of action upon which relief may be granted. The plaintiff failed in its Summons and Complaint to adequately plead the nature of the alleged cause of action"; and
- Twentieth Affirmative Defense: The circumstances surrounding it, it is so unfair that they "shock the conscience"; and
- Twenty First Affirmative Defense: "Plaintiff has not established subject jurisdiction over the defendant. The court lacks jurisdiction over the defendant. Subject matter jurisdiction is lacking. Complaint to be dismissed based upon subject matter jurisdiction"; and
- Twenty Second Affirmative Defense: "The complaint should be dismissed based upon lack of standing"; and

- Twenty Third Affirmative Defense: "Based upon plaintiff's bad faith, the Complaint should be dismissed"; and
- Twenty Fourth Affirmative Defense: "Based upon the forgoing, the plaintiff's claims are barred by the doctrine of unclean hands"; and
- Twenty Sixth [*sic*] Affirmative Defense: "Based upon foregoing, the plaintiff's claims are barred by the doctrine of estoppel"; and
- Twenty Seventh Affirmative Defense: "Plaintiff's action should fail because of lack and failure of consideration. Plaintiff has not and cannot show that it provided consideration to the defendant"; and
- Twenty Eighth Affirmative Defense: "Plaintiff's claims are barred by Statute of Frauds"; and
- Twenty Ninth Affirmative Defense: "Plaintiff engaged in deceptive acts and practices unlawful [*sic*]"; and
- Thirtieth Affirmative Defense: "The claims asserted in the Complaint are not set forth with sufficient particularity to enable Defendant to determine all of his defenses to these claims. Defendant therefore reserves the right to assert any additional defenses that may be applicable and to withdraw any defenses that are inapplicable once the precise nature of the claims are ascertained through discovery and investigation."

The Plaintiff argues that all the Defendants' Affirmative Defenses should be dismissed pursuant to CPLR § 3211(b). "Pursuant to CPLR 3211 (b), 'a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.'" (*Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018]). "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'". (*Wells Fargo Bank, N.A.*, 160 AD3d at 913, citations omitted.

Likewise, in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020], the Second Department held as follows:

> "'In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference' ...'[I]f there is any doubt as to the availability of a defense, it should not be dismissed'...Dismissal may be warranted under CPLR 3211(a)(1) 'if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'". (*LG Funding, LLC*, 181 AD3d at 664, internal citations omitted).

The Plaintiff, in moving to dismiss the affirmative defenses, bears "the burden of demonstrating that those defenses are without merit as a matter of law". (*Butler v Catinella*, 58 AD3d 145, 148 [2d Dept 2008], citations omitted).

The Plaintiff first argues that the Defendants' usury defense and all of their "usury-based" defenses are meritless and must be dismissed as a matter of law. The issue upon which the availability of the usury defense hinges is whether the parties' agreement constituted a loan. "[W]here there is no loan, there can be no usury, however unconscionable the contract may be". (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, [2d Dept 2020]. In determining whether the subject transaction constituted a loan, "[t]he court must examine whether the plaintiff 'is absolutely entitled to repayment under all circumstances'", because "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan". (*Id.*, citations omitted).

The Second Department has articulated three factors to be weighed when determining whether payment 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". (*Id.*, citations omitted).

The Plaintiff argues that the parties' transaction is not a loan based on the following: first, that the Agreement contained express reconciliation and adjustment provisions providing for reconciliation and adjustment every two weeks. The Court has reviewed the "Reconciliation" provisions cited to by the Plaintiff's attorney [labeled § 1.4 Adjustments to the Remittance in the parties' Agreement], and notes that the contractual language indicates that reconciliation and remittance adjustment are only available to the Merchant "[i]f an Event of Default has not occurred", and only after the Merchant "give[s] notice to Purchaser to *request* a decrease in the Remittance". (Emphasis supplied).

The Court has also reviewed the Agreement's sections defining the "Events of Default" [Section 3.1 of the Agreement] and governing Notices [Section 4.3]. Construing in the Defendants' favor the provisions included in the "Events of Default", and affording them every favorable inference therefrom, the Court has considerable concerns that it would be impossible for the Defendants to request a reconciliation from the Plaintiff without there first having been one or more default events. Additionally, construing the Notice provisions in the Defendants' favor, and affording them every favorable inference therefrom, the Court further finds that the Reconciliation/Adjustment provisions are potentially discretionary and that the Plaintiff could potentially withhold reconciliation from the Defendants even after requested. The Court finds that the Plaintiff has failed to establish that the usury defense is without merit, and therefore the Thirteenth Affirmative Defense alleging that the subject Agreement is a usurious loan shall not be dismissed. (*LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). The portion of the Plaintiff's motion which seeks dismissal of the Thirteenth Affirmative Defense alleging usury is DENIED.

Likewise, the Plaintiff has also failed to establish that the following affirmative defenses should be dismissed as meritless or unavailable based on the facts of this case: First Affirmative Defense alleging excessive fees constituting improper penalties; Second Affirmative Defense alleging unconscionable contract; Fourth Affirmative Defense alleging violation of duty of good faith and fair dealing; Eighth Affirmative Defense asserting *in pari delicto* doctrine; Ninth Affirmative Defense alleging the failure to mitigate damages; Fourteenth Affirmative Defense alleging the Agreement lacks a legal purpose; Fifteenth Affirmative Defense alleging a contract of adhesion; Twenty-Third Affirmative Defense alleging the Plaintiff's bad faith; Twenty-Fourth Affirmative Defense alleging the Plaintiff's unclean hands; Twenty-Ninth Affirmative Defense alleging the Plaintiff engage in deceptive acts and practices.

The Plaintiff's motion papers do not address the following affirmative defenses and therefore the Court will not dismiss these affirmative defenses: Fifth Affirmative Defense: Plaintiff is suing for the wrong amount; Seventeenth Affirmative Defense alleging lack of personal jurisdiction; Eighteenth Affirmative Defense alleging that the Defendant has paid, in whole or in part, the amounts claimed by the Plaintiff; Twenty-First Affirmative Defense alleging lack of subject matter jurisdiction; Twenty-Sixth Affirmative Defense alleging estoppel doctrine; Twenty-Eighth Affirmative Defense alleging Statute of Frauds.

However, the Plaintiff sufficiently established that many of the twenty-nine affirmative defenses should be dismissed pursuant to CPLR 3211 (b). (*See Cohen Fashion Opt., Inc. v. V & M Opt., Inc.*, 51 AD3d 619, 619-20, 858 NYS2d 260, 261 [2d Dept 2008]). The Court finds that the Plaintiff has sufficiently established that the following affirmative defenses are meritless or do not apply based on the facts of this case: Third Affirmative Defense alleging unjust enrichment; Sixth Affirmative Defense alleging laches doctrine; Seventh Affirmative Defense alleging fraudulent inducement; Tenth

Affirmative Defense alleging a lack of damages or that damages are inconsequential and de minimis; Eleventh Affirmative Defense alleging the failure to timely and properly exhaust all necessary administrative, statutory, and/or jurisdictional prerequisites; Twelfth Affirmative Defense alleging that the Plaintiff failed to comply with its obligations under the Agreement; Sixteenth Affirmative Defense alleging that the Plaintiff failed to state a claim upon which relief can be granted; Nineteenth Affirmative Defense alleging that the Complaint fails to state a cause of action upon which relief may be granted [duplicative of Sixteenth Affirmative Defense]; Twentieth Affirmative Defense alleging "[t]he circumstances surrounding it, [*sic*] it is so unfair that they 'shock the conscience'"; Twenty-Second Affirmative Defense alleging lack of standing; Twenty-Seventh Affirmative Defense alleging lack and failure of consideration; Thirtieth Affirmative Defense asserting a catchall affirmative defense to assert any additional defenses that might be applicable.

Based on the foregoing, the Plaintiff's motion to dismiss the Defendants' affirmative defenses is GRANTED in part and DENIED in part.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion for an Order pursuant to CPLR 3211 (b) dismissing the Defendants' affirmative defenses is GRANTED to the extent that the following affirmative defenses shall be severed and stricken: Third Affirmative Defense alleging unjust enrichment; Sixth Affirmative Defense alleging laches doctrine; Seventh Affirmative Defense alleging fraudulent inducement; Tenth Affirmative Defense alleging a lack of damages or that damages are inconsequential and de minimis; Eleventh Affirmative Defense alleging the failure to timely and properly exhaust all necessary administrative, statutory, and/or jurisdictional prerequisites; Twelfth Affirmative Defense alleging that the Plaintiff failed to comply with its obligations under the Agreement; Sixteenth Affirmative Defense alleging that the Plaintiff failed to state a claim upon which relief can be granted; Nineteenth Affirmative

Defense alleging that the Complaint fails to state a cause of action upon which relief may be granted [duplicative of Sixteenth Affirmative Defense]; Twentieth Affirmative Defense alleging "[t]he circumstances surrounding it, [*sic*] it is so unfair that they 'shock the conscience'"; Twenty-Second Affirmative Defense alleging lack of standing; Twenty-Seventh Affirmative Defense alleging lack and failure of consideration; Thirtieth Affirmative Defense asserting a catchall affirmative defense to assert any additional defenses that might be applicable; and it is further,

ORDERED, that the Plaintiff's motion to dismiss is otherwise DENIED; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: June 20, 2023
Mineola, New York

HON. CONRAD D. SINGER, J.S.C.

ENTERED
Jun 22 2023
NASSAU COUNTY
COUNTY CLERK'S OFFICE