SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

TRIAL/IAS, PART 44
NASSAU COUNTY

Kash Capital,

Plaintiff,

INDEX NO.: 603587/2020

- against -

MOTION SUBMISSION
DATE: 11/10/23
MOTION SEQUENCE
NO: 02

F&Z Holding, LLC d/b/a F&Z Holding, Simonxpress Pizza, LLC d/b/a Hungry Howie's and Fawzi R. Simon,

Defendants.

The following e-filed documents for Motion Sequence 02, listed by NYSCEF document numbers "36", "37", "38", "40", "41", "42", and attachments and exhibits have been read on this motion:

Amended Notice of Motion and Affidavits/Affirmations..... X
Memorandum of Law in Support..... X
Affidavit/Affirmation in Opposition..... X
Memorandum of Law in Reply..... X

The plaintiff moves this Court for an order dismissing the defendants' counterclaim pursuant to CPLR §3211(a)(7) and §3211(a)(1). The defendants oppose the motion, and the plaintiff submits a reply.

The plaintiffs initiated the instant proceeding against the defendants by way of Summons and Verified Complaint alleging causes of action sounding in breach of contract, breach of personal guarantee, unjust enrichment, and conversion. The defendants appeared by way of answer with counterclaim. The defendants' counterclaim seeks a declaration that the parties' agreement is criminally usurious and void *ab initio*.

The plaintiff alleges that it entered into a Standard Merchant Cash Advance Agreement ("Agreement") with defendants F&Z Holding, LLC d/b/a F&Z Holding and Simonxpress Pizza, LLC d/b/a Hungry Howie's (collectively, the "Merchant"), which was personally guaranteed by defendant Fawzi R. Simon ("Guarantor"). The plaintiff claims that pursuant to the terms of the Agreement, the Merchant agreed to sell $291,800.00 of their future receivables to the plaintiff for $200,00.00. According to the Verified Complaint, the Merchant made payments totaling $152,280.00 and then stopped making payments. As such, the plaintiff claims that the defendants Breached the Agreement and owe the plaintiff $139,52.00 plus fees.

In the motion at bar, the plaintiff argues that the plaintiffs' counterclaim that the against the plaintiff should be dismissed pursuant to CPLR §3211(a)(7) and §3211(a)(1) on the grounds the defendants' counterclaim is barred because the Agreement does not constitute a loan as it contained a reconciliation provision, did not contain a finite term, and a filing for bankruptcy was not defined as an event of default.

It is well established that with respect to a motion to dismiss a counterclaim for failure to state a cause of action pursuant to CPLR §3211(a)(7), "a court must accept as true the facts as alleged in the pleading, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Wilson 3 Corp. v. Deutsche Bank Natl. Trust Co.*, 172 AD3d 960, 962). To prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR §3211(a)(1), "the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Gould v. Decolator*, 121 AD3d 845, 847). "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable." (*Granada Condo. III Ass'n v. Palomino*, 78 AD3d 996, 996–97 [internal quotation marks omitted]).

However, while the criteria in determining whether a counterclaim will withstand a motion pursuant to CPLR §3211(a)(7) is whether the pleadings state a cause of action discerned from the four corners of the pleadings, (*Guggenheimer v. Ginsburg*, 43 NY2d 268), the court is required to determine whether the proponent of the pleading has a cause of action, and not whether the proponent has merely stated a cause of action. *(Meyer v. Guinta*, 262 AD2d 463). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and whether the requisite elements of any cause of action known to our law can be discerned from its averments." (*Moore v. Johnson*, 147 AD2d 621). Unless the plaintiff can demonstrate that there is no factual issue as claimed by the plaintiffs, the motion to dismiss should be denied. (*S&J Serv. Ctr., Inc. v. Commerce Commercial Group, Inc.*, 178 A.D.3d 977, 979).

In the motion at bar, the plaintiff argues that the plaintiffs' counterclaim that the against the plaintiff should be dismissed pursuant to CPLR §3211(a)(7) and §3211(a)(1) on the grounds the defendants' counterclaim is barred because the Agreement does not constitute a loan as it contained a reconciliation provision, did not contain a finite term, and a filing for bankruptcy was not defined as an event of default.

"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." (*Crystal Springs Capital, Inc. v. Big Thicket Coin, LLC*, 220 AD3d 745, 746-747). "To determine 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. 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." (*Id.*).

Here, the defendants' answer with counterclaims alleges that the Agreement was loan, not a purchase of future receivables. In support of this contention, the answer with counterclaims provides that although the Agreement contained a reconciliation provision, said provision the Merchant was "powerless to stop the automatic daily ACH debit from its bank account" without breaching the Agreement because none of the terms of the Agreement allowed the defendants to stop with automatic withdrawals under any circumstances. In addition, the defendants assert that under the terms of the Agreement, the defendants were required to remit a daily payment of $3,240.00 per day until the $291,800.00 owed to the plaintiff was repaid, which translates to ninety payments over the course of one hundred thirty days at an interest rate of one hundred twenty six percent, which is substantially higher than the twenty-five percent criminal usury rate. Moreover, the defendants' answer with counterclaims provides that the application of the reconciliation provision would not reduce the fixed daily payment beneath the criminal usury rate and, as such, the provision was a "false red herring."

Accepting the facts as alleged in the defendants' answer with counterclaims as true and affording the defendants the benefit of every possible favorable inference, the defendants have sufficiently pled their counterclaim sounding in usury. (*Wilson 3 Corp.*, 172 AD3d at 962). Specifically, the defendants have pled facts alleging that the $291,800.00 was repayable absolutely in support of their claim that the Agreement constituted a loan. The defendants also sufficiently pled that, although there was a reconciliation provision, its application under the terms therein would not reduce the interest rate below the criminal usury rate and, therefore, ineffective. The defendants also pled that the repayment was required to be completed within one hundred and ninety days, which constitutes a finite term. (*Crystal Springs Capital, Inc.*, 220 AD3d at 746-747). Therefore, the totality of the facts pled supports the defendants' claim that the Agreement was a usurious loan, not a cash advance and dismissal of the defendants' counterclaim is not warranted under these circumstances.

Based upon the foregoing, it is hereby

ORDERED, that plaintiff's motion (Motion Sequence 02) for an order dismissing the defendants' counterclaim sounding in usury to CPLR §3211(a)(1) and §3211(a)(7) is denied, and it is further

ORDERED, that counsel for all parties shall appear for the previously scheduled preliminary conference on February 8, 2024. Counsel shall refer to the court's website (http://ww2.nycourts.gov/COURTS/10JD/nassau/civgeneralforms.shtml) for the fillable Preliminary Conference form with instructions on how to fill it out and how to return it. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require.

The foregoing constitutes the Order of this Court.

ENTER:

HON. CATHERINE RIZZO, A.J.S.C.

Dated: January 12, 2024