SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

PLATINUM RAPID FUNDING GROUP LTD.,

Plaintiff,

- against -

VIP LIMOUSINE SERVICES, INC. and CHARLES COTTON,

Defendants.

TRIAL/IAS PART 19
Index No.: 604163-15
Motion Date: 4/15/16; 5/31/16
Sequence Nos.: 001, 002, 003
MOD, MOD, MOD
DECISION AND ORDER

The following papers were read on this motion:

Sequence No. 001:
Notice of Motion, Affirmation and Exhibits..... 1
Plaintiff's Memorandum of Law..... 2
Defendants' Memorandum of Law in Opposition..... 3
Affirmation in Support and Exhibit..... 4
Reply Affirmation and Exhibits..... 5

Sequence No. 002:
Notice of Motion, Affirmation, Good Faith Affirmation and Exhibits..... 6

Sequence No. 003:
Defendants' Notice of Cross-Motion..... 7
Defendants' Memorandum of Law in Opposition..... 8
Affirmation of Daniel Ginzburg in Support of Defendants' Opposition..... 9
Good Faith Affirmation of Daniel Ginzburg.....10
Reply Affirmation and Exhibit.....11

PRELIMINARY STATEMENT

In Sequence No. 001, plaintiff brings this application for an order dismissing defendants' affirmative defenses for failure to state a cause of action and upon documentary evidence, and to dismiss defendants' counterclaims insofar as defendants' answer can be construed as asserting a counterclaim. Defendants have submitted opposition to this application.

In Sequence No. 002, plaintiff brings this application for an order striking defendants'

answer for failure to produce discovery, or compelling the defendants to produce all outstanding discovery within twenty days or be precluded from offering any evidence or testimony in support of defendants' affirmative defenses, and granting plaintiff such other and further relief as the Court deems just and proper.

In Sequence No. 003, defendants bring this application for an order pursuant to CPLR § 3124 compelling plaintiff to respond to defendants' document requests within twenty (20) days and precluding them from asserting objections thereto. Plaintiff has submitted opposition to this application.

BACKGROUND

On or about December 18, 2014, VIP Limousine Services, Inc. ("VIP") entered into a Merchant Agreement with Platinum Rapid Funding Group, Inc. ("Platinum"), whereby Platinum sold its future receivables with a face value of $28,400.00 to Platinum for an upfront discounted price of $20,000.00 ("First Agreement"). Platinum deposited $20,000.00, less any agreed upon amounts, into a bank account designated by VIP.

On or about December 18, 2014, VIP Limousine Services, Inc. ("VIP") entered into a second Merchant Agreement with Platinum Rapid Funding Group, Inc. ("Platinum"), whereby Platinum sold its future receivables with a face value of $71,000.00 to Platinum for an upfront discounted price of $50,000.00 ("Second Agreement"). Platinum deposited $50,000.00, less any agreed upon amounts, into a bank account designated by VIP.

In accordance with the Agreements, Platinum purchased, and was the sole owner of $99,400.00 if VIP's future revenue and receivables. Between December 28, 2014 and March 10, 2015, VIP paid Platinum $32,435.06 of the future receivables. Plaintiff contends that VIP breached its contract on or before March 10, 2015 by terminating Platinum's ability to electronically withdraw funds from their account through ACH, the Automated Clearing House.

Plaintiff served an Amended Verified Complaint dated December 29, 2015 (Exh. "A"). The First Cause of Action is for Breach of Contract for defendant's withholding the balance of $66,964.94, plus the costs and attorneys' fees incurred as a result of this action.

The Second Cause of Action alleges Breach of Representations and Warranties, in that defendant represented and warranted that it would "not change its processor, add terminals, change its financial institution or bank account(s) or take any other action that could have any advese effect upon Merchant's obligations under this Agreement . . ." without Platinum's prior written consent.

In the Third Cause of Action, plaintiff alleges a breach of the personal guarantee of performance of Charles Cotton. The Fourth Cause of Action alleges that, in accordance with the Agreement, Business Defendant and Defendant Cotton are obligated to pay all costs and attorneys' fees incurred as a result of a breach of the Agreement.

On February 5, 2016, defendants filed a Verified Answer with Affirmative Defenses and a Counterclaim (Exh. "B"). After generally denying the allegations of the Complaint, the Answer sets forth the following Affirmative Defenses: (1) failure to state a claim upon which relief can be granted; (2) claim barred by estoppel, unclean hands, waiver and doctrine *in pari delicto*; (3) defendants did not breach any duty or obligation allegedly owed to plaintiff; (4) claims are barred by plaintiff's failure to exercise due diligence to protect its interests and avoid injury; (5) plaintiff has failed to satisfy all conditions precedent; (6) to the extent plaintiff has suffered damages, its claim is barred in whole or in part by its failure to mitigate damages; (7) defendants deny plaintiff was damaged by them; (8) any damages sustained by plaintiff were incurred as a result of acts or omissions of individuals or entities that defendants "did not retain, reserve or exercise control over, and for which Defendants are not legally responsible"; (9) any damages suffered by plaintiff were due to their own affirmative actions and/or omissions, and do not give rise to any liability of defendants; (10) defendants did not make any false or misleading representations to plaintiff; (11) plaintiff has committed civil and criminal usury; and (12) defendants reserve the right to move for leave to add additional defenses as discovery progresses.

DISCUSSION

Motion Sequence No. 1

In Motion Sequence No. 1, plaintiff moves to dismiss the affirmative defenses and counterclaims, to the extent that the Answer can be construed as asserting a counterclaim. There is no allegation designated as a counterclaim contained in the Answer. Both plaintiff and defendants submit a Memorandum of Law in support of their respective positions.

CPLR § 3211 (b) provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In reviewing such a motion to dismiss affirmative defenses, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every doubt (*Strapoli v. Agrelopo, LLC,* 136 A.D.3d 722 [2d Dept. 2016]).

Affirmative defenses "1" through "10" are either general and unsubstantiated claims, or mere denials of the allegations of the Complaint. CPLR § 3211 (b) does not specify the grounds

upon which defenses may be dismissed, but they may be dismissed upon the grounds set forth in CPLR § 3211 (a)(7), that the pleading fails to state a cause of action (SIEGEL, NEW YORK PRACTICE, 5th Ed., § 269).

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*Uzzle v. Nunzie Court Homeowners Ass'n., Inc.* 70 A.D.3d 928 [2d Dept. 2010]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]).

On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]).

The first through tenth affirmative defenses, with the exception of the sixth affirmative defense, do not specify any basis for their assertions. Defendants make no effort to set forth in what manner plaintiff had unclean hands, contributed to its own loss, failed to exercise due diligence, what conditions precedent plaintiff failed to satisfy, or what third parties caused injury to plaintiff. Defendant also asserts that they did not breach a contract nor did they make misrepresentations to plaintiff. These are wholly unsubstantiated generalities, which fail to state a defense to the action. Bare legal conclusion, unsupported by factual allegations, are insufficient to constitute an affirmative defense (*Robbins v. Growney,* 229 A.D.2d 356, 358 [1st Dept. 2009; *The Carlyle, LLC v. Beekman Garage, LLC,* 133 A.D.3d 510, 511 [1st Dept. 2015]).

Defendants' contention that the Agreements violate General Obligation Law § 5-501[1] and Banking Law § 14-a[1], and are civilly and criminally usurious is without merit. A corporation is prohibited from asserting a defense of civil usury (*Arbozova v. Skalet,* 92 A.D.3d 816 [2d Dept. 2012]). An individual guarantor of a corporate obligation is also precluded from raising such a defense (*Id.*). Defendants have failed to adequately allege a defense of criminal

usury in violation of Penal Law § 190.40, in that they failed to allege that the lender knowingly charged, took or received annual interest exceeing 25% on a loan or forbearance of money. In its bill of particulars, defendant hypothesizes that the terms of the Agreement could result in payment of criminally excessive interest, but this is clearly insufficient under the pleading requirements.

Essentially, usury laws are applicable only to loans or forbearances, and if the transaction is not a loan, there can be no usury. As onerous as a repayment requirement may be, it is not usurious if it does not constitute a loan or forbearance. The Agreement was for the purchase of future receivables in return for an upfront payment. The repayment was based upon a percentage of daily receipts, and the period over which such payment would take place was indeterminate. Plaintiff took the risk that there could be no daily receipts, and defendants took the risk that, if receipts were substantially greater than anticipated, repayment of the obligation could occur over an abbreviated period, with the sum over and above the amount advanced being more than 25%. The request for the Court to convert the Agreement to a loan, with interest in excess of 25%, would require unwarranted speculation, and would contradict the explicit terms of the sale of future receivables in accordance with the Merchant Agreement.

Plaintiff's motion to dismiss all the Affirmative Defenses, with the exception of the sixth affirmative defense, and the Counterclaim, to the extent the Answer may be read to assert one, is granted.

Motion Sequence No. 2

Plaintiff seeks an Order striking defendants' Answer for failure to comply with outstanding discovery. On December 30, 2015, plaintiff served its 1st Demand for Discovery, Demand for a Verified Bill of Particulars, and a Notice to Admit. After an extension of time, responses were due by February 5, 2016. After a further extension, on February 12, 2016, defendants allegedly produced an unverified Bill of Particulars and an unverified response to the Notice to Admit.

In their response, defendants objected, and failed to answer, Demands 2 — 5. These demands requested the name of banks or credit unions in which VIP deposited its receipts; banks or credit unions used to hold, deposit or transfer funds for VIP Limousine; VIP Limousine's gross monthly revenues for each month from October 1, 2014 to the present date; and the identity of each and every corporation, partnership, limited liability company, or other business entities owned by defendant Charles Cotton.

In response to Request No. 6, defendants allege that plaintiff violated § 5-501 of the General Obligations Law, § 14-a of the Banking Law, and § 190.40 of the Penal Law. In its response to Request No. 7, defendants identified witnesses as Charles Cotton, representatives of plaintiff, and Colonial Funding Network. In response to Requests Nos. 8 and 9, defendant categorizes the transaction as a loan, with payment of $270.48 per day for the initial transaction, and $563.50 per day for the second transaction, both to continue until full repayment is made, and calculates that the interest rate for the first transaction, payable over 147 days, is 104%, and the rate for the second transaction, over 175 days, produces an interest rate of 88%.

Among the provisions of the Merchant Agreement was a representation that defendants would not change banking institutions from the one from which plaintiff was authorized to make electronic withdrawals. To the extent that defendants have substituted other banking facilities from their original designation, they would be in violation of the Agreement. Requests Nos. 2 and 3 seek relevant information, and defendants are directed to provide the requested information within 20 days of service upon them with a copy of this Decision and Order with Notice of Entry.

Request No. 4 seeks the gross monthly revenue of defendant VIP Limousine for the months commencing October 1, 2014 onward. The calculation of the payments required under the Merchant Agreement is based upon VIP Limousine's revenue. This is relevant information, and defendant is directed to produce such information, also within 20 days of service of the Decision and Order with Notice of Entry.

Request No. 5 seeks the identity of all other businesses operated by defendant Cotton. While this may be relevant in connection with supplementary proceedings in the event of a judgment against Mr. Cotton, the Court does not regard this information as relevant or likely to lead to relevant information in connection with this action, and defendants are not required to respond to this Demand.

Defendant has adequately responded to Requests 6 — 9. Requests 10 and 11 seek copies of recorded communications, and other written communications between Platinum and defendants, both of which have been objected to by defendant. Defendants are directed to produce copies of such recorded and written documents within 20 days of service of a copy of this Decision and Order with Notice of Entry.

Request No. 12 seeks records of disbursements, draws, payments, and/or salary payments to any owner, shareholder, manager, member, director, and/or officer of VIP Limousine from October 1, 2014 to the time of the demand. The Merchant Agreement does not provide for the

deduction of any of the foregoing to arrive at what is referred to the "settlement amount" from which 12 percent is to be directed to Platinum. The relevant issue is how much income defendant VIP Limousine derived, and whether they permitted the agreed-upon percentage to be electronically deducted by plaintiff. The distribution of the funds received is not relevant, or likely to lead to relevant information, and defendants are not obligated to provide the information requested in Demand No. 12.

Requests Nos. 13 and 14 call for the production of mortgage or loan agreements since December 1, 2014, and factoring agreements entered into by VIP Limousine from October 1, 2014. This information is not relevant to the issue of defendant VIP Limousine's income, and their obligation to permit electronic access to 12% of those funds. **Plaintiff's motion to compel production of this information is also denied as lacking in relevance, or likely to lead to the discovery of relevant information.**

Request No. 15 seeks documentation in the form of records identifying each date that VIP Limousine operated since December 18, 2014. This is an overly broad and ambiguous demand, which would impose upon defendants an onerous task of identifying what documents are required to be produced. The information as to the days VIP Limousine operated is relevant to the determination of the dates for which income is to be calculated as the basis for payment, but the means of production requested is overly burdensome. **The motion to compel production of this information is denied.**

The demand for "(c)opies of any document referring to Platinum in the possession of any defendant" is overly broad and unduly burdensome. **In the absence of a particularized category of documents, the motion to compel production of documents as set forth in Request No. 16 is denied.**

Defendant has responded to Request No. 17 for contracts and agreements between any defendant and Platinum by referring to the exhibits attached to the Amended Complaint as Exhibit "A".

Request No. 18 seeks the identity of any defendant which has bee dissolved, sold, assigned, or otherwise transferred and records of such activity. Defendant responds "Not Applicable", which the Court interprets as meaning that no such action has been undertaken with respect to VIP Limousine. The same applies to Request No. 19, which calls for information with respect to the dissolution or transfer of assets of VIP Limousine.

Request No. 20 calls for the production of all documents upon which defendant will rely

in support of its First through Twelfth Affirmative Defenses. Defendants agreed to produce such documents, and are directed to comply with this request within 20 days of the receipt of a copy of this Decision and Order with Notice of Entry.

To the extent that defendants fail to respond to any of the foregoing Requests, to which a response is directed, they will be precluded from offering at trial any documentation sought by plaintiff.

Cross-Motion Sequence No. 3

By this motion, defendant seeks to compel plaintiff to respond to their document requests within 20 days. Annexed as Exh. "A" to the Affirmation in Support of Cross-motion is a copy of the requests for the following:

1. Documents sufficient to identify Plaintiff's stockholders, officers and members of the Board of Directors.
2. All documents constituting Plaintiff's underwriting manual friends smallest and/or policies.
3. The underwriting file concerning either of the Defendants.
4. All communications between Plaintiff had Colonial Funding Networks ("Colonial") concerning either Defendant.
5. Documents constituting any contract, agreement, understanding, etc. with Colonial.
6. Documents identifying any instructions, regulations or practices provided by Plaintiff to Colonial that Colonial must abide by in connection with brokerage services provided by it to Plaintiff.
7. All communications within Plaintiff concerning either Defendant.
8. All communications with any individual or entity concerning either Defendant.
9. All documents reflecting payments by either Defendant to Plaintiff and/or Colonial.
10. All documents reflecting payments made by Plaintiff to any individual or entity using funds provided by Plaintiff.
11. Documents sufficient to identify all "merchant advance" brokers providing services to Plaintiff.
12. All documents constituting manuals for compliance with any federal, state or local statutes, regulations and rules.
13. Documents sufficient to identify all lawsuits commenced by Plaintiff since 2014 in connection with "merchant advance" transactions.

In its Reply Affirmation, plaintiff responds by objecting to each and every one of the foregoing demands as being overly broad, unduly burdensome, and irrelevant to the issues in this action (Exh. "11"). Plaintiff has not produced anything in response to the Demand of defendants. While defendants are undoubtedly dissatisfied with plaintiff's response to their Demands, the validity of the objections to those demands is not presently before the Court, and the Court takes no position with respect to the propriety of the demands, or the responses by plaintiff.

To the extent requested relief has not been granted, it is denied.

This case is now being set down for a further discovery conference in this Part 19 on June 22, 2016 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
June 8, 2016

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.

ENTERED

JUN 10 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE