

Maina v Rapid Funding NYC

2014 NY Slip Op 30952(U)

April 11, 2014

Sup Ct, New York County

Docket Number: 652525/2011

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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KIONGO W. MAINA,

Plaintiff,

DECISION AND ORDER

-against-

**Index No.: 652525/2011
Mot. Seq. No. 004, 006, 007**

**RAPID FUNDING NYC, LLC, SIGNATURE BANK,
AND N.Y.C. TAXI & LIMOUSINE COMMISSION,**

Defendants.

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O. PETER SHERWOOD, J.:

This Decision and Order resolves three pending motions. In motion sequence no. 004, defendants, Rapid Funding NYC, LLC (“Rapid Funding”) and Signature Bank (together, “Defendants”) move (1) for summary judgment on their first counterclaim for breach of contract and (2) to dismiss the complaint.¹ In a motion filed on, December 20, 2013, (motion sequence no. 006), plaintiff, Kiongo Maina, (plaintiff or Maina) moves to amend the complaint. The proposed amended complaint, which lists seventeen causes of action, alleges only three categories of claims: breach of contract (causes of action 1 through 5), breach of the covenant of good faith and fair dealings (causes of action 6 through 10) and conversion (causes of action 11 through 17). On January 30, 2014, plaintiff filed yet another motion to amend (motion sequence no. 007). In this motion, plaintiff seeks to amend his answer to the counterclaims and to dismiss the sixth affirmative defense (set-off).

BACKGROUND

Plaintiff is a taxi driver. Until June, 2013, he owned a valuable New York City taxicab medallion which he was forced to sell primarily to pay off a loan made to him by Rapid Funding. Rapid Funding provides services to the taxi industry, including brokering taxi medallions and making loans.

On January 31, 2008, Rapid Funding issued plaintiff a loan in the amount of \$380,000,

¹Although this branch of the motion is fashioned as a motion to dismiss, the court will treat it as a motion for summary judgment seeking dismissal of the complaint because Rapid Funding has filed an answer to the complaint (*see* CPLR 3211[e]).

secured by plaintiff's taxicab medallion, the taxicab, taxi-meter, and other assets. Rapid Funding retained \$7,500 of the loan proceeds for itself, claiming it to be a loan "origination fee". Plaintiff disputes that he ever agreed to such a fee.

Plaintiff refinanced the loan on September 4, 2008 in the amount of \$475,000. Plaintiff claims that during the refinancing process, Rapid Funding retained for itself an additional \$32,000 as to which plaintiff claims he never agreed. Defendants claim that these are standard fees charged in the taxicab industry. They state that plaintiff agreed to the fees and attach to their papers copies of checks made payable to Rapid Funding and containing, on the back of each, the words "Payment Approved," under which plaintiff's signature appears.

On February 11, 2010, the parties again refinanced the loan, creating a total encumbrance of \$540,000. Rapid Funding immediately discounted the loan and sold an interest exceeding 90% to defendant, Signature Bank. Similar to the previous loans, plaintiff claims that Rapid Funding retained for itself an additional \$40,000 without his consent. Rapid Funding offers the same justification for these charges. Plaintiff asserts that he has found another company to finance the loan, but that Rapid Funding demanded \$632,000 as the sale price for the loan, \$92,000 more than the original principal. Defendants respond that the additional amount is to cover default interest, and late payment and loan pre-payment penalties owed under the terms of the Note.

The 2010 loan agreement provides for payment of monthly installments of approximately \$3,500, due on the first day of each month, and a balloon payment due March 1, 2013, three years after the loan was made. It is undisputed that plaintiff failed to make the April 1, 2010, payment, and that he failed to make any payments after June, 2011. Defendants claim that plaintiff's default triggered an acceleration clause which permits Rapid Funding to sell the loan collateral to pay off the loan.

In an order dated January 20, 2012, the court granted plaintiff's motion for a preliminary injunction, enjoining defendants from auctioning the taxi medallion. The order was conditioned on plaintiff making monthly installment payments of principal and interest in the amount of \$3,562.21, pursuant to the terms of the underlying Note. The order allowed Rapid Funding to seek relief from the preliminary injunction upon a default of plaintiff's payment obligations and failure to cure.

Plaintiff failed to make the required payments on the due dates. Further, under the terms of

the Note, in the event that plaintiff does not make the March 1, 2013 balloon payment within ten days of the due date, plaintiff will incur an additional 5% late charge on the amount of the balloon payment. Plaintiff defaulted on the Note.

Due to plaintiff's violation of New York City Taxi and Limosine Commission (TLC) rules and regulations, the TLC revoked plaintiff's right to operate a medallion (although he was allowed to keep his hack license). The TLC's attorney has advised the court that revocation of a medallion does not result in the confiscation of the medallion. Rather, it forbids the medallion holder from operating the medallion and requires him to sell, transfer or otherwise dispose of it to someone approved by TLC. There is no prohibition on refinancing a revoked medallion. However, the TLC states that it will not issue a letter stating that plaintiff is an approved medallion owner, an endorsement many lenders require as a condition of financing or refinancing medallions. The TLC notes that even if plaintiff were to find a willing lender to refinance the medallion, he would still be obligated to transfer of the medallion in short order.

Under the terms of the Loan Agreement, plaintiff was required not to incur any subordinate encumbrances against the medallion without Rapid Funding's prior written consent. Nevertheless, plaintiff, permitted a subordinate lien to be filed against the medallion naming David Darzi as the secured party. (*see* Ex. H attached to defendants' moving papers).

Rapid Funding filed a verified answer with counterclaims on April 13, 2012. Plaintiff failed to answer the counterclaims or otherwise file a motion in connection with them. In motion sequence no. 007, e-filed on February 20, 2014, plaintiff attempts to cure the default (*see* NYSCEF Doc. No. 62). By order dated May 29, 2013, the court vacated the preliminary injunction prohibiting the sale of the medallion. Shortly thereafter, the medallion was sold for \$1.05 million. The focus of the case then turned to allocation of the proceeds of the sale.

In response to what plaintiff characterizes as Rapid Funding's deceptive, duplicative and fraudulent tactics designed to trick plaintiff into taking the Loans, Richard Chipman, the sole member and manager of Rapid Funding, avers that these were commercial loan transactions made to the owner of a valuable asset (the medallion) and thus Maina is a sophisticated small business owner (Chipman *aff'd*, ¶ 33); that the loans were not represented as "no fee" loans but instead plaintiff was aware of and agreed to Rapid Funding's fee and interest charges which Chipman

characterizes as customary in New York City taxicab financing (*id.*, ¶¶ 7, 25); that it is plaintiff's own recklessness, irresponsibility and selfish borrowing-- including persistent defaults-- that caused him to incur these debts; and that in fact, plaintiff pocketed \$94,647.95 for himself from the proceeds of the three loans (*see id.*, ¶ 23). Chipman adds that although plaintiff was unrepresented at the time the loans were signed, he had ample opportunity to obtain counsel, made additional secured borrowings in violation of his obligations under the terms of the Notes, ignored any responsibility for the situation and shrugged off his repeated and continual default under the terms of the Loans.

Rapid Funding seeks an award of \$712,678.38, representing the balance claimed to be due and owing through February 21, 2013, as follows:

• Principal Balance (as of February, 21, 2013)	\$540,000.00
• Accrued interest at default rate of 16% per annum through February 21, 2013	\$110,667.70
• Pre-payment fee	\$8,154.46
• Late charges	\$356.22
• Attorney fees and disbursements	<u>\$53,500.00</u>
	\$712,678.38

Rapid Funding states further that "plaintiff continues to accrue interest and legal fees and disbursements...[and] will incur an additional late charge of five percent (5.00%) of the amount of [a]... balloon payment that is due on March 1, 2013" (Aff. of Irene Chipman, ¶ 22-23 NYSECF Doc. No. 27).

The observations of Mr. Chipman notwithstanding, the record before the court reveals that the Notes were made by Maina in his personal capacity and are secured by more than just his taxicab-related assets. Further, on an initial 2008 loan of \$366,096, plus \$87,448 disbursed to Maina directly in 2008 and 2010, as well as \$12,616 paid to third parties for various purposes, including attorney fees and insurance (a total of \$446,160), Rapid Funding collected \$912,780 and claims to be entitled to \$159,000 more (*see* Aff. of R. Chipman ¶ 22). The \$912,780 is in an escrow account maintained by counsel to Rapid Funding. Of that amount, Rapid Funding paid itself "origination fees" of \$46,500 (not provided for in any of the loan documents but which Rapid Funding describes as "customary in the industry") and \$33,714 to "pay off" the loan it made and it refinanced.

DISCUSSION

That branch of Rapid Funding's motion which seeks dismissal of plaintiff's complaint must be dismissed as moot. Plaintiff has now filed motions to amend the complaint and to answer the counterclaim. These pleadings address the deficiencies in the original complaint. CPLR 3025 (b) provides that leave amend the pleadings shall be "freely given," absent prejudice to the other parties. Although the motion may be characterized as "unreasonably late" (Defendants' Opposition at ¶ 8), defendants have not shown that they have been prejudiced. The motions for leave to amend the complaint and the answer to defendants' counterclaim is GRANTED.

As to the branch of Rapid Funding's motion that seeks summary judgment dismissing the (amended) complaint, the court observes initially that plaintiff failed to submit a counterstatement of undisputed facts in opposition to defendants' motion for summary judgment, as required by Commercial Division Rule 19-a. Accordingly, the court has the discretion to deem defendants' statement of material facts as admitted, and to grant defendants summary judgment so long as defendants establish a prima facie entitlement to that relief (*see Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010] [Rule 19-a "gives a motion court the discretion to deem facts admitted, [but] the court is not required to do so"]).

The loans at issue in this case are personal loans. Although the loans were secured by the taxi medallion and taxicab used by plaintiff in his work, the loans are also secured by other, non-business assets. Defendants have not established either that the loans are business loans or that Maina is a "sophisticated small business owner".

Defendants have established a prima facie case for summary judgment, at least as to liability. Defendants have presented the loan agreements, established their performance thereunder, proved plaintiff's failure to make all required payments, and shown damages as a result of plaintiff's failure to make payments. Other than asserting that he was dissuaded from obtaining an attorney, and contending that Rapid Funding continued to accept late payments despite his record of late payments, plaintiff fails to raise any triable issues of fact to defeat the motion for summary judgment. As to damages, Rapid Funding does not adequately explain its entitlement to the purported origination fees that it claims are "customary" in the industry. These fees are not reflected in the loan agreements, although checks in amounts claimed as origination fees are endorsed on the back by plaintiff as

“approved”. Further, Rapid Funding has not shown that the pre-payment fees charged on loans it refinanced are anything other than a penalty. New York condemns the contractual imposition of a penalty (*see Equitable Lbr. Corp. v. IPA Land Dev. Corp*, 38 NY 2d 516[1976]). Summary judgement will be granted as to liability.

Regarding defendant Rapid Funding’s claim for an award of attorneys’ fees, the Note provides that Rapid Funding is entitled to recover attorney fees and expenses in connection with enforcement of any of its remedies equal to 20% of the outstanding principal and interest then due. Rapid Funding is entitled to recover attorney fees of 20% only if it demonstrates that the quality and quantity of the legal services rendered were such to warrant, on a *quantum meruit* basis, that full percentage (*see First Bank of East Islip v. Brower*, 42 NY 2d 471,474 [1977]). Because Rapid Funding has offered no evidence to support the reasonableness of the attorneys’ fees it seeks, this aspect of the motion must be denied. Moreover, where contractual attorneys’ fees are in the nature of a penalty, they should be disallowed (*see RDS Industries, Inc. v. Consolidated Edison Co. of N.Y.*, 2013 WL 685224 [Sup. Ct, New York County, February 20, 2013]). In this case, Rapid Funding has imposed multiple contractual penalties on plaintiff. They include large “origination” fees, late payment penalties, and pre-payment penalties on loans refinanced by Rapid Funding. Arbitrary imposition of a 20% attorney fee charge without any need to show that such fees are reasonable, is yet another penalty.

Of the \$712,678.38 Rapid Funding seeks to recover through February 21, 2013, it shall be allowed \$659,178.38 plus interest at the statutory rate from February 22, 2013 through June 30, 2013 (128 days) when Rapid Funding received \$665,000 from proceeds of the sale of the medallion (\$679,983.11).² The net amount still outstanding as of June 30, 2013 is \$14,983.11. The amount being held in escrow, less \$14,983.11, shall be released to plaintiff.

Accordingly, it is hereby

ORDERED that the plaintiff’s motion to amend the complaint (motion sequence no. 006) is GRANTED; and it is further

ORDERED that the motion to amend the answer to the counterclaims (motion sequence no.

² Daily interest for the 128 day period from February 22, 2013 to June 30, 2013, the latest date for receipt of funds from sale of the medallion is \$162,537 ($\$659,178 \times 0.09 \div 365$).

007) is GRANTED as moot; and it is further

ORDERED that the motion of defendants for summary judgment (motion sequence no. 004) is GRANTED; and it is further

ORDERED that judgement shall be entered against plaintiff, Kiongo Maina and in favor of defendants, Rapid Funding NYC, LLC and Signature Bank in the amount of \$14,983.11 together with costs and disbursements as calculated by the clerk upon submission of a proper bill of costs; and it is further

ORDERED that counsel for defendants, acting in his capacity as escrow agent, shall, upon entry of the judgment, release to plaintiff all sums being held in escrow on account of the sale of the medallion after deducting \$14,983.11 (plus any costs and disbursements awarded by the court) and paying the deducted amount over to defendant, Rapid Funding in full satisfaction of its judgment.

This constitutes the decision and order of the court.

DATED: April 11, 2014

ENTER,



O. PETER SHERWOOD

J.S.C.