SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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PURITAN PARTNERS LLC,

Plaintiff,

- v -

BREEZER HOLDINGS, LLC,MAXIFY SOLUTIONS, INC.

Defendant.

INDEX NO. 654132/2023

MOTION DATE 01/10/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 41, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 63, 64, 65
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, the Defendants' motion (Mtn. Seq. No. 004) for summary judgment is granted (*Adar Bays, LLC v GeneSYS ID, Inc.* (37 NY3d 320 [2021]). Simply put, there are no issues of fact that (i) the Transaction (hereinafter defined) was a loan for less than $2,500,000, (ii) is therefore subject to the usury laws and (iii) that the interest rate charged viewed from the time of inception is criminally usurious such that the Transaction is void *ab initio*.

In *Adar Bays*, the Court of Appeals addressed two questions certified by the Second Circuit for consideration. First, the Court addressed whether a stock conversion option that permits a lender, in its sole discretion, to convert any outstanding balance to shares of stock at a fixed discount should be treated as interest for the purpose of determining whether the transaction violates the criminal usury laws (N.Y. Penal Law § 190.40). Second, the Court addressed whether criminally usurious loans under N.Y. Penal Law § 190.40 are void *ab initio* under N.Y.

Gen. Oblig. Law § 5-511. As discussed below, the Court held that the answer to both questions is "yes."

As relevant, in *Adar Bays*, the parties executed a traditional loan instrument (*i.e.*, a note), which included a floating-price conversion option that allowed the lender to convert unpaid loan principal into stock at a 35% discount from the stock's lowest trading price in the preceding 20-day period (*id.*, at 335).

As to the first certified question discussed above, more specifically, the Court held that the conversion option should be analyzed as part of determining the rate of interest charged by the lender to the extent such value, when measured at the time of contracting, can be reasonably determined. The Court reasoned that the presence of this conversion option did not convert the loan into an equity investment because (i) the option was part of the consideration for the loan and (ii) the lender avoided the risk of share-price volatility that an equity investor would bear (*id.*, at 334). And, as to the second certified question discussed above, upon thorough consideration and analysis of the development of New York's usury laws over the past three centuries, the Court held that criminally usurious loans are indeed void *ab initio* (*id.,* at 326 and 332-333).

In the case at *nisi prius*, Puritan sued Breezer alleging that Breezer had defaulted on virtually all of Breezer's obligations pursuant to certain transaction documents executed in connection with what is at its core a loan transaction. The transaction was consummated on or around December 20, 2020 (the **Transaction**), with the execution of, among other documents, a certain Securities

Purchase Agreement (NYSCEF Doc. No. 53), a certain 10% Original Issue Discount Senior Secured Convertible Note Due June 30, 2022 (NYSCEF Doc. No. 54), and a certain Common Stock Purchase Warrant (the **Warrant**; NYSCEF Doc. No. 55). Pursuant to the Transaction, Puritan loaned Breezer $1,684,444.44 discounted to $1,500,000[1] which Breezer agreed to repay pursuant to the terms of the transaction documents. Breezer also granted the Warrant as additional consideration.

In support of their motion for summary judgment, the Defendants adduce evidence meeting their prima face burden of entitlement to judgment and dismissal (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) arguing (i) that the Transaction is a loan, despite one of the transaction documents being titled "Share Purchase Agreement," (ii) that the loan was for less than $2.5 million such that it is subject to New York's usury interest limitations and (iii) that application of *Adar Bays* requires dismissal of this case because the true interest rate of the loan exceeds 25% per annum viewing the Transaction from the vantage point of inception (Gen. Oblig. Law §§ 5-511 and 501; *see* NYSCEF Doc. No. 32, at 12-13). As discussed below, they are correct on all counts.

In their opposition papers, Puritan argues (i) that the Transaction was an investment not a loan, (ii) that even if it were a loan, the amount advanced by Puritan and "other investors" should be aggregated so as to exceed the usury cap in this instance and that Breezer admitted as such in public notices that they actually received $2.8 million and (iii) even if the amount were below

[1] Puritan also disbursed $16,000 to reimburse Breezer for certain legal fees incurred.

$2.5 million (i.e., and the amount of "other investors" were not aggregated).[2] Puritan's arguments fail and thus do not raise an issue of fact requiring further proceeding.

To discern whether a transaction is a loan, a court must consider (i) whether there was an intent to borrow or an intent to engage in a joint transaction or exchange money for some other reason (*Adar Bays*, 37 NY3d at 334-35) and (ii) whether the obligation to repay the principal sum is absolute – *i.e.*, it is not a loan where the risk of ownership has passed to the funder (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, 666 [2d Dept 2020]; *cf. Spin Capital, LLC v Golden Foothill Ins. Services, LLC*, 2023 WL 2265717 [Sup Ct, NY County 2023]). The Appellate Division has held that in the context of analyzing a merchant cash advance agreement that this requires consideration of: (a) whether there is a reconciliation provision in the agreement, (b) whether the agreement has a finite term, and (c) whether there is any recourse should the merchant declare bankruptcy (*LG Funding*, 181 AD3d at 666).

The Transaction does not involve a merchant cash advance agreement. The Court notes nonetheless that the transaction documents require payment under all circumstances. The term of the Note is finite and maturity occurs on June 20, 2022 (unless advanced for a reason specifically described in the Note). Section 8 of the Note provides that bankruptcy is an event of default entitling Puritan to immediate full repayment of any unpaid amounts (NYSCEF Doc. No. 54 § 8[a][v] & [b]; *see LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). The transaction documents make clear that Puritan bore no market risk

[2] Breezer submits in its opposition papers that it only received $1,500,000 from Puritan which Puritan does not dispute and that despite its public disclosures to the contrary as to "other investors", in actuality, it only received an additional $400,000 (NYSCEF Doc. Nos. 64 ¶ 17; NYSCEF Doc. No. 63).

associated with an equity investment. The Note features both a fixed and a floating-price convertible option (the **Option**) allowing Puritan to convert any or all outstanding Note balance into membership interests in Breezer at the lesser of (i) $148.55 per interest or (ii) a 30% discount to the price of the membership interest after a Qualified Offering (as defined in the Note) (NYSCEF Doc. No. 54, §§ 4[a]-[c]). The Warrant contained an identical convertible option to purchase up to 8,504 membership shares under the same pricing terms as the Note's conversion provisions (NYSCEF Doc. No. 55, § 2[b]). If not exercised, the Warrant entitles Puritan to an additional 10% return on the Note. In other words, under any set of circumstances, Puritan receives additional 10% guaranteed interest by virtue of the Warrant and the Transaction was structured so that Puritan could avoid precisely the sort of membership interest-price risk an equity investor or joint venturer would bear because Puritan (i) stood to lose nothing if Breezer never went public, (ii) stood to lose nothing if the share price never went above $148.45 but (iii) if Breezer did go public (or go above $148.45 per share), Puritan would receive more membership interests by exercising the options than the converted principal was worth (NYSCEF Doc. No. 54 § 4[b]; *see Adar Bays*, 37 NY3d at 335). Thus, the Transaction, bearing all of the traditional hallmarks of a loan, is clearly a loan, despite Puritan's attempt to mask it otherwise.

As to interest, the Note indicates that the principal amount is $1,684,444.44 (NYSCEF Doc. No. 54 at 1) reflecting a 10% original issue discount (*i.e.*, $168,444.44). Interest accrues under the Note at a rate of 10% per annum (*id.* § 2[a]), and Breezer was additionally "required to offer to prepay in cash the aggregate principal amount of the Notes at 120% of the principal amount thereof plus any unpaid accrued interest to the prepayment date, [...] (iv) on the maturity date

[*i.e.*, June 30, 2022] of the Note (*id*. at § 6[e]). The Warrant entitled Puritan to, as discussed above, the minimum of 10% additional guaranteed interest on the Note if the Warrant was not exercised (NYSCEF Doc. No. 54, §5[o]).

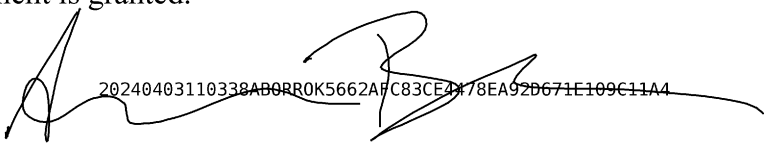
Significantly, Puritan concedes that the loan was only for $1,684,444.44, whereas it advanced only $1,516,000 (NYSCEF Doc. No. 32, at 4; NYSCEF Doc. No. 52, ¶41). Other monies advanced which purport to bring the aggregate amount to $2.8 million (and outside of the protection of the usury laws) were advanced by "others investors," and Puritan had no interest in these other advances (NYSCEF Doc. No. 52, ¶41; NYSCEF Doc. No. 64, ¶17).

Lastly, it is clear that the loan at issue here exceeds the criminal usury cap of 25% per annum. As discussed above, the Warrant must be included in the interest calculation (*Adar Bays*, 37 NY3d at 334), whether the Warrant went unexercised (guaranteeing Puritan an additional 10% interest on the amounts chargeable under the Note (NYSCEF Doc. No. 55, §5[o]) or whether it were exercised (which would only be after a public offering or other increase in membership interest price so as to give Puritan more than 10% additional return) viewed from the time the transaction documents were executed, Puritan would receive (i) at least 27.6% if Puritan received the guaranteed 10% additional interest by not exercising the Warrant or (ii) depending on the valuation methodology applied to the conversion option in the Warrant, anywhere from 47% to 63.1% to 145% (NYSCEF Doc. No. 32 at 18; NYSCEF Doc. No. 29, ¶13). Thus, viewed from inception, Puritan was guaranteed interest in excess of the 25% maximum amount permitted by law.

For completeness, the Court notes that Puritan's Smithline Affidavit (NYSCEF Doc. No. 52, ¶¶ 52-53) does not address the 10% additional guaranteed interest (or indeed any amount of interest) attributable to the Warrant and thus raises no issue of fact for trial. As such the motion is granted, and the case is dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted.



4/3/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE