

Colonial Funding Network, Inc. v Davincitek Corp.
2021 NY Slip Op 30026(U)
January 5, 2021
Supreme Court, New York County
Docket Number: 652745/2017
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. MELISSA ANNE CRANE</u>	PART	IAS MOTION 15EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>652745/2017</u>
COLONIAL FUNDING NETWORK, INC.		MOTION DATE	<u>N/A</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>

- v -

DAVINCITEK CORPORATION d/b/a DAVINCI
TECHNOLOGY CORPORATION and ANTHONY
CURLO (a/k/a ANTHONY T. CURLO)
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for DISMISSAL.

MELISSA A. CRANE, J.:

In this underlying action for breach of contract and breach of guaranty, defendants Davincitek Corporation d/b/a Davinci Technology Corporation (Davinci) and Anthony Curlo (a/k/a Anthony T. Curlo) (Curlo) (collectively, defendants) move pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Colonial Funding Network, Inc. as servicing provider for Platinum Rapid Funding Group, Ltd. cross-moves for summary judgment in its favor and also cross-moves to strike defendants' affirmative defenses. For the reasons set forth below, defendants' motion is denied. The branch of plaintiff's cross motion for summary judgment in its favor is granted and, as a result, the remainder seeking dismissal of the affirmative defenses is deemed moot.

BACKGROUND AND FACTUAL ALLEGATIONS

On June 20, 2016, plaintiff, as funder, entered into a merchant cash advance agreement (Agreement) with Davinci, as merchant. Pursuant to the Agreement, plaintiff purchased

\$288,962.90 of Davinci's future receivables, defined as Davinci's "future accounts, contract rights and other obligations arising from or relating to the payment of monies from Merchant's customers' . . . for the payment of Merchant's sale of goods or services until the . . . 'Purchase Amount' has been delivered by Merchant to Funder." NYSCEF Doc. 18, Agreement at 1. The Agreement indicates that plaintiff paid \$203,495.00 as an agreed-upon price for these receivables, and that Davinci was required to pay back the \$288,962.00 with a specific daily amount of \$1,720.00. The Agreement explained that the "funder has determined Merchant's expected future daily receipts to be \$13,230.92," and that plaintiff was entitled to collect a specified percentage of 14%, or \$1720.00, of these daily receivables. *Id.* at 2.

Section 1.2 sets forth that "Merchant going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement." *Id.* at 3. However, the "Merchant is required to give Funder written notice within 24 hours of any filing under title 11 of the United States Code." *Id.* at 7. Pursuant to section 2.8, Davinci did not contemplate or anticipate filing for bankruptcy protection as of the date of the Agreement.

There is a separate Security Agreement and Guaranty, where Curlo, as undersigned guarantor, agreed to a personal guaranty of Davinci's performance. Curlo signed as President and CEO, under the lines for both Merchant and Owner/Guarantor.

As of November 21, 2016, Davinci stopped depositing its receivables into the account. Plaintiff then commenced the instant action, grounded in breach of contract, seeking to recover the amount of \$114,750.84, plus costs and interests. The complaint states that, as of November 21, 2016, plaintiff "has been unable to collect its daily percentage of Receivables purchased" from Davinci. Of the receivables purchased, Davinci "delivered a total of \$169,162.06 to Plaintiff, leaving a balance of \$111,800.84 worth of Receivables due and owing to Plaintiff"

NYSCEF Doc. No. 1, Complaint, ¶ 14. Plaintiff also states that, pursuant to the Agreement, Davinci owes an additional \$450.00 for returned ACH debit fees and a \$2,500.00 default fee. It further claims that Curlo executed a personal guaranty, but has not fulfilled his obligations as guarantor.

The first cause of action alleges that Davinci breached the terms of the Agreement, thereby defaulting under the Agreement. By commencing this action, plaintiff is now enforcing “its rights and remedies” as a result of Davinci’s default. Plaintiff is now seeking an entry of judgment against Davinci in the amount of \$114,750.84, plus interest at the statutory rate from November 21, 2016 through the entry of judgment. The second cause of action is one for an account stated.¹

In the third cause of action, breach of guaranty, plaintiff seeks to enforce its rights under the Agreement against Curlo as a result of defendants’ default. It states that “Curlo, as guarantor . . . , and having failed to render payment of the full balance due and owing [plaintiff] as of the date herein, is currently in default of the Agreement’s guaranty.” *Id.*, ¶ 37.

Pursuant to the fourth cause of action, attorney’s fees, plaintiff is seeking costs, expenses and attorney’s fees. Plaintiff explains that, as set forth in the Agreement, Curlo, as guarantor, agreed to pay all costs associated with the remedies in enforcing a default, including attorneys’ fees.²

Defendants answered the complaint and denied plaintiff’s allegations. They set forth eleven affirmative defenses: failure to state a cause of action, lack of jurisdiction, “no money

¹ Plaintiff subsequently withdrew this cause of action.

² Plaintiff states that it “also now waives its Fourth Cause of Action stated in the Complaint to the extent that said cause of action seeks to recover attorney’s fees expended in this litigation. Plaintiff’s request for court costs remains unchanged.” NYSCEF Doc. No. 23, Aff of David Wolfson, ¶ 4.

due,” no contract between the parties, failure to mitigate, unclean hands, waiver and release, violation of the Fair Practice Debt Collection Act, usury, and a usurious interest rate in violation of New York General Obligation Law § 5-501 and § 5-511. In the eleventh affirmative defense, defendants reserve their right to assert additional affirmative defenses upon completion of discovery.

Defendants’ Motion for Summary Judgment

Defendants moved for summary judgment dismissing the complaint “on the grounds of usury and violation of New York General Obligation Law § 5-501 and § 5-511.” NYCSEF Doc. No. 15, Curlo Aff, ¶ 1. In support of the motion, defendants provide an affidavit from Curlo, the President and CEO. Curlo states that the parties entered into an agreement whereby plaintiff funded \$203,495.00 and Davinci was required to pay back \$288,962.90. “From June 2016 to November 2016, the defendants made total payment of \$182,377.08, leaving a balance less than \$21,000 in principal. However annual interest rate of the subject transaction is in fact 93% which is usurious under New York State civil and criminal law.” *Id.*, ¶ 6.

In sum, defendants believe that, despite their default, plaintiff should be precluded from recovering on the loan because it was an illegal transaction. Regardless of the fact that the Agreement is labeled as a Merchant Agreement, defendants argue that they have established that the Agreement constituted a loan, with an illegal interest rate. Defendants add that the maximum permitted annual interest rate under New York’s criminal usury statute is 25%. They argue that, “[b]ased on the records before court, it is an inevitable conclusion that the real purpose of the Agreement was for plaintiff to lend money to defendants at the usurious rate set forth above, and that defendant agreed to borrow the money based on the same usurious terms dictated by plaintiff.” NYCSEF Doc. No. 20, Memorandum of law in support at 8. Defendants allege that,

as the transaction is usurious, both the merchant agreement and guarantee should be void and unenforceable.

Curlo further states that he “never executed the Security Agreement and Guaranty in my individual capacity, rather I signed as the President and CEO of my corporation, Davinci. At no time did I act in any type of personal capacity.” Curlo aff, ¶ 4. As a result, defendants argue that Curlo, as a corporate officer, cannot be held personally liable for actions taken in furtherance of the corporation’s business. Curlo also claims that the “terms and conditions in the Merchant Agreement, Security Agreement and Guaranty are inadequate because they are illegible and excessively small print.” *Id.*, ¶ 11. Lastly, Curlo alleges that his corporation “ceased business by the fall of 2018.” *Id.*, ¶ 13.

Plaintiff’s Opposition and Cross Motion

Plaintiff opposes defendants’ motion and cross-moves for summary judgment on its causes of action and for dismissal of defendants’ affirmative defenses. Plaintiff argues that the civil usury statute is inapplicable here, as General Obligations Law § 5-521 prevents a corporation from asserting the usury defense. Nevertheless, plaintiff maintains that the defense of criminal usury pursuant to Penal Law § 190.40 fails as a matter of law, as the transaction was not usurious. Plaintiff argues that, to establish a prima facie case of usury, the transaction at issue must be a loan. Here, however the documentary evidence indicates that the transaction was allegedly not a loan, but a sale of future account receivables. Among other things, plaintiff argues that the clear and unambiguous terms of the Agreement designate the transaction as a purchase and sale of future receivables and note that Davinci was a “sophisticated business entity that had entered into at least one previous merchant cash advance transaction” NYSCEF Doc. No. 24, Athanasopoulos affirmation, ¶ 23. The Agreement also had a reconciliation

provision, “allowing the parties to adjust the daily payment amount downward.” This also leads to the conclusion that the Agreement was not a loan. *Id.*, ¶ 25. Plaintiff further claims that the transaction cannot be a loan as the payments to plaintiff were not absolutely repayable, but were contingent on the continued collection of receivables from Davinci’s customers. Plaintiff maintains that, unlike the cases defendants cited, plaintiff purchased the receivables and took the risk it would not recover its entire purchase if defendants’ business failed. *Id.*, ¶ 31.

According to plaintiff, the documentary evidence indicates that Curlo is personally liable under the guaranty. Further, as Davinci, the corporation, is barred from asserting the civil usury defense, so is Curlo, the individual guarantor. In addition, here, Curlo signed the guaranty for a guaranty of performance, rather than an “unconditional payment guaranty,” which supports the conclusion that the Agreement is not a loan.

Plaintiff believes that it is entitled to summary judgment on its causes of action as it has established defendants’ breach of contract and damages. The parties entered into an Agreement and plaintiff provided \$203,495.00 of funding to defendants, who accepted it. However, defendants breached the Agreement when plaintiff was unable to collect the daily batch amount as of November 22, 2016. Plaintiff submits its accounting sheet, indicating that plaintiff has received \$177,162.06 in receivables. It alleges that defendants’ accounting is off by one payment, as no payment was debited on October 10, 2016, which was Columbus Day.

In support of its contentions, plaintiff submits the affidavit of David Wolfson, CFN’s Vice President of Risk Management and Asset Recovery. According to Wolfson, defendants made several warranties and representations in the Agreement, including apprising plaintiff of the financial state of the business settling the receivables on a daily basis. A default occurs if, among other things, defendants breach any terms, make any representation of warranty proving

to have been incorrect, or make changes to the Account without first obtaining plaintiff's written consent. By November 21, 2016, Davinci stopped depositing receivables into the account and breached the terms of the Agreement. Defendants failed "to honor their contractual obligations and facilitate the transfer of future receivables to [plaintiff], as required by the Merchant Agreement dated June 20, 2016" NYSCEF Doc. No. 23, Wolfson aff, ¶ 2.

According to plaintiff, as a result of breaching the terms of the Agreement, defendants defaulted. In the event of a default, plaintiff is entitled to a refund of the purchase price and to costs and interest. Wolfson submits a balance sheet showing the daily receivables deposited into plaintiff's account. Although the Agreement provides for additional default and ACH debit fees totaling \$2950.00, plaintiff waives these fees to "facilitate the entry of judgment." *Id.*, ¶¶ 25-26.

Plaintiff states that defendants also defaulted on the Agreement by changing the designated Account without receiving plaintiff's prior written consent. Although defendants were supposed to use the Wells Fargo Account, "[i]n response to Plaintiff's discovery demands, Defendants provided bank statements from Peapack-Gladstone Bank where it indicates Defendants deposited their receivables" Athanasopoulos affirmation, ¶ 16. In relevant part, pursuant to the Agreement, Davinci was supposed to make the payments into "only one depositing account acceptable to Funder" Agreement at 1 (emphasis in original). Changing the depositing account without first obtaining plaintiff's consent is considered an event of default. *Id.* at 6.

These bank statements also allegedly establish that, after their initial default on the Agreement, defendants "entered into an agreement with Yellowstone Capital and obtained additional funding all while making payments to Yellowstone Capital." Athanasopoulos affirmation, ¶ 15. This would indicate that defendants breached the "Working Capital Funding"

provision of the Agreement, that prevents defendants from entering into similar merchant agreements with parties other than plaintiff. For instance, on June 19, 2018, a \$10,522 deposit was made into defendants' account from Yellowstone Capital. There are several subsequent debits made to Yellowstone Capital in the amount of \$298.00. According to plaintiff, these bank statements allegedly also indicate that Davinci continued to operate for years after its initial default on the Agreement.

Affirmative Defenses

In their answer, defendants do not provide anything other than boilerplate statements under each affirmative defense. Plaintiff argues that many of defendants' affirmative defenses fail as a matter of law as they lack explanation or factual support. Plaintiff also cites caselaw for each affirmative defense and argues why it should be stricken.

Defendants' Opposition

Defendants reiterate that Agreement is not a purchase and sale transaction for future sale proceeds, but a criminally usurious loan. They states that "plaintiff neither requested nor got the identity of any receivable, customer or invoice" NYSCEF Doc. No. 41, defendants' memorandum of law at 5. They continue that "[w]hile the plaintiff may argue that its intent was the purchase of receivables, the only rights and obligations express [sic] in the Agreement are fixed daily payment [sic] by Davinci until the plaintiff is fully paid, with no right by Davinci to avoid it." *Id.* at 6. They maintain that plaintiff assumes no risk if customers do not make payments.

Given that defendants were required to pledge additional properties such as inventory and equipment as collateral in the Security Agreement, they argue that the Agreement is a loan.

They continue that the guaranty itself could be a form of collateral, also indicating that the transaction is a loan.

Further, according to defendants, the bank statements plaintiff submitted, along with counsel's affirmation, do not "sufficiently establish the [sic] Davinci collected revenues after the alleged default. To the contrary, the income funds appearing on the bank statements were from [sic] loans and personal funds" *Id.* at 8. As a result, plaintiff allegedly "failed to make a prima facie showing that the defendants generated revenues which they are entitled to collect." *Id.*

According to Curlo, while plaintiff claims that it only received \$177,162.06, his business records show that defendants paid \$182,377.08. He states that this discrepancy, at a minimum, precludes summary judgment. Curlo further argues that plaintiff fails to make a prima facie case that sales were generated after the alleged default in 2016. According to Curlo, almost no sales were generated after the alleged default. He attaches a spreadsheet which allegedly indicates how "the income funds are from other loans and my personal funds in an attempt to maintain the business between 2017 and the mid of 2018." NYSCEF Doc. 39, Curlo aff, ¶ 5. Curlo concludes that "plaintiff is not entitled to the defendants' other source of funds, such as loans, other than the accounts receivable." NYSCEF Doc. 39, Curlo aff, ¶ 6.

Curlo again maintains that he is not subject to personal liability as he did not sign the Security Agreement and Guaranty in his individual capacity.

With respect to the affirmative defenses, in opposition, defendants only address plaintiff's arguments with respect to the affirmative defenses alleging a usurious loan and interest rate.

DISCUSSION

I. Summary Judgment

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon the movant’s proffer of evidence establishing a prima facie case, “the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

The Nature of the Transaction-Purchase of Future Receivables or Usurious Loan

Defendants move for summary judgment dismissing the complaint on the grounds that the agreement in question is a criminally usurious loan. While defendants argue that the agreement is a loan, plaintiff asserts that it is a merchant agreement for the sale of future receivables which cannot be usurious. At the outset, the court notes that defendants move for summary judgment dismissing the complaint on the grounds of usury, citing General Obligations Law § 5-511. Davinci, as a corporation, and Curlo, as the individual guarantor of the corporation’s debt, are precluded from asserting the defense of civil usury. *See* General

Obligations Law § 5-521 (1) (“No corporation shall hereafter interpose the defense of usury in any action”); *see also Schneider v Phelps*, 41 NY2d 238, 242 (1977) (internal citation omitted) (“If the loan was made to a corporation, the corporation, by statute, is prohibited from asserting the defense of usury. Likewise, an individual guarantor of a corporate obligation is also precluded from asserting such a defense”).

Nonetheless, although defendants are precluded from asserting the defense of civil usury, “a corporation may interpose[] a defense of criminal usury as described in section 190.40 of the penal law.” General Obligations Law § 5-521 (3). As set forth in Penal Law § 190.40, a transaction is criminally usurious when it imposes an annual interest rate exceeding 25%.³

“Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be.” *Seidel v 18 East 17th St. Owners, Inc.*, 79 NY2d 735, 744 (1992) (internal quotation marks and citations omitted). A party raising the defense of usury has a high burden, as “there is a strong presumption against a finding of usury.” *Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895 (2d Dept 2006). At a potential trial, defendants would be required to prove usury by “clear and convincing evidence.” *Id.* at 896. However, now, on the cross motion for summary judgment, plaintiff is “required to demonstrate that, as a matter of law, the transaction between the parties did not constitute a usurious loan.” *Id.*

³ Criminal usury in the second degree, as set forth in Penal Law § 190.40, states the following: “A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.”

“In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character.” *Olliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972 (2d Dept 2013) (internal quotation marks and citation omitted). The court must examine whether the plaintiff “is absolutely entitled to repayment under all circumstances.” *K9 Bytes, Inc. v Arch Capital Funding, LLC* 56 Misc 3d 807, 816 (Sup Ct, Westchester County 2017). A transaction cannot be a true loan “[u]nless a principal sum advanced is repayable absolutely. When payment or enforcement rests on a contingency, the agreement is valid though it provides for a return in excess of the legal rate of interest.” *Colonial Funding Network, Inc. v Epazz, Inc.*, 252 F Supp 3d 274, 281 (SD NY 2017) (internal quotation marks and citations omitted).

Courts generally consider three factors for assessing “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.” *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 666 (2d Dept 2020). Courts have explained the reconciliation provision as allowing “the merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof).” *K9 Bytes, Inc. v Arch Capital Funding, LLC* 56 Misc 3d at 816.

Courts have found that “[p]urchases and sales of future receivables are common commercial transactions expressly contemplated by the Uniform Commercial Code.” *Principis Capital LLC v WTC Victor, LLC*, 2019 NY Slip Op 33678 (U), * 3 (Sup Ct, NY County 2019); *see also Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507, 507 (1st Dept 2018) (Court held that the “underlying agreement [a Merchant Agreement for the purchase of future receivables] leading to the judgment by confession was not a usurious transaction”).

With respect to the first factor, on the first page of the Agreement, the parties state that they are entering into a purchase and sale of future receivables. The Agreement further explains that the “Purchase Price is not intended to be, nor shall it be construed as a loan” Agreement at 1. The Agreement then sets forth a reconciliation provision, indicating that the ability for plaintiff to collect sales proceeds is uncertain as it is contingent on Davinci’s ability to generate sales and then collect revenue. It states the following, in relevant part:

“Funder will debit the Specific Daily Amount each business day and upon receipt of the Merchants [sic] monthly bank statements to reconcile the Merchant’s account by either crediting or debiting the difference from or back to the Merchant’s bank account so that the amount debited per month equals the specified percentage. Upon written request by Merchant to Funder for a true-up, Merchant shall provide Funder with web access to business primary bank account and/or additional financial documents to allow for reconciliation.”

Agreement at 1-2.

The provision further indicates that if defendants overpaid, plaintiff shall apply the overpayment forward. Upon defendants’ request, plaintiff may adjust the amount of payment due, however this is at plaintiff’s sole discretion. By this provision, not only can defendants seek an adjustment, but plaintiff has the obligation to reconcile defendants’ account so that the debited amount equals the specified percentage.

In addition, the Agreement lists the daily payment and the explanation for how plaintiff arrived at that number. For instance, plaintiff estimated defendants’ expected future daily receipts by reviewing the average daily gross receipts generated in the previous four months. The Agreement specifies that “[t]he below daily payment has been determined by this formula and may be reconciled each month hereafter.” *Id.* at 2.

Defendants argue that the Agreement is a loan transaction, based on the requirement of a fixed daily payment. However, as explained, the daily payment is reconcilable and may

fluctuate based on daily gross receipts generated by defendants. This is in contrast to *Merchant Funding Servs., LLC v Volunteer Pharmacy, Inc.* (55 Misc 3d 316, 322 [Sup Ct, Westchester County 2016]), cited by defendants, where that plaintiff “fail[ed] to point to a non-recourse provision in the agreement by which it assumed the risk that it might not be able to collect payments from [defendant’s] accounts receivable.”⁴ Here, however, payments to plaintiff are contingent on defendants’ receivables and could be lowered if defendant made less money.

With respect to the second element, finite term, the Agreement, has no specific end date for repayment. The Agreement expressly states that there is “no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Funder. . . . Funder is entering into this Agreement knowing the risks that Merchant’s business may slow down or fail” Agreement at 3. Plaintiff purchased and owned the receipts up until the full purchased amount of the receipts are created. The payments, “in respect to the full amount of the Receipts shall be conditioned upon Merchant’s sale of products and services and the payment therefore by Merchant’s customers” *Id.* at 4.

As previously mentioned, defendants’ obligation to pay, along with the amount due, were contingent on its daily sales and revenue. As a result, the amount of time required for repayment is unknown. Accordingly, this indefinite term in the Agreement evidences the contingent nature of the transaction as it “is consistent with the contingent nature of each and every collection of future sales proceeds under the contract.” *IBIS Capital Group, LLC v Four Paws Orlando LLC*, 2017 NY Slip Op 30477[U], *5 (Sup Ct, Nassau County 2017).

⁴ Subsequent to the submission of this motion, *Merchant Funding Servs., LLC v Volunteer Pharmacy, Inc.* (179 AD3d 1051 [2d Dept 2020]) was reversed, as defendants should have brought a plenary action, rather than a motion, to vacate the judgment by confession.

The third factor used to determine if the repayment is absolute or contingent is whether plaintiff has any recourse if Davinci declares bankruptcy. Here, the Agreement provides that bankruptcy or going out of business, in and of itself, is not a breach of the Agreement. Similarly, bankruptcy is not listed as one of the “events of default” in the Agreement allowing plaintiff to enforce “the provisions of the Personal Guarantee of Performance against the Guarantor.” Agreement at 4. This factor weighs in favor of finding that payment is not absolute and that the transaction is not a loan. *See e.g. Merchant Cash and Capital, LLC v Sogomonyan*, 2017 NY Slip Op 31111(U), *9 (Sup Ct, Nassau County 2017) (“Court dismissed the affirmative defense of usury, as, among other reasons, “any bankruptcy or cessation of business by the Company would not be considered a breach by the Company or obligate the Guarantor to pay the purchased amount”).

Defendants argue that, as plaintiff holds a security interest in defendants’ equipment and inventory, the Agreement is a loan. However, courts have found that where a merchant agreement incorporates a security agreement to provide security interest, it is not necessarily a loan. *See e.g. Rapid Capital Fin., LLC v Natures Mkt. Corp.*, 57 Misc 3d 979, 985 (Sup Ct, Westchester County 2017) (“this protection of plaintiff’s ultimate ability to collect its full entitlement [by executing a security agreement] is insufficient, alone, to establish that this nominal purchase agreement is, instead, actually a loan”).

Defendants continue that the guaranty itself could be a form of collateral, indicating that the transaction is a loan. However, although the guaranty Curlo signed guaranteed Davinci’s performance of its obligations under the Agreement, it did not affect the contingent nature of the transaction. Further, “[Curlo] did not agree to pay the Purchase Amount if [Davinci] was unable to pay because it ceased operations in the ordinary course of business. The Guaranty did not alter

[plaintiff's] risk of non-payment if [Davinci's] business failed.” *Womack v Capital Stack, LLC*, 2019 WL 4142740, *8, 2019 US Dist LEXIS 148644 (SD NY 2019, 1:18-cv-04192[ALC]).

Referring to CPLR 4544, Curlo claims that the terms of the Agreement are inadequate due to an excessively small print size. However, CPLR 4544 is inapplicable because this was not a consumer transaction. *See e.g. Key Equip. Fin., Inc. v South Shore Imaging, Inc.*, 39 AD3d 595, 597 (2d Dept 2007) (“CPLR 4545 applies, by its terms, only to printed contracts or agreements involving consumer transactions or residential leases”).⁵

In conclusion, applying the three-part test, the court concludes that the terms of the Agreement demonstrate, as a matter of law, that the transaction was for the purchase of future receivables and did not “constitute[] a criminally usurious loan.” *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d at 666. Accordingly, the court denies defendants’ motion for summary judgment dismissing the complaint on this basis.

Breach of Contract

The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance of the contract by the injured party; (3) breach; and (4) resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007). The parties entered into an Agreement whereby plaintiff purchased \$288,962.90 of Davinci’s future receivables. According to Wolfson, plaintiff performed under the Agreement by paying Davinci the agreed-upon price of \$203,495.00. On November 21, 2016, Davinci breached the Agreement when it stopped depositing the receivables into plaintiff’s account. Defendants delivered a total of \$177,162.06,

⁵ Pursuant to CPLR 4544, a consumer transaction is defined as “a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes.”

leaving a balance of \$111,800.84 worth of receivables due to plaintiff. Wolfson states that defendants' breach has caused damages in the amount of \$111,800.84 plus costs and interest.

In opposition to plaintiff's prima facie breach of contract claim, defendants do not dispute that plaintiff fulfilled its obligations under the Agreement. Defendants also do not dispute that they made payments from June 2016 until November 2016 and then stopped depositing receivables. According to Curlo, his records indicate that \$182,377.08 was paid to plaintiff, while plaintiff claims to have only received \$177,162.06. As plaintiff notes, defendants' accounting sheet lists 104 payments between June 22, 2016 and November 18, 2016, totaling \$182,377.08 paid to plaintiff. Payments started on June 22, 2016 and ended on November 18, 2016. NYSCEF Doc. No. 33. Comparing the list with the Wells Fargo bank statements and plaintiff's statement of activity, it appears that defendants incorrectly included a payment on October 10, 2016. *See* NYSCEF Doc. 34, NYSCEF Doc. No. 27. However, it also seems that defendants failed to include a payment made for the week ending on November 18, 2016. Defendants also made a payment on November 21, 2016 that was not accounted for in defendants' accounting sheet. On November 22, 2016, defendants made a payment, but it was returned for insufficient funds. In total, the record indicates that defendants made 105 payments of \$1720.02, totaling \$180,602.10.

Plaintiff's statement of activity lists 103 payments, including the payment made on November 21, 2016. However, the activity started on June 24, 2016, and does not show the payments listed June 22, 2016 and June 23, 2016 as on the defendants' accounting sheet. Given plaintiff's concession that payments began on June 22, 2016, the record indicates that defendants made 105 payments, for a total amount of \$180,602.10. This would leave a remainder \$108,360.80, due and owing to plaintiff, with a default date of November 22, 2016.

Next, despite their acknowledged default, defendants argue that the transaction is usurious and should be null and void. As discussed, plaintiff has established that the contract was for the purchase of future receivables, rather than a criminally usurious loan.

Lastly, according to defendants, the income funds appearing on bank statements were either from loans or personal funds. As a result, plaintiff has purportedly failed to establish that defendants generated revenue that plaintiff is entitled to collect.

In response to plaintiff's cross motion, defendants do not provide any itemized bank statements for the relevant time period. Instead, Curlo submits a one-page document where he lists the amounts of personal funds and loans from friends/family/others that were deposited for 2017 and 2018. However, this record is insufficient to raise an issue of fact as to whether Davinci was in breach on November 21, 2016, the time of the default.⁶ Pursuant to the Agreement, neither bankruptcy nor a decline in business is an event of default. If defendants believed that their business was slowing down and they could not deposit receivables on a certain day, Davinci could request a reconciliation and a true up would occur. Defendants also had the option to request that plaintiff adjust the amount of any payment due under the Agreement. However, defendants did not make this request. As a result, defendants defaulted when they stopped making payments altogether without requesting a reconciliation pursuant to the option the Agreement provided.

Further, even if defendants' income was from loans and personal funds and they did not generate receivables during that time, the bank statements plaintiff submitted indicate that defendants received a loan from Yellowstone Capital and then made subsequent payments to

⁶ As Curlo even states, "plaintiff fails to make a prima facie case establishing sales were generated after the alleged default in 2016" Curlo aff, ¶ 6.

Yellowstone Capital. According to plaintiff, defendants would be breaching section 2.9 of the Agreement if they entered into another similar merchant agreement. However, at this time, it is not necessary to decide if any further defaults occurred after the initial default in November 2016.

Breach of Guaranty

The third cause of action, alleging a breach of guaranty, seeks to hold Curlo personally and fully liable for the amount owed to plaintiff. It is well settled that “[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” *Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 (1st Dept 2012) (internal quotation marks and citations omitted). While defendants do not argue fraud or duress, they claim that Curlo is not individually liable for the guaranty as he signed as the President and CEO, and not in his individual capacity. However, as set forth below, defendants’ arguments fail to raise a triable issue of fact.

The record indicates that there is a Security Agreement and Guaranty, separate from the Agreement, whereby Curlo agreed to a personal guaranty of performance. Curlo, as guarantor, guaranteed Davinci’s performance of all representations made by Davinci in the Agreement. The guarantor’s obligations were due at the time of Davinci’s breach of the Agreement. Further, upon any event of default, plaintiff was entitled to pursue any remedy available at law to collect outstanding obligations. The guarantor signed that he understood the seriousness of the provisions of the Agreement and that he had a chance to speak to counsel if he chose to do so.

Accordingly, here, “the terms of the instant Guaranty constitute a deliberately stated, unambiguous and separate expression personally obligating [Curlo] for [defendants’] debt.”

PNC Capital Recovery v Mechanical Parking Sys., 283 AD2d 268, 270 (1st Dept 2001) (internal citations omitted); *see also Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 (2014) (internal quotation marks and citations omitted) (“a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms”).

Defendants claim that there is no indication that Curlo acted in a personal capacity. Curlo also signed under the Merchant line and also under the Owner/Guarantor line, According to defendants, the corporate title under his signature demonstrates that he was executing the Agreement in his official, and not personal, capacity. However, contrary to defendants’ contentions, courts have held that “where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual.” *PNC Capital Recovery v Mechanical Parking Sys.*, 283 AD2d at 270, quoting *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 (1961).

Thus, on the cross motion for summary judgment, plaintiff has “prove[n] the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty.” *Davimos v Halle*, 35 AD3d 270, 272 (1st Dept 2006). Plaintiff has established that, in the event of Davinci’s breach, Curlo personally guaranteed Davinci’s performance of its obligations. As previously mentioned, Davinci is liable on the breach of contract claim. Curlo has defaulted under the Guaranty by failing to render the payment Davinci owed to plaintiff. In opposition, defendants have failed to raise a triable issue of fact.

Accordingly, plaintiff is also granted summary judgment in its favor on the breach of guaranty claim against Curlo.

Affirmative Defenses

Defendants failed to respond to most of plaintiff’s arguments in favor of dismissing the defenses. Regardless, in light of this decision granting summary judgment in plaintiff’s favor, plaintiff’s motion to strike the affirmative defenses is deemed moot. *See e.g. Venezolana De Navegacion v Joseph Vinal Container Corp.*, 1987 US Dist LEXIS 12888, 1987 WL 7377, at *3 n 1 (SD NY 1987) ([Plaintiff’s] further motion to strike the First Affirmative Defense is made moot by the granting of the motion for summary judgment”).

CONCLUSION


Accordingly, it is

ORDERED that defendants’ motion for summary judgment is denied; and it is further

ORDERED that the branch of plaintiff’s cross motion for summary judgment in its favor. is granted, and the remainder seeking to strike defendants’ affirmative defenses is deemed moot; and it is further

ORDERED that plaintiff is awarded \$108,360 against DAVINCITEK CORPORATION d/b/a DAVINCI TECHNOLOGY CORPORATION and ANTHONY CURLO (a/k/a ANTHONY T. CURLO), jointly and severally, plus costs and disbursements to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff is to serve notice of entry on defendants, on the office of the General Clerk, and on the office of the County Clerk, which shall enter judgment accordingly.


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<u>1/5/2021</u> DATE					<hr/> MELISSA ANNE CRANE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE

