SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CAVALRY LLC d/b/a CAVALRY ASSOCIATES a/k/a CAVALRY a/k/a CNC, and YOEL BOCHNER,

Plaintiffs,

-against-

EBF HOLDINGS, LLC d/b/a EVEREST BUSINESS FUNDING d./b/a EBF and BANKS 1-5,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF003081-2021
Motion Date: September 20, 2021

The following papers numbered 1 to 8 were read on Defendant's motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit / Exhibits - Memorandum 1-4

Affirmation in Opposition / Exhibits - Memorandum 5-6

Reply Affidavit / Exhibit - Reply Memorandum 7-8

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This action concerns a merchant funding agreement (the "Agreement") dated April 15, 2021, whereby defendant EBF Holdings, LLC ("Everest") purported to purchase certain future receivables of plaintiff Cavalry LLC ("Cavalry"). On May 11, 2021, less than one month after entering the Agreement, Plaintiffs commenced this action, asserting that the transaction, though ostensibly a purchase and sale of future receivables, was in fact a criminally usurious loan.

A. Plaintiffs' Complaint

Plaintiffs' claim that the Agreement at issue here constitutes a criminally usurious loan rests on the following allegations of their Complaint:

> 43. Everest's cash advances are payday loans because Everest structures them so that they are subject to repayment absolutely, not on a contingent basis. They do this in a number of ways.
>
> 44. First, Everest requires merchants to repay the cash advances through daily payments at fixed amounts that are not reconciled. These amounts are stated in Everest's agreements and called a "Daily Payment."
>
> 45. These fixed daily payment amounts do not vary from day to day. Everest states in its agreement that they will "reconcile" merchants' payment amounts based on a "Specified Percentage" of their "receivables," but this contract language is a sham, as set forth below.
>
> 46. Second, Everest's loan agreement indicates a finite repayment term. The repayment term is the total repayment amount of the cash advance, called a "Purchased Amount," divided by its daily payment amount. For example, an agreement with a total repayment amount of $280,000 and a daily payment of $2,000.00 indicates a finite repayment term of 140 business days ($280,000 ÷ $2,000.00 = 140).
>
> 47. Third, Everest drafted their loan agreement to provide it with security in the event of default. The agreement states that (a) the cash advances are personally guaranteed by guarantors, who are in most cases merchants' principals; (b) Everest holds security interests under the Uniform Commercial Code over "all accounts" and other assets of merchants; and (c) bankruptcy or the termination of merchant's business is an event of default triggering immediate payment of the entire amount due.
>
> 48. And fourth, Everest requires merchants and their guarantors to provide Everest with signed, personal guaranties and/or confessions of judgment. Everest files the confessions in New York State Supreme Court in the event of any purported default and thereby obtains immediate judgment against merchants and their guarantors for the full repayment amount of the cash advance – with no notice, no judicial review, and no other proof of default aside from Everest's own self-serving (and often false) affidavits.

(Complaint ¶¶ 43-48)

On that foundation, Plaintiffs allege eleven (11) causes of action under New York state law, all predicated on their claim that the Agreement constitutes not a sale of future receivables, but rather a usurious loan:

(1) civil usury, in violation of GOL §5-501(1)
(2) criminal usury, in violation of Penal Law §190.40
(3) engaging in unlicensed lending, in violation of Banking Law §§ 340 and 356
(4) violation of GBL §349, based on alleged usurious lending
(5) declaratory judgment that Agreement is usurious and unenforceable
(6) unjust enrichment, based on receipt of proceeds of illegal loan
(7) fraudulent inducement of criminally usurious Agreement
(8) engaging in deceptive usurious practices, in violation of GOL §5-515
(9) collecting unlawful usurious debt, in violation of Penal Law §§190.42, 109.45
(10) permanent injunctive relief against unlawful usurious practices
(11) intentional infliction of emotional distress

B. Defendant's Motion

Everest moves for summary judgment dismissing Plaintiffs' complaint, and for judgment as a matter of law on its counterclaims for (1) breach of contract as against Cavalry, and (2) breach of personal guaranty as against plaintiff Yoel Bochner. The threshold issue here is whether the Agreement is in fact what it purports to be – the purchase and sale of a percentage of Cavalry's future receivables – or what Plaintiffs claim it is: a usurious loan *in disguise*.

C. Are Merchant Funding Agreements Sales or Loans ?

1. General Principles

In *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra,* 181 AD3d 664 (2d Dept. 2020), the Second Department was confronted with the very issue presented here, i.e., whether a merchant funding agreement which ostensibly involved a sale of receivables was in actuality a usurious loan. The Court wrote:

> 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 (*see, Seidel v. 18 E. 17th St. Owners,* 79 NY2d 735...; *Abir v. Malky, Inc.,* 59 AD3d 646, 649...). 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'" (*Abir v. Malky, Inc.,* 59 AD3d at 649 ...[cit.om.]). 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 Co.]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v. Small,* 273 App.Div. 102...).

LG Funding, LLC, supra, 181 AD3d at 665-666.

Thus, an essential element of usury is the existence of a loan, and a transaction however characterized by the parties may be deemed a loan where the principal sum advanced is "repayable absolutely." *See, id.* What does that mean ? The *LG Funding, LLC* Court cited *Rubenstein v. Small, supra,* wherein the First Department wrote:

> For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard. Bank of United States v. Owens, [27 U.S.] 527...; Hall v. Eagle Insurance Co. of London, England, 151 App.Div. 815, 827..., affirmed 211 NY 507...

Rubenstein v. Small, supra, 273 App.Div. 102, 104 (1st Dept. 1947). *Rubenstein* in turn cited *Bank of U.S. v. Owens* and *Hall v. Eagle Ins. Co., supra.* In *Bank of U.S. v. Owens, supra,* 27 US 527 (1829), the U.S. Supreme Court wrote:

> A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume where the treaty is for a loan, and the capital is to be returned at all events; has always been adjudged to be so much profit taken upon a loan; and to be a violation of those laws which limit the lender to a specified rate of interest.

Id., 27 US at 537. *Hall v. Eagle Ins. Co., supra,* 151 AD 815, 136 NYS 774 (1st Dept. 1912), *aff'd* 211 NY 507 (1914), quoted *Bank of U.S. v. Owens, supra,* and went on to quote *Tyson v. Rickard,* 3 Har. & J. (Md.) 109 as follows:

> A stipulation to repay the principal in money is not necessary to constitute a loan. It is enough if the principal is secured, and not bona fide put in hazard, and it matters not what the nature of the security is; it is sufficient. *** The true ground is, not that there must be a stipulation to repay the principal at all events in money, but that it must in some way be secured, as distinguished from being put in hazard; but whether it is secured by pawn or pledge, or a conveyance of land, or is by agreement to be returned in lands, goods or money, is not material. If the principal is secured and the interest reserved is more than the law allows, it is usury.

See, Hall v. Eagle Ins. Co., supra, 136 NYS at 783.

In principle, then, a loan may be found to exist where the payor is entitled to repayment of principal under all circumstances, or when the principal is secured such that it is not *bona fide* at hazard of loss.

2. Specific Criteria

In *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra*, the Second Department summarized the specific criteria by which New York courts determine whether merchant funding agreements which ostensibly involve a sale of receivables are in actuality usurious loans:

> 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....

LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra, 181 AD3d at 666.

Elucidating these three criteria, the court in *Pirs Capital, LLC v. C&M Truck, Tire & Trailer Repair Inc.,* 69 Misc.3d 457 (Sup. Ct. N.Y. Co. 2020) wrote:

> The first prong of the test is whether the contract contains a reconciliation provision that allows the merchant (here, defendant D&M) to seek adjustments of the amount

> remitted to the purchaser (here, plaintiff). If a transaction does not have a reconciliation agreement, then it is more likely to be a loan than a purchase of future receivables....
>
> The next prong of the test is whether the transaction is for a fixed (or "finite") term or for a non-finite term. Ordinarily, a loan consists of a face value, repayable (with interest) over a finite period DEFINED in the transaction documents. If a transaction instead has a non-finite term, that suggests that the transaction is instead a purchase of future receivables. In that scenario, the length of time required to complete the transaction will be contingent "upon the outside factor of customers actually shopping at [the merchant] and paying for products and services," thereby generating receivables for the purchaser to collect....
>
> The third and final prong of the test is whether the purchaser has any recourse in the event of the merchant's bankruptcy. If the purchaser does have recourse, especially through a personal guaranty, that is a consideration pointing toward the agreement being treated as a loan rather than a receivables purchase....

Pirs Capital, LLC, supra, 69 Misc.3d at 462-463. *See also, K9 Bytes, Inc. v. Arch Capital Funding, LLC,* 56 Misc.3d 807, 816-818 (Sup. Ct. Westchester Co. 2017).

D. The April 15, 2021 Merchant Funding Agreement

1. The Agreement Purports To Be A Sale of Future Receipts, Not a Loan

The Agreement is captioned "Payment Rights Purchase and Sale Agreement", and states:

> Seller hereby sells, assigns and transfers to Purchaser, without recourse, upon payment of the Purchase Price [$200,000], the Purchased Amount of Future Receipts [$280,000] by delivering to Purchaser the Specified Percentage [15%] of the proceeds of each future sale by Seller.

(Agreement, p. 1) Everest's "Acknowledgment" follows:

> There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Purchaser. Seller going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Purchaser is entering into this Agreement knowing the risks that Seller's business may slow down or fail, and Purchaser assumes these risks based on Seller's representations warranties and covenants in this Agreement, which are designed to give Purchaser a reasonable and fair opportunity to receive the benefit of its bargain.

(*Id.*, p. 2) Section 2.2 of the Agreement, entitled "Nonrecourse Sale of Payment Rights", further

provides:

> Seller represents and warrants that it is selling the Purchased Amount of Future Receipts to Purchaser in the ordinary course of Seller's business and the Purchase Price paid by Purchaser is good and valuable consideration for the sale. Seller is selling a portion of a future revenue stream to Purchaser at a discount, not borrowing money from Purchaser. Purchaser assumes the risk that Future Receipts will be remitted more slowly than Purchaser may have anticipated or projected because Seller's business has slowed down, or the full Purchased Amount may never be remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business. By this Agreement, Seller transfers to Purchaser full and complete ownership of the Purchased Amount of Future Receipts and Seller retains no legal or equitable interest therein.

(*Id.*, p. 5)

It is plain from the language of the Agreement that the parties intended the transaction to be a sale of a percentage of Cavalry's future receipts and not a loan.

2. The Agreement Accords Plaintiffs the Right to Reconciliation

The Agreement provides that "Seller shall deposit all Future Receipts into only one bank account...," and that "Purchaser will debit the Daily Payment [$2,000] from the Account each Weekday (Monday - Friday). Seller authorizes Purchaser to initiate electronic checks or ACH debits from the Account equal to the Daily Payment each business day and will provide Purchaser with all required account information...." (Agreement, p. 2)

However, contrary to Plaintiffs' allegation, the Agreement accords Plaintiffs the right to a reconciliation to assure that the amount collected equals the specified percentage of Cavalry's actual receipts:

> Seller's Right to Reconciliation. The Daily Payment amount [$2,000] is intended to represent the Specified Percentage [15%] of Seller's Future Receipts. Seller may request that Purchaser reconcile Seller's actual receipts by either crediting or debiting the difference back to or from the Account so that the amount Purchaser debited in the most recent calendar month equaled the Specified Percentage of Future Receipts that Seller collected in that calendar month. Any reconciliation request must be: (1) in writing;

> (2) include a copy of Seller's bank statement for the calendar month at issue; and (3) be sent to Everest Business Funding at 5 West 37th Street, Suite 1100, New York NY 10018 within 30 days after the last day of the calendar month at issue. It is solely the Seller's responsibility to send a complete bank statement. Seller agrees to provide Purchaser any information requested by Purchaser to assist in this reconciliation. Within four business days of Buyer's reasonable verification of such information, Buyer shall reconcile Seller's actual receipts. Failure to send a written reconciliation request within 30 days after the last day of the calendar month at issue forfeits that month's reconciliation.

(Agreement, p. 2)

The Agreement's provision for a monthly reconciliation to assure that the Daily Payments remitted to Everest do not exceed the Specified Percentage of Cavalry's actual receipts – the first prong of the Second Department's test in *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra* – supports a finding that the transaction was in actuality a sale of future receivables, not a loan. *Cf., LG Funding, LLC, supra,* 181 AD3d at 666 (question of fact whether transaction was usurious loan where reconciliation was available only at funder's "sole discretion"); *Davis v. Richmond Capital Group, LLC,* 194 AD3d 516 (1st Dept. 2021) (same, reconciliation was discretionary and "purchaser" allegedly did not permit reconciliation).

3. The Agreement Does Not Have a Finite Term

Contrary to Plaintiffs' allegation, the Agreement has no fixed or finite term as a loan would normally have. It provides, rather, for the sale, assignment and transfer of "the Purchased Amount of Future Receipts [$280,000] by delivering to Purchaser the Specified Percentage [15%] of the proceeds of each future sale by Seller" (Agreement, p. 1), and further, that "[t]here is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Purchaser." (*Id.*, p. 2) Although payment of the Daily Payment of $2,000.00 would *absent reconciliation* result in payment of the Purchase Price in a finite term,

the Agreement, as shown above, does provide for reconciliation to assure that the Daily Payments remitted to Everest do not exceed the Specified Percentage [15%] of Cavalry's receipts. (*Id.*, p. 2) Here then, as in *Pirs Capital, LLC v. C&M Truck, Tire & Trailer Repair Inc.*, *supra*,"the length of time required to complete the transaction will be contingent 'upon the outside factor of customers actually shopping at [the merchant] and paying for products and services,' thereby generating receivables for the purchaser to collect." *Id.*, 69 Misc.3d at 463.

Thus, the absence of a fixed or finite term for payment – the second prong of the Second Department's test in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, *supra* – also supports a finding that the transaction was in actuality a sale of future receivables, not a loan.

4. Everest Has Only Limited Recourse In The Event of Cavalry's Bankruptcy or Termination of Business

Plaintiffs further assert that this transaction should be construed as a loan, and not a purchase and sale of future receivables, because (1) the " bankruptcy or the termination of merchant's business is an event of default triggering immediate payment of the entire amount due"; (2) "the cash advances are personally guaranteed by guarantors, who are in most cases merchants' principals"; (3) "Everest holds security interests under the Uniform Commercial Code over 'all accounts' and other assets of merchants"; and (4) Everest requires merchants and their guarantors to provide confessions of judgment by means of which it "obtains immediate judgment against [them] for the full repayment amount of the cash advance" in the event of a default. (*See,* Complaint ¶¶ 47-48) All four of these claims are *demonstrably false.*

(a) Bankruptcy / Termination of Business

Contrary to Plaintiffs' assertion, neither bankruptcy nor the termination of its business is an event of default under the Agreement. Everest therein acknowledges:

> Seller going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Purchaser is entering into this Agreement knowing the risks that Seller's business may slow down or fail, and Purchaser assumes these risks based on Seller's representations warranties and covenants in this Agreement, which are designed to give Purchaser a reasonable and fair opportunity to receive the benefit of its bargain.

(Agreement, p. 2) As per Everest's acknowledgment, and contrary to Plaintiffs' allegation, neither the termination of Cavalry's business nor its bankruptcy are included among the "Events of Default" specified in the Agreement. (*Id.*, pp. 6-7, ¶ 3.1) In this regard, a default occurs only if "Seller *intentionally* interferes with Purchaser's right to collect the Daily Payment in violation of this Agreement." (*Id.*, ¶3.13[a]). This provision quite clearly does not insulate Everest from the assumed risk of Cavalry's slow down or failure due to adverse financial conditions, but only from bad faith efforts to defeat Everest's rights under the Agreement.

(b) Personal Guaranty

Contrary to Plaintiffs' assertion, Everest's cash advance is not personally guaranteed by Cavalry's principal. The Agreement provided for a *limited performance Guaranty* by Yoel Bochner of *certain* of Cavalry's obligations (the "Guaranteed Obligations") under the Agreement – not including delivery of the Daily Payment or payment of the Purchased Amount of Future Receipts – as follows:

5.1.1 Seller's obligation to provide bank statements and other financial information that fairly represent the financial condition of Seller at such dates, within 5 business days after request from Purchaser;

5.1.2 Seller's obligation to not change its Credit Card processor, add terminals, change its financial institution or bank account(s), use multiple bank accounts, or take any similar action that could have an adverse effect upon Seller's obligations under this Agreement, without Purchaser's prior written consent;

5.1.3 Seller's obligation to not conduct Seller's businesses under any name other than as disclosed to Processor and Purchaser;

5.1.4 Seller's obligation to not change any of its places of business or the type of business without prior written consent by Purchaser; and

5.1.5 Seller's obligation to not voluntarily sell, dispose, transfer or otherwise convey its business or substantially all business assets without (I) the express prior written consent of Purchaser, and (ii) the written agreement of any purchaser or transferee assuming all of the Seller's obligations under this Agreement pursuant to documentation satisfactory to Purchaser.

In the event that Seller fails to perform any of the Guaranteed Obligations, Purchaser may recover from Guarantor for all of Purchaser's losses and damages and all remedies specified in Section 3.2 of this Agreement by enforcement of Purchaser's rights under this Performance Guaranty....

(Agreement, p. 9, ¶5.1)

The effect of Mr. Bochner's personal Guaranty is to enforce those "warranties and covenants" of Cavalry that are "designed to give [Everest] a reasonable and fair opportunity to receive the benefit of its bargain." In this regard, the Agreement specifically states that:

> Purchaser is entering into this Agreement knowing the risks that Seller's business may slow down or fail, and Purchaser assumes these risks *based on Seller's representations warranties and covenants in this Agreement, which are designed to give Purchaser a reasonable and fair opportunity to receive the benefit of its bargain.*

(Agreement, p. 2) Since neither the slow down or termination of Cavalry's business in the event of adverse financial conditions nor its bankruptcy would constitute events of default or a breach of Cavalry's obligations, the Guaranty would not in those circumstances afford Everest recourse for recovery of its principal. The existence of the Guaranty simply does not contradict Everest's acknowledgment that it was knowingly assuming the risk that Cavalry's business may slow down or fail, or prevent the conclusion that Everest's principal was genuinely at hazard in this transaction. *Cf., LG Funding, LLC, supra,* 181 AD3d at 666 (question of fact whether transaction was usurious loan where "purchaser" was entitled to enforce personal guaranty in

event of "seller's" bankruptcy); *Davis v. Richmond Capital Group, LLC, supra,* 194 AD3d 516 (same).

(c) Security Interest

Contrary to Plaintiffs' assertion, the Agreement does not give Everest a UCC security interest "over 'all accounts' and other assets" of Cavalry, but only over the very Future Receivables which Everest *purchased* in this transaction. (Agreement, p. 4, ¶1.12) This affords Everest only limited recourse in the event of Cavalry's slow down, failure or bankruptcy, since the UCC security interest would attach only to 15% of whatever receipts there were; it would neither assure payment absolutely of the Purchased Amount of Future Receivables or prevent Everest's principal from being genuinely at hazard in this transaction.

(d) Confession of Judgment

Contrary to Plaintiffs' assertion, neither Cavalry nor its principal, Mr. Bochner, were required to provide Everest with Confessions of Judgment.

(e) Business Interruption Insurance

The Agreement's requirement that Cavalry procure business interruption insurance does not convert the transaction between Cavalry and Everest into a loan. As Defendant observes, Cavalry's payment obligation depends on its having receivables in the ordinary course of business. The required insurance protects Everest's investment by enabling Cavalry to survive a business interruption outside of the ordinary course and resume generating receivables, but it neither assures payment absolutely of the Purchased Amount of Future Receivables or prevents Everest's principal from being genuinely at hazard in this transaction.

(f) Conclusion

Thus, the absence of recourse in the event of Cavalry's failure or bankruptcy – the third and final prong of the Second Department's test in *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra* – likewise supports a finding that the transaction was in actuality a sale of future receivables, not a loan.

5. The Agreement Constitutes a Purchase of Future Receivables, Not a Loan

In interpreting a contract, primary attention must be given to the purpose of the parties in making the contract. *See, Greenfield v. Philles Records, Inc.*, 98 NY2d 562 (2002); *In re Herzog,* 301 NY 127 (1950); *Madison Avenue. Leasehold, LLC v. Madison Bentley Associates, LLC,* 30 AD3d 1 (1st Dept.), *aff'd* 8 NY3d 59 (2006). Agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract. *See, Schron v. Troutman Sanders, LLP,* 20 NY3d 430 (2013); *Goldman v. White Plains Center for Nursing Care, LLC,* 11 NY3d 173 (2008). When the terms of the contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract. *Goldman v. White Plains Center for Nursing Care, LLC, supra*; *Greenfield v. Philles Records, Inc., supra.*

A contract is unambiguous if, on its face, it is reasonably susceptible of only one meaning. *See, White v. Continental Casualty Company,* 9 NY3d 264 (2007); *Greenfield v. Philles Records, Inc., supra.* Conversely, a contract is ambiguous if the agreement on its face is reasonably susceptible of more than one reasonable interpretation. *See, Brad H. v. New York,* 17 NY3d 180 (2011); *Angelino v. Freedus,* 69 AD3d 1203 (3d Dept. 2010). Whether the contract is ambiguous is determined by examining the entire contract and considering the relation

of the parties and the circumstances under which the contract was executed, with the wording to be considered in light of the obligation as a whole and the intention of the parties as manifested thereby. *See, Kass v. Kass,* 91 NY2d 554 (1998); *William C. Atwater & Co. v. Panama R.R. Co.,* 246 NY 519 (1927).

Ambiguity as to the meaning of the terms and the intent of the parties may raise a jury question, but the threshold decision on whether a writing is ambiguous is the exclusive province of the court. *See, Innophos, Inc. v. Rhodia, S.A.,* 10 NY3d 25 (2008); *Bailey v. Fish & Neave,* 8 NY3d 523 (2007); *W.W.W. Associates, Inc. v. Giancontieri,* 77 NY2d 157 (1990). Extrinsic and parol evidence may not be considered unless it is determined that the document itself is ambiguous. *See, Consedine v. Portville Central School District,* 12 NY3d 286 (2009); *W.W.W. Associates, Inc. v. Giancontieri, supra.*

Based on the foregoing analysis under the rubric articulated by the Second Department in *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra,* the Court concludes as a matter of law that the Agreement is not ambiguous, and that it unambiguously evidences a purchase and sale of a percentage of Cavalry's future receivables, not a loan. The Court notes in this regard that Plaintiffs commenced this action on May 11, 2021, less than one month after making the Agreement on April 15, 2021, and prior to the time when Cavalry's right to its first monthly reconciliation would have accrued. Consequently, there is no foundation for Plaintiffs' conclusory allegation that the reconciliation provision of the Agreement was a "sham."

As the Court of Appeals observed in *Seidel v. 18 East 17th Street Owners, Inc.,*

> Usury laws apply only to loans or forebearances, not investments (General Obligations Law §5-501[1], [2]). If the transaction is not a loan, "there can be no usury, however unconscionable the contract may be." (*Orvis v. Curtiss,* 157 NY 657, 661...).

Seidel, 79 NY2d 735, 744)(1992). Therefore, Plaintiffs' claim of usury is without merit, and all of the causes of action in their Complaint, predicated as they are on a baseless claim of usury, are subject to dismissal.

6. Postscript

The present action is one of four essentially identical lawsuits commenced by Plaintiffs on May 11, 2021 based on merchant funding agreements dated, respectively, March 18, 2021, April 15, 2021, April 26, 2021, and April 28, 2021, pursuant to which Cavalry received substantial sums of money from different merchant funding companies in return for a promise of payment of a percentage of its future receipts. The complaints in all four actions contain the same blunderbuss allegations of usury and fraud, with (1) no citation to the specific provisions of any of the agreements in question, and (2) no specific allegations of any wrongful conduct undertaken by those funding companies pursuant to the agreements in question. (Cavalry had previously brought similar lawsuits based on merchant funding agreements against other funding companies in 2019 and 2020.)

It appears from the face of the record that Cavalry – breezily assuming victim status with no concrete factual allegations or supporting evidence of any kind – has fraudulently induced the defendant funding companies to part with considerable sums of money in return for promises it had no intention of keeping. Cavalry's scheme to defraud is evidenced by the pattern of its obtaining large sums of money from a number of different parties in return for a promise of future payment of a portion of its receivables, and then promptly filing frivolous lawsuits to forestall collection of the promised payments. *See, e.g., People v. Fenner,* 155 AD2d 946 (4th Dept.), *appeal denied* 75 NY2d 770 (1989); *People v. DeMuirier,* 106 AD2d 266, 267

(1st Dept. 1984); *People v. Coloney,* 98 AD2d 969, 970 (4th Dept. 1983). Thus, Cavalry and its principal are potentially liable to criminal prosecution for larceny by false promise under Penal Law §155.05(2)(d), which provides:

> A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

Id. See, People v. Kramer, 92 AD2d 529, 542 (1998); *People v. Norman,* 85 NY2d 609, 619 (1995).

E. Defendant's Motion for Summary Judgment Dismissing Plaintiffs' Complaint

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985). If the movant establishes *prima facie* entitlement to judgment as a matter of law, the opponent "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980). The motion "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR §3212(b).

Defendant established *prima facie* that (1) the Agreement evidences a purchase and sale of future receivables, not a loan; (2) hence, there can be no usury; and consequently (3) Plaintiffs' complaint, which is in all respects dependent on their baseless claim that the transaction was a loan and that Defendant was guilty of criminal usury, must be dismissed in its entirety.

In opposition, Plaintiffs failed to adduce admissible evidence giving rise to any triable issue of fact. In this regard:

(1) Plaintiffs erroneously assert that usurious intent is a question of fact for the jury. That is so only if the transaction in question is a loan. "If the transaction is not a loan, 'there can be no usury, however unconscionable the contract may be.' (*Orvis v. Curtiss,* 157 NY 657, 661...)." *Seidel v. 18 E. 17th St. Owners, supra,* 79 NY2d at 744. The Court has determined as a matter of law that the transaction at issue here was not a loan.

(2) Plaintiffs' claim that Defendant denied a proper request for reconciliation is wholly unfounded. The only admissible evidence in this regard is a letter request dated July 26, 2021, which (a) did not include a copy of Cavalry's bank statement as required by the Agreement, and (b) was made for the first time long after Cavalry had ceased making Daily Payments and commenced this action, and Defendant had counterclaimed for the entire sum due under the Agreement. Quite obviously, Defendant was at that juncture under no obligation to entertain the spurious request for reconciliation.

(3) Plaintiffs' counsel flags Defendant's relationship to entities – including TMT Funding, Alpine Funding, and Whetstone Holdings – that may offer business loans and lines of credit, and proffers the unsubstantiated assertion that "[i]f lenders are involved, then Defendant is giving out

loans and using fraud to entice businesses and circumvent usury laws." (Memo., p. 7) However, regardless of the ultimate source of the Purchase Price funds flowing from Everest to Cavalry, the transaction at issue here was structured not as a loan but as a purchase and sale of future receivables. The terms of the transaction are clearly set forth on the face of the Agreement, and there is no admissible evidence that any fraudulent misrepresentations were made or that Cavalry's principal was misled in any way concerning the nature of the transaction. Inasmuch as the merchant funding agreement at issue here was one of no less than four such agreements pursuant to which Mr. Bochner in the course of one month's time obtained hundreds of thousands of dollars from four different merchant funding companies, he is hard pressed to demonstrate the existence of any fraud beyond his own, and he has not done so here.

(4) Plaintiffs' counsel asserts:

> At no point did Defendant identify, request, or receive any of the accounts receivable. Defendant doesn't have a department which reviews receivables or investigates the risk level of merchants' clientele. Instead, the Agreement in Section 2.1 designates that role to Plaintiffs. A lender in a true accounts receivable transaction would want information about specific receivables purchased and the underlying obligors to vet its risk. Defendant took no such actions and it bears no risk for any of the supposed accounts purchased.

(Memo., p. 16) Counsel's assertions are wholly incompetent as he does not assert personal knowledge of the interaction between Everest and Cavalry in connection with this transaction. In any event, the Agreement involved not the purchase of "*specific* receivables," but rather of 15% of *all* of Cavalry's receivables; and in this regard Everest undertook extensive due diligence to evaluate its risk, including "review of several months of bank statements submitted by Cavalry, numerous photographs of Cavalry's place of business, and reports on Mr. Bochner.' (L. Jackon Reply Aff. ¶6) Here too, then, Plaintiffs' evidence fails to support their contention

that a transaction bearing all the earmarks of a purchase and sale of future receivables was in fact a loan in disguise.

The Court has considered Plaintiffs' remaining contentions and finds them to be without merit. For the reasons stated hereinabove and in Defendant's motion papers, the Complaint is dismissed in its entirety.

F. Defendant's Motion for Summary Judgment as Against Cavalry

In its First Counterclaim against Cavalry, Defendant asserts a cause of action for breach of the Agreement. Defendant alleges that it performed its own obligations under the Agreement, and that Cavalry defaulted by reason *inter alia* of the following:

> 145. On or about May 7, 2021, only several weeks after receiving the Purchase Price, [Cavalry] ceased remitting the Specified Percentage to [Everest] and [Everest's] attempted debits of the Account were repeatedly rejected by [Cavalry's] bank. [Cavalry] also blocked and/or withdrew its authorization for [Everest's] debits of the Specified Percentage. These are Events of Default under the [Agreement].
>
> 146. [Cavalry] never requested that [Everest] perform a reconciliation or demonstrated that [Cavalry] had ceased collecting receivables or was incurring hardship.

The Agreement specifically defines "Events of Default" as follows:

> Events of Default, The occurrence of any of the following events shall constitute an "Event of Default": (a) Seller intentionally interferes with Purchaser's right to collect the Daily Payment in violation of this Agreement; (b) Seller violates any term or covenant in this Agreement;...or (e) or Seller fails to provide timely notice to Purchaser such that in any given calendar month there are five consecutive ACH transactions attempted by Purchaser that are rejected by Seller's bank and Seller fails to communicate and/or provide documentary evidence satisfactory to Seller for the failed transactions or failed remittance.

Section 3.2(A) of the Agreement further provides that in the event of a default, "The Specified Percentage shall equal 100%. The full uncollected Purchased Amount plus all fees (including legal fees) due under this Agreement will become due and payable in full immediately." Based

on the foregoing, Defendant claims entitlement to judgment as a matter of law against Cavalry in the sum of the Purchased Amount ($280,000) less the $21,000 paid by Cavalry under the Agreement, i.e., the sum of $259,000.

The determinative issue is whether Defendant has established Cavalry's default under the Agreement as a matter of law. Defendant appears to argue that Cavalry "intentionally interfere[d] with Purchaser's right to collect the Daily Payment in violation of [the] Agreement (Event of Default "a") and "violate[d] any term or covenant in [the] Agreement" (Event of Default "b") because (1) it allegedly "blocked its bank account from autodebiting", and (2) remitted no further payments to Everest thereafter. (*See,* Defendant's Memo. p. 20) However, Defendants' showing is deficient in two respects.

First, there is no admissible evidence that Cavalry blocked its bank account from auto-debiting. Indeed, the only evidence of record is the statement of Mr. Bochner, recorded in Defendant's records, that "*the bank* placed a block on the transactions." (Jackson Aff., Ex. B)

Second, mere non-payment of the Daily Payment is not an event of default under the Agreement. If it were, a court might possibly infer therefrom that the Purchased Amount of Future Receivables ($280,000) was payable in a finite term at a fixed (and usurious) interest rate. *See, e.g., Davis v. Richmond Capital Group, LLC, supra,* 194 AD3d 516 (rejection of two or three automated debits without prior notice constituted an event of default). Under the Agreement a default occurs only upon an "intentional" interference with Everest's rights (Events of Default, subd. "a"). Given the inherent difficulty of proving intent, the Agreement establishes what is, in effect, an objective measure of intent: a default occurs where five (5) consecutive ACH debits are attempted by Everest and rejected by Cavalry's bank during a calendar month,

where Cavalry has neglected to "communicate and/or provide documentary evidence satisfactory to Seller for the failed transactions or failed remittance." (Events of Default, subd. "e") However, the proof on this score also fails to demonstrate Defendant's entitlement to judgment as a matter of law. Defendant's documentary evidence shows that there were indeed five consecutive rejected ACH transactions in May 2021 – on May 3, 4, 5, 11 and 12 – but also reflects communications from Mr. Bochner on May 6, 2021 purporting to explain the problem:

> Merchant called in...said he was out for a couple of days he was in Europe and the time change was off. Said he has a treasury system that requires his approval for all checks and ACHs and he didn't have time to approve them so bank placed a block on the transactions but he got it resolved yesterday evening so everything should be fine now. Merchant said he will take care of the missed payments today when he gets in the office later on.... (11:51 AM)
>
> Yoel called in...with Isaac from accounting on the phone who handles the payments. Said because of this hiccup it's caused them some issues with their available cash and since mostly everyone wants their payments they are a little strapped and can't catch up on everything today. I agreed to accept a good faith payment of $1,000 today and have the unblock form signed to reinstate the payments on Tuesday 5/11 and they will send in a lump sum payment of about $14,000 on 5/11 to catch up..... (2:37 PM)

(L. Jackson Aff., Ex. B)

Instead of "catching up" on May 11, 2021 as promised and continuing payments, Plaintiffs commenced the present action. The question thus arises whether, by commencing the action Plaintiffs repudiated the Agreement and gave Defendant the right to sue for a total breach.

> "An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for ... performance has arrived" (10-54 Corbin on Contracts §54.1 [2017]; *see* 13 Williston on Contracts §39:37 [4th ed.]). An anticipatory breach of a contract – also known as an anticipatory repudiation – "can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (*Norcon Power Partners v. Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 ... [1998]...; *see* 2B N.Y. PJI2d 4:1 at 35-36 [2017]).

> For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be "positive and unequivocal" (*Tenavision, Inc. v. Neuman,* 45 NY2d 145, 150... [1978]; *see Ga Nun v. Palmer,* 202 NY 483, 489... [1911]).

Princes Point LLC v. Muss Development LLC, 30 NY3d 127, 133 (2017).

The Court of Appeals in *Princes Point LLC* proceeded to address "the unsettled question whether "the commencement of an action, particularly one seeking rescission, is itself an anticipatory breach'." *See, id.* Beginning with the proposition that "the commencement of a declaratory judgment action does not constitute an anticipatory breach...because a declaratory judgment action merely seeks to define the rights and obligations of the parties" (*id.,* at 133-134), the Court wrote:

> A declaratory judgment action would produce a ruling as to the rights of the parties under the terms of the contract, and essentially would determine the meaning of those terms (*see* CPLR 3001 [considering declaratory judgment actions]). Nevertheless, in this context – specifically, where the amended complaint seeks, among other things, reformation of the amendments to the contract and specific performance of the original agreement – there was no "positive and unequivocal" repudiation (*Tenavision,* 45 NY2d at 150...). There is no material difference between this action and a declaratory judgment action. At bottom, both actions seek a judicial determination as to the terms of a contract, and **the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval** (*see* Restatement [Second] of Contracts §250, Illustration 3).

Princes Point LLC v. Muss Development LLC, supra, 30 NY3d at 134 (boldface added).

Here, Plaintiffs' action sought *inter alia* a declaratory judgment that the Agreement constitutes a criminally usurious loan (and rescission, not reformation and specific performance). Inasmuch as the parties have not raised or briefed the issue, the Court is not prepared at this juncture to determine whether Plaintiffs' commencement of such an action amounts to a repudiation of its obligations under the Agreement.

On the present record, then, the Court concludes that Defendant has failed to eliminate all material issues of fact with regard to the occurrence of an "Event of Default" under the Agreement. Accordingly, Defendant's motion for summary judgment against Cavalry on its counterclaim for breach of the Agreement must be denied.

G. Defendant's Motion for Summary Judgment as Against Yoel Bochner

Defendant argues: "In the Personal Guaranty of Performance, Bochner guaranteed Cavalry's obligation to provide financial information upon Everest's request, the obligation to deposit its receipts into the designated account and refrain from interfering with Everest's right to debit that account ([Agreement] ¶5.1). Thus, when Cavalry blocked the account and failed to remit the required payments to Everest, Bochner became jointly liable for Cavalry's breach." (Defendant's Memo. p. 20) As set forth in Point "F" above, Defendant's evidence fails to demonstrate as a matter of law Cavalry's breach of the Agreement on the grounds alleged. Perforce, its motion for summary judgment on Mr. Bochner's limited performance Guaranty fails.

It is therefore

ORDERED, that Defendant's motion for summary judgment dismissing Plaintiffs' Complaint is granted, and the Complaint is hereby dismissed, and it is further

ORDERED, that Defendant's motion for summary judgment against defendant Cavalry LLC on its First Counterclaim is denied, and it is further

ORDERED, that Defendant's motion for summary judgment against defendant Yoel Bochner on its Second Counterclaim is denied, and it is further

ORDERED, that a virtual Preliminary Conference in this matter is hereby scheduled for

November 3, 2021, 2021 at 9:30 a.m. / p.m.

The foregoing constitutes the decision and order of the Court.

Dated: October 5, 2021 ENTER
Goshen, New York

Cath M. Bartlett

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE