Legend Advance Funding II, LLC v Almeida's Auto Repair, Inc.
2022 NY Slip Op 31003(U)
March 24, 2022
Supreme Court, New York County
Docket Number: Index No. 656328/2020
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** 38M

Justice

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LEGEND ADVANCE FUNDING II, LLC,

Plaintiff,

- v -

ALMEIDA'S AUTO REPAIR, INC., d/b/a ALMEIDA'S AUTO REPAIR, and ERIC ALMEIDA,

Defendants.

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INDEX NO. 656328/2020

MOTION DATE 06/09/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, and 13

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for summary judgment pursuant to CPLR 3212 is denied, based upon the following memorandum decision.

Background

In this action for breach of a merchant sales agreement, plaintiff Legend Advance Funding II, LLC ("plaintiff") asserts two causes of action for breach of contract and one for unjust enrichment against defendants Almeida's Auto Repair, Inc. ("Merchant") and Eric Almeida ("Almeida"). Plaintiff now moves for summary judgment on its complaint.

Pursuant to a Merchant Sales Agreement and Security Agreement dated October 6, 2020 (the "agreement"), plaintiff purchased $22,560.00 of Merchant's receivables, for a purchase price of $16,000.00 (NYSCEF Doc. No. 9 at 1). Merchant set up an account from which plaintiff would daily withdraw $134.29, as an approximation of the specified percentage of 13.28% of Merchant's receivables, until such time as plaintiff had withdrawn the entire purchase

price (*id.*). Once a month, Merchant was permitted to submit its bank statements to plaintiff in order to reconcile the actual amount of its receivables and the money withdrawn, and credit or debit merchant's account accordingly (*id.*). The agreement was for an indefinite term (*id.* at 2, § 1.2). Further, the terms of the agreement stated that the parties intended "that the transfer of the interest in the Receivables from Merchant to [plaintiff] constitute a sale, and not a loan, for all purposes" (*id.*, § 1.8). As further incentive for plaintiff to enter into the agreement, Almeida signed a Performance Guaranty (the "guaranty"), pursuant to which plaintiff could seek recourse from Almeida for Merchant's default under the agreement, including in the event that merchant declared bankruptcy (*id.* at 7).

Somewhat confusingly, plaintiff initially alleged in its complaint that, after having paid merchant as required, Merchant breached the agreement on November 10, 2020 by blocking access to the designated bank account from which plaintiff was to withdraw funds through a stop payment order, and otherwise failed to direct payment to plaintiff (NYSCEF Doc. No. 1, ¶¶ 8, 14), which are events of default under the agreement (NYSCEF Doc. No. 9, § 3.1). Plaintiff asserted that a balance of $19,605.62 is due and owing from merchant, for which Almeida is also liable under the guaranty (NYSCEF Doc. No. 1, ¶¶ 10-11). Now on the instant motion, plaintiff asserts that Merchant blocked access to the account on June 9, 2021, and that the outstanding balance is $16,980.62 (NYSCEF Doc. No. 7, ¶¶ 7-8).

Plaintiff commenced this action by filing a summons and complaint on November 17, 2020 (NYSCEF Doc. No. 1). Defendants appeared and answered the complaint (NYSCEF Doc. No. 3). Plaintiff now moves for summary judgment on its complaint.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

As an initial matter, there is a dispute as to the nature of the contract between the parties which must be resolved before determining the merits of plaintiff's motion. Specifically, defendants argue that, contrary to the complaint and the documentation, the agreement between the parties is actually a loan rather than a receivables contract, and moreover it is a loan which charges Merchant interest at a rate amounting to criminal usury (Penal Law § 190.40). Specifically, defendants calculate that based on the daily payback amount set forth in the agreement, Merchant will pay interest of approximately 41% over the course of the payback period, and an annual rate of approximately 60%. If defendant is correct, then plaintiff may not recover under the agreement or the guaranty (General Obligations Law § 5-521[3]; *Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 326 [2021]).

The Penal Law provides that the charging of interest on a loan or forbearance greater than 25% per year, or the equivalent rate for a shorter or longer period, is a felony (Penal Law § 190.40). "A party raising a usury defense must satisfy a heavy burden" (*Pirs Capital, LLC v*

D&M Truck, Tire & Trailer Repair Inc., 69 Misc 3d 457, 460 [Sup Ct, NY County 2020]. Usury only applies to a "loan or forbearance of any money, goods or things in action" (General Obligations Law § 5-501; *Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]). In other words, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli*, 170 AD2d at 434). "The court will not assume that the parties entered into an unlawful agreement . . . when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]).

In the case of the agreement herein, there are three factors to consider in determining whether the transaction should be considered a loan or a sale of receivables: "(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*, 181 AD3d 664 [2d Dept 2020]). Here, the agreement includes a reconciliation provision and is for a non-finite term, both factors suggesting that the agreement was a purchase of future receivables rather than a loan (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752 [2d Dept 2022]). The third factor, however, weighs more heavily against the agreement being a purchase of future receivables, as plaintiff has multiple means of recourse if merchant declares bankruptcy.

The agreement lists as an event of default Merchant's "filing for protection under applicable bankruptcy law" (NYSCEF Doc. No. 9 at 4, § 3.1). If Merchant files for bankruptcy protection, plaintiff may enforce the provisions of the agreement and the guaranty against both defendants, including, *inter alia*, requiring payment of "the full uncollected Purchased Amount

plus all fees due under this agreement" (*id.* at 3, § 1.10; *id.* at 4, § 3.2). In addition, the guaranty provides that Almeida remains liable for Merchant's obligations even in the event of a bankruptcy (*id.* at 7). A key feature of purchases of future receivables is that they are "sufficiently risky such that they cannot be considered loans, as a matter of law, [because] under no circumstances could [plaintiff] be assured of repayment, because its agreements are contingent on a Merchant's success, and the term is indefinite" (*Pirs Capital, LLC*, 69 Misc 3d at 464). The provisions stating that bankruptcy is an event of default allowing plaintiff to seek payment of the full amount, or enforce the agreement against both defendants herein, however, "suggest that the plaintiff did not assume the risk that [Merchant] would have less-than-expected or no revenues" (*LG Funding, LLC*, 181 AD3d at 664; *see also Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

"Since [plaintiff] failed to demonstrate the absence of triable issues of fact as to whether the transaction constitutes a criminally usurious loan," plaintiff is not entitled to summary judgment (*LG Funding, LLC*, 181 AD3d at 664). Moreover, plaintiff has failed to establish prima facie entitlement to the amount sought. The record contains no documentary proof of the amount debited from Merchant's account, plaintiff's alleged failed attempts to withdraw funds from merchant's account, or the stop payment order claimed by plaintiff. The discrepancy between the amounts sought and the fact patterns set forth in the complaint and the supporting papers on the motion remains unresolved. The essentially self-serving affidavit of Lisa Adjoda, plaintiff's collections paralegal, does not sufficiently resolve these matters such that plaintiff has met its burden to tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman*, 49 NY2d at 562; *see also Miller v HSBC USA, Inc.*, 2008 NY Slip Op 33065[U] [Sup Ct, Queens County 2008] ["However, in light of the fact that defendants' other

documentary evidence was deemed inadmissible, this self-serving affidavit, standing alone, is insufficient to satisfy defendants' burden of eliminating all triable issues of fact"]).

Accordingly, it is hereby

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

3/24/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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