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| <b>World Global Capital, LLC v Mesko</b>                                                                                                                                                                                       |
| 2023 NY Slip Op 30490(U)                                                                                                                                                                                                       |
| February 15, 2023                                                                                                                                                                                                              |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 161124/2021                                                                                                                                                                                           |
| Judge: Verna L. Saunders                                                                                                                                                                                                       |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. VERA L. SAUNDERS, JSC

PART 36

*Justice*

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INDEX NO. 161124/2021

WORLD GLOBAL CAPITAL, LLC, d/b/a YES FUNDING  
Plaintiff,

MOTION SEQ. NO. 001

- v -

JAMES P MESKO d/b/a J.P. MESKO CONTRACTING  
SERVICES and JAMES P MESKO,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that this motion by plaintiff for summary judgment is granted for the reasons set forth below.

In this action, plaintiff World Global Capital, LLC d/b/a YES Funding (“YES”) seeks damages of \$74,653.00 from defendant James P. Mesko d/b/a J.P. Mesko Contracting Services (“Mesko Contracting”) for breach of contract, and from defendant James P. Mesko (“Mr. Mesko”) under a personal guaranty of the contract. On August 10, 2018, the parties entered into a Secured Merchant Agreement for the Purchase and Sale of Future Receivables (“agreement”) (NYSCEF Doc. No. 2), pursuant to which Mesko Contracting sold plaintiff \$82,445.00 (“purchased amount”) of its future receivables for \$55,000.00 (agreement, p. 1).<sup>1</sup> In addition, the individual defendant Mr. Mesko executed a personal guaranty (“guaranty”) (NYSCEF Doc. No. 2, pp. 6-7), pursuant to which he agreed to be liable for the performance of all obligations of Mesko Contracting. The guaranty provides that if Mesko Contracting defaults under the agreement, YES may enforce its rights against Mesko Contracting under the agreement against Mr. Mesko, without first seeking recourse from Mesko Contracting (*id.*, p. 6).

The purchased amount was to be paid to YES from a percentage of Mesko Contracting’s daily revenue (agreement, p. 1). Pursuant to the agreement, Mesko Contracting was to deliver a 15% share of its daily receivables to YES on each business day (“specified percentage”) (*id.*). Mesko Contracting authorized YES to debit from its bank account (by way of ACH debits) the specified percentage, which was an initial fixed amount based on a good faith approximation of the specified percentage (“Initial Daily Installment”), until it accumulated to the purchased amount. Mesko Contracting was obligated to ensure that the specified percentage was retained

<sup>1</sup> The Court notes that it appears that YES and defendants previously entered into another secured contract on June 4, 2018. Although neither party references this prior contract, the Balance Transfer Form following the agreement and the transactional history log mentions the prior secured agreement with a remaining balance, which was debited to the present agreement.

by YES for any specific month throughout the duration of the agreement (NYSCEF Doc. 2, p. 9) (addendum to agreement). If the cumulative Initial Daily Installment debits in a month equaled an amount greater than the specified percentage and Mesko Contracting requested a reconciliation, YES was obligated to credit Mesko Contracting the difference (*id.*). On the other hand, if the cumulative Initial Daily Installment debits equaled to an amount less than the specified percentage, YES was entitled to debit the difference from such bank account (“reconciliation”) (*id.*). In the addendum, the parties agreed that the specified percentage would be revised to a daily payment of \$1,199.00 per business day (“daily payment”) (*id.*).

Mesko Contracting agreed to use only one bank account, to be approved by YES, into which Mesko Contracting agreed to deposit all of its receipts, and from which YES was to conduct its ACH debits of the specified percentage of said receipts (agreement, p. 1 at ¶ 1.1). If Mesko Contracting used a bank account other than the one so specified above, or if Mesko Contracting prevented YES from debiting the specified percentage from said bank account, Mesko Contracting would be in default of the agreement (agreement at ¶ 1.10). Plaintiff alleges that it fulfilled its obligation under the agreement to provide the \$55,000.00 to Mesko Contracting and Mesko Contracting initially also fulfilled its obligation under the agreement and deposited its receivables into the bank account so that YES could debit the Initial Daily Installment (*Dahan Affidavit in Support* [NYSCEF Doc. No 13] at ¶ 7). However, on August 23, 2018, Mesko Contracting prevented YES from continuing to debit the bank account to collect the specified percentage, and therefore defaulted under the agreement (*id.* at ¶ 8).

Plaintiff alleges that Mesko Contracting continues to conduct regular business operations and is still collecting accounts receivables, but it refuses to remit the specified percentage to YES, has been withholding the future receivables it sold to YES, and refuses to continue performing under the terms of the agreement (*id.* at ¶ 9). YES does acknowledge that Mesko Contracting remitted certain receivables totaling \$7,792.00 pursuant to the agreement, leaving an un-remitted balance in the sum of \$74,653.00 (*id.* at ¶ 7).

Plaintiff moves for summary judgment, pursuant to CPLR 3212, against defendants in the sum of \$74,653.00, plus pre-judgment interest at nine (9%) percent from the date of breach to the date of entry of judgment, and post-judgment interest from the date of entry until paid, plus costs, disbursements, and attorneys’ fees.

It is well-settled that 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 demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (see *Zuckerman*, 49 NY2d at 562.)

Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562).

In order to establish a *prima facie* case on a breach of contract claim, plaintiff must show proof of a contract, plaintiff's performance under the contract, defendant's breach thereof, and damages as a result. (see *Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019].) Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted. (see *Bartfield v RMTS Assoc.*, 283 AD2d 240, 241 [1st Dept 2001].)

In support of its motion, plaintiff relies upon the agreement and the guaranty by Mr. Mesko. To establish that it performed under the contract by depositing \$55,000.00 into the bank account designated by Mesko Contracting, plaintiff submits the following: a copy of the transactional history under the agreement (NYSCEF Doc. No. 3); Dahan's affidavit; and an attorney affirmation from Boris Yankovich, Esq. (NYSCEF Doc. No. 14). Defendants do not dispute that YES deposited \$55,000.00 into the bank account that it designated. It appears that Mesko Contracting performed its obligations under the agreement until August 23, 2018, based on the transactional history log. Defendants do not dispute that Mesko Contracting stopped making payments after this date. The supporting papers demonstrate that \$7,792.00 was remitted to Mesko Contracting, and YES alleges the damages it suffered as a result of defendants' breach in the unpaid amount of \$74,653.00. Accordingly, YES has met its *prima facie* burden entitling it to summary judgment.

In opposition, defendants contend that the motion for summary judgment should be denied because there are multiple issues of material fact: (1) whether the reconciliation provisions incorporated in the agreement as Section A are a nullity to the extent that the provisions are in the sole discretion of plaintiff; (2) whether the sixty-eight (68) daily payments establish a finite-term agreement; (3) whether Sections 1.11 and 3.1 of the agreement grant plaintiff the right to demand immediate and full repayment of any unpaid purchase amount if defendant requested a reconciliation, petitioned bankruptcy, or otherwise admitted to its inability to repay its obligation pursuant to the agreement; and (4) whether the agreement is unenforceable as a loan agreement to the extent that it violated the permissible interest rate pursuant to General Business Law § 5-521 and Penal Law § 190.40. However, defendants failed to establish any genuine issue of material fact which would preclude the granting of summary judgment.

Defendants argue that they did not breach the contract because they communicated with plaintiff to request a reconciliation of the Initial Daily Installment amount pursuant to the loan agreement, which was subsequently denied (*Jacovetti Affirmation* [NYSCEF Doc. No. 17] at ¶ 10; *Mesko Affidavit* [NYSCEF Doc. No. 18] at ¶ 8). The addendum to the agreement provides that at Mesko Contracting's request, it may request a reconciliation to take place within five (5) business days after the end of a calendar month (NYSCEF Doc. No. 2). Upon submitting this request and within five (5) business days following the end of the calendar month, Mesko Contracting was to "produce any and all evidence and documentation requested by YES in its sole and absolute discretion, necessary to identify the appropriate amount of and effectuate – the Specified Percentage," to assist plaintiff with the processing of this request for a reconciliation (*id.*). The addendum specifies that Mesko Contracting "specifically acknowledges that the Daily Payment in lieu of the Specified Percentage is being provided to the Merchant [Mesko Contracting] as a courtesy, and if the Merchant fails to furnish the requested documentation within five (5) business days following the end of a calendar month, then YES shall not be

obligated to effectuate the Reconciliation” (*id.*). Plaintiff and defendants all agree that a request for a reconciliation was made on August 23, 2018, just nine (9) business days after the agreement was signed. Therefore, this request was untimely according to the terms of the agreement because the request was not made within five (5) business days following the end of the calendar month. Furthermore, defendants do not proffer any evidence to show that it complied with the procedures specified in the agreement, insofar as they failed to provide any accompanying documentation with the request for a reconciliation as explicitly required by the agreement. Although defendants concede that plaintiff rejected its request for a reconciliation, it is undisputed that Mesko Contracting stopped making any Daily Payments after this date, which constitutes a default under the agreement, and therefore, Mesko Contracting breached the agreement (*id.* [Section 3.1 of the agreement]).

In addition, defendants argue that the reconciliation provision is a nullity because any adjustment is in plaintiff’s sole discretion and cite to the following language: “YES may, upon Merchant’s request, adjust the amount of any payment due under this Agreement at YES’s sole discretion and as it deems appropriate.” (*id.*, at p. 1). This language is found in the first paragraph of the agreement and does not refer to the reconciliation provision, which is provided for in the addendum. The addendum provides that defendants may request a reconciliation and that it is to provide accompanying documentation “as requested by YES at its sole and absolute discretion necessary to identify the appropriate amount of – and effectuate – the Specified Percentage” (*id.*, Addendum), wherein YES would then process and respond to such request. The agreement also states that this is provided to defendants as a courtesy. Defendants’ claim that the reconciliation provision is in plaintiff’s sole discretion is correct, but their argument that this provision is a nullity for this reason, is meritless, as defendants consented to the terms of this agreement when they signed it.

Mr. Mesko, as guarantor, has not made any payments to plaintiff due to Mesko Contracting’s default, and therefore, Mr. Mesko breached the “Personal Guaranty of Performance” in the guaranty (*id.*).

Mr. Mesko next argues that he executed the agreement with plaintiff because he understood it to be a loan agreement and that he was not informed otherwise (Mesko Aff. at ¶ 3). Mr. Mesko further claims that plaintiff did not explain to him that he would be in default if he “requested reconciliation, applied for an additional loan or if [he] inquired about bankruptcy or petitioned for bankruptcy” (*id.* at ¶ 15). Defendants also argue that Sections 1.11 (Protections of Default) and 3.1 (Events of Default) of the agreement grant plaintiff the right to demand immediate and full repayment of any unpaid purchase amount if defendant requested reconciliation, petitioned bankruptcy, or otherwise admitted to their inability to repay its obligation under the agreement.

A review of the agreement shows that not only does it clearly state that it involves purchases or sales, but it also expressly states that it is not a loan. The agreement is titled “Secured Merchant Agreement,” and “Purchase and Sale of Future Receivables” is printed a few lines below it in bolded and underlined capital letters. Section 1.8 of the agreement also explicitly provides that “Merchant and YES agree that the purchase price (\$55,000.00) under this agreement is in exchange for the purchased amount (\$82,445.00) and that such purchase Price is

not intended to be, nor shall it be construed as a loan from YES to Merchant (*id.*). “Even if someone were confused by the contracts, or did not understand the obligation or the process, by reading the documents, one would grasp immediately that they certainly were not straightforward loans” (*K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 812 [Sup Ct, Westchester County 2017]). “Where a party has the means available to him of knowing by the exercise of ordinary intelligence the truth or real quality of the subject of the representation, he must make use of those means or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations” (*K9 Bytes, Inc.*, 56 Misc 3d at 813 [internal quotation marks and citations omitted]).

Section 1.10<sup>2</sup> of the agreement covers YES’ protections against default, which may be invoked by YES immediately and without notice to Merchant, if defendants breach the contract. Such protections include granting YES the right to demand immediate and full repayment of any unpaid purchase amount. However, Section 3.1 of the agreement explicitly states that filing for protection under the applicable bankruptcy law does not constitute a default and the addendum, as mentioned earlier, provides certain procedures were to be followed if defendants requested reconciliation, and not that the simple requesting of a reconciliation would constitute a default.

Finally, defendants argue that the agreement is usurious because the interest on the loan amounts to over forty-nine percent (49%), which is well beyond the New York State statutory limits for civil and criminal usury (*Jacovetti Aff.* at ¶ 10; *Mesko Aff.* at ¶ 6). In New York, transactions are presumed to not be usurious and claims of usury must be proven by clear and convincing evidence as a result (*K9 Bytes, Inc.*, 56 Misc 3d at 816). Courts must consider three factors in determining whether a transaction is a loan in that the courts must examine whether or not a defendant is absolutely entitled to repayment under all circumstances (*id.*). The three factors that a court must consider are: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether the defendant has any recourse in the event that the merchant declares bankruptcy (*id.*; *Pirs Capital, LLC v D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc 3d 457, 462-463 [Sup Ct, NY County 2020]). The transaction “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” (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] [internal quotation marks and citations omitted]).

The first prong of the test was discussed above. There is a reconciliation provision in the addendum to the agreement. Defendants’ contention that the reconciliation provision is a nullity was addressed above and was found to be meritless.

The second prong of the test is to determine whether the transaction is a fixed term or for a non-finite term. A loan generally has a face value, repayable with interest over a finite period defined in the transaction documents (*Pirs Capital, LLC*, 69 Misc 3d at 463). A transaction with a non-finite term tends to suggest that the transaction is a purchase of future receivables rather than a loan (*id.*). Here, the agreement’s repayment terms are non-finite and there is no repayment term. Section 1.8 of the agreement provides that “YES has purchased and shall own

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<sup>2</sup> Defendants mistakenly cite to Section 1.11 – Protections of Default in its opposition papers (NYSCEF Doc. Nos. 17-18).

all the Receipts described in this Agreement up to the full Purchased Amount as the Receipts are created. Payments made to YES in respect to the full amount of the Receipts shall be conditioned upon Merchant's sale of products and services and the payment thereof . . .” (NYSCEF Doc. No. 2). Similarly, the addendum provides for the collection of a specified amount, subject to periodic adjustment, until the purchaser receives the full purchased amount (NYSCEF Doc. No. 2; *Pirs Capital, LLC*, 69 Misc 3d at 463).

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, it may appear that the agreement is being treated as a loan rather than a receivables purchase (*id.*; *K9 Bytes*, 56 Misc 3d at 816-818). Here, as mentioned earlier, Section 3.1 of the agreement states that filing for bankruptcy does not constitute a default. Mr. Mesko's guaranty states that his obligations are due if the following happen: Merchant breaches the agreement, and if any representations made by the merchant in the addendum or in the merchant agreement are false and/or misleading (Guaranty, p. 6). It appears that plaintiff would not be able to seek recourse through the personal guaranty if Mesko Contracting were to file for bankruptcy. However, the guaranty also provides that “in the event that Merchant fails to deliver the receivables purchased hereunder or perform any obligation when due under the Merchant Agreement, YES may enforce its rights under this Agreement without first seeking to obtain payment from Merchant . . .” (*id.*). This recourse provision seemingly weighs to some extent in favor of treating the transaction as a loan. However, this court agrees with the analysis in *K9 Bytes* that notwithstanding the recourse provision, and having weighed all of the factors, the agreement is “sufficiently risky such that they cannot be considered loans, as a matter of law” (see *K9 Bytes*, 56 Misc 3d at 818). That is, “[u]nder no circumstances could [YES] be assured of repayment, because its agreements are contingent on a merchant's success, and the term is indefinite” (*id.*).

Under the facts presented here, the agreement clearly provides that it is for the purchase of future receivables at a discount and defendants acknowledged that they received fair compensation for those receivables. Plaintiff met its *prima facie* burden entitling it to summary judgment and defendants failed to establish any genuine issue of material fact, which would preclude the granting of same. Accordingly, it is

**ORDERED** that plaintiff's motion for summary judgment against defendants is granted to the extent set forth below; and it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against defendants James P. MESKO d/b/a J.P. Mesko Contracting Services, and James P. Mesko, jointly and severally, on the first and second causes of action in the amount of \$74,653.00, with pre-judgment interest from August 23, 2018 to the date of entry of judgment, with costs and disbursements as calculated by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that plaintiff's claim for attorneys' fees is severed and referred to a Special Referee to hear and determine; and it is further

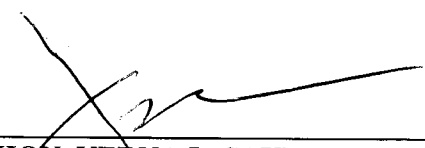
**ORDERED** that a copy of this order with notice of entry be served by plaintiff upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

**ORDERED** that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

**ORDERED** that within 30 days of entry of this judgment and order, plaintiff shall serve a copy upon defendants with notice of entry.

This constitutes the decision and order of the Court.

February 15, 2023

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE