

**Mr. Advance LLC v Pore Co. LLC**

2023 NY Slip Op 31131(U)

March 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 524558/2021

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20<sup>th</sup> day of March 2023.

PRESENT: HON. CARL J. LANDICINO,  
Justice.

-----X  
MR. ADVANCE LLC,

Index No. 524558/2021

*Plaintiff,*

DECISION AND ORDER

-against-

Motion Sequence #1

THE PORE CO. LLC D/B/A THE PORE CO., and  
MICHAEL L. RAMIREZ,

*Defendants.*  
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed .....	9,10,12
Opposing Affidavits (Affirmations).....	18, 19
Reply Affidavits (Affirmations) .....	22-25
Memorandum of Law .....	11, 20, 26

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After a review of the papers, the Court finds as follows:

In this action to recover damages for the breach of a contract for the assignment of future receivables, the Plaintiff, Mr. Advance, LLC, moves for an order pursuant to CPLR § 3212 granting summary judgment in its favor.

“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” (*Alvarez vs. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923, *citing Winegrad vs. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316; *Zuckerman vs. City of New York*, 49 N.Y.2d 557). The

essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach (*see Arnell Const. Corp. v. New York City Sch. Const. Auth.*, 144 A.D.3d 714, 715, 41 N.Y.S.3d 101, 103; *Legum v. Russo*, 133 A.D.3d 638, 639, 20 N.Y.S.3d 124).

The Plaintiff established its *prima facie* entitlement to summary judgment by showing that: (1) the parties entered into a contract for the assignment of future receivables together with a related Guaranty; (2) Plaintiff performed its obligations under the contract by tendering the purchase price, subject to fees provided for in the agreement, and (3) Defendants breached their contractual obligations under the contract on or about July 20, 2021, by failing to tender the receivables as required and as such, defaulted on the Contract. However, Plaintiff does not detail the sum allegedly due as of the date of default, in the amount of \$36,313.38. Additional fees are referenced but not itemized or explained.

The Plaintiff, as contended by the Defendants, is not precluded from recovery on the basis that the transaction between the parties was a usurious loan. The Appellate Division, Second Department has been clear in its holding in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312:

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 N.Y.2d 735, 586 N.Y.S.2d 240, 598 N.E.2d 7; *Abir v. Malky, Inc.*, 59 A.D.3d 646, 649, 873 N.Y.S.2d 350). 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 A.D.3d at 649, 873 N.Y.S.2d 350, quoting *Ujueta v. Euro--Quest Corp.*, 29 A.D.3d 895, 895, 814 N.Y.S.2d 551 [internal quotation marks 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, 57 N.Y.S.3d 625 [Sup. Ct. Westchester County]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v. Small*, 273 App.Div. 102, 75 N.Y.S.2d 483). 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 (*see K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d at 816--819, 57 N.Y.S.3d 625; *see also Funding Metrics, LLC v D & V Hospitality, Inc.*, 62 Misc.3d 966, 91 N.Y.S.3d 678, 970 [Sup. Ct. Westchester County]).

Although the Defendants allege an attempt at reconciliation, there is no evidence supporting same. The Agreement contains a reconciliation provision providing for mandatory adjustments in the weekly payments the Defendant merchant is obligated to make under the contract based on changes in its sales. The Defendants’ failure to properly request a reconciliation and to provide the Plaintiff with the materials necessary to consider the request is not a basis to deny the motion. See Paragraph 10 of the Agreement. Further, as the amount of the weekly payments could possibly change if a reconciliation took place, the term of the agreement was not finite. Further, the Agreement at Section 2 states that the term is indefinite. Finally, there were no provisions in the Agreement to the effect that a declaration of bankruptcy would constitute a default under the Agreement.

However, the Plaintiff is not entitled to recover a default fee. A default fee constitutes an unenforceable penalty and not recoverable liquidated damages. In *Truck Rent-A-Center Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425, the Court of Appeals held:

The rule is now well established. A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. (*City of Rye v Public Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 473, *supra*;

*Wirth & Hamid Fair Booking v Wirth*, 265 N.Y. 214, 223, *supra*; *Curtis v Van Bergh*, 161 N.Y. 47; *Ward v Hudson Riv. Bldg. Co.*, 125 N.Y. 230, *supra*; Restatement, Contracts, § 339.) If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced. (*Equitable Lbr. Co. v IPA Land Dev. Corp.*, 38 N.Y.2d 516, 521-522, *supra*; *Seidlitz v Auerbach*, 230 N.Y. 167, 172-173; 14 NY Jur, Damages, § 155.) In interpreting a provision fixing damages, it is not material whether the parties themselves have chosen to call the provision one for "liquidated damages", as in this case, or have styled it as a penalty. (E.g., *Wirth & Hamid Fair Booking v Wirth*, 265 N.Y. 214, 225, *supra*; *Ward v Hudson Riv. Bldg. Co.*, 125 N.Y. 230, 234, *supra*.)

In *Perseus Telecom, Ltd. v Indy Research Labs, LLC*, 41 N.Y.2d 420, 425, the Court of Appeals held:

A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.

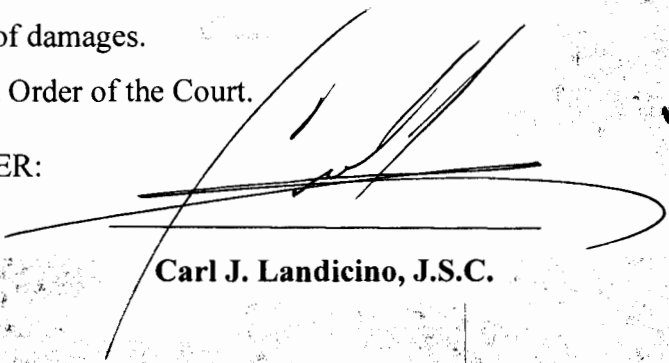
Here, Plaintiff's losses are not easily determined. Plaintiff is entitled to the total amount owed under the agreement less the amount repaid, with interest from the date of breach. It is unclear whether the amount sought includes impermissible damages.

For the above reasons, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted solely to the extent that Plaintiff is entitled to an award for summary judgment on the issue of liability as to breach of contract. The matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
Carl J. Landicino, J.S.C.

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