

**Kapitus Servicing, Inc. v Point Blank Constr., Inc.**

2023 NY Slip Op 31476(U)

May 2, 2023

Supreme Court, New York County

Docket Number: Index No. 653952/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

*Justice*

-----X

KAPITUS SERVICING, INC.,

Plaintiff,

- v -

POINT BLANK CONSTRUCTION, INC., KIP WALKER

Defendant.

-----X

INDEX NO. 653952/2022

MOTION DATE 04/28/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

Defendants' motion to dismiss is denied.

**Background**

In this action about a factoring agreement between plaintiff and defendant Point Blank Construction, Inc. (defendant Walker is a guarantor), defendants move to dismiss. They submit two memos of law: one that discusses whether or not the parties' agreement violates usury laws and the other that explores whether or not this Court has subject matter jurisdiction.

Defendants contend that the factoring agreement is, in fact, a loan and therefore that the applicable interest rate is well above the criminal usury rate. They contend that the Court lacks subject matter jurisdiction because defendants did not purposefully avail themselves of New York. Defendants argue they engaged in a one-time transaction with an entity (plaintiff) that was formed outside the state of New York.

In opposition, plaintiff contends that the parties' agreement contained a forum selection clause and so this Court can properly exercise jurisdiction over defendants. They also argue that

the parties' agreement was not a loan and, instead, was a purchase and sale agreement. Plaintiff emphasizes that the agreement was for the purchase and sale of future receivables.

Defendants did not submit a reply.

### **Forum Selection Clause**

“It is well-accepted policy that forum-selection clauses are prima facie valid. In order to set aside such a clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court” (*Br. W. Indies Guar. Tr. Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234, 234, 567 NYS2d 731 [1st Dept 1991]).

Here, the agreement contains a clear forum selection clause that provides, in pertinent part, that “Any suit, action or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if FUNDER so elects, be instituted in any court sitting in New York” (NYSCEF Doc. No. 18, ¶ 4.5). The Court finds that there is no basis to disturb this provision and that defendants did not meet their burden to show that enforcing this provision would be unreasonable. Defendants were sophisticated enough to create a corporate entity to run their business and seek out an agreement with plaintiff. That they would prefer not to litigate in New York is not a basis to cast aside an obligation that is part of the parties' agreement. The Court therefore finds that it has subject matter jurisdiction over this case; defendants' remaining arguments with respect to this claim are without merit.

### **Usury**

“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.

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. The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. 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*, 181 AD3d 664, 122 NYS3d 309 [2d Dept 2020] [internal quotations and citations omitted]).


The Court denies this branch of the motion. The instant agreement concerns the sale and purchase of future receivables, not a situation where a sum is advanced and is “repayable absolutely.” Moreover, the agreement here contains a reconciliation provision (*see* NYSCEF Doc. No. 18 at 1). And it does not have a finite term; in fact, the agreement specifically states that “[t]his Agreement shall have an indefinite term” (*id.* ¶ 1.2). Simply put, defendants did not meet their burden, on a motion to dismiss, that the instant agreement was a loan subject to usury laws.

Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss is denied and they are directed to answer pursuant to the CPLR.

Conference: August 1, 2023 at 10:00 a.m. By July 25, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute regarding discovery or 3) letters explaining why no agreement

about discovery could be reached. Based on these submissions, the Court will assess whether an in-person appearance is necessary. The failure to upload anything by July 25, 2023 will result in an adjournment of the conference.

<u>5/2/2023</u>					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	