

**BMT Capital Group Inc. v Adkins Bldrs., LLC**

2023 NY Slip Op 31600(U)

April 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 512038/2022

Judge: Rupert V. Barry

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 13

BMT CAPITAL GROUP INC.,

Plaintiff,

-against-

ADKINS BUILDERS, LLC, DAKENNA  
DEVELOPMENT, INC., ADKINS CONSTRUCTORS,  
LLC, ADKINS CONSTRUCTION COMPANY, LLC,  
AKINS CONSTRUCTION CO LLC, ADKINS  
CONSTRUCTION, and MORRIS HOWARD ADKIN  
JR,

Defendants.

Motion Seq. No.: 1

Cal. No.: 8

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**DECISION & ORDER**

**Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Plaintiff's motion for summary judgment: NYSCEF Doc. Nos.: 6 – 28.**

On April 26, 2022, Plaintiff commenced this action by filing its Summons and Verified Complaint (Doc. No.: 1) asserting causes of action for breach of a Future Receivables Sale and Purchase Agreement (the "MCA Agreement") (Doc. No.: 8), dated February 17, 2022, against Adkins Builders, LLC, Dakenna Development, Inc., Adkins Constructors, LLC, Adkins Construction Company, LLC, Adkins Construction Co LLC, and Adkins Construction (collectively, the "Merchants") and for a breach of a personal guaranty related to the Merchants' breach of the MCA Agreement against Morris Howard Adkins, Jr. (the "Guarantor" and, collectively with the Merchants, "Defendants"). On May 16, 2022, issue was joined when Defendants filed their Verified Answer (Doc. No.: 3).

On August 16, 2022, Plaintiff filed the instant motion seeking summary judgment against Defendants pursuant to CPLR § 3212 (Doc. Nos.: 6 – 18). On March 6, 2023, Defendants filed

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their opposition to Plaintiff's summary judgment motion (Doc. Nos.: 20 – 25). On March 27, 2022, Plaintiff filed its reply to the Summary Judgment Motion Opposition (Doc. Nos.: 26 – 28).

This Court finds that Plaintiff set forth a *prima facie* case for breach of the MCA Agreement against the Merchant and breach of the personal guaranty related to the Merchants' breach of the MCA Agreement against the Guarantor. Specifically, the Plaintiff proved:

- (1) the existence of a contract between the Plaintiff and the Defendants (i.e. the MCA Agreement). Pursuant to the MCA Agreement, the Merchant agreed to sell \$231,000.00 of its future receipts (the "Purchased Receivables") to the Plaintiff for an immediate purchase price of \$165,000.00 less a \$13,000.00 processing fee (the "Purchase Price"). \$52,000.00 of the Purchase Price was applied to the balance of a prior Future Receivables Sale and Purchase Agreement between the parties. The Merchant agreed to remit the Purchased Receivables at a rate of ten percent (37%) (the "Specified Percentage") of its total receivables to the Plaintiff. The Merchant and the Plaintiff agreed that the estimated amount of the Specified Percentage would be \$2,000.00 per business day (the "Daily Remittance"), which would be remitted via an ACH withdrawal from a bank account specified by the Merchants, but that such amount could be adjusted at the request of the Merchants from time-to-time to more accurately reflect the Merchants' actual receipts during a given period.
- (2) that the Plaintiff performed under the MCA Agreement by funding the Purchase Price (*see* Doc. No.: 9).
- (3) that the Merchants breached the MCA Agreement on March 23, 2022 by (a) intentionally interfering with the Plaintiff's right to collect the Daily Remittance by placing stop payment on the Plaintiff's ACH debits of the Merchants' bank account, and (b) by failing to remit any of its receivables after March 23, 2022. *See* Remittance History (Doc. No.: 10). Prior to the Merchants' breach, the Merchants had remitted \$34,000.00 of the Purchased Receivables to the Plaintiff, leaving an undelivered balance of \$197,000.00.
- (4) that the Guarantor breached the Performance Guaranty contained in the MCA Agreement by failing to perform the Merchant's obligations in the MCA Agreement upon the Merchant's breach of the MCA Agreement.
- (5) that as a result of the Defendants' breach of the MCA Agreement and the Personal Guaranty, the Defendants' incurred damages in the amount of \$197,000.00, which consists of the undelivered balance of the receivables.

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**At the hearing, Plaintiff agreed to waive its contractually agreed to attorneys' fees in the amount of \$65,010.00.**

Defendants do not dispute the amount of the remittances made to Plaintiff, that they interfered with Plaintiff's right to collect the Daily Remittance by placing stop payment on Plaintiff's ACH debits of the Merchants' bank account, that there were no remittances made to Plaintiff after March 23, 2022, the amount of the outstanding balance, or the contractually agreed to fees.

In opposition to Plaintiff's summary judgment motion, Defendants argued that the MCA Agreement is a disguised usurious loan and is unenforceable pursuant to General Obligations Law § 5-521(3) and Penal Law § 190.40. This argument is unsupported by the record in this case. The MCA Agreement is a purchase of assets and not a loan. As such, usury does not apply (*Seidel v. 18 E. 17th St. Owners*, 79 NY2d 735, 744 [1992] ["Usury laws apply only to loans or forbearances . . . . If the transaction is not a loan, there can be no usury . . . ."] [internal citations and quotations omitted]).

There is a three-factor test to be considered in determining whether such a revenue purchase agreement is a loan in disguise: "(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 merchant declare bankruptcy" (*Principis Capital, LLC v. I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022] [quoting *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665-666 [2d Dept 2020]).

Here, the MCA Agreement had a mandatory reconciliation provision, an indefinite term, and bankruptcy was not an event of default. As such, Defendants' argument that the MCA Agreement was a disguised usurious loan is unsupported by the evidence in this case.

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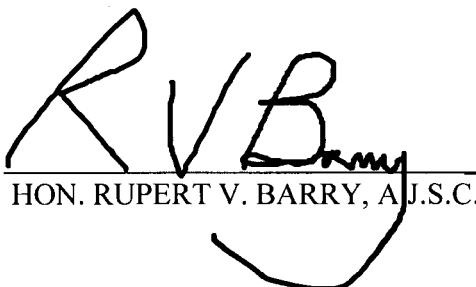
Additionally, Defendants argue that further discovery is need. Defendants, however, fail to make a showing that there is any “needed proof within the exclusive knowledge of [the Plaintiff]” needed to oppose summary judgment (*Voluto Ventures, LLC v. Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]).

For the reasons forgoing reasons, it is

**ORDERED**, that Plaintiff’s motion for summary judgment is GRANTED, and Plaintiff shall have a judgment against Defendants, jointly and severally, in the amount of \$134,530.00 with statutory interest of 9% per annum from May 17, 2022, plus the costs and disbursements of this action; and it is further

**ORDERED**, that Plaintiff shall file a proposed Judgment consistent with this Order with the Clerk of the Court within thirty days of the entry of this Decision and Order.

Dated: April 5, 2023

  
HON. RUPERT V. BARRY, A.J.S.C.

KINGS COUNTY CLERK  
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