STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE

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MAYFAIR BUSINESS CAPITAL LLC,

Plaintiff,

v.

BCK COATINGS INC. and ROBERT J. WELCH,

Defendants.

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**8TH JUDICIAL DISTRICT**
**COMMERCIAL DIVISION**
**DECISION AND ORDER**
**Index No. 801004/2023**

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **MURRAY LEGAL, PLLC**
Christopher R. Murray, Esq., Of Counsel
Phillip A. Spinella, Esq., Of Counsel
Attorneys for Plaintiff

**PARNESS LAW FIRM, PLLC**
Hillel I. Parness, Esq., Of Counsel
Attorneys for Defendants

**WALKER, J.**

Defendants, BCK Coatings Inc. ("BCK") and Robert J. Welch ("Welch")[1], have applied for an order (Motion 1; Doc. 6) dismissing the Complaint (Doc. 1).

**BACKGROUND**

Plaintiff, Mayfair Business Capital LLC ("Mayfair") "has been engaged in the business of purchasing future accounts-receivable from retail and wholesale merchants" (*Id*., at ¶2).

On October 29, 2020, BCK and Mayfair entered into a future receipts sale and purchase

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[1] Mayfair alleges that Welch "is the owner, principal, and/or a manager of" BCK (Doc. 1, ¶5).

agreement ("Agreement") wherein BCK sold $3,848,314.40 ("Purchased Amount") of its future receivables ("Future Receipts") to Mayfair, to be paid to Mayfair from a percentage of BCK's daily revenue ("Specified Percentage"), for a purchase price of $2,748,796 ("Purchase Price"), minus the agreed-upon fees disclosed in Appendix A to the Agreement (the Purchase Price, minus the agreed upon fees, equaling $2,683,796, the "Payment Amount") (*Id*., at ¶9).

Under the Agreement, BCK was required to Pay Mayfair the Payment Amount in weekly disbursements, and initially the Payment Amount was scheduled to be disbursed over fifteen (15) weeks, with a sliding scale of disbursements whereby the first disbursement would be the largest amount paid, and the final disbursement the smallest, as detailed in Section 7 of the Disbursement Schedule Addendum to the Agreement ("Disbursement Addendum") (*Id*., at ¶11).

Mayfair alleges that it fulfilled its obligations under the Agreement by advancing $2,517,801 to BCK between October 30, 2020 and December 14, 2020, and that from October 30, 2020 through May 21, 2021, BCK "intermittently" fulfilled its obligations under the Agreement, ultimately remitting $1,304,741.43 to Mayfair (*Id*., at ¶¶21-22).

However, Mayfair further alleges that on June 1, 2021, BCK breached the Agreement by blocking Mayfair's "access to the Designated Account, and/or ceasing to deposit its receivables into the Designated Account, and/or otherwise depriving . . . [Mayfair] of its Specified Percentage of . . . [BCK's] daily receipts (*Id*., at ¶23)[2]. According to Mayfair, BCK continues to collect accounts receivables, but refuses to remit the Specified Percentage of its daily receivables to Mayfair and has refused to otherwise perform under the terms of the Agreement (*Id*., at ¶¶ 24-

[2] Mayfair defines "Designated Account" as the banking account specified in the Agreement in which BCK was required to deposit Future Receipts (Doc. 1, ¶13).

25).

Mayfair has declared BCK in default of the Agreement and has asserted claims against Defendants grounded in breach of contract and breach of personal guaranty. Mayfair also seeks reimbursement of its attorneys' fees.

Defendants contend that the Agreement constitutes a usurious loan. In opposing dismissal, Mayfair denies that the Agreement is a loan and contends that by seeking to retroactively recharacterize the Agreement from a purchase of receivables agreement into a usurious loan, Defendants seek a seven (7) figure windfall.

**DISCUSSION**

Defendants' application is grounded in the premise that the Agreement constitutes a usurious loan, because it has an effective interest rate of 49.7% (New York Penal Law §190.40 [a loan is criminally usurious if the interest rate is 25% or higher]). The court disagrees, because loans in excess of $2.5 million or more are not subject to New York's usury laws, and the Agreement is not a loan.

**Penal Law §190.40 Does Not Apply to this Matter**

New York General Obligations Law §5-501(6)(b) states, in relevant part, that,

> [n]o law regulating the maximum rate of interest which may be charged, taken or received . . . shall apply to any loan or forbearance in the amount of two million five hundred thousand dollars or more.

The legislative history of the 1980 amendment to §5-501(6)(b) reflects "the legislature's judgment that borrowers of more than $2.5 million were 'capable of protecting their own interests' without the protection of the usury laws" (*Adar Bays, LLC v. GenSYS ID, Inc.*, 37

N.Y.3d 320, 331 [2021] [internal citations omitted]).

Here, the amount in dispute is $2,517,801, which exceeds $2.5 million, thus precluding Plaintiff from interposing the defense of usury.

In their reply submission, Defendants dispute the amount of funds that Mayfair allegedly advanced, contending that Mayfair extended $2,090,301, not $2,517,801. Thus Defendants further contend that GOL §5-501(6)(b) does not apply to this matter, because the amount advanced ($2,090,301) is below $2.5 million.

Preliminarily, Mayfair objects to Defendants' contention, because it is premised on the Reply Affidavit of Welch, BCK's principal, which attaches (as exhibit A thereto) a document identifying advances made by Mayfair totaling $2,090,301 (Doc. 15). Mayfair objects to the Welch Affidavit on several grounds, including that the reply is not responsive to Mayfair's opposition to the application and seeks to introduce facts, arguments and evidence for the first time in a reply. The court disagrees. In disputing the amount of funding Mayfair allegedly advanced, the Welch Affidavit is directly responsive to Mayfair's contentions grounded in GOL §5-501(6)(b)[3]. The court also rejects Mayfair's objections to the Welch Affidavit's evidentiary foundation, because Welch is BCK's principal and he stated that the affidavit is "based on my personal knowledge, and based on the review of the books and records of BCK maintained in the usual course of business" (*Id.*, at ¶1).

While the court accepts Defendants' reply submissions (consisting of the Welch Affidavit

[3] Mayfair's objections are made via a document titled "Notice of Rejection and Objection" (Doc. 16). The document most closely resembles a memorandum of law, but it is a surreply submission, which this court does not permit absent prior approval, which Mayfair did not obtain (Doc. 16). Thus, regardless of how it is characterized, it shall not be included in any record on appeal.

and a Reply Memorandum of Law), the court rejects the contention that GOL §5-501(6)(b) does not apply to this matter (*Tides Edge Corp. v Cent. Fed. Sav., F.S.B.*, 151 A.D.2d 741, 742 [2d Dept. 1989] [whether GOL §5-501(6)(b) applies turns on "the amount that . . . [the lender] **agreed** to advance"] [emphasis added]).

**The Agreement Is Not a Loan**

This court has previously addressed the issue of whether agreements similar to the Agreement are loans. For the reasons stated in the following opinions of this court, they are not: *Yellowstone Capital LLC v. Central Wireless LLC*, 60 Misc3d 1220(A) [Sup Ct, Erie Co 2018]); *Kennard Law P.C. v. High Speed Capital LLC*, Sup Ct, Erie Co, Index No. 805626/2020 (Docs. 18, 19); and *Progressive Water Treatment, Inc., d/b/a Originclear v. Yellowstone Capital LLC*, Sup Ct, Erie Co, Index No. 814628/2020 (Doc. 58).

Moreover, the Agreement expressly states the following, in relevant part:

> 4. Sale of Future Receipts (THIS IS NOT A LOAN): Seller is expressly selling a portion of a future revenue stream to Buyer on a discounted basis, not borrowing money from Buyer. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Buyer. For clarity, it is the intent of the parties that the contemplated transaction shall never be construed as a loan in any fashion.

(Doc. 2, p. 2, Terms and Conditions number 4) (all capital letters in original).

Such language is clear on its face and belies and contradicts Defendants' contention that the Agreement is a loan.

In light of the foregoing, the application to dismiss the Complaint is denied in all respects.

This constitutes the Decision and Order of this court. Submission of an order by the

parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: June 1, 2023
Buffalo, New York

**HON. TIMOTHY J. WALKER, J.C.C.**
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District