Prosperum Capital Partners LLC v St Therese Healthcare, Inc
2023 NY Slip Op 32423(U)
July 17, 2023
Supreme Court, Kings County
Docket Number: Index No. 501593/2022
Judge: Debra Silber

At an IAS Term, Part 9 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 17th day of July, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

----------X

PROSPERUM CAPITAL PARTNERS LLC
D/B/A ARSENAL FUNDING,

Plaintiff,

-against-

ST THERESE HEALTHCARE, INC
D/B/A ALLIANCE HOME HEALTHCARE SERVICES
and MONETTE WILDAY
A/K/A MONETTE OLIVIA WILDAY,

Defendants.

----------X

DECISION/ORDER

Index No.: 501593/2022
Mot. Seqs. 1, 2

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Cross Motion and Affidavits (Affirmations)	7-18; 20-24
Opposing Affidavits (Affirmations)	26-38
Reply Affidavits (Affirmations)	

Upon the foregoing papers, plaintiff Prosperum Capital Partners LLC (plaintiff or PCP) moves (in motion sequence [mot. seq.] one), for an order: (1) pursuant to CPLR 3212, granting it summary judgment for the sum $121,878.19, based on the causes of action in the verified complaint, (2) for an award of attorneys' fees; and (3) awarding it costs, expenses and disbursements.

Defendants St Therese Healthcare, Inc. (Merchant) and defendant Monette Wilday (Wilday or Guarantor) cross-move (in mot. seq. two) for an order, pursuant to CPLR 3212, dismissing the action on the grounds that (1) plaintiff lacks standing, and/or (2) the transaction is a criminally usurious loan, and thus, is unenforceable, and/or (3) the court does not have subject matter jurisdiction over this matter.

Background

The Agreement

On October 14, 2021, plaintiff and Merchant Defendant entered into a "Agreement of Sale of Future Receipts" with three riders (Merchant Agreement) and a "Security Agreement and Guaranty" (Security Agreement), which is described as rider 4, and which references the Agreement of Sale of Future Receipts (collectively, the "Merchant Agreement"). Pursuant to the Merchant Agreement, plaintiff agreed to buy $111,000.00 (Purchase Amount) of the Merchant Defendant's future receivables for a sum of $75,000.00 (Purchase Price), with the Purchase Amount to be remitted to plaintiff from 23% of Merchant Defendant's future receivables at a "Weekly Remittance" rate of $3,964.29. The Merchant Agreement provides that PCP will debit the weekly sum from Merchant's bank account until such time as PCP receives payment in full of the Purchased Amount. In addition, Guarantor Wilday executed a guarantee of performance of all representations, warranties and covenants made by the Merchant Defendant in the Merchant Agreement.

The Merchant Agreement also states [Doc 15]:

> "18. **NOT A LOAN**. Merchant and Purchaser agree that the Purchase Price is paid to Merchant in consideration for the ownership of the Sold Amount of Future Receipts and that payment of the Purchase Price by Purchaser is not intended to be, nor shall it be construed as, a loan from Purchaser to Merchant that requires absolute and unconditional repayment on a maturity date, and Guarantor waives any claims or defenses of usury in any action arising out of this Agreement To the contrary, Purchaser's ability to receive the Sold Amount of Future Receipts pursuant to this Agreement, and the date when the Sold Amount of Future Receipts is delivered to Purchaser in full (if ever) are subject to and conditioned upon performance of Merchant's business" [emphasis added].

The Merchant Agreement also contains the following reconciliation provision:

> "10. **Merchant's Right for Reconciliation of Daily Deliveries.** a. If any time during the term of this Agreement, Merchant will experience sporadic increase or decrease in its daily receipts, Merchant shall have the right, at its sole and absolute discretion, but subject to the provisions of this Section 10 below, to request retroactive reconciliation of the Merchant's actual daily receipts for one full calendar month immediately preceding the day when such request for reconciliation is received by Purchaser (each such calendar month, a "Reconciliation Month").
> b. Such reconciliation (the "Reconciliation") of Merchant's daily receipts for a Reconciliation Month shall be performed by Purchaser within five (5) Business Days following its receipt of the Merchant's request for reconciliation by either crediting or debiting the difference back to or from the Approved Bank Account so that the total amount debited by Purchaser from the Approved Bank Account during the Reconciliation Month at issue equals the Specific Percentage of the Future Receipts that Merchant collected during the Reconciliation Month at issue.
> c. The parties acknowledge and agree that one or more Reconciliation procedures performed by Purchaser may reduce the actual Daily Delivery amount during the Reconciliation Month in comparison to the one set forth in preamble of this Agreement, and, as the result of such reduction, the term of this Agreement during which Purchaser will be debiting the

> Approved Bank Account may extend substantially" [emphasis added].

With respect to notices, the Merchant Agreement states:

> "50. **Notices.** All notices, requests, consent, demands and other communications hereunder shall be delivered by certified mail, return receipt requested, to the respective parties to this Agreement at the addresses set forth in this Agreement and shall become effective as of the date of receipt or declined receipt."

With respect to the parties' liability for damages, the Merchant Agreement states:

> "39. **No Liability**. " IN NO EVENT SHALL PURCHASER BE LIABLE FOR ANY CLAIMS ASSERTED BY MERCHANT OR ITS GUARANTOR UNDER ANY LEGAL THEORY FOR LOST PROFITS, LOST REVENUES, LOST BUSINESS OPPORTUNITIES, EXEMPLARY, PUNITIVE, SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES, EACH OF WHICH IS WAIVED BY MERCHANT AND GUARANTOR(S). THE LIABILITY OF PURCHASER SHALL BE LIMITED TO THE AMOUNT OF THE PURCHASE PRICE."

The Security Agreement [Doc 15 Page 17] provides that it "constitute[s] a security agreement under the Uniform Commercial Code" and that:

> "Merchant grants to AF[1] a security interest in and lien upon: (a) all accounts receivables, accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by Merchant, (b) all proceeds, as that term is defined in Article 9 of the UCC (c) all funds at any time in the Merchant's Account, regardless of the source of such funds, (d) present and future Electronic Check Transactions, and (e) any amount which may be due to AF under this Agreement, including but not limited to all rights to receive any payments or credits under this Agreement (collectively, the

[1] AF is Arsenal Funding, plaintiff's "d/b/a".

> "Secured Assets"). Merchant agrees to provide other security to AF upon request to secure Merchant's obligations under this Agreement. Merchant agrees that, if at any time there are insufficient funds in Merchant's Account to cover AF's entitlements under this Agreement, AF is granted a further security interest in all of Merchant's assets of any kind whatsoever, and such assets shall then become Secured Assets. These security interests and liens will secure all of AF's entitlements under this Agreement and any other agreements now existing or later entered into between Merchant, AF or an affiliate of AF. AF is authorized to execute and file any and all notices or filings it deems necessary or appropriate to enforce its entitlements hereunder
>
> This security interest may be exercised by PCP without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets."

On October 15, 2021, plaintiff paid Merchant Defendant the Purchase Price, minus agreed upon fees, for the future receivables. Payments were initially made pursuant to the Agreement for a few weeks, then many were returned for insufficient funds, and the last payment cleared on December 22, 2021 [Doc 16].

The Underlying Lawsuit

On January 18, 2022, plaintiff commenced this action by filing a summons and verified complaint. The complaint alleges, among other things, that defendant "materially breached the terms of the Contract by causing the Receivables to be deposited into a separate account not designated in the Contract, blocked the payment due to Plaintiff so that Plaintiff could not collect the amount of Receivables due and/or prevented Plaintiff from collecting the amount due to non-sufficient funds or otherwise failed to pay and/or prevented Plaintiff from collecting the amount due pursuant to the payment schedule in the Contract and thereby defaulted under the terms of the Contract or otherwise violated a

material term of the Contract which constituted an event of default thereunder" (complaint ¶ 8). The complaint further alleges that "the balance due is $121,878.19" (*id.* ¶ 9). The complaint asserts three causes of action: (1) breach of contract, (2) personal guarantee, and (3) account stated. The complaint demands the amount owed plus interest, costs, disbursements, and attorney's fees.

On February 14, 2022, Merchant Defendant and Guarantor (collectively, defendants) filed a verified answer, admitting that certain ACH payments were made, but denying all other allegations in the complaint and asserting that the Agreement was a criminally usurious loan. The answer does not delineate defendants' affirmative defenses, instead rambling on for twenty pages and oddly, incorporating paragraphs of the contract into the answer. Paragraph 37 states that plaintiff lacks standing as it is not authorized to do business in NY, unless it proves otherwise, and the answer makes no mention of the claimed lack of subject matter jurisdiction.

On June 14, 2022, plaintiff filed this motion (mot. seq. one) for summary judgment. On September 12, 2022, defendants filed this cross-motion (mot. seq. two) to dismiss. The motions were argued on May 19, 2023 and decision was reserved.

Plaintiff's Instant Motion for Summary Judgment

Plaintiff contends that it has met its prima facie burden on its breach of contract cause of action, and "It is respectfully submitted that Plaintiff has satisfied its burden in making a prima facie showing that it is entitled to judgment as a matter of law by submitting evidence showing Defendants' default and balance due under the Contract."

In support, plaintiff submits an affidavit from Alfred Granik, Plaintiff's Managing Director [Doc 9]. Mr. Granik states that payments of $19,821.45 were made leaving a balance due and owing of $91,178.55 on December 22, 2021, when the last payment was made. He states that Merchant Defendant and Guarantor defaulted on the Agreement when they stopped making payments and thereby breached their representations and warranties to plaintiff. Plaintiff submits a copy of the Agreement as well as funding confirmation records showing the payments made to plaintiff. He itemizes the fees added to reach the amount sued for, and concludes that defendants owe plaintiff the sum of $121,878.19 plus interest.

With respect to the personal guarantee cause of action, plaintiff argues that Guarantor breached the Agreement by failing to perform pursuant to the guaranty, in that Guarantor did not pay the outstanding balance, in violation of the Agreement.

Plaintiff's counsel includes in his affirmation in support [Doc 8 ¶5] that "In the event the Court awards Plaintiff reasonable attorneys' fees pursuant to the Contract and requires an inquest thereof, then Plaintiff hereby waives its right to an award of attorneys' fees and seeks the entry of judgment for the sum certain."

Mr. Granik also provides an affidavit in opposition to the cross-motion, at Document 26, in which he states that plaintiff was formed in Delaware, and authorized to do business in New York. The assumed name is similarly authorized in NY. A copy of the NYS Department of State Division of Corporations' printout is provided. Thus, plaintiff has established that it has standing to sue.

Defendants' Opposition and Cross Motion for Summary Judgment

In opposition to plaintiff's motion and in support of their motion for summary judgment, defendants contend that the Agreement was not a "purchase agreement" but rather a usurious loan. In that regard, defendants argue that "calling these loan agreements a 'purchase of receivables' is only industry propaganda." Defendants argue that the case law will catch up and hold that these purchase agreements are in fact loans, although defendants' counsel does not cite any case on point. He avers that the agreement did not have a real reconciliation provision, and that the agreement doesn't make the transaction a risk to plaintiff.

Finally, with regard to the defendants' claim that the court does not have subject matter jurisdiction, counsel states that the law is clear that parties cannot create subject matter jurisdiction through a contractual forum selection clause. However, here, plaintiff has a New York office, is authorized to do business in New York, and, in addition, defendants chose to enter into this transaction even though Merchant Defendant does not seem to do business in New York. The contract has a forum selection provision, which, on these facts, is binding. Counsel's claim that this action is "one foreign entity suing another" is incorrect. He seems to believe that every business formed in Delaware has to sue in Delaware. That is not the applicable law.

Plaintiff's Reply and Opposition to Cross-Motion

In opposition to defendants' cross motion, plaintiff provides an affirmation of counsel, the affidavit of Mr. Granik discussed above, the print-out from the NYS Department of State, a memo of law, and copies of a number of decisions issued by New

York courts upholding and enforcing contracts such as this one, for the purchase of receivables.

Plaintiff contends that the Agreement is not a usurious loan; that it is self-evident from the language of the Agreement that upon a reconciliation request from the Merchant Defendant, plaintiff was required to provide a reconciliation; that the Agreement has no finite term, no end date and no sunset provision, but relies solely on Merchant Defendant's receivables. Plaintiff points to the language of the Agreement which states that there is no interest rate or time period for collection of the Purchase Amount by plaintiff. In addition, plaintiff argues that the fact that it has no recourse if defendants declare bankruptcy demonstrates further that the Agreement is not a loan. Plaintiff also highlights the plain language in the Agreement that "[t]his is not a loan." Plaintiff further cites to multiple cases in which agreements similar to the Agreement have been deemed a purchase and sale, rather than a loan, including cases where the agreement also contained a security agreement.

Defendants have not filed a Reply to their cross-motion.

Discussion

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68

NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tristate Cleaning Solutions, Inc. v Landco H & L, Inc*., 204 AD3d 1064, 1065-106 [2d Dept 2022; *Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016]). Here, plaintiff has met its prima facie burden by submitting proof of an executed written contract, by submitting the Agreement and proof of the defendants' breach by submitting proof of nonpayment under the Agreement (*see Principis Capital, LLC v I Do, Inc*., 201 AD3d 752, 754 [2d Dept 2022]).

Plaintiff has demonstrated that it paid the Purchase Price to Merchant Defendant and that Merchant Defendant retained the Purchase Price without paying the Purchase Amount, or even a Weekly Remittance that would eventually total the Purchase Amount, to plaintiff.

Plaintiff has also met its burden of demonstrating prima facie entitlement to summary judgment as a matter of law against Guarantor, as the execution of an unqualified guarantee renders a guarantor personally liable for the obligations of an obligor under a contract to the same extent as the obligor (*see Desiderio v Devani*, 24 AD3d 495, 497 [2d Dept 2005]). Here, plaintiff has met its burden by submitting the Agreement, which contains the Security Agreement evidencing Guarantor's obligation to pay in the event that Merchant Defendant does not, as well as bank account debits which demonstrate that plaintiff was not paid (*see Valley Natl. Bank v INI Holding, LLC*, 95 AD3d 1108, 1108 [2d Dept 2012]; *Imperial Capital Bank v 11-13-15 Old Fulton D, LLC*, 88 AD3d 652, 653 [2d Dept 2011]).

In opposition, defendants have failed to establish, by admissible evidence, the existence of a triable issue of fact as to whether the Agreement was in fact a usurious loan. "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" (*Principis Capital*, 201 AD3d at 754; *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). "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" (*LG Funding*, 181 AD3d 664 [internal quotation marks omitted]).

> "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" (*id*.).

Here, the court initially notes that the Agreement explicitly states: "This is not a Loan" and that Merchant Defendant is not borrowing money from plaintiff. While not dispositive, other factors demonstrate that the Agreement here was a merchant agreement and not a loan. Specifically, the terms of the Agreement contain a reconciliation provision which allows for adjustments to the payments made by Merchant Defendant to plaintiff based on Merchant Defendant's revenue (*see Principis Capital*, 201 AD3d at 754). As the amount of the payments could change, the terms of the Agreement were not finite (*id*.). Under the terms of the Agreement, only Merchant Defendant may seek an increase or a decrease of the Daily Remittance rate. This is in contrast to the contract at issue in *LG Funding, LLC*, where the Appellate Division held that there were issues of fact as to whether the contract was a usurious loan in part because it contained language that the plaintiff "may, upon [defendant's] request, adjust the amount of any payment due under this Agreement at [its] sole discretion and as it deems appropriate" (*LG Funding*, 181 AD3d at 666 [emphasis added]). In the agreement at issue here, plaintiff is required to adjust the amount to be debited, which is not discretionary [Doc 15 ¶10(b)]. In several of the cases cited by plaintiff, the agreement stated that the purchaser could deny a request for reconciliation, and the court still found the agreement was not a loan. Thus, as the amount of the Daily Remittance could change, the term of the Agreement was not finite (*see*

Principis Capital, 201 AD3d at 754). In any event, defendants do not contest plaintiff's contention here that the Merchant Defendant never requested reconciliation.

In addition, a review of the Agreement indicates that that it did not eliminate all risk, which would be an indicia of a loan rather than a merchant agreement. To that end, while there is a provision in the Agreement establishing that a bankruptcy filing would constitute an event of default (*see* Agreement Terms and Conditions, Doc 15 ¶28(j)), paragraph 16 states that the bankruptcy of Merchant, natural disasters, loss of the premises where Merchant's business operates, and adverse business conditions that occur for reasons outside Merchant's control are all "valid Excuses" which excuse the Merchant from performance. Further, unlike in *Davis v Richmond Capital Group, LLC* (194 AD3d 516 [1st Dept 2021]), where the court indicated that "provisions making rejection of an automated debit on two or three occasions without prior notice an event of default entitling defendants to immediate repayment of the full uncollected purchased amount" may be an indicia of a usurious loan, here, the Agreement does not contain precisely this provision. Instead, a default notice is required, and ¶28(h) requires four or more ACH transactions that are attempted and rejected in one month before there is an "event of default".

Nor does the fact that the Agreement contains a personal guarantee authorizing plaintiff to collect from Guarantor indicate that the Agreement was a loan. While "provisions authorizing defendants to collect on the personal guaranty in the event of the business's inability to pay or bankruptcy" may be one indicia of a usurious loan (*see Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]), here, evaluating the agreement as a whole, the court finds that it is a merchant agreement rather than a loan.

This interpretation is supported by the Second Department's decision in *Principis Capital.* In that case, which dealt with an alleged breach of contract of a substantially similar future receivables agreement which contained a similar reconciliation agreement provision, as well as a personal guarantee, was held to be a merchant agreement rather than a loan. The Second Department ruled that the company defendant failed to raise a question of fact on summary judgment as to whether the agreement was a loan (*see Principis Capital*, 201 AD3d at 754-755). Likewise, the First Department, in evaluating a substantially similar receivables contract which contained similar "may" language in its reconciliation provision, as well as a personal guarantee agreement, held that such a contract was not a usurious loan (*see Champion Auto Sales LLC v Pearl Beta Funding, Inc*., 159 AD3d 507 [1st Dept], *lv denied* 31 NY3d 910 [2018] [affirming lower court's dismissal of complaint seeking to vacate a judgment of confession based on documentary evidence]). One recent lower court decision noted that there have been at least 38 recent New York State Court cases considering merchant agreements substantially similar to the one in the instant matter, and all have been determined to be merchant agreements and not loans, and that they were not usurious (*see Yellowstone Capital LLC v Central USA Wireless LLC*, 60 Misc 3d 1220 (A) [Sup Ct, Erie County 2018]). In sum, the totality of the evidence fails to demonstrate that the Agreement was a usurious loan. Consequently, defendants have failed to meet their prima facie burden on their motion, without regard to plaintiff's opposition (*see Winegrad,* 64 NY2d at 853).

Plaintiff's third cause of action, for an account stated, is dismissed for a failure of proof. Plaintiff has not established all of the elements of this cause of action.

Finally, as plaintiff's counsel has not provided an affirmation of services rendered in support of his application for counsel fees, and has explicitly withdrawn the request if a hearing is determined to be necessary, plaintiff's claim for counsel fees is denied.

With regard to the issue of standing, plaintiff has established that it is authorized to do business in New York, that Arsenal Funding is an authorized "d/b/a", and that the courts of New York have subject matter jurisdiction over this dispute.

The court has considered the parties' remaining contentions and finds them to be unavailing.

Conclusions

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. one), for an order, pursuant to CPLR 3212, granting it summary judgment against defendants on all of the causes of action in the verified complaint is granted to the extent that plaintiff is entitled to summary judgment on its first cause of action for breach of contract against the Merchant Defendant, and on its second cause of action on the guarantee against the individual defendant, but the third cause of action, for account stated, is dismissed; and it is further

ORDERED that defendants' cross motion (mot. seq. two), for an order, pursuant to CPLR 3212, dismissing the action on the ground that the transaction is a criminally usurious loan, that the plaintiff does not have standing to sue, or that the courts of New York do not have subject matter jurisdiction over this dispute, is denied in its entirety.

Settle a judgment on notice for the sum demanded in the complaint, $121,878.19, together with 9% interest from the date the action was commenced, January 18, 2022, and the costs and disbursements of the action, against defendants jointly and severally.

All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J. S. C.