Fox Capital Group, Inc. v Relik Realty, LLC
2023 NY Slip Op 32444(U)
July 14, 2023
Supreme Court, Nassau County
Docket Number: Index No. 608568/22
Judge: Erica L. Prager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

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FOX CAPITAL GROUP, INC.,

Plaintiff,

-against-

RELIK REALTY, LLC D/B/A 11 ELEVEN APARTMENTS, INTELLIGENT COMMUNITY SOLUTIONS, KENDALL MANOR, RELIK OAKMONT PARTNERS LLC, GULF BREEZE PARTNERS LLC, MIDAS HOSPITALITY, LLC, S3 CREATIVE, LLC, RELIK CAPITAL MANAGEMENT LLC, RELIK-AQUARENA, LLC, SYCAMORE EXPERIENCE, LLC AND ROBERT JAY LOPES,

Defendants.

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IAS/TRIAL PART 18

Motion Seq.: 001, 002
Submission Date: 4/25/23

Index No.: 608568/22

DECISION AND ORDER

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Upon the foregoing papers, the following motions are determined herein:

Motion Sequence 001. Plaintiff's motion for an Order: (i) pursuant to CPLR § 3212 granting to plaintiff summary judgment on the causes set forth in its Verified Complaint; (ii) dismissing defendant's affirmative defenses; (iii) awarding plaintiff costs, expenses and disbursements; and (iv) for such other and further relief as the Court deems proper and just.

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Motion Sequence 002. Defendants' cross-motion for an Order:

(i) pursuant to CPLR § 3211(a)(2) and/or CPLR § 3211(a)(3), dismissing the Complaint on the grounds that this Court has no jurisdiction over this breach of contract action between two foreign entities with an amount in controversy of less than $1,000,000; or that plaintiff lacks capacity to sue as a foreign corporation not duly registered to do business in the State of New York;

(ii) pursuant to CPLR § 3211(a)(1) and/or CPLR § 3212 granting defendants dismissal of the Complaint in its entirety on the grounds that documentary evidence establishes that defendants have not breached the parties' agreement;

(iii) pursuant to CPLR § 3211(a)(1) and/or CPLR § 3212, granting defendants dismissal of the Complaint in its entirety on the grounds that plaintiff's claims are based upon a criminally usurious and legally unenforceable loan agreement; and

(iv) for such other and further relief as this Court deems just and proper.

BACKGROUND

This is an action in which plaintiff FOX CAPITAL GROUP, INC., seeks to recover damages for breach of a commercial agreement for the sale of future receivables. The following facts are taken from the parties' submissions, and are undisputed, unless otherwise noted.

On or about March 24, 2022, defendant RELIK REALTY, LLC and additional entities INTELLIGENT COMMUNITY SOLUTIONS, KENDALL MANOR, RELIK OAKMONT PARTNERS LLC, GULF BREEZE PARTNERS LLC, MIDAS HOSPITALITY, LLC, S3 CREATIVE, LLC, RELIK CAPITAL MANAGEMENT LLC, RELIK-AQUARENA, LLC, SYCAMORE EXPERIENCE, LLC, d/b/a 11 ELEVEN APARTMENTS (collectively, the "Merchant") entered into an agreement with plaintiff FOX CAPITAL GROUP, INC., entitled the Future Receivables Sale and Purchase Agreement (the "Agreement"). The Agreement provided for the purchase and sale of the Merchant's Receipts[1] in the amount of $217,500.00 (the "Purchased Amount") for a discounted Purchase Price of $150,000, to be paid up front by plaintiff. The Agreement required the Merchant, upon receiving the Purchase Price, to deposit all of its Receipts into a designated bank account (the "Account"), out of which plaintiff was authorized to receive, through an Authorized Clearing House ("ACH") debit, the Daily Remittance of $1,359.38 until the Purchased Amount was paid in full. The Daily Remittance purports to represent an approximation of the Purchased Percentage (15%) of the Merchant's Receipts calculated on a daily basis. The Daily Remittance was subject to a reconciliation provision, which, upon notice by either party and upon the terms set forth therein, provided for an adjustment of the amounts debited by plaintiff to

[1] Except where otherwise noted, all defined terms used herein shall have the meaning ascribed to them in the Agreement.

accurately reflect the Purchased Percentage of the daily Receipts, based upon the Receipts for the two week period prior to notice being given.

The Merchant's obligations under the Agreement were unconditionally guaranteed by its principal, defendant ROBERT JAY LOPES (the "Guarantor"), pursuant to the "Guaranty of Performance" contained in the Agreement (the "Guaranty") (see Agreement, ¶5). In addition, the Merchant's obligations were secured by a security interest in all of the Merchant's assets (the "Security Interest") (see Agreement, ¶4).

Plaintiff commenced the instant action on June 30, 2022 with the electronic filing of the Summons and Complaint (the "Complaint"). The Complaint alleges that: (i) on March 25, 2022, the plaintiff performed its obligations under the Agreement by paying the up front Purchase Price, less the agreed upon fees; (ii) commencing on June 9, 2022, the Merchant materially breached the Agreement insofar as it intentionally stopped payments to plaintiff from the Account without providing prior notice, and without providing plaintiff with any financial disclosures or written requests for reconciliation, while continuing to conduct regular business operations; and (iii) the Merchant made payments totaling $67,969.00 leaving a balance due of $149,531.00, plus an additional $5,000.00 default fee. Based upon the foregoing, plaintiff asserts three causes of action: the FIRST, against the Merchant for breach of contract; the SECOND, against the Guarantor for breach of the Guaranty; and the THIRD, against all defendants for unjust enrichment.

Issue was joined on July 28, 2022, with the filing of defendants' Answer. The Answer asserts seventeen (17) affirmative defenses, including (among others) lack of jurisdiction, failure to state a claim, and usury.

Plaintiff now moves for summary judgment upon the grounds that there are no issues of fact with respect to the Merchant's obligations under the Agreement, the Guarantor's unconditional guaranty of performance of all of the Merchant's obligations under the Agreement, and the defendants' breach of the Agreement and the Guaranty. Alternatively, plaintiff argues that allowing defendants to retain the Purchase Price without delivering the Purchased Amount would constitute unjust enrichment.

Defendants oppose the motion, and cross-move to dismiss the action, upon the grounds that: (i) this Court lacks jurisdiction over this matter, and plaintiff lacks the capacity to sue; (ii) the Agreement which plaintiff seeks to enforce constitutes a criminally usurious loan and is therefore void and unenforceable; and (iii) the Merchant did not default under the Agreement. Defendants also argue that the motion is premature, insofar as no discovery has yet been exchanged.

DISCUSSION

The Court first considers the issues raised in the cross-motion to dismiss, to determine whether or not they are dispositive of plaintiff's claims.

Jurisdiction/Capacity to Sue.

Defendants seek to dismiss the action pursuant to CPLR §3211(a)(2) and/or CPLR §3211(a)(3) on the grounds that the Court lacks jurisdiction over this action, and that plaintiff lacks the capacity to sue in New York. Citing section 1314(b)(1) of the Business Corporation Law (BCL) and section 5-1402 General Obligations Law (GOL), defendants assert that the New York courts lack jurisdiction over the action because defendants are not residents of New York or entities formed in New York, and the amount in controversy is less than $1,000,000.00. Defendants argue that the forum selection clause in the Agreement cannot confer jurisdiction on the New York courts. In addition, citing BCL §§ 202 and 1312(a), defendants maintain that plaintiff lacks capacity to sue in New York because it was neither formed as a domestic entity, nor registered to do business as a foreign entity in New York.

CPLR §3211(a)(2) concerns the Court's jurisdiction over the subject matter of the action. The New York State Supreme Court, as a court of general original jurisdiction, is competent to entertain all causes of action unless specifically prohibited. *Lacks v. Lacks, supra. See NY Const., Art. VI, §7.* BCL §1314(b)(1) and GOL §5-1402 are not limitations upon the subject matter jurisdiction of the Court, but merely address the propriety of the forum chosen by the plaintiff, and the right of the plaintiff to maintain an action in New York against a non-resident or foreign corporation.

The Agreement that is the subject of this action contains a forum selection clause pursuant to which all the defendants have expressly and specifically consented to jurisdiction in New York:

> 6.5 **Governing Law, Venue, and Jurisdiction**. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regards to any applicable principles of conflicts of law. Any suit, action, or proceeding arising out of or relating to this Agreement or the transaction contemplated herein or the interpretation, performance, or breach hereof, shall be instituted in any federal or state court sitting in the State of New York (the "Acceptable Forums"), provided that FCG may institute suit in another forum. Merchant, each Guarantor and each Owner agree that the Acceptable Forums are convenient to them, and submit to the personal jurisdiction of the Acceptable Forums and waive any and all objections to jurisdiction or venue in the Acceptable Forums.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." *Bernstein v. Wysoki*, 77 A.D.3d 241, 248–49 (2d Dept. 2010) (internal citations and quotation marks omitted). "Absent a strong showing that it should be set aside, a forum selection agreement will control." *Id.* No such showing has been made here.

The Court thus turns to the statutory provisions cited by defendants for the proposition that, notwithstanding a presumptively valid forum selection clause, the plaintiff cannot maintain this action in New York.

BCL §1314(b)(1) provides:

> (b) Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in the following cases only:
> (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.

Subsections (2) through (5) of BCL §1314(b) describe other circumstances, not applicable here, under which a foreign corporation may maintain an action in New York against another foreign corporation.

GOL § 5-1402 provides:

> 1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.
> 2. Nothing contained in this section shall be construed to affect the enforcement of any provision respecting choice of forum in any other contract, agreement or undertaking.

Reading these provisions together, defendants conclude that where, as here, both the plaintiff and the defendant are foreign entities, an action can be maintained in New York only if: (i) the action relates to a "contract made or to be performed within this state" as provided in BCL §1314(b)(1) (or qualifies under one of the other four subsections); or, (ii) notwithstanding the limitation set forth in BCL §1314(b), the contract at issue concerns an obligation totaling not less than $1,000,000.00. Insofar as the Agreement sued upon here was not made or to be performed in New York, and did not involve an amount in controversy equal to or greater than $1,000,000.00, defendants contend that the action cannot be maintained in New York.

The Court reads the statutes differently. First, BCL §1314(b) is not applicable. The following subsection, BCL §1314(c), expressly provides: "Paragraph (b) does not apply to a corporation which was formed under the laws of the United States and which maintains an office in this state." It is undisputed that plaintiff was formed under the laws of the State of Florida. Plaintiff avers further, without contradiction, that it maintains an office in New York, and provides the address. See Verified Complaint ¶1 (*NYSCEF Doc. 1*); Affidavit of Yosef Rapoport, dated 8/2/22, ¶3 (*NYSCEF Doc. 10*). Thus, BCL §1314(b) does not operate to bar plaintiff from maintaining an action in New York.[2]

Second, GOL § 5-1402(1) merely defines an additional set of circumstances under which a foreign corporation may still maintain an action in New York against another foreign entity, notwithstanding that it is barred from doing so under BCL §1314(b) or some other provision. The statute does not support the converse implication urged by defendants – that a foreign corporation may not maintain an action against a foreign entity in New York unless the amount in controversy equals or exceeds $1,000,000. Notably, subsection (2) makes that point explicitly. GOL §5-1402 cannot be read to limit a plaintiff's choice of forum, particularly where such choice was made in accordance with a valid contractual forum selection clause. As discussed above, the forum selection clause applicable here is *prima facie* valid and enforceable, and defendants have not made the requisite showing to set it aside.

[2] In the face of similar challenges, this plaintiff's right to maintain an action in New York has been upheld by the trial courts in *Fox Capital Group, Inc. v JW Trucking LLC et al.*, Index No. 603494/2022 [Pineda-Kirwin, J.] [*NYSCEF Doc 59*] and *Fox Capital Group, Inc. v. Superior Caregivers LLC et al.*, Index No. 613133/2021 [McCormack, J.] [*NYSCEF Doc 60*].

As to the plaintiff's capacity to sue, the Business Corporation Law prohibits suit in New York by a foreign corporation that is not authorized to do business in New York. See BCL §1312(a). Here, however, plaintiff avers that it is authorized to do business in New York. See Verified Complaint ¶1 (*NYSCEF Doc. 1*); Affidavit of Yosef Rapoport, dated 8/2/22, ¶3 (*NYSCEF Doc. 10*). Moreover, plaintiff's entity status can be found on the NY State Department of State, Division of Corporations website at https://apps.dos.ny.gov/publicInquiry/EntityDisplay.

Based upon the foregoing, the Court finds that defendants have not met their burden to establish that New York is an improper forum for adjudicating this matter, or that plaintiff lacks the capacity to sue in New York.

Usurious Loan.

Defendants assert that the true nature of the transaction underlying the Agreement was a loan. They approximate interest thereunder at a rate of 96% per annum, rendering the transaction criminally usurious pursuant to Penal Law §190.40, and thus void and unenforceable as a matter of law.

According to defendants, the terms and conditions of the Agreement itself demonstrate, as a matter of law, that regardless of the representations made therein and the language in which the Agreement was cast, the transaction was, in substance, a loan. Defendants rely primarily upon the following arguments.

(i) The transaction had none of the characteristics of a sale of receivables. Plaintiff did not investigate the Merchant's account debtors or determine the fair market value of the Merchant's accounts, but rather relied upon the Merchant's own credit-worthiness in determining the terms of the funding. The Merchant did not sell any identifiable receivables. Plaintiff had none of the rights of ownership—it did not have the right to possess, use, or convey any of the accounts it purportedly purchased. Moreover, the plaintiff had no obligation or right (except in the case of the Merchant's default) to collect any of the receivables.

(ii) The Daily Remittance was a fixed amount. It was payable regardless of the actual Receipts, and a default could be declared upon only a limited number of instances of insufficient funds.

(iii) The reconciliation provision was illusory. Plaintiff could refuse to reconcile in the absence of "onerous" documentation. Moreover, the amount of the Daily Remittance could not be adjusted prospectively to reflect a downturn in the Merchant's business.

(iv) Based upon the fixed amount of the Daily Remittance and the illusory nature of the reconciliation provision, the Agreement had a *de facto* fixed term of 160 days.

(v) Most significantly, under the terms and conditions of the Agreement, the plaintiff did not bear the risk of a downturn in, or a cessation of, the Merchant's Receipts. Rather, such terms, including but not limited to the Guaranty and the Security Interest, ensured that the sums advanced would be repayable absolutely. According to defendants, plaintiff had recourse to the Guaranty and Security Interest even in the event of the Merchant's bankruptcy.

The Court notes, at the outset, that defendants seek dismissal of the usury defense pursuant to CPLR §3211(a)(1) and/or CPLR §3212. The latter is the less exacting standard, insofar as it only requires the defendants to make a prima facie showing in order to shift the burden to the plaintiff, and does not require the defendants to conclusively refute the plaintiff's claims at the outset. Compare *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986) with *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 590-91 (2005). For purposes of this decision, insofar as the CPLR §3212 analysis would be required in any event (if dismissal were denied under the more stringent standard), and insofar as the plaintiff has also moved pursuant to CPLR §3212, the Court will consider both the motion and the cross-motion under the same standard applicable to a motion for summary judgment, which is well known and need not be repeated here.

The determination as to whether a transaction constitutes a usurious loan is guided by principles which, although variously articulated, appear to be well established. "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 ... 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." *Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752, 754 (2d Dept. 2022) (internal citations and quotation marks omitted). See also *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 665 (2d Dept. 2020). The three factors provide a guide to the analysis, but do not dictate the Court's conclusion. See *Fleetwood Services, LLC v. Ram Capital Funding, LLC*, 2022 WL 1997207 (S.D.N.Y. 2022).

Applying these principles to the transaction at issue here, although the terms seem disadvantageous to the defendants, the Court does not find the transaction to be a usurious loan.

The Court considers, first, that the amount of the Daily Remittance is subject to reconciliation, based upon documented changes in the Merchant's Receipts. The Agreement provides (in relevant part):

> 1.4.1 Either party may give notice to the other for a reconciliation of the Daily Remittance to more accurately reflect the Purchased Percentage for the two week period prior to notice being given. .... In the event Merchant requires a reconciliation to decrease the amount of the Daily Remittance, it shall be the Merchant's sole responsibility to initiate by instituting the process in Section 1.4.2. If a reconciliation is required [plaintiff] shall modify the Daily Remittance such that the modified Daily Remittance amount is a good faith approximation by [plaintiff] of the (a) Purchased Percentage multiplied by (b) the gross revenues of Merchant during the previous two weeks divided by (c) the number of business days in the previous two weeks.
>
> 1.4.2 In the event that Merchant desires a reconciliation of the Daily Remittance, it shall be Merchant's sole responsibility to make a formal written request for a reconciliation. Requests for reconciliation must be made by email and shall include a copy of Merchant's most recent bank statements or credit card processing statements, as well as Merchant's account reports showing transactions in the month to date, or other documents or reports available to the Merchant for the verification of revenues. ... The reconciliation shall be made by [plaintiff] within two business days of notice being given and shall be effective as of the date of the notice (such that any overpayment by Merchant after the date of the notice shall be credited to future remittances to be made). Merchant shall not be in default if it does not have the amount of the higher Daily Remittance on account each day between making its request for reconciliation and [plaintiff's] reconciliation and adjustment of the debits through its payment processor, provided however that Merchant shall at the time of making the reconciliation request notify [plaintiff] that it has an insufficient balance, and no other Event of Default has occurred. ...
>
> 1.4.3 ... Nor shall Section 1.4 require [plaintiff] to reconcile remittances for any period other than the two-week period prior to any request by the Merchant for reconciliation.

This provision is somewhat ambiguous with respect to its retroactive application. Certain language supports the interpretation that the provision is backward-looking in its reliance upon data from the previous two weeks, but forward-looking in application. Specifically, the language "shall be effective *as of the date of the notice* (such that any overpayment by Merchant *after the date of the notice* shall be credited to future remittances to be made)" (emphasis supplied) suggests that the reconciliation may effect an adjustment of the Daily Remittance going forward from the date of the notice, at least until either party requests another reconciliation. This language, however, appears to be inconsistent with the language of subsection 1.4.3 which suggests that the reconciliation only reduces payments already made in the preceding two week period. In any event, however, the Court need not determine how the provision is intended to apply insofar as, either way, the Agreement provides a mechanism to adjust the amounts collected by plaintiff in the event of a documented downturn in Receipts. Moreover, the Court cannot speculate how the provision is applied in practice insofar as the defendants admittedly did not follow the procedures required to invoke it.

Based upon the terms of this provision, the Court does not find that the right to a reconciliation is illusory. The burden of providing "a copy of Merchant's most recent bank statements or credit card processing statements, as well as Merchant's account reports showing transactions in the month to date, or other documents or reports available to the Merchant for the verification of revenues" is not, in the opinion of this Court, prohibitively onerous. Moreover, once the Merchant gives notice in accordance with the provision, the reconciliation is mandatory – "[t]he reconciliation *shall* be made by [plaintiff] within two business days of notice being given and *shall* be effective as of the date of the notice" (emphasis supplied).

Second, the Court considers that the term of the Agreement is not finite. By definition, the Agreement ends when the Purchased Amount is paid in full. In view of the mandatory reconciliation provision that may be invoked to adjust the Daily Remittance, even if retroactively, the date upon which the Purchased Amount will be paid in full is subject to change. See *Principis Cap.*, 201 A.D.3d at 754.

Most fundamentally, the Court considers that the Agreement requires plaintiff to bear some risk that the Purchased Amount will not be paid in full, notwithstanding the excess of terms and conditions provided for its protection. That is, under certain circumstances, the risk that the Merchant's business will slow down or cease may ultimately be borne by the plaintiff. Provided that the Merchant follows the procedures set forth in paragraph 1.4, an unforeseeable downturn in the Merchant's Receipts would not, in itself, trigger a default (see Agreement, ¶ 3.1 [13]). Provided that the Merchant is not already in default, a declaration of bankruptcy on the part of the Merchant would not constitute an event of default (see Agreement, ¶¶ 1.11, 3.1). The Agreement even provides for the Merchant to shut down the business if forced to do so by circumstances not reasonably within its control, so long as it complies with the conditions set forth in paragraph 2.6. In the absence of an event of default, the plaintiff has no recourse to any of the remedies available to it under the Agreement, including the Guaranty or the Security Interest (see Agreement ¶¶ 4.2, 5.1). In fact, the Agreement specifically provides that the plaintiff is not permitted to recover the Purchased Amount under the Security Interest or the Guaranty in the event that the Merchant itself is not required to pay it, such as for the reasons set forth in Section 1.9.2 of the Agreement (see Agreement, ¶¶ 4.6, 5.1). Such reasons include the slow-down or failure of the Merchant's business, or the bankruptcy of the Merchant (see Agreement, ¶1.9.2).

Accordingly, upon close review of the Agreement, in light of the guiding principles articulated in governing case law, the Court finds that the defendants have not met their "heavy burden" to establish, as a matter of law, a right to dismissal of the action and nullification of the Agreement on the basis that the subject transaction constituted a usurious loan. See *Hochman v LaRea*, 14 AD3d 653 (2d Dept. 2005).

Breach of Contract

Defendants assert that they did not breach the Agreement. In support of this proposition, they submit bank records which, they claim, demonstrate that the Account lacked sufficient funds to meet the Daily Remittance.[3] The Guarantor claims that on or about June 3, 2022, he reached out to advise plaintiff that there were insufficient funds to cover the weekly payment. Nonetheless, plaintiff continued to "pull" the subsequent payment due on June 9, and when it was returned for insufficient funds, plaintiff declared an event of default. See Guarantor Affidavit dated October 14, 2022, ¶21 (*NYSCEF Doc. 25*). Defendants seem to argue that their financial circumstances should have relieved them of their obligation to pay the Daily Remittance, and that plaintiff was actually the party to have breached the agreement by "feigning" a default.

In opposition to defendants' cross-motion, and in support of its own motion for summary judgment, plaintiff offers proof that (i) on or about June 13, 2022, the Merchant put a stop payment on the Account (see 6/30/22 Bank Statement [*NYSCEF Doc. 27*]; ACH Code Record [*NYSCEF Doc. 39*]); and (ii) the Merchant had entered into other merchant cash advance agreements, whose automatic payments were depleting the Account (see 6/30/22 Bank Statement [*NYSCEF Doc. 27*]; Affidavit of Shloime Nelken dated April 18, 2023, ¶6 [*NYSCEF Doc. 38*]; Guarantor Affidavit dated October 14, 2022, ¶19 [NYSCEF Doc. 25]). These actions on the part of the Merchant were, in and of themselves, events of default. See Agreement ¶¶ 2.15, 3.1(13). Moreover, the Merchant never sought a reconciliation pursuant to the paragraph 1.4 of the Agreement, nor submitted any of the documentation required therein. Accordingly, plaintiff argues, there can be no reasonable argument that the Merchant was not in default.

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[3] In practice, the Daily Remittance was transmitted on an aggregate weekly basis.

Upon the record presented, the Court finds that the plaintiff has established the defendants' breach of the Agreement and the Guaranty as a matter of law. Although the Court may be sympathetic to the economic hardships facing small businesses which might induce them to enter into such agreements, the Court cannot disregard the fact that the defendants entered into this Agreement of their own accord and failed to abide by its terms. The Court does not find, as defendants suggest, any evidence of fraud on the part of the plaintiff. The terms of the Agreement were stated expressly on its face, and there is no evidence that defendants were prevented from garnering an understanding of their rights and obligations thereunder.

In view of the Court's finding that the plaintiff has established its causes of action for breach of contract and breach of guaranty, the Court does not reach the unjust enrichment claim. See *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (unjust enrichment claim is not available when it duplicates a contract claim).

To the extent that any of the affirmative defenses set forth in defendants' Answer were not addressed herein, the Court finds such defenses to be devoid of evidentiary facts, and thus insufficient to defeat summary judgment. See *Katz v. Miller*, 120 A.D.3d 768, 769-770 (2d Dept. 2014); *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 (1st Dept. 2015); *Moran Enterprises Inc., v Hurst*, 96 A.D.3d 914 (2d Dep't 2012).

The Court does not find the plaintiff's motion to be premature. "A grant of summary judgment is not premature merely because discovery has not been completed." *U.S. Bank N.A. v Wiener*, 171 AD3d 1241, 1242 (2nd Dept. 2019). "In order for a motion for summary judgment to be denied as premature, the opposing party must provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party." *Mogul v Baptiste*, 161 AD3d 847, 848 (2nd Dept. 2018). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *HSBC Bank USA, N.A. v Annijos*, 151 AD3d 943 (2nd Dept. 2017).

CONCLUSION

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

Based upon the foregoing, it is

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ORDERED, that plaintiff's motion for summary judgment (*Mot. Seq. 001*) is ***granted***. Submit judgment on notice. Plaintiff has waived attorney's fees for purposes of this motion. See Affirmation ¶20, (*NYSCEF Doc. 12*). It is further

ORDERED, that defendants' cross-motion to dismiss the Complaint (*Mot. Seq. 002*) is ***denied***.

Any requests for relief not specifically addressed herein are ***denied.***

This constitutes the Decision and Order of this Court.

Dated: July 14, 2023
Mineola, NY, 11501

E N T E R:

HON. ERICA L. PRAGER, J.S.C.

ENTERED
Jul 17 2023
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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