

**Coldwater Capital Inc. v JW Colo. LLC**

2023 NY Slip Op 32727(U)

August 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 514911/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
-----X  
COLDWATER CAPITAL INC.,

Plaintiff, Decision and order

- against -

Index No. 514911/2022

JW COLORADO LLC; R.K. GRACE & CO;  
IPOSELECT.COM INC; GRACE CONSULTING GROUP,  
INC; GRACE SECURITIES CORP.; KAWESKE,  
SUAREZ & COMPANY; R.K. GRACE PREFERRED,  
INC.; R.K. GRACE & COMPANY OF NEW YORK, INC.;  
LEGATUS INTERNATIONAL INC; INVESCO GLOBAL  
HEALTH SCIENCES FUND; FORSETI LLC and JOHN  
DAVID KAWESKE,

Defendants, August 1, 2023

-----X  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 arguing there are no questions of fact the defendants owe the money sought. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On March 28, 2022, the plaintiff a merchant cash advance funding provider entered into a contract with defendants who reside in Colorado. Pursuant to the agreement the plaintiff purchased \$599,600 of defendant's future receivable for \$400,000. The defendant John David Kaweske guaranteed the agreement. The plaintiff asserts the defendants stopped remittances in May 2022 and now owe \$524,650. This action was commenced and now the plaintiff seeks summary judgement arguing

there can be no questions of fact the defendants owe the amount outstanding and judgement should be granted in their favor. The defendants oppose the motion.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

In this case, there are no questions of fact the agreement was a cash advance agreement and not a usurious and unenforceable loan. The agreement contained a reconciliation provision which conclusively establish the agreement was not usurious (see, K9 bytes, Inc., v. Arch Capital Funding LLC, 56 Misc3d 807, 57 NYS2d 625 [Supreme Court Westchester County 2017]). The defendants argue the reconciliation provision in the contract was merely illusory and thus not a true reconciliation provision, hence the contract was a loan and was usurious.

The courts have developed three criteria evaluating whether a particular arrangement is a loan or a merchant case advance.

First, whether there is a reconciliation provision, whether the agreement has an indefinite term and lastly, whether the funder has recourse if the merchant declares bankruptcy (IBIS Capital Group LLC v. Four Paws Orlando LLC, 2017 WL 1065071 [Supreme Court New York County 2017]). Thus, a reconciliation provision demonstrates, without any evidence to the contrary, that the plaintiff is not entitled to repayment in all circumstances. In this case the reconciliation provision is mandatory, supporting the simple conclusion the agreement is not a loan. The provision does not state that any discretion is permitted by the plaintiff at all. This is particularly true where the defendants "have not alleged that reconciliation did not in actuality function as agreed (or, indeed, that" the defendants "ever even requested reconciliation)" (see, Streamlined Consultants Inc., et., al., v. EBF Holdings LLC, 2022 WL 4368114 [S.D.N.Y. 2022]). While the memorandum in opposition states that "defendants communicated with plaintiff to request an adjustment or reconciliation of the daily remittance amount pursuant to the loan agreement" (see, Memorandum in Opposition, Page 12 [NYCEF Doc. #42]) there is no evidence supporting that contention. Further, the memorandum cites to "Exhibit 'A'" however, the defendant did not submit any exhibits. Moreover, the John Kaweske has submitted an affidavit that states that "on or around April 12, 2022 I contacted plaintiff to request reconciliation of the remittance amount due

to reduced revenue and on this occasion, they refused my request" (see, Affidavit of John David Kaweske, ¶7 [NYSCEF Doc. No. 40]). However, while the merchant agreement requires the merchant to merely notify the funder of any reconciliation request, Paragraph 4.3 of the merchant agreement states that "all notices, requests, consents, demands...shall be delivered by certified mail" or via email (see, Merchant Agreement, Paragraph 4.3 [NYSCEF Doc. No. 2]). There is no evidence presented, raising any questions of fact, that such written notice was forwarded to the funder.

The defendant raises four issues why summary judgement cannot be granted.

First, whether the reconciliation provision rests with the sole discretion of the plaintiff. Second, whether the payment plan constitutes a finite term agreement. Third, whether the plaintiff had the right to demand full payment upon defendant's breach. Fourth, whether the agreement was a usurious loan.

As noted, the reconciliation provision does not allow for any discretion on the part of the plaintiff and that does not render the agreement a usurious loan. Further, the existence of such reconciliation provision means the agreement does not have a definite term. Moreover, Section 3.3 of the agreement does not grant the plaintiff the right to accelerate the amount owed.


Therefore, no issues of fact have been raised which would demand a denial of the motion for summary judgement.

Consequently, the motion seeking summary judgment is granted.

So ordered.

ENTER:

DATED: August 1, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchel'sman  
JSC