At IAS Part 99, at the Kings County Supreme Court, 360 Adams St., Brooklyn, NY 11201, on the ___ day of _____ 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.

JUL 25 2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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VOX FUNDING LLC,

Plaintiff,

-against-

BHPH CONSULTING SERVICES LLC D/B/A EPHONEPAY,
SEAN FOUZAILOFF and ANATOLIY SLUTSKIY,

Defendants.

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DECISION/ORDER

Index No.: 502531/2021
Mot. Seq. 1 & 2

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Motion for Summary Judgment, filed 8/5/2022 (Motion Sequence #1); Affidavit of Louis Calderon, Plaintiff's President, sworn to on 7/26/2022; Exhibits A-B; Attorney Affirmation of Derek M. Medolla, Esq., affirmed on 8/2/2022 (NYSCEF #21); Statement of Material Facts; Memorandum of Law.....	15-23
Defendants' Memorandum of Law and Attorney Affirmation of Blake Boghossian, Esq. in Opposition, affirmed on 4/26/2023; Affidavit of Defendant Sean Fouzailoff, sworn to on 4/26/2023; Response to Statement of Material Facts.....	27-29
Defendants' Motion for Summary Judgment, filed 4/26/2023 (Motion Sequence #2); Memorandum of Law in Support.....	30-31
Affidavit of William Clyne, Plaintiff's Funding Analyst in Reply, sworn to on 7/7/2023; Exhibits A-C; Memorandum of Law in Reply to Motion Sequence #2 and in Further Support of Motion Sequence #1.....	33-37
Affidavit of Defendant Sean Fouzailoff in Reply to Motion Sequence #1, sworn to on 6/13/2023; Exhibit A.....	38-39

Plaintiff Vox Funding, LLC commenced this action by filing a summons and complaint on February 1, 2021, alleging a breach of contract against defendant BHPH Consulting Services LLC D/B/A Ephonepay ("BHPH Consulting") and defendants Sean Fouzailoff and Anatoliy Slutskiy, personal guarantors of BHPH Consulting's contractual obligations. Issue was joined on April 20, 2021.

On August 6, 2020, plaintiff and defendants entered into a Future Receivables Sale Agreement whereby plaintiff purchased future receipts from defendants having a value of $159,454.07 for the purchase

price of $113,894.76 (NYSCEF #2). The balance was to be paid off via weekly Automated Clearing House ("ACH") withdrawals (*Id.*). Defendants delivered its future receivables through the agreed upon ACH withdrawals until December 2, 2020, at which point defendants allegedly defaulted.

Plaintiff moves for summary judgment based on defendant's default and breach of the agreement and claim that the remaining balance owed on the date of the default was $124,643.05 (NYSCEF #3). Additionally, pursuant to the contract, plaintiff seeks a default fee of 10% of the remaining balance, a blocking fee of 10% of the remaining balance, and a UCC filing and release fee of $150.00, for a total of $149,720.46. President of Vox Funding, Louis Calderone, submitted an affidavit that states that, on or about December 2, 2020, defendants breached their contractual obligations when they failed to deliver the agreed-upon payment, and blocked plaintiff's ACH withdrawal.

Defendants oppose the motion, arguing that they did not default but tried to reconcile the loan and were denied. Defendants also move for summary judgment arguing that the agreement was a usurious loan and not a contract for future receivables. Defendant-guarantor Sean Fouzalioff, president of BHPH Consulting, submitted an affidavit that states that around December 2020, BHPH Consulting notified plaintiff that their business had declined, they were anticipating bankruptcy, and that they requested a reconciliation. However, they submit no evidence, other than defendant Fouzalioff's affidavit, evidencing such. Plaintiff submitted an email sent to defendants Fouzailoff and Slutskiy on November 20, 2020, requesting defendants submit three months of the business bank account statements and bank login access so plaintiff could evaluate defendants' revenue (NYSCEF #34). Defendant Slutskiy replied and said they would unblock the ACH withdrawal if they could pay $1,800 per week and further stated that defendants could not provide any financial documentation until defendant Fouzailoff was "back on his feet" as he was sick with COVID-19 (NYSCEF #34). Plaintiff responded that they would accept $1,800 a week if defendants unblocked the withdrawal (*Id.*). The payment history shows defendants made payments of $1,800 on November 13, 2020 and November 25, 2020, a payment of $700 on December 2, 2020, and no additional payments thereafter (NYSCEF #3).

Plaintiff submitted two additional emails that they sent to defendants, dated December 29, 2020 and January 8, 2021, notifying defendants that their withdrawals were again blocked, requesting the ACH withdrawals be unblocked, and again requesting updated bank statements (NYSCEF #35-36). Plaintiff warned defendants that the matter would be sent to the legal department if they did not comply (*Id.*). Plaintiff states that they did not receive any reply from defendants. Defendants failed to submit any evidence that they responded to plaintiff, unblocked the ACH withdrawals, or sent the requested financial information. Defendants submitted a letter that they mailed to plaintiff, dated January 24, 2021, that states that the business has "suffered closures" related to COVID-19 and asked that they reduce the total amount due to $20,000.00 (plaintiff alleges the amount owed at that time was $124,643.05) (NYSCEF #39). In the January 24, 2021 letter, defendants stated that they would pay the $20,000.00 lump sum via credit card and they were "closing [their] doors within the next few months and currently [did] not have any receivables to meet our contractual debt obligation" (NYSCEF #39).

As an initial matter, the court will determine if the agreement was one for a usurious loan or an agreement for the purchase of future receivables. If this is an agreement for the purchase of future receivables, the court will decide whether there is a question of fact regarding the alleged breach.

In determining whether a transaction constitutes a loan or not, the court must consider it "in its totality" and judge it "by its real character, rather than by the name, color, or form which the parities have seen fit to give it." *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312 (2d Dep't 2020). The court's conclusion depends on whether the plaintiff is absolutely entitled to repayment under all circumstances, and "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan." *Id.*

"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.*

The first factor of the test, whether there is a reconciliation provision, is determined by the merchant's ability to seek adjustments of the amount remitted to the purchaser. *See K9 Bytes, Inc. v. Arch Cap. Funding, LLC*, 56 Misc. 3d 807, 817, 57 N.Y.S.3d 625 (N.Y. Sup. Ct. 2017). If there is no reconciliation provision, the agreement may be considered a loan. *Id.* In this case, however, the agreement contains a reconciliation provision, which supports a finding that the transaction was for future receivables. Section 2 of the agreement states:

> The Estimated Remittance Amount is intended to represent the Specified Percentage of Merchant's daily or weekly Future Receivables. Merchant may request that Purchaser adjust the Estimated Remittance Amount to more closely reflect the Merchant's actual Future Receivables times the Specified Percentage. Merchant agrees to provide Purchaser any information requested by Purchaser to assist in this reconciliation. Upon reasonable verification of such information, Purchaser shall adjust the Estimated Remittance Amount on a going-forward basis to more closely reflect the Merchant's actual Future Receivables times the Specified Percentage. Purchaser will give Merchant notice five business days prior to any such adjustment. After each adjustment made pursuant to this Section, the new dollar amount shall be deemed the Estimated Remittance Amount until any subsequent adjustment.

(NYSCEF #5, page 3). Defendants argue that this reconciliation provision was illusory because when they attempted to reconcile, they were denied a reconciliation. However, they provided no evidence of their request for reconciliation (defendants did provide an email stating that they would unblock the ACH withdrawals if plaintiff would accept $1,800 per week [NYSCEF #34]). There is no evidence that defendants submitted the requested bank statements necessary to reconcile. In fact, plaintiff lowered the weekly amount owed to $1,800.00 without any financial documentation (NYSCEF #34). Accordingly, the court does not find the reconciliation provision to be illusory based on the language within the contract and the actions of the parties.

The second factor of the test is whether the agreement has a finite or non-finite term for payment of receivables to plaintiff. *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309, 312 (2d Dep't 2020). Generally, if a transaction has a non-finite term, it is for a purchase of future receivables, rather than a loan. *See Pirs Cap., LLC v. D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc. 3d 457, 463, 129 N.Y.S.3d 734, 740 (N.Y. Sup. Ct.), *judgment entered sub nom. Pirs Cap., LLC v. D&M Truck, Tire & Trailer Repair Inc.* (N.Y. Sup. Ct. 2020). Here, the agreement's payment terms are non-finite. Section 11 of agree the agreement provides:

> [T]here are no specific scheduled payments and no repayment term. If Merchant's business slows down and Merchant's Future Receivables decrease or if Merchant closes its business or ceases to process Payment Devices and Merchant has not violated any of the representations, warranties and covenants provided in Section 14 below, there shall be no default or breach of this Agreement. Purchaser assumes the risk that Merchant's business may fail or be adversely affected by conditions outside the control of Merchant provided Merchant has not breached a representation, warranty or covenant set forth in Section 14 below.

(NYSCEF #2, page 5). The weekly remittance fee is also not fixed, as it is referred to as an "expected remittance term" and states, "Expected term of this Agreement based on the Specified Percentage (this is only an estimate)" (NYSCEF #2, page 1). Accordingly, the non-finite terms go in favor of this being a contract for future receivables.

The third factor is whether there is any recourse in the agreement should the merchant declare bankruptcy. *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309, 312 (2d Dep't 2020). As stated above, Section 4 of the Agreement provides that defendants would not be in breach of or default under the agreement if BHPH Consulting's "business slows down and Merchant's Future Receivables decrease or if Merchant closes its business or ceases to process Payment Devices and Merchant has not violated any of the representations, warranties and covenants" (NYSCEF #2, page 5). The provision continues, "Purchaser assumes the risk that Merchant's business may fail or be adversely affected by conditions outside the control of Merchant provided Merchant has not breached a representation, warranty or covenant" (*Id.*). While the provision does not explicitly address bankruptcy, it states that seller assumes the risk if merchant's business fails by conditions outside the control of merchant, which would cover bankruptcy in the event of business failure due to COVID-19, as defendants allege is the case here. Therefore, because declaring bankruptcy would not be a breach of or a default under the agreement, plaintiff would have no recourse in that event. *See LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309, 312 (2d Dep't 2020).

Having weighed all three factors, the court finds that the agreement between plaintiff and defendants is one for the purchase of future receivables, and not a usurious loan.

Defendants argue that summary judgment should be granted in their favor because they did not default under the agreement but instead tried to reconcile the loan and were denied. However, they do not provide any evidence that they provided plaintiff with the necessary, requested financial information. Defendant "agreed to provide Purchaser any information requested by Purchaser to assist in this reconciliation" (NYSCEF #5, page 3). Plaintiff asked defendants for bank statements multiple times via email, and there is no evidence in the record that defendants provided said statements. Accordingly, plaintiff was not obligated to reconcile the account. Moreover, the record shows that plaintiff allowed defendants to lower their payment to $1,800.00 per week even without the financial records (NYSCEF #34).

Additionally, defendants blocked the ACH withdrawals on multiple occasions, which constitutes a breach under the contract (NYSCEF #2, pages 1-2, 9; NYSCEF #34). Finally, defendants have not provided any evidence that BHPH Consulting declared bankruptcy or any evidence, outside self-serving affidavits, that the business slowed, failed, or was adversely affected by conditions outside their control. Instead, the record shows that defendants defaulted under the agreement by intentionally impeding payments to plaintiff and failed to provide plaintiff with the financial documentation necessary to reconcile.

Based on the foregoing, it is

ORDERED that the plaintiff's motion for summary judgment (Motion Sequence #1) is **GRANTED**; and it is further

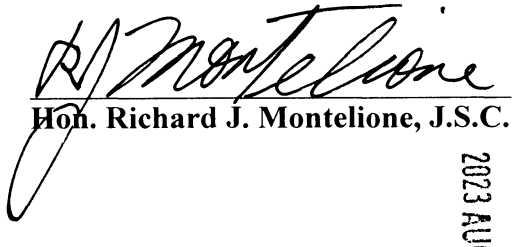
ORDERED that defendants' motion for summary judgment (Motion Sequence #2) is **DENIED**; and it is further

ORDERED that this matter is referred to a special referee to determine the amount defendants owe to plaintiff; and it is further

ORDERED, that plaintiff shall serve a copy of this order upon defendants with notice of entry within sixty (60) days.

This constitutes the decision and order of the court.

ENTER



Hon. Richard J. Montelione, J.S.C.