SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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EBF PARTNERS, LLC,

Plaintiff,

- v -

CREATIVE SPORTS CONCEPTS LLC and MICHAEL R. TAYLOR,

Defendants.

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INDEX NO. 161898/2019

MOTION DATE 11/23/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is granted as to liability only in accordance with the following memorandum decision.

Background

Plaintiff and defendant Creative Sports Concepts LLC ("Creative") are parties to a Payment Rights Purchase and Sale Agreement dated October 3, 2019, pursuant to which plaintiff purchased $99,400.00 worth of Creative's future receivables for $70,000 (agreement, NYSCEF Doc. No. 20). Defendant Michael R. Taylor is the guarantor of the agreement (*id.* at 10). Relevant to the instant motion, Creative is entitled to reconcile the daily payment amount to better reflect Creative's actual sales each calendar month (*id.* at 2). Further, while several events of default are listed, a bankruptcy proceeding involving Creative is not one of them (*id.* at 6, ¶ 3.1).

Plaintiff states that on December 3, 2019, plaintiff's daily debit on Creative's account was blocked, and since then Creative has not tendered the daily percentage of its receivables to

plaintiff or restored plaintiff's access to the account (Jackson aff., NYSCEF Doc. No. 18, ¶¶ 11-12). Plaintiff, therefore, commenced the instant action for breach of contract and related commercial torts, and now makes the instant motion for summary judgment.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

A breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, plaintiff has established

prima facie entitlement to summary judgment on liability by submission of the agreement between the parties (NYSCEF Doc. No. 20), a copy of Creative's payment history (NYSCEF Doc. No. 23), and the affidavit of its representative Laura Jackson (NYSCEF Doc. No. 18), attesting to plaintiff's performance and defendants' breach of the agreement and guarantee. Plaintiff's additional claims for unjust enrichment and conversion are essentially duplicative of the breach of contract claims (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987] [unjust enrichment]; *Richbell Information Services, Inc. v Jupiter Partners, LP*, 309 AD2d 288, 306 [1st Dept 2003] [conversion]).

In opposition, defendants make several arguments, specifically, that the agreement is actually a usurious loan, that plaintiff is barred from enforcing the agreement due to its unclean hands, that the guarantee does not sufficiently bind defendant Taylor, and that there are issues of fact related to how much money is actually owed. As an initial matter, the doctrine of unclean hands is an equitable defense that is unavailable to defendants in this action for money damages (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). Similarly, the unambiguous language of the guarantee provides that if Creative breached the agreement, "[Plaintiff] may recover from Guarantor for all of Purchaser's losses and damages and all remedies specified in Section 3.2 of this Agreement by enforcement of Purchaser's rights under this Performance Guaranty without first seeking to obtain payment from Seller or any other guarantor, or any other guaranty" (agreement, NYSCEF Doc. No. 20 at 9).

Defendants' argument regarding usury requires deeper analysis. "A party raising a usury defense must satisfy a heavy burden" (*Pirs Capital, LLC v D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc 3d 457, 460 [Sup Ct, NY County, 2020]). Usury only applies to a "loan or forbearance of any money, goods or things in action" (General Obligations Law § 5-501;

Donatelli v Siskind, 170 AD2d 433, 434 [2d Dept 1991]). In other words, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli*, 170 AD2d at 434). "The court will not assume that the parties entered into an unlawful agreement . . . when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]).

In the case of the agreement herein, there are three factors to consider in determining whether the transaction should be considered a loan or a sale of receivables: "(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" (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). These factors are not dispositive, since ultimately if the advanced sum is repayable absolutely then the agreement is a loan (*LG Funding, LLC*, 181 Ad3d at 666). In addition, courts may consider factors such as a discretionary reconciliation provision, default provisions entitling the lender to immediate repayment, and collection on the personal guaranty in the event of default or bankruptcy finding in determining whether such agreements "were loans subject to usury laws" (*Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

Here, the agreement appears to be what it states on its face, a purchase of future receivables. The agreement lacks a finite term, contains a reconciliation provision, and does not provide that Creative's filing for bankruptcy protection is a default under the agreement. Accordingly, defendants cannot show that the Agreement is a criminally usurious loan (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]).

Finally, defendants fail to raise an issue of fact as to liability. Defendant Taylor admits that Creative entered into the agreement with plaintiff (Taylor aff., NYSCEF Doc. No. 26, ¶ 15), and does not deny his signature on the agreement. While he refers to a prior agreement with plaintiff, the documents underlying any such prior agreement are not part of the record, and in any case, any such agreement is not relevant to the unambiguous terms of agreement from which arises this action. However, he does raise an issue of fact as to damages. Contrary to the documents submitted by plaintiff, Taylor asserts that Creative only received $28,075.00, rather than the $70,000.00 set forth in the agreement (*id.*, ¶ 18). This calls into question the amount of money that is actually still owed to plaintiff. In reply, plaintiff does not reconcile this discrepancy. Thus, the amount of plaintiff's damages remains to be determined through discovery and trial.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants on the first and second causes of action as follows; and it is, therefore,

ORDERED that the defendants are found liable to plaintiff on the first and second causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street, New York, New York on October 4, 2023, at 2:15 PM.

This constitutes the decision and order of the court.

9/6/2023								
DATE					LOUIS L. NOCK, J.S.C.			
CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE