

AJ Equity Group LLC v Spig Indus., LLC

2023 NY Slip Op 33393(U)

September 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 517856/2023

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 28th day of September 2023.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

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AJ EQUITY GROUP LLC,

Plaintiff,

Index No. 517856/2023

-against-

Cal. No. 4 MS 1

SPIG INDUSTRY, LLC; SELCO
CONSTRUCTION SERVICES, INC;
MAKE-AWAY, LLC; DANNY WEBB CONST. CO.
INC and JOSHUA MONROE HARMAN, JESSE
CHRISTOPHER HARMAN,

Decision and Order

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 1

8-24; 27

Upon the foregoing papers, plaintiff’s motion for an order pursuant to CPLR §3212, granting summary judgment against defendants is decided as follows:

On or around February 9, 2023, the parties entered into a merchant cash agreement whereby plaintiff purchased from defendant merchant \$374,750.00 in future receivables (hereinafter “Purchased Amount”) in exchange for an upfront purchase price of \$250,000.00. The Purchased Amount was to be remitted to plaintiff via daily ACH debits in the amount of \$5,353.57, which purportedly represented a good faith estimate of 10% of defendant merchant’s daily receipts.

According to the affidavit of Asher Sussman (“Sussman”), CEO of plaintiff, on or about June 13, 2023, defendant merchants defaulted under the provisions of the relevant agreement by (i) failing to give plaintiff 24 hours advance notice that there would be insufficient funds in the account such that four of plaintiff’s attempted debits were rejected for insufficient funds; and (ii) failing to make any remittances thereafter. Sussman also avers that defendant guarantors, Joshua Monroe Harman and Jesse Christopher Harman, breached the provisions of the personal guaranty by failing to pay on the guaranty upon defendant merchants’ default. Plaintiff seeks summary judgment in the amount of \$330,451.51, which, according to plaintiff, consists of the outstanding balance owed on the Purchased Amount of receivables of \$325,001.51, default fee of \$5,000.00 and an NSF total fee of \$450.00.

Defendants oppose plaintiff’s motion. Defendants contend that, under paragraph 17 of the relevant agreement, in the event of a default, plaintiff is entitled to the entire amount owed. Further, while there is a purported reconciliation provision, the determination regarding the reconciliation is left entirely with plaintiff and there is no indication as to what would occur if plaintiff did not timely comply. In addition, defendants point out that, under paragraph 16, plaintiff is given broad Power of Attorney regarding defendants’ business which is highly prejudicial to them. It is defendants’ position that these contract provisions make this agreement a loan and not a genuine purchase of future receivables.

In reply, plaintiff points out that defendants fail to allege that they ever made a reconciliation request and, as such, they cannot be heard to speculate about what would have happened if they had. Regardless, that the reconciliation provision is clearly mandatory since it states that, upon merchant’s request and its provision of the necessary financial information, “[Plaintiff] will credit to the Account all amounts to which [Plaintiff] was not entitled” (NYSCEF

Doc. No. 13, Sussman Aff., Ex. A, § 4). In addition, plaintiff points out that the agreement's term is necessarily indefinite because the "Specific Daily Amount" was subject to mandatory and regular adjustment under the reconciliation provision. Finally, plaintiff asserts that it has limited recourse in the event of merchant's bankruptcy as the agreement does not make merchant's filing for bankruptcy an event of default (*see id.* at § 32).

Discussion

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). Once such a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"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" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020]). As stated by the court in *Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]:

"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'" (*citing to LG Funding, LLC v United Senior Props. of Olathe, LLC, supra*).

Here, upon review of the relevant agreement and the parties' arguments, plaintiff established its prima facie entitlement to summary judgment. Further, the subject merchant agreement satisfies the *Principis* criteria. In opposition, defendants failed to raise an issue of fact. As such, plaintiff's motion for summary judgment against defendants is granted. Plaintiff shall submit a proposed judgment, along with an itemization of any requested costs, interest and attorneys' fees, on notice within 30 days of this decision's filing.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court