

TVT Direct Funding LLC v Vendita Tech. Group Inc.

2023 NY Slip Op 33410(U)

September 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 501742/2022

Judge: Reginald A. Boddie

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At an IAS Term 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.

PRESENT:

Honorable Reginald A. Boddie
Justice, Supreme Court

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TVT Direct Funding LLC,

Plaintiff,

Index No. 501742/2022

-against-

Cal. No. 20-21 MS 1, 3

Vendita Technology Group Inc. D/B/A Vendita
Technology Group and Vendita LLC and Vendita
Corporation and Douglas Sullinger,

Decision and Order

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 1

12-21

MS 3

43-50; 52

Plaintiff's motion seeking summary judgment and defendants' cross-motion seeking summary judgment dismissing the complaint are decided as follows:

On May 10, 2021, the parties entered into an agreement pursuant to which plaintiff purchased \$660,000.00 of defendants' future receivables for the sum of \$500,000.00 ("Agreement"). The individual defendant, Douglas Sullinger, executed a personal guarantee of performance of all the obligations of the corporate defendants under the Agreement. Plaintiff alleges that, on or about November 30, 2021, defendants breached the Agreement by failing to

deliver future receivables due to plaintiff. According to plaintiff, at the time of their breach, defendants had delivered a total net amount, after applicable fees, of \$236,303.63 in future receivables, leaving a remaining balance of \$423,696.37. Under the Agreement, plaintiff asserts that it is entitled to a default fee in the amount of \$2,500.00, a UCC filing and release fee of \$150.00, and \$140.00 for four electronic debits that were returned as unpaid. Based on the foregoing, plaintiff argues that judgment should be awarded and entered in favor of plaintiff against defendants, jointly and severally, in the amount of \$423,696.37 with interest thereon from November 30, 2021, the date of default, plus costs and attorneys' fees.

In support of its motion for summary judgment, plaintiff contends that the Agreement does not constitute a loan insofar as the Agreement contains several provisions dealing with reconciliation and the merchant's right to adjust payments, the term is indefinite because of the above-referenced reconciliation provision, and plaintiff has no recourse in the event of merchant's bankruptcy filing. Plaintiff further argues that defendants' affirmative defenses either lack merit or are inapplicable to the circumstances herein. Finally, plaintiff argues that defendants' counterclaim for negligent misrepresentation premised on the purported statement by plaintiff that the "temporary loan would be converted into a long-term note" must be dismissed for failure to state a claim. Specifically, because both parties are sophisticated and experienced and the Agreement's terms are very clear, plaintiff argues that defendants' attempt to claim negligent misrepresentation is a disingenuous attempt to skirt their contractual obligations.

Defendants cross-move for summary judgment dismissing plaintiff's complaint on the grounds that the subject Agreement constitutes a usurious loan. In support, defendants proffer the addendum to the Agreement which refers to the Agreement as a "loan," the plaintiff as a "lender" and defendants as "borrowers." In addition, defendants argue that the Agreement's reconciliation

provision is merely a smokescreen to cover up the actual mechanism of this loan. According to defendants, in December 2021, its sole customer and source of revenue, IBM, terminated its contract with defendants, but plaintiff refused to issue a “true up” or reconciliation and claimed that defendants breached the Agreement. Moreover, defendants point out that an adjustment remains solely at plaintiff’s discretion and that such adjustment can only be requested once per month. Defendants claim that a true reconciliation does not limit the time frame by which a borrower and merchant may seek a reconciliation. Based on the foregoing, defendants argue that plaintiff’s motion for summary judgment must be denied and their cross-motion for judgment dismissing the complaint granted as plaintiff breached the Agreement.

In opposition to defendants’ cross-motion, plaintiff argues that defendants fail to prove that IBM terminated its contract with them or that their revenue was reduced to virtually nothing. Plaintiff points out that defendants’ proffered evidence, an email thread with a purported employee of IBM, merely states that Vendita Technology Group has been blocked as a supplier, and their affidavit in support is self-serving. To the extent that the court finds issues of fact exist, plaintiff contends that discovery is needed to uncover the relationship between defendants and IBM, whether IBM actually terminated defendants’ contract and whether defendants ever followed the procedures in the Agreement for the reconciliation. Furthermore, plaintiff claims that it attempted to get in touch with defendants after the missed payment but were unable to do so.

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant’s burden is “a heavy one” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving

party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

Here, based on the parties’ submissions, there is an issue regarding whether defendants properly requested a reconciliation and, if so, whether plaintiff breached the Agreement by refusing to issue one. In the event the Agreement’s reconciliation provision is found to be illusory, there would also be an issue as to whether the Agreement constitutes a criminally usurious loan. As such, both plaintiff’s motion and defendants’ cross-motion for summary judgment are denied. The parties shall appear for a virtual preliminary conference on Tuesday, November 21, 2023 at 10:30 AM.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court