

American Funding Servs. v T.N. Eldridge Devs. LLC

2023 NY Slip Op 34179(U)

December 1, 2023

Supreme Court, New York County

Docket Number: Index No. 451204/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

AMERICAN FUNDING SERVICES,

Plaintiff,

INDEX NO. 451204/2023

MOTION DATE N/A

MOTION SEQ. NO. 002

- v -

T. N. ELDRIDGE DEVELOPMENTS LLC,DFTF
ENTERPRISES LLC,DFTF ENTERPRISES, PINNACLE
FREIGHT LINES LLC,PINNACLE FREIGHT LINES, VASHTI
FREIGHT LINES LLC,VASHTI FREIGHT LINES,
VANGUARD YOUTH SOCIETY INC, VANGUARD YOUTH
SOCIETY, QUESTCARE HEALTH & COMMUNITY
SERVICES, LLC,QUESTCARE HEALTH & COMMUNITY
SERVICES, VANGUARD YOUTH SOCIETY FOUNDATION,
LUXURY-FETISH.COM, TOJUNA NICOLE ELDRIDGE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Plaintiff’s motion for summary judgment is granted.¹ This action arises out of an agreement between Plaintiff, American Funding Services (AFS), and Defendants T.N. Eldridge Developments LLC D/B/A/ T. N. Eldridge Developments; DFTF Enterprises LLC; DFTF Enterprises; Pinnacle Freight Lines LLC; Pinnacle Freight Lines; Vashti Freight Lines LLC; Vashti Freight Lines; Vanguard Youth Society INC; Vanguard Youth Society; Questcare Health & Community Services; Vanguard Youth Society Foundation; Luxury-Fetish.com (hereinafter Merchant) and Tojuna Nicole Eldridge (hereinafter Guarantor).

Summary of Facts

¹ The Court would like to thank Madison Huberman for her assistance in this matter.

AFS and Defendants entered into a Revenue Purchase Agreement (the “Agreement”) pursuant to which Defendant Merchant sold future receivables and sales proceeds with a face value of \$69,950.00 to AMS for \$50,000.00 from AMS. Under the agreement, a portion of the Purchase Price was to be used to satisfy the balance remaining on a prior purchase agreement. According to the Agreement, Defendant Merchant agreed to pay AMS the purchased \$69,950.00 by ensuring that all its sales proceeds and receivables were deposited into one designated deposit account and permitting AFS to electronically debit from that account 12% of Defendant Merchant’s daily sales proceeds until AFS collected the purchased amount. After AFS paid the Purchase Price, Defendant Merchant partially performed its part of the Agreement between June 27, 2022, and August 10, 2022. During the time of performance, Merchant remitted \$20,673.00 of the purchased sales proceeds. On August 10, 2022, AFS was denied access to the account by the Merchant and deprived the 12% of daily sales proceeds. AFS now moves for summary judgment under CPLR § 3212 against Defendant Merchant and Defendant Guarantor for breach of a Merchant Agreement.

Standard of Review

Under CPLR § 3212, summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action is established sufficiently to warrant the Court as a matter of law in directing the judgment in favor of any party. *See generally Zuckerman v. City of New York*, 49 N.Y.2d 595 (1980). The party moving for summary judgment must present a prima facie case of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *See CPLR § 3212(b); Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733 (2008).

Arguments of the Parties

Plaintiff contends that Defendants breached the Purchase and Sale Agreement based on the Affidavit of Phillip Scaglione, a manager of AFS. Plaintiff alleges that Defendant Merchant is liable to Plaintiff for Breach of Contract because AFS has established the existence of the Agreement, its performance of the terms of the Agreement, Defendant's breach of the Agreement, and monetary damages. Plaintiff further contends that Defendants breached the Agreement on August 10, 2022, and therefore, Plaintiff is entitled to prejudgment interest at the statutory rate of 9% per year, as established under CPLR § 5004, from that date to the date of entry of judgment. *See Sokolik v. Pateman*, 114 A.D.3d 839, 841, 981 N.Y.S.2d 111 (2d Dep't 2014); *Marine Management, Inc. v. Seco Management, Inc.*, 176 A.D.2d 202, 203, 574 N.Y.S.2d 207 (2d Dep't 1991).

Additionally, Plaintiff contends that Defendant Guarantor is liable to Plaintiff AFS for Breach of the Personal Guarantee. Plaintiff alleges that the Agreement indicates that Guarantor is personally liable as the guarantor if Merchant breaches its performance under the Agreement. Plaintiff argues that according to the Guarantee Provision of the Contract, it explicitly contains a section entitled "Guaranty of Performance" which provides that the defendant Guarantor is jointly and severally liable to AFS under the terms of the Agreement for any breach of the Agreement. Plaintiff contends that since Merchant failed to perform according to the terms and conditions of the Agreement thereby causing monetary damage to Plaintiff, Defendant Guarantor as the personal guarantor is jointly and severally liable under the terms of the personal guarantee.

Defendants first contend that Plaintiff's motion for summary judgment is premature as pursuant to the order dated August 13, 2023, a motion for summary judgment shall be filed 60 days after filing the Note of Issue. Therefore, Plaintiff's motion should be denied without prejudice. Second, Defendants contend that Plaintiff has failed to make out a prima facie case.

Defendants allege that there is evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution or tender an acceptable excuse for the failure to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Third, Defendants contend that the Scaglione Affidavit fails to lay a proper foundation for any business records. Defendants allege that Mr. Scaglione does not testify as someone with first-hand knowledge of plaintiff's business practices and procedures, does not testify that he has a business duty to maintain any of the records annexed to plaintiff's motion, does not testify as to what information is transmitted to what person, and does not identify or list the third parties that transmit information to AFS. *Capybara Cap., L.L.C. v. Zilco NW, L.L.C.*, 78 Misc. 3d 1238(A) (N.Y. Sup. Ct. 2023).

Fourth, Defendants contend that Plaintiff has failed to establish a breach of contract as Plaintiff cannot establish that the Defendants failed to perform. To establish a breach of a Revenue Purchase Agreement for future receivables, the plaintiff must establish that (1) the defendant's business produced sufficient quantities of future receivables to remit payment and (2) the defendant refused to remit payment. Here, Defendants allege that there is not enough admissible evidence to establish breach of the Agreement. Fifth, Defendants contend that the Agreement here is a usury loan and, therefore, is void as a matter of law. *Bouffard v. Befese, L.L.C.*, 111 A.D.3d 866, 870 (2d Dep't 2013) (quoting *Abir v. Malky, Inc.*, 59 A.D.3d 646, 649 (2d Dep't 2009)). Defendants allege that the agreement has all indicia of being a loan and since the annual percentage rate would be 535.68%, the Plaintiff set the defendant up to fail. Sixth, Defendants contend that Plaintiff's requested fees are unenforceable penalties. Finally, Defendants contend that Plaintiff's motion is improper and premature.

Plaintiff further contends that Plaintiff has met its burden by showing that Defendants breached a binding agreement between the parties which damaged Plaintiff. *See Stonehill Capital*

Mgt. L.L.C. v. Bank of the W., 28 N.Y.3d 439 (2016). Plaintiff alleges that Defendants have failed to raise a material issue of fact as Defendants have not challenged any of the material facts presented by Plaintiff. Under 22 NYCRR 202.8-g(c), “each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.”

Plaintiff also contends that Defendants’ arguments are without merit as Plaintiff has established the formation of a Contract, Plaintiff has established the Defendants’ breach, and Plaintiff has established damages. Concerning Defendants’ claim that the motion is premature, Plaintiff contends that the date on the court order is an end date, not the only day on which the motion may be filed. No law or statute stands for the proposition that a motion for summary judgment cannot be filed before the filing of a Note of Issue.

Additionally, Plaintiff contends that the Agreement is not a usury loan. To determine if an agreement is a loan or a transaction contemplated by a merchant agreement: (1) whether there is a reconciliation provision; (2) whether the agreement has an indefinite term; and (3) where the plaintiff has any recourse should the merchant declare bankruptcy. *See Kennard L. P.C. v. High Speed Cap, LLC*, 199 A.D.3d 1406, 1406 (4th Dep’t 2021); *Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752, 754 (2d Dep’t 2022) (citing *LG Funding, LLC v. United Senior Propos. of Olathe, LLC*, 181 A.D.3d 664, 665-66 (2d Dep’t 2020)); *see also K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807, 817 (Sup. Ct. West. Cnty. 2017). Plaintiff alleges that all three factors weigh heavily in favor of finding that the Agreement is an enforceable sale of future receivables and not a loan.

Discussion

As noted, Plaintiff contends that Defendants breached the Agreement between the parties when Defendants denied AFS access to the account and deprived AFS of 12% of daily sales proceeds. The Court agrees. Plaintiff has established that there is a binding agreement between the parties that damaged the Plaintiff. The Court finds the Defendants' argument that Mr. Scaglione failed to lay a proper foundation for any business records unavailing, as the affidavit indicates that Mr. Scaglione is a manager for the Plaintiff, that he reviewed the records of the Plaintiff, and he has knowledge about how the records are kept and maintained. He also indicated that the documents he is relying on were made in the ordinary course of business. The Court finds that sufficient to lay the foundation for the records in question.

Further, the Court finds that the Defendants failed to perform under the Agreement by denying AFS access to the account and depriving them of sales proceeds. Defendants appear to be currently operating and generating revenue. The Plaintiff has established that Defendants have collected money in revenue since the breach and failed to remit anything to Plaintiff.

Additionally, the Agreement here is not a usury loan as the Plaintiff does not have any legitimate recourse provisions if the Merchant declares bankruptcy, there is no finite reconciliation term, and the Agreement is contingent on Defendant's ability to generate future receivables creating an inherent risk in Plaintiff's ability to collect upon its investment. Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted as to liability; and it is further

ORDERED that a trial of the issues regarding damages, including attorneys' fees, is directed; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


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LYLE E. FRANK, J.S.C.

12/1/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE