Premiere Capital Funding, LLC. v Galactic Stadium, Inc.
2023 NY Slip Op 35158(U)
May 18, 2023
Supreme Court, Richmond County
Docket Number: Index No. 152230/2019
Judge: Catherine M. DiDomenico
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
---X
PREMIERE CAPITAL FUNDING, LLC.,

Plaintiff

Part- IAS 11
Present: Hon. Catherine DiDomenico

-against-

DECISION AND ORDER

GALACTIC STADIUM, INC. / DBA: FOAM VS PAINT and ERVIN BELLAMY

Defendants.

Index No. 152230/2019
Motion Sequence Nos.: 001 & 002
---X

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion Sequence Numbers 001 and 002

	Numbered
Summons and Complaint	1
Notice of Motion for Summary Judgment by Plaintiff (001),	2
Notice of Cross Motion to Dismiss and Opposition by Defendant	3
Plaintiff's Affirmation in Opposition to 002 and in Reply to 001	4
Transcript of Oral Argument (8/21/22)	5

Upon the foregoing cited papers, the Decision and Order is as follows:

Factual & Procedural History

Plaintiff Premier Capital Funding, LLC. is a New York limited liability company. Premiere Capital is engaged in the business of purchasing a percentage of a company's accounts receivable in return for an up-front lump sum capital payment. Galactic Stadium Inc. is a Texas based corporation engaged in the business of promoting music festivals. Defendant Ervin Bellamy is the sole owner of Galactic Stadium who signed a personal guaranty of the contract at issue in this action. Venue is properly before this Court as the parties' contract states that New York State Supreme Court, Richmond or Kings County, shall be the parties' choice of venue.

On or about August 27, 2019, the parties executed a "Future Receivables Purchase Agreement" wherein Plaintiff purchased **$21,300** worth of Defendants' future accounts receivable in return for a lump sum payment of **$14,031.** This is commonly known as a "factoring agreement." **See *RMP Capital Corp. v. Victory Jet, LLC.*, 139 A.D.3d 836 (2d Dept.**

[*1]

2016). Clause 6.1 of the parties' contract authorized Plaintiff to withdraw 13% of the accounts receivable directly from the Defendants' business bank account each day until the purchase price was satisfied. Plaintiff alleges that after the withdrawal of approximately **$1,958**, Defendants placed a "stop payment" on their business bank account, breaching the contract. Following this alleged breach, Plaintiff commenced the present lawsuit alleging breach of contract, or in the alternative, the quasi-contractual theories of unjust enrichment and fraudulent misrepresentation as the balance of the **$14,031** received by Defendants was not returned after they stopped making payments.

Plaintiff commenced the present lawsuit with the filing of a Summons and Complaint on September 24, 2019. Defendants Galactic Stadium, Inc. and Ervin Bellamy filed an Answer on November 1, 2019. After the completion of discovery, Plaintiff filed a motion (Seq. No. 001) seeking an order granting summary judgment on its breach of contract cause of action. Defendants filed a cross-motion for summary judgment (Seq. No. 002) seeking an order declaring the contract to be an illegal usurious loan and dismissing the Plaintiff's case on that ground. Both motions were argued on August 21, 2022 and were submitted for decision upon receipt of the argument transcript.

Applicable Law

A party seeking summary judgment in a breach of contract action bears the initial burden of demonstrating its prima facie entitlement to the requested relief. **See *Scarpelli v. Naderi*, 207 A.D.3d 769 (2d Dept. 2022)**. Only after the moving party has satisfied this obligation does the burden shift to the party opposing summary judgment to raise an issue of fact sufficient to require a trial. **See *Law Firm of Ira H. Liebowitz, Lasky & Peterson v. Sikowitz*, 129 A.D.3d 774 (2d Dept. 1987)**. When determining a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party. **See *Fricano v. Law Offs. of Tisha Adams*, 194 A.D.3d 1016 (2d Dept. 2021)**.

Here both parties move for summary judgment based upon the same set of facts, however, they argue that the contract at issue should be interpreted differently. Plaintiff alleges that the contract is a legal agreement to purchase accounts receivable while Defendants argue that it is an illegal usurious loan disguised as a factoring agreement. The fundamental principle of contract interpretation is that agreements are to be construed in accord with the parties' intent. **See *PSCW, Inc. v. Monaco*, 2023 NY Slip Op 02542 (2d Dept. 2023).** Where a contract's terms are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed. **See *Tomhannock, LLC v. Roustaboud Resources, LLC.* 33 N.Y.3d 1080 (2019); see also *LG Funding, LLC. v. Branson Getaways, Inc.*, 2017 NY Slip Op 32837(U) (Sup. Ct. Nass. Cty. 2017).**

Decision

(1) Plaintiff's Motion for Summary Judgment.

In order to establish a prima facie entitlement to summary judgment on a breach of contract cause of action, the moving party must establish (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. **See *Walter Boss, Inc. v. Roncalli Frgt. Co., Inc.*, 210 A.D.3d 1124 (2d Dept. 2022); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC.*, 83 A.D.3d 804 (2d Dept. 2011)**. With respect to the personal guaranty, the moving party must simply prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty. **See *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v. Navarro*, 25 N.Y.3d 485 (2015)**.

Here, the existence of a contract and personal guaranty is undisputed. It is further undisputed that Plaintiff advanced the sum they owed under the contract's terms, to wit, **$14,031**, and that Defendants unilaterally stopped payments after only **$1,958** was paid towards the contractual sum owed **($21,300)**. As this default in payment resulted in a shortfall of at least **$19,342**, the element of damages is established. Thus, as Plaintiff has met its initial burden of establishing its entitlement to summary judgment as a matter of law, the burden shifts to the Defendant to raise a triable issue of fact or to establish a viable defense to the suit. **See *Fopeco, Inc. v. General Coatings Technologies, Inc.*, 107 A.D.2d 609 (1st Dept. 1985); see also *RCR Servs. v. Herbil Holding Co.*, 229 A.D.3d 379 (2d Dept. 1996)**. In opposition, Defendants argue that they have a viable defense to Plaintiff's breach of contract cause of action on the ground that the contract at issue is an illegal usurious loan that cannot be enforced by this Court. **See e.g. *542 A. Realty, LLC v. A.Davis, LLC.* 189 A.D.3d 950 (2d Dept. 2020)**.

(2) **Defendants' Cross Motion for Summary Judgment.**

In addition to opposing Plaintiff's motion, Defendants cross move for a declaratory judgment that the contract at issue is an unenforceable, usurious loan. If this finding is made, Defendants then seek summary judgment dismissing Plaintiff's Complaint. Defendants assert that the contract at issue is not what it appears to be, an agreement to purchase future accounts receivable, but rather is a *disguised* loan which contains a hidden provision charging usurious interest far more than New York State's permitted civil rate of 16% and criminal rate of 25%. **See *Adler v. Marzario*, 200 A.D.3d 829 (2d Dept. 2021); see also *Bakhash v. Winston*, 134 A.D.3d 468 (1st Dept. 2015)**. If this assertion is found to be correct, a usurious loan is void on its face and relieves the borrower of the obligation to pay both principal and interest thereon. **See**

General Obligations Law §5-511; *Abraham v. American Gardens Co.*, 189 A.D.3d 741 (2d Dept. 2020). However, "the rudimentary element of usury is the existence of a loan… and where there is no loan, there can be no usury, however unconscionable the contract may be." ***Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752 (2d Dept. 2022).**

In opposition, Plaintiff argues that the contract is exactly what it purports to be, a legal agreement to purchase accounts receivable, and not a loan. In fact, section 2.1 of the contact, entitled "**NOT A LOAN**" [1] clearly indicates the parties' mutual understanding that the contract was "not intended to be, nor shall it be construed as a loan from Purchaser to Merchant." However, when determining the nature of an agreement to purchase receivables, language purporting to state its nature is only one factor to be considered and is not conclusive, rather, the contract "must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it." **See *L.G. Funding, LLC v. United Senior Props. Of Olathe, LLC,* 181 A.D.3d 664 (2d Dept. 2020).**

When considering whether a factoring agreement is actually a loan, courts are primarily charged with determining whether the party purchasing the receivables is entitled to repayment under all circumstances, as unless a principal sum advanced is repayable absolutely, the transaction cannot be a loan. **See *Rubenstein v. Small*, 273 A.D.102 (1st Dept. 1947)**. 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 ramification should the merchant declare bankruptcy. **See *L.G. Funding*, Supra**. In New York, there is a presumption that an arm's length transaction between sophisticated negotiating parties is not usurious. **See *Giventer v. Arnow*, 37 N.Y.2d 305 (1975); see also *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 57 N.Y.S.3d 625 (Sup. Ct. West. Cty. 2017).** Accordingly, claims of usury must be proven by clear and convincing evidence. **See *Roopchand v. Mohammed*, 154 A.D.3d 986 (2d Dept. 2017).**

Regarding the three factors above, the agreement does not set a finite term for repayment. Rather, it authorizes Premiere Capital to withdraw a sum equal to 13% of Galactic Stadium's accounts receivable each day until the agreed upon purchase amount was recovered. The daily withdrawal amount agreed to by the parties was **$177.50**, which approximated 13% of Defendants' anticipated receivables. However, Clauses 1.3 and 1.4 allow for reconciliation of this amount. Specifically, section 1.3(b) indicates that on the 15th and 30th day of every month Plaintiff would reassess the Defendants' bank account to determine a new daily transfer amount, if appropriate. Moreover, section 1.3(e) indicates that Plaintiff would use reasonable business

1 Capitalization and bold font type in the original.

practices to calculate a daily transfer amount that reflects 13% of deposits being made into the bank account. Regarding the third factor to be considered, the agreement *does* consider the commencement of a bankruptcy proceeding to be an "event of default" but this factor alone is not determinative and must be considered in light of the terms of the contract as a whole.

Accordingly, after considering the three factors above, and after considering the context of the agreement in its entirety, this Court finds, as a matter of law, that the contract at issue is a valid agreement to purchase future accounts receivable and is not a disguised loan. The agreement specifically indicates that it is "**NOT A LOAN**." This unambiguous statement, while not conclusive, was agreed to between two sophisticated parties and is therefore the best indicator of their intent. **See *Bedford-Carp Constr., Inc. v. Brooklyn Union Gas Co.*, 2023 NY Slip Op 02097 (2d Dept. 2023); see also *Falanga v. Hillabrant*, 208 A.D.3d 1308 (2d Dept. 2022)**. Moreover, Article 20 of the contract indicates that all parties were given "ample time and opportunity to seek the advice of counsel prior to its execution." New York has a strong public policy favoring freedom of contract under these circumstances. **See *Canyon Sterling Emerald, LLC v. 4 S. Dev., LLC.*, 212 A.D.3d 767 (2d Dept. 2023)**. There is also a presumption that sophisticated parties who enter into a contract are not entering into a usurious loan. **See *Zanfini v. Chandler*, 197 A.D.3d 594 (2d Dept. 2021)**.

In addition to the clear statement regarding the parties' intentions, the terms of the agreement itself indicate that it is not a loan. The agreement specifically provides for reconciliation. Thus, as the amount of the monthly payments was subject to change, the term of the agreement could not be finite. **See *Principis Capital, LLC v. I Do. Inc.*, 201 A.D.3d 752 (2d Dept. 2022)**. Despite the terms of the reconciliation clause, there is no indication in the motion record that Defendants ever requested a reduction in the daily withdrawal amount and were denied. Rather, Defendants accepted funding from Plaintiff and then resorted to self-help by instituting a "stop payment" without explanation, and without offering to return the funds received. Defendant's claim that Plaintiff should have adjusted the daily withdrawal themselves is specious, as Defendants only made 11 daily payments before unilaterally stopping the withdrawals. Finally, while the bankruptcy default provision is a factor to be considered, is not enough on its own to establish, by clear and convincing evidence, that the agreement should be considered a usurious loan. **See *Pirs Capital, LLC v. D&M Truck, Tire & Trailer Repair Inc.*, 129 N.Y.S.3d 734 (Sup. Ct. NY Cty. 2020)**. Similarly, the fact that the parties agreed that Plaintiff would be granted a security interest in Defendants property is also insufficient to establish that the contract was a loan. **See *NY Capital Asset Corp. v. F&B Fuel Oil Co., Inc.* 98 N.Y.S3d 501 (Sup. Ct. West. Cty. 2018)**.

[*5]

For the detailed reasons set forth above, and in light of the presumption in favor of the contract being valid, this Court finds that the contact at issue is an enforceable agreement to purchase accounts receivable, and not a usurious loan. **See *Principis Capital;* Supra; see also *BMT Cap. Grp. Inc. v. Adkins Builders, LLC.*, 2023 NY Misc. Lexis 2244 (Sup. Ct. Kings Cty. 2023); *Pearl Delta Funding, LLC . v. KK17 Transportation LLC.*, 2023 N.Y. Misc. Lexis 1111 (Sup Ct. Qns. Cty. 2023); *Brickstone Group LLC v. Arizona Native Bldrs., LLC*, 2022 NY Slip Op 34260(U) (Sup. Ct. NY Cty. 2022); *Tender Loving Care Homes Inc. v. Reliable Fast Cash, LLC.*, 172 N.Y.S.3d 335 (Sup. Ct. Rich. Cty. 2022).**

Accordingly, Defendants' motion for summary judgment dismissing the case on the ground that the contract is unenforceable is hereby denied. Moreover, as Defendants fail to raise a triable issue of fact in response to Plaintiff's motion for summary judgment, that motion is granted, in part, to the extent that the issue of liability is resolved in favor of Plaintiff. **See *Parkside Funding Grp., LLC, Middlebury Chiropractic, PLC*, 2023 N.Y. Misc. Lexis 2247 (Sup. Ct. Kings. Cty. 2023)**. On the issue of damages, Plaintiff's motion requests the "sum certain sought in the Complaint" but a review of the Complaint indicates that the damages sought include the principal balance of **$19,342** together with default fees and penalties, interest, and reasonable attorneys' fees, costs, and disbursements. As only the figure of **$19,342** is a sum certain, the matter shall be scheduled for an evidentiary hearing to determine the proper amount of damages (Article 20 mutually waives any right to a jury trial).

Considering the ruling above, the Court need not address the aspects of Defendants' motion which seek to dismiss the alternatively plead causes of action for unjust enrichment and fraudulent misrepresentation. Any other requests for relief found in either motion that were not specifically addressed herein are hereby denied. Parties are hereby directed to contact the Court via conference call on July 19, 2023, at 2PM for a pre-hearing conference. This constitutes the Decision and Order of the Court.

Dated: May 18, 2023

Hon. Catherine M. DiDomenico
A.J.S.C

[*6]