Landmark Funding Group LLC v Alternative Materials LLC
2024 NY Slip Op 30645(U)
February 29, 2024
Supreme Court, Kings County
Docket Number: Index No. 534708/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

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LANDMARK FUNDING GROUP LLC,

Plaintiff, Decision and order

- against - Index No. 534708/2022

ALTERNATIVE MATERIALS LLC, DDB ASSET MANAGEMENT LLC, KL MINING OPERATIONS LLC, KC LOGISTICS SALES LLC, KC II HOLDING LLC, SCOTT ANDREW HAIRE, and ROBERT STOUT,

Defendants, February 29, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1 & #2

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 arguing there are no questions of fact the defendants owe the money sought. The plaintiff has also moved seeking to dismiss defendant's counterclaims. The defendants have opposed the motions. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On April 11, 2021, the plaintiff a merchant cash advance funding provider entered into a contract with defendants who reside in Texas. Pursuant to the agreement the plaintiff purchased $1,500,000 of defendant's future receivable for $1,000,000. The defendants guaranteed the agreement. The plaintiff asserts the defendants stopped remittances in November 2021 and now owe $1,122,695. This action was commenced and now the plaintiff seeks summary judgement arguing there can be no questions of fact the defendants owe the amount outstanding and

judgement should be granted in their favor. The defendants oppose the motion arguing there are questions of fact which preclude a summary determination at this time. Further, the plaintiff has moved seeking to dismiss defendant's counterclaims.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

The defendants argue the agreement in this case was a usurious loan and thus is unenforceable. In this case, there are no questions of fact the agreement was a cash advance agreement and not a usurious and unenforceable loan. The agreement contained a reconciliation provision which conclusively establish the agreement was not usurious (see, 92 Palm Foods LLC v. Fundamental Capital LLC, 80 Misc3d 1211(A), 195 NYS2d 636 [Supreme Court Suffolk County 2023]). The defendants argue the reconciliation provision in the contract was merely illusory and thus not a true reconciliation provision, hence the contract was

a loan and was usurious.

It is well settled that if the party that provided the funds is absolutely entitled to repayment in all circumstances then a loan exists, however, if the provider is not absolutely entitled to repayment then the transaction is not a 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 (LG Funding LLC, v. United Senior Properties of Olathe, LLC, 181 AD3d 664, 122 NYS3d 309 [2d Dept., 2020]). The courts have developed three criteria evaluating whether a particular arrangement is a loan or a merchant case advance. First, whether there is a reconciliation provision, whether the agreement has an indefinite term and lastly, whether the funder has recourse if the merchant declares bankruptcy (Principis Capital LLC, v. I Do Inc., 201 AD3d 752, 160 NYS3d 325 [2d Dept., 2022]). Thus, a reconciliation provision demonstrates, without any evidence to the contrary that the funder is not "absolutely entitled to repayment under all circumstances" (NY Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc3d 1229(A), 98 NYS3d 501 [Westchester County 2018]). As the court there noted "when payment or enforcement rests on a contingency, therefore, the agreement is valid though it provides for a return in excess of the legal rate of interest" (id). In this case the

reconciliation provision is mandatory, supporting the simple conclusion the agreement is not a loan (see, Tender Loving Care Homes Inc., v. Reliable Fast Cash LLC, 76 Misc3d 314, 172 NYS3d 335 [Supreme Court Richmond County 2022]). Specifically, the reconciliation provision in this case states that "any Merchant may give written notice to LFG requesting that LFG conduct a reconciliation in order to ensure that the amount that LFG has collected equals the Specified Percentage of Merchant(s)'s Receivables under this Agreement" (see, Standard Merchant Cash Advance Agreement, ¶4 [NYSCEF Doc. No. 8]).

The defendants argue that reconciliation provision is a sham because the provision "relates only to collection of payments and not to any adjustment of the amount of the Daily Payment based on Alternative's actual Receivables" (see, Memorandum in Opposition, page 12 [NYSCEF Doc. No. 31]). However, the provision states that if "LFG collected more than it was entitled to, then LFG will credit to the Account all amounts to which LFG was not entitled" (see, Standard Merchant Cash Advance Agreement, ¶4 [NYSCEF Doc. No. 8]). Although not explicitly stated, in that event LFG would surely lower the daily remittances going forward. In any event that omission, if it is even an omission, does not mean the entire reconciliation provision is a sham.

Next, defendants argue that the daily remittance amount was not based upon any of the defendant's financial information and

thus lacked any due diligence. There is only one appellate case that held a merchant agreement was really a loan, based in part, on the fact the daily payment rate did not represent a good faith estimate of receivables (see, Davis v. Richmond Capital Group LLC, 194 AD3d 516, 150 NYS3d 2 [1st Dept., 2021]). In Davis, the court explained a merchant agreement was really a loan for five distinct reasons. First, the reconciliation provision was discretionary, second, the funder refused to permit reconciliation, third, "the selection of daily payment rates that did not appear to represent a good faith estimate of receivables" (id), fourth, the agreement made rejection of automated debits on two or three occasions an improper event of default, and lastly, the agreement authorized collection on a personal guaranty in the event of bankruptcy. Thus, based upon that decision the defendants argue the reconciliation provision in this case is a sham because there is no good faith basis the amount taken each day is a good faith estimate of receivables. In truth, there is no way of knowing whether such daily amount represents a good faith estimate of receivables and for that very reason the merchant may reconcile if the amount taken is too high. To be sure, such estimate must be based upon the merchant's representations of daily revenue. Any changes in revenue can surely trigger the reconciliation as noted. Moreover, it is unlikely the court in Davis (supra) sought to create a new basis

to challenge the reasonableness of a merchant cash agreement, standing alone, on the grounds the amount taken is not correlative to revenue. As noted, that was one reason among five, rendering the agreement problematic in totality (see, Haymount Urgent Care P.C., v. GoFund Advance LLC, 2022 WL 2297768 [S.D.N.Y. 2022]). Thus, this contention, in isolation, is really another way of arguing the funder did not permit, or the agreement did not allow, reconciliation. However, that claim is refuted by the facts, as noted, that reconciliation was requested and in fact the daily remittance was reconciled.

Further, there is no merit to the argument the plaintiff "knew" the defendants had no receivables and offered them funds anyway. If that were true then the defendants may surely be responsible for seeking to obtain funds they had no way of ever returning.

Next, the defendants argue there is no end limit when the amount taken must be returned. In K9 bytes, Inc., v. Arch Capital Funding LLC, 56 Misc3d 807, 57 NYS2d 625 [Supreme Court Westchester County 2017] the court explained that a reconciliation provision is designed to permit the merchant to seek an adjustment of the amounts remitted each day. Thus, "if a merchant is doing poorly, the merchant will pay less, and will receive a refund of anything taken by the company exceeding the specified percentage (which often can also be adjusted downward).

If the merchant is doing well, it will pay more than the daily amount to reach the specified percentage" (id). Therefore, the possibility of a refund is expressly contemplated within any valid reconciliation provision. Thus, there is no basis to argue the reconciliation provision was a sham because it could extend the length of the repayment period. Indeed, a valid and functioning reconciliation provision will always extend the repayment period because the daily remittances are always changed.

Next, the defendants argue that a holistic examination of the agreement demonstrates it functioned as a loan and not as a merchant cash advance. Of course, even if there is technical compliance with the criteria noted above, an agreement can still be deemed a loan where "[t]he agreement also contains provisions suggesting that [the merchant's] obligation to repay was absolute and not contingent on its actual accounts receivable" (LG Funding LLC, supra). Thus, for the agreement to be considered a merchant cash advance there must be a real risk on the part of the funder that the merchant may have reduced revenues or even no revenue. Cases that have concluded merchant agreements are really loans have all based that conclusion upon the fact the reconciliation provision was virtually impossible to employ, essentially guarantying a recovery of the funds advanced (see, Haymount Urgent Care PC v. GoFund Advance LLC, 609 F.Supp3d 237 [S.D.N.Y.

2022], Lateral Recovery LLC v. Queen Funding LLC, 2022 WL 2829931 [S.D.N.Y. 2022], Fleetwood Services LLC v. Richmond Capital Group LLC, 2023 WL 3882697 [2d Cir. 2023]). As noted, in this case the reconciliation provision is not a sham, rather, it is a valid provision available to the merchant if necessary. Therefore, the above infirmities do not create any questions of fact in this regard.

The defendants also argue the agreement was both procedurally and substantively unconscionable. The defendants do not really elaborate or describe the inherent unconscionability of the agreement other than to note the same arguments already asserted, namely the reconciliation provision is a sham and there was no risk to the plaintiff. The court has already rejected those arguments and therefore, likewise, there can be no sustainable allegations of unconscionability. Moreover, there is no basis to conclude the merchant cash contract was a contract of adhesion. "A contract of adhesion contains terms that are unfair and nonnegotiable and arises from a disparity of bargaining power or oppressive tactics" (Love'M Sheltering Inc., v. County of Suffolk, 33 AD3d 923, 824 NYS2d 98 [2d Dept., 2006]). Form agreements "are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties" (Sablosky v. Edward S. Gordon Company

Inc., 73 NY2d 133, 538 NYS2d 513 [1989]). The defendant has not raised anything other than conclusory allegations the agreement in this case was an adhesion contract.

Therefore, based on the foregoing, the motion seeking summary judgement that money is owed is granted. The motion seeking to dismiss the affirmative defenses and counterclaims is hereby granted.

So ordered.

ENTER:

DATED: February 29, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC