SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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OXEA CAPITAL LLC,

Plaintiff,

- v -

ZURCADO INC. and TOMAS GARCIA AYABAR EDUARDO,

Defendants.

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INDEX NO. 655255/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, and 24

were read on this motion by plaintiff for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

The plaintiff's motion for summary judgment is granted in part, as follows.

Plaintiff's *Prima Facie* Showing

This action asserts a cause of action for breach of a "Purchase and Sale Agreement For Future Receivables" (NYSCEF Doc. No. 12) (the "Agreement"). The court finds that plaintiff has established *prima facie* entitlement to summary judgment on its first cause of action, asserted against the corporate defendant, Zurcado Inc. ("Zurcado"), for breach of the Agreement by the submission thereof (*id.*); the affidavit of Marcelo Rodriguez, managing principal of plaintiff, setting forth the details of the default (NYSCEF Doc. No. 9); the relevant payment history (NYSCEF Doc. No. 13); and the itemized statement of account of plaintiff (NYSCEF Doc. No. 14) (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010] ["The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages"]).

In opposition, Zurcado fails to raise a material issue of fact requiring trial. Zurcado's submission, consisting of a memorandum of law in opposition and statement of counter facts, was made by its counsel, who lacks personal knowledge of this matter (NYSCEF Doc. No. 17, 18) (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). Zurcado's submission offers no evidentiary proof showing that a triable issue of fact exists and merely speculates as to the sufficiency of plaintiff's *prima facie* evidence.[1]

Moreover, Zurcado's assertion that discovery is necessary to resolve this matter is unsupported by the record. Zurcado does not establish that facts "essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212[f]; *Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016] ["mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion"]).

Defendants' Affirmative Defenses

Defendants raise twenty affirmative defenses in their answer; but advance only the first and twentieth affirmative defenses in opposition to the motion (NYSCEF Doc. No. 3, 17). Accordingly, defendants concede that the other affirmative defenses should be dismissed (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] ["By his silence in his opposition brief,

[1] No affidavit from the defendants is submitted refuting the details of Zurcado's defaults attested to in the affidavit of Marcelo Rodriguez, plaintiff's managing principal (NYSCEF Doc. No. 9). Mr. Rodriguez identifies himself as being the one "responsible for collection of delinquent accounts at the office of Plaintiff at which the company's books and records . . . are maintained" (*id.*, ¶ 1). Mr. Rodriguez authenticates those records as business records sufficient to satisfy the criteria for admissibility under CPLR 4518, and exhibits the relevant payment history and statement of account (NYSCEF Doc. Nos. 13, 14). Instead of proffering an affidavit specifically rebutting those details, defendants submit their attorney's memorandum which goes no further than suggesting that plaintiff's showings should be subject to supplementation with canceled checks or wire transfers. That passive approach ignores the procedural precept requiring the party opposing a motion for summary judgment to produce evidence sufficient to establish triable issues of fact, once the movant presents its *prima facie* evidentiary showing (*e.g., Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed"]).

The first affirmative defense of ambiguity regarding the amount of money due and owing is meritless. This argument is belied by the Agreement (NYSCEF Doc. No. 12), the payment history between the parties (NYSCEF Doc. No. 13), and the itemized statement of account (NYSCEF Doc. No. 14) setting forth the payments that plaintiff received and the amount outstanding pursuant to the Agreement.

Defendants also argue that the Agreement is, in reality, a usurious loan (the twentieth affirmative defense); but the terms of the Agreement prove otherwise. It "must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]). And this defense "must be established by clear evidence as to all the elements essential thereto" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975] [internal quotation marks omitted]).

Usury only applies to a "loan or forbearance of any money, goods or things in action" (General Obligations Law § 5-501; *Donatelli, supra*). In other words, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli, supra*). "The court will not assume that the parties entered into an unlawful agreement" (*Giventer, supra*).

In the case of the "Purchase and Sale Agreement For Future Receivables" underlying this matter, there are three factors to consider in determining whether the transaction should be considered a loan or a sale of receivables: "(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" (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). These factors are not dispositive, because ultimately, if the advanced sum is repayable absolutely, then the agreement is a loan (*id.*, at 666). In addition, courts may consider factors such as a discretionary reconciliation provision, default provisions entitling the lender to immediate repayment, and collection on the personal guarantee in the event of a default or a bankruptcy filing, in determining whether such agreements "were loans subject to usury laws" (*Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

Here, the Agreement appears to be what it states on its face, a purchase and sale agreement for future receivables. The agreement lacks a finite term, contains a reconciliation provision, and does not provide that any filing by Zurcado for bankruptcy protection constitutes a default under the agreement (NYSCEF Doc. No. 12 at 1 ["Buyer shall periodically reconcile the Account . . . ."], § 4.3 ["This Agreement shall be in full force and effect until Buyer has received all amounts due and owing hereunder . . . ."], § 4.8 [no bankruptcy default provision]). Accordingly, defendants cannot show that the agreement is a usurious loan (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]).[2]

[2] The court observes that plaintiff's submission of the Agreement (NYSCEF Doc. No. 12) includes a separate document at the outset of the submission, styled "Letter of Intention," dated March 27, 2023 – two days prior to the execution of the Agreement on March 29, 2023 – which loosely refers to the anticipated cash advance as a "loan," and to a "maximum repayment period" of 42 weeks. However, that letter does not govern the analysis because the actual Agreement – executed subsequent to the date of the letter, contains an "Entire Agreement" clause (§ 5.9) which provides that the Agreement supersedes all prior agreements and understandings between the parties (*see, DuBow v Century Realty, Inc.*, 172 AD3d 622 [1st Dept 2019]; *Kindler v Newsweek, Inc.*, 277 AD2d 159 [1st Dept 2000]). As discussed in the text, the terms of the Agreement proper (without regard to the prior letter) comfortably fit within the Appellate Division's factors for determining the non-loan status of a particular merchant cash advance transaction under review.

Accordingly, the court grants plaintiff's motion for summary judgment insofar as moved against the corporate defendant, Zurcado Inc.

The Guaranty Cause of Action

As to its third cause of action asserted against the individual defendant, Tomas Garcia Ayabar Eduardo, plaintiff has failed to establish *prima facie* entitlement to summary judgment. There are contradictory guarantee provisions within the Agreement, raising a material issue of fact as to whether a meeting of the minds occurred concerning the scope of the guarantee (*Express Indus. & Terminal Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 ["To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms"] [citation omitted], *rearg denied* 93 NY2d 1042 [1999]).

On the one hand, the Agreement states that "any . . . breach of any of the express terms of this Agreement constitutes a material breach of this Agreement and that Seller and Guarantor agree to be jointly and severally liable to compensate Buyer, pursuant to the terms of this Agreement" (NYSCEF Doc. No. 12 at 7). On the other hand, the separately designated guarantee agreement, titled "Limited Personal Guarantee," expressly limits the guarantor's liability. It states that the guarantor (defendant Eduardo) is only liable upon the occurrence of certain enumerated events, called "Trigger Provisions," none of which includes nonpayment by Zurcado (*see*, NYSCEF Doc. No. 12 at 8).[3]

The issue whether the guarantor's liability encompasses "any breach" under one clause in the Agreement or is specifically limited to the precise conditions expressly enumerated in the

[3] Indeed, defendants' verified answer (NYSCEF Doc. No. 3 ¶¶ 12, 13) denies the complaint's allegations that Mr. Eduardo "agreed to pay the plaintiff for all amounts due and owing under the Agreement in the event of a breach of the Agreement by the Company" (NYSCEF Doc. No. 1 ¶¶ 12, 13).

"Limited Personal Guarantee" presents a triable issue of material fact. "The language employed in the contract is not susceptible of only one meaning, and thus the contract is ambiguous as a matter of law. . . ." (*Computer Assocs. Intl., Inc. v U.S. Balloon Mfg. Co.*, 10 AD3d 699, 700 [2d Dept 2004] [citation omitted].) Because plaintiff has not tendered sufficient evidence to eliminate a material issue of fact from the case – namely, the nature and scope of the guarantee – plaintiff cannot now demonstrate that it is entitled to judgment as a matter of law on its cause of action for breach of the guarantee (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The second cause of action seeks a recovery of plaintiff's attorneys' fees incurred in the course of its prosecution of this action pursuant to the terms of the Agreement (*see*, NYSCEF Doc. No. 12 § 4.10 ["Fees and Costs"]). Given the interlocutory posture of this case on account of the within denial of summary judgment as to defendant Eduardo, the court reserves determination on this cause of action until further proceedings relating to the liability, if any, of defendant Eduardo as a guarantor.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted as hereinafter delineated, as against defendant Zurcado Inc.; and it is further

ORDERED that the plaintiff's motion for summary judgment is denied, as against defendant Tomas Garcia Ayabar Eduardo; and it is further

ORDERED that defendants' affirmative defenses are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Oxea Capital LLC and against defendant Zurcado Inc. in the principal amount of $33,028.20, with interest on the said principal amount at the statutory rate from May 15, 2023, through entry

of judgment, as calculated by the Clerk, and continuing to so accrue thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that disposition of plaintiff's second cause of action for an award of attorneys' fees shall await further proceedings relating to the extent, if any, of defendant Tomas Garcia Ayabar Eduardo's liability as a guarantor of Zurcado Inc.'s obligations to plaintiff; and it is further

ORDERED that a preliminary conference will be convened on March 27, 2024, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

3/4/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE