

**Highland Hill Capital LLC v Muse Extension Lounge
LLC**

2024 NY Slip Op 31766(U)

May 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 520118/2023

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - PART 24

-----X
HIGHLAND HILL CAPITAL LLC,

Plaintiff,

-against-

MUSE EXTENSION LOUNGE LLC d/b/a MUSE
EXTENSION LOUNGE, JULIA WARD EXTENSIONS
LLC, and JULIA RAE WARD,

Defendants.
-----X

Motion Seq. #1 and 2

Index No. 520118/2023

DECISION/ORDER

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HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to Dismiss¹ and Notice of Motion for Summary Judgment², submitted February 5, 2024.

Papers	Numbered
Notice of Motion and Affirmation to Dismiss.....	1&2; 3 [Exh. 1]
Notice of Motion and Affirmation for Summary Judgment.....	1&2;3[Exh. 1-6]
Affirmation in Opposition.....	4 and 6; 5 and 6
Affirmation In Reply.....	7 [Exh.7-8]; 8[Exh. 7-10]
Memorandum of Law.....	4 and 6; 5 and 6

Plaintiff commenced this action to recover damages for breach of contract and breach of the personal guaranty against the defendants for a sum certain totaling, \$118,00.16. Plaintiff moves pursuant to CPLR §3211(a)(1) and (a)(7) to dismiss defendants' counterclaims based upon a defense founded upon documentary evidence and for failure to state a cause of action. Plaintiff also moves pursuant to CPLR §3212 for summary judgment in its favor against defendants. Defendants oppose both motions on the grounds that plaintiff has not met its prima facie burden in that it has failed to offer evidence in admissible form and is not relieved of its burden to prove its causes of action in its complaint.

The underlying action seeks damages based on an alleged breach of a purported Merchant Cash Advance Agreement entered into between the parties on or about April 11, 2023. Plaintiff alleges that pursuant to the Agreement, plaintiff purchased 27% of the defendants' total future accounts up to the sum of \$193,661.94, in exchange for an upfront purchase price of \$132,736.08 of the defendants, Muse Extension Lounge LLC d/b/a Muse

¹ . Motion Seq. #1

² . Motion Seq. #2

Extension Lounge, Julia Ward Extensions LLC and Julia Rae Ward. Pursuant to the Agreement, the future receipts had a value of \$182,393.05 which plaintiff purchased for \$121,262.00. The Agreement required Muse Extension Lounge LLC d/b/a Muse Extension Lounge, Julia Ward Extensions LLC, defendant company to pay plaintiff by ensuring that the sale proceeds and receivables were deposited into a designated bank account permitting plaintiff to electronically debit from said account 27% of the receivables, as a daily remittance of \$1,398.23, an amount which was deemed a good faith estimate of the purchased percentage of the defendants' average daily receivables, which would be credited toward the purchased amount. In addition, in connection with the Agreement, defendant, Julia Rae Ward, as guarantor, executed a Personal Guaranty of Performance. The defendant company delivered to plaintiff receivables totaling \$88,70.64, which plaintiff states leaves a balance due and owing of \$92,204.13.

In support of its motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), the plaintiff annexes a copy of the Merchant Cash Agreement with Guaranty, an affidavit by Andrew Versace, the COO of Highland Hill Capital LLC, the ACH transfer confirmation of plaintiff's payment to the defendant company, and a copy of a report of defendants' account. Mr. Versace, as plaintiff's COO, states in his affidavit in support of the motion to dismiss, that the defendant company performed some of its obligations under the contract up until July 11, 2023, when it failed to deliver receivables as agreed to in the contract, thereby defaulting. Mr. Versace states that the plaintiff was denied access to ACH debit when it was initiated on July 11, 2023, and received a bank return code indicating that the debit failed because the defendant company instructed its bank to stop the payment, which resulted in a default under the terms of the Agreement.

In opposition to plaintiff's motion to dismiss, the defendants' attorney argues that plaintiff is improperly utilizing CPLR 3211(b), as an end around to test the strength of its case, and that plaintiff must prove all elements of the cause of action in its summons and complaint to obtain a judgment against the defendants, not to disprove the defenses against itself and must met its burden by offering evidence in admissible form. Defendants argue that the plaintiff has not met its burden of establishing breach of contract.

In reply, plaintiff points out that its motion to dismiss is pursuant to CPLR 3211(a)(1) and (7), and annexes an accompanying affidavit made by Scott Federico, the plaintiff's Senior Funding Coordinator. In addressing defendants' allegation in its opposition that the plaintiff breached its contractual obligation by denying the defendant company's request for reconciliation, Mr. Scott states that he spoke with Julia Ward via telephone and on behalf of the plaintiff agreed to adjust the defendant company's daily remittances by reducing it by 50% from 1,398.28 to \$699.00 per day. Mr. Scott's affidavit annexed a copy of a confirmation email that was sent to Ms. Ward on July 7, 2023. (See, Exh. 8 NYSCEF Doc. No.46).

After careful consideration of the moving papers to dismiss and for summary judgment, opposition thereto and review of the documents, the court finds and follows:

First, the court notes, for accuracy, that plaintiff moves pursuant to CPLR 3211(a)(1) and (a)(7), as opposed to CPLR 3211(b), as argued in defendants' attorney's opposition

papers. In addition, plaintiff moves for summary judgment in its favor against the defendants.

When considering a motion to dismiss pursuant to CPLR § 3211, a pleading is to be afforded a liberal construction. The court must generally accept the facts as alleged to be true and afford them every possible favorable inference. *See, Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 45 N.Y.S.3d 276 (2016). Under CPLR 3211(a)(1), a motion to dismiss on the ground that a defense is founded on documentary evidence may be appropriately granted only where the documentary evidence offered utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *See, Ruffino v. Serio*, 206 A.D.3d 775, 167 N.Y.S.3d 823 (2nd Dept., 2022). Pursuant to CPLR 3211(a)(7), a motion to dismiss for failure to state a cause of action, a court need only determine whether the facts as alleged fit within a cognizable legal theory. *See, Edelman v. Berman*, 195 A.D.3d 995, 151 N.Y.S.3d 123 (2nd Dept., 2021). In the case at bar, the court finds that the plaintiff has satisfied its burden as required by CPLR 3211(a)(1) and (a)(7).

Defendant argues that the plaintiff is not relieved of its burden to prove its causes of action in its complaint, the alleged agreement is a loan with usurious interest and there are issues of fact which preclude dismissal and summary judgment.

Motion to Dismiss

Whether the agreement to purchase future accounts receivable is a loan with a usurious interest in excess of New York State's permitted civil rate (*see, Adler v. Marzario*, 200 A.D.3d 829, 155 N.Y.S.3d 337 (2nd Dept.,)), the language purporting to state its nature 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, 122 N.Y.S.3d 309 (2nd Dept., 2020). The court will look at whether the purchasing party is entitled to repayment under all circumstances, as unless a principal sum advanced is repayable absolutely, the transaction cannot be a loan. Three factors are usually weighed to determine whether the 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 recourse should the merchant declare bankruptcy. *See, L.G. Funding, supra*. In the case at bar, the agreement does not set a finite term for repayment. It indicates that Highland Hill Capital agreement is for estimated payments that could be debited at 27% of the merchant's receivable, but instead was being debited \$1,298.28 daily. In addition, the agreement provides a reconciliation clause which would allow for an adjustment of the percentage to reflect the actual future receipts more closely. The agreement also speaks to what would happen if the business went bankrupt, that the business would not owe anything to the buyer and would not be in breach of or default under the agreement. Accordingly, after considering the three factors above, as well as the context of the agreement in its entirety, the court finds the agreement is a valid agreement to purchase future accounts receivable, and not a disguised loan.

Furthermore, the court finds that the plaintiff established the essential elements of a breach of contract cause of action, to wit, the existence of a contract, the plaintiff's performance under the contract and the defendant's breach of the contract, and the resulting damages. See, Liberty Equity Restoration Corporation v. Park, 160 A.D.3d 628, 75 N.Y.S.3d 47 (2nd Dept., 2018).

Motion for Summary Judgment

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." See, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

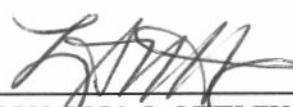
The court finds that the plaintiff has satisfied its burden in making a prima facie showing of its entitlement to summary judgment by submitting evidence showing defendants' default under the Contract and Guaranty. Defendants' claim that the agreement was misrepresented as an agreement to purchase receivables which defendant, Julia Rae Ward understood to be a loan, and that as guarantor, she was fraudulently induced into signing the contract is unpersuasive. As indicated above, the contract has been considered in its totality and is not a loan disguised as a purchase future accounts receivable and is therefore not usurious. See, Tender Loving Care Homes, Inc. v. Reliable Fast Cash, LLC, 76 Misc.3d 314, 172 N.Y.S.3d 335 (Sup. Court, Richmond Co., 2022). The defendants have failed to raise a triable issue of fact which would preclude summary judgment from being granted.

Accordingly, plaintiff's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is hereby granted in its entirety; summary judgment is granted in plaintiff's favor, and it is hereby

ORDERED, that judgment is granted in favor of plaintiff against the defendants, Muse Extension Lounge LLC d/b/a Muse Extension Lounge, Julia Ward Extensions LLC, and Julia Rae Ward, jointly and severally in the amount of \$118,000.16, with interest thereon from July 11, 2023, plus costs and disbursements.

This constitutes the decision and Order of this Court.

Dated: Brooklyn, New York
May 14, 2024


HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

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