SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
CLOUDFUND LLC,

DECISION AND ORDER

Plaintiff,

Index No.035714/2023
(Motion# 1-3)

-against-

PEREZ & RUIZ INSURANCE AGENCY LLC D/B/A PEREZ & RUIZ INSURANCE AGENCY and MARIOLGA RUIZ ARAUJO,

Defendants.
----------X
Sherri L. Eisenpress, J.

The following papers, electronically filed on the NYSCEF system as documents numbered 14-20 and 39-61, were considered in connection with (i) Defendants' Notice of Motion for an Order pursuant to CPLR § 503 and 511, changing the venue of this action from Rockland County to Kings County, or alternatively, pursuant to CPLR § 510(3), changing venue from Rockland County Supreme Court to New York County and to extend all discovery deadlines and issue a preliminary conference (Motion #1); (ii) Plaintiff's Notice of Motion, pursuant to Civil Practice Law and Rules § 3212, for summary judgment against defendants, in the amount of $17,754.00, plus pre-judgment interest at 9% from the date of the defendants' breach, October 19, 2023, to the date of entry of judgment, plus costs and disbursements, and dismissing Defendants' affirmative defenses (Motion #2); and (iii) Defendants' Notice of Cross motion for an Order, pursuant to CPLR § 2201, staying the action pending a decision in the action entitled People by Letitia James v. Yellowstone Capital LLC and denying Plaintiff's motion for summary judgment (Motion #3).

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiff filed a Summons and Complaint through the NYSCEF system on November 10, 2023, sounding in breach of contract with respect to a purchase and sales agreement entered into on August 30. 2023, with Defendants Perez & Ruiz Insurance Agency LLC d/b/a Perez & Ruiz Insurance Agency and Mariolga Ruiz Araujo (collectively referred to as "Defendants" or "Merchants"). Plaintiff purchased all rights to Merchant's future receivables having an agreed upon value of $15,000.00 ("Purchase Price) of its future business receivables/revenue to Plaintiff, for the sum of $22,350.00 ("Purchased Amount"), to be paid to Plaintiff from a percentage of Defendants' daily[1] revenue in the amount of $160.00.

Defendants filed an Answer with Affirmative Defenses on December 11, 2023 , in which they generally denied the allegations in the Complaint and asserted various affirmative defenses including that the contract fails to state a cause of action, is unconscionable, seeks excessive fees, violates the duty of good faith and fair dealing, seeks punitive attorney's fees, violates the doctrine of laches, plaintiff failed to mitigate damage, constitutes an unenforceable contract, intervening causes, assumption of risk, the court lacks subject matter jurisdiction, constitutes a usurious loan, failure to join a necessary party, lack of personal jurisdiction, unlawful practices and violation of fiduciary duty.

Change of Venue

Defendants move to change venue of this action from Rockland County to either Kings County or New York County. The basis of this request is that while Plaintiff's office is located in Rockland County, Plaintiff's attorney's office is located in Manhattan, 40 miles away and more than an hour drive[2]. Defendant claims that as a result of this fact, and

---

[1] Monday-Friday

[2] It is unclear whether Defendants are seeking to change venue based upon Plaintiff's counsel's location (initially in New York County but subsequently its substituted counsel is located in Nassau County) or Defendants' counsel's

notwithstanding that Defendants are located in the State of Florida, they will be denied their day in Court. They further assert that such a change in venue is warranted in the interests of justice. Lastly, Defendants assert that the forum selection clause is unreasonable and unjust.

In opposition to the motion, Plaintiff argues that Defendants' choice of counsel does not render the forum selection clause unjust or unreasonable and note that none of the cases relied upon by Defendants support this proposition. Plaintiff notes that the forum selection clause agreed to by the parties' permits Plaintiff to select any court sitting in New York ("Acceptable Forums") and that Defendants agreed that any "Acceptable Forum" was convenient and waived any and all objections to inconvenience of the venue.

The parties' agreement contains a forum selection clause as follows:

> Governing Law, Venue and Jurisdiction. This Agreement shall be governed by and construed exclusively in accordance with the laws of the State of New York, without regards to any applicable principles of conflicts of law. Any lawsuit action or proceeding arising out of or in connection with this Agreement shall be instituted exclusively in any court sitting in New Yor, (the "Acceptable Forums"). The parties agree that the acceptable Forums are convenient. And submit to the jurisdiction of the Acceptable Forums and waive any and all objections to inconvenience of the jurisdiction or venue.

"Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract." Brooke Group Ltd. v. JCH Syndicate 488, 87 N.Y.2d 530, 534, 640 N.Y.S.2d 479 (1996). "Such a forum selection clause is prima facie valid and enforceable 'unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all

---

location which he states is Queens County but who's address on the motion papers is in Kings County.

practical purposes be deprived of its day in court." Adler v. 20/20 Companies ,82 A.D.3d 918, 919 N.Y.S.2d 38, 39 (2d Dept. 2011).

Defendants' application for a change of venue is denied. Defendants' have not shown that the forum selection clause is unreasonable, unjust or in contravention of public policy. Plaintiff's business headquarters are located in Rockland County and Defendants were free to select a more local attorney if their attorney was unwilling or unable to travel and it is not unusual for attorneys located in New York City to attend Court in Rockland County.

Application for a Stay

Defendants also move for a stay of this action, pursuant to CPLR § 2201, pending a decision in an action entitled People by Letitia Mames v. Yellowstone Capital, which seeks to have respondents in that action permanently enjoined from participating in the type of agreement at issue-merchant cash advances and/or purchases of receivables. Cloudfund LLC is a Respondent in that action. In opposition to the cross-motion, Plaintiff argues that there is no basis for a stay because the instant case pertains to an Agreement executed in August, 2023 and the aforementioned Petition pertains to alleged practices up to and including August, 2022. Plaintiff further notes that the Attorney General is not the legislature and does not make the law. Accordingly, regardless of the outcome of that proceeding, case law in this State currently holds that agreements such as the one at issue are legally recognized and enforceable. Here, while the Court is certainly cognizant of the issue these types of agreements raise, the law at present is that they are enforceable, and the Petition in the other matter does not justify the issuance of a stay.

Summary Judgment

Plaintiff moves for summary judgment on its breach of contract claim and submits an affidavit from Kevin Ganesh, Authorized Account Representative for Plaintiff

Cloudfund LLC assigned to the transaction at issue, to lay a foundation for the admission of various business records including the contract, a transaction history and proof of funding. Mr. Ganesh attests that he has personal knowledge of the facts set forth by virtue of his supervisory role on this transaction and "actual involvement in underwriting and servicing of this transaction for Plaintiff." He further attests that he has personal knowledge of the business records annexed to the motion, the record keeping practices and the information contained in the documents as a result of his supervisory role and actual involvement in the transactions. Acts and occurrences.

Plaintiff asserts that the parties entered into the Agreement on August 30, 2023. On August 30, 2023, it performed its part of the Agreement by depositing $3,500 to the Merchant in accordance with the Merchant's instructions. $450 was paid toward due diligence and origination fees and $11,500 was paid toward a prior balance owed by the Defendants to Cloudfund on a prior contract, as specifically referenced in the Agreement. After Cloudfund paid the Purchase Price, the Merchant partially performed its part of the Agreement between August 31, 2023, and October 19, 2023, permitting Cloudfund to collect $4,596.00 of the total purchased amount of $22,350.00, leaving an ending balance of $17,754.00. Plaintiff asserts that the Agreement was breached on October 20, 2023, when they blocked Plaintiff's access to the designated receivables deposit account. Plaintiff notes that the Agreement was personally guaranteed by Defendant Mariolga Ruiz Araujo. Plaintiff seeks interest from the date of breach on October 20, 2023, but does not seek attorney's fees or default fees.

Defendants oppose the summary judgment motion and argue that the Affidavit of Kevin Ganesh fails to lay a proper foundation for any business records. They also argue that the loan is usurious as a matter of law and therefore void. Lastly, Defendants assert that the motion is premature because depositions have not taken place.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

As an initial matter, the Court finds that the affidavit of Kevin Ganesh, an Authorized Account Representative for Cloudfund who avers that he had actual involvement in underwriting and servicing this transaction for Plaintiff, establishes the requisite foundation for the admission of the attached business records. There is no requirement that a plaintiff rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518 (a), and the records themselves actually evince the facts for which they are relied upon. Citigroup v Kopelowitz, 147 AD3d 1014, 1015 (2d Dept 2017).

The three foundation requirements for admission of a business record are: (i) the record must be made in the regular course of business-reflecting a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the

business; (ii) it must be the regular course of business to make the record-in other words, the record was made pursuant to established procedures for the routine, habitual, systematic making of such a record; and (iii) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made. People v. Cratsley, 86 N.Y.2d 81, 89, 629 N.Y.S.2d 992 (1995). Here, Plaintiff's affidavit satisfies the foundational requirements.

The essential elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." Liberty Equity Restoration Corporation v. Park, 160 A.D.3d 628, 630, 75 N.Y.S.3d 47 (2d Dept. 2018). Here, Plaintiff has established its prima facie entitlement to summary judgment on its breach of contract cause of action. There is no dispute that the parties entered into a contract; Plaintiff deposited the initial monies into Defendants' account; Defendants' failed to pay the full amount of monies owed pursuant to the contract and/or otherwise comply with the notice provisions; and Plaintiff was damaged as a result of the breach. Plaintiff demonstrated its entitlement to summary judgment by virtue of the contract, Affidavit of Kevin Ganesh and the transaction history.

In opposition thereto, Defendants have not demonstrated a triable issue of fact sufficient to deny summary judgment. Defendants have made no showing that the transaction was entered into due to fraud or duress. Nor is the Agreement considered to be a loan. In New York, there is a presumption that a transaction is not usurious and as a result, claims of usury must be proven by clear and convincing evidence, a much higher standard than the usual preponderance. Giventer v. Arnow, 37 N.Y.2d 305, 372 N.Y.S.2d 63, 67 (1975). Significantly, usury laws apply only to loans or forbearance, not investments. NY Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op.

50310(u)(Sup Ct. Westchester County 2018). Thus, if the transaction is not a loan, there can be no usury, however unconscionable the contract may be. Id.; Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d 735, 744, 586 N.Y.2d 240 (1992).

Whether a transaction constitutes a usurious loan requires the agreement to 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." Ujueta v. Euro-Quest Corp., 29 A.D.3d 895, 814 N.Y.S.2d 551 (2d Dept. 2006). In determining whether a transaction is a loan or not, the Court must examine whether or not defendant is absolutely entitled to repayment under all circumstances. K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc.3d 807, 57 N.Y.S.3d 625, 632 (Sup. Ct. Westchester County 2017). "For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." Id.; Rubenstein v. Small, 273 App.Div. 102, 104, 75 N.Y.S.2d 483 (1st Dept. 1947). Hence, there can be no usury unless the principal sum advanced is repayable absolutely. Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op. 50310(u)(Sup Ct. Westchester County 2018). When payment or enforcement rests on a contingency, the agreement is valid though it provides for a return in excess of the legal rate of interest. Id.

Purchases and sales of future receivables and sales proceeds are common commercial transactions expressly contemplated by the Uniform Commercial Code. NY Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A), 2018 N.Y. Slip Op. 50310(u)(Sup. Ct. Westchester County 2018). Id. Lower Courts addressing such agreements have considered and rejected similar arguments as have been made here and found that the agreements to purchase receivables were not loans. See Ibis Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071, 2017 N.Y.Slip Op. 30477(u)(Sup. Court, Nassau County 2017); Capital Asset Corp., v. F & B Fuel Oil Co., Inc., 58 Misc.3d 1229(A),

2018 N.Y. Slip Op. 50310(u)(Sup Ct. Westchester County 2018); Rapid Capital Finance, LLC v. Natures Market Corp., 66 N.Y.S.3d 797, 2017 N.Y.Slip Op. 27340 (Sup. Ct. Westchester Co. 2017); K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc.3d 807, 57 N.Y.S.3d 625, 632 (Sup. Ct. Westchester County 2017). Here, the Agreement does not have a specified time for repayment and the daily amounts to be received are contingent in nature. Therefore, considering the Agreement itself, and the factors which various Courts have considered when determining whether an agreement is a loan, this Court finds that the Agreement at issue is not a loan subject to charges of usury, as the law currently exists. Therefore, Defendant is entitled to $17,754.00 (the balance remaining on the contract) plus statutory interest at 9% from the date of the breach to wit: October 20, 2023.

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion to change venue (#1) is DENIED in its entirety, and it is further

ORDERED that Plaintiff's Notice of Motion (#2) for summary judgment against defendants is GRANTED to the extent set forth herein; and it is further

ORDERED that Plaintiff may enter judgment against Defendants jointly and severally in the amount of SEVENTEEN THOUSAND SEVEN HUNDRED FIFTY-FOUR DOLLARS AND 00/100 CENTS ($17,754.00) plus pre-judgment interest at 9% from October 20, 2023, to the date of entry of judgment, with costs and expenses as taxed by the Rockland County Clerk, without further leave of Court; and it is further

ORDERED that Defendants' Notice of Cross-Motion (#3) for a stay is DENIED in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motions #1-3.

Dated: New City, New York
May 29, 2024

HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO: (All parties via NYSCEF)