

**Pinnacle Bus. Funding LLC v Muharib**

2024 NY Slip Op 32629(U)

July 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 504416/2023

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 18<sup>th</sup> day of July 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF  
NEW YORK COUNTY OF KINGS

-----X  
PINNACLE BUSINESS FUNDING LLC,

Index No: 504416/2023

Plaintiff,

-against-

**ORDER**

ANTHONY S. MUHARIB D/B/A ONLINE BONDS  
and ANTHONY S. MUHARIB,

Defendants.  
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**The following NYSCEF Docs. # were considered herein:**

**NYSCEF Nos.:**

Notice of Motion/Affirmation in Support/Affidavits Annexed  
Exhibits Annexed/Reply  
Affirmation in opposition/Affidavits Annexed/Exhibits Annexed

22-23; 28  
24-26, 29-32  
35-39

In this action, Pinnacle Business Funding LLC (“Plaintiff”) moves for an order (Motion Sequence No. 2) dismissing Anthony S. Muharib d/b/a Online Bonds and Anthony Muharib’s (Collectively, “Defendants”) affirmative defenses and for summary judgement pursuant to CPLR 3212. Plaintiff further seeks to amend the caption of this action to name “Pinnacle Business Funding LLC d/b/a Pinnacle Business Funding NY LLC” as Plaintiff. Defendants have opposed the motion.

This matter arises out of a contractual dispute between Plaintiff and Defendants. In a Standard Merchant Cash Advance Agreement (“the Agreement”) Plaintiff purchased \$112,425 (the “Purchase Price”) in receivables from Defendants for an upfront Purchase Price of \$75,000. Twenty percent of the receivables were to be delivered to Plaintiff until the Purchase Price was paid in full. Pursuant to the Agreement, Defendant Anthony S. Muharib personally guaranteed that the Company Defendant would perform its obligations thereunder and that he would be personally liable for any loss suffered by Plaintiff as a result of certain breaches by Company Defendant.

In support of its motion, Plaintiff argues it is entitled to summary judgement because it has demonstrated that it has (1) fully performed its obligations under the contract, (2) established the existence of a guarantee by Muharib and (3) established that Defendants defaulted in the performance of their obligations. Plaintiff alleges that pursuant to the Agreement, Company Defendant agreed to use one bank account approved by Plaintiff from which Company Defendant authorized Plaintiff to make daily ACH withdrawals until the Purchase Price was fully paid to Plaintiff. Plaintiff claims that it remitted the necessary funds to Company Defendant in full satisfaction of its obligations, but on October 5, 2022, Defendants blocked Plaintiff's access to the account and prevented Plaintiff from making the agreed upon ACH withdrawals, which is a default pursuant to the Agreement. Plaintiff asserts that Defendants made payments totaling \$24,273.00, leaving a balance of \$88,152.00. Additionally, Plaintiff contends that Defendants' affirmative defenses must be dismissed on the grounds that they fail as a matter of law.

In opposition, Defendants argue that Plaintiff's motion should be denied for lack of subject matter jurisdiction. Defendants also argue that the Agreement between the parties was actually a usury loan in violation of New York law. Additionally, Defendants claim that Plaintiff has no right to any default fee.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgement as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 310 [1986]). The party moving for summary judgment must present a prima facie case of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* CPLR 3212 [b]; *Smalls v AJI Industries, Inc.*, 10 NY3d 733, [2008]; *Alvarez*, 68 NY2d at 324).

To establish a prima facie case for breach of contract, the plaintiff must demonstrate (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach (*Junger v John v. Dinan Assoc., Inc.*, 164 A.D.3d 1428 [2d Dept 2018]).

Under CPLR 4518, writings or records made as a record of an act, transaction, occurrence or event are admissible in evidence in proof of that act, transaction, occurrence, or event, if made in the regular course of a business. In this matter, Plaintiff submits an affidavit from Ari Bregin.

Ari Bregin notes that he supervises underwriting and collections for Pinnacle and is the keeper of

Pinnacle's business records. Ari Bregin further notes that he participated in the transactions at issue in this lawsuit and has personal knowledge of Pinnacle's record keeping practices.

In the affidavit, Ari Bregin recounts the dispute and lays out a prima facie case for breach of contract. Ari Bregin states that by standard merchant cash advance agreement, Pinnacle purchased \$112,425 in Receivables from Merchant for an upfront Purchase Price of \$75,000. Reference is made to the Agreement (see NYSCEF Doc. 6). Ari Bregin next states that Pinnacle performed its obligations under the Merchant Agreement by remitting the Net Funds provided in cash to Merchant. Reference is made to the Remittance History (see NYSCEF Doc. 25). Further, Ari Bregin states that upon receiving the Net Funds Provided, Merchant remitted only \$24,273 to Pinnacle against the Receivables Purchased Amount, leaving a balance due and owing of \$88,152. Ari Bregin notes that as of October 5, 2022, Merchant simply ceased performing under the Merchant Agreement, for Merchant remitted no further receivables to Pinnacle, and all attempts to auto-debit the Specified Percentage from the Account were unsuccessful and rejected by Merchant's bank, in part, due to a stop payment placed on Pinnacle's ACH debits. Based on the foregoing, it is determined that the defendants have breached the Agreement.

Defendants raised several affirmative defenses in their answer. CPLR 3211(b) provides that a party may move for judgement dismissing one or more defenses, on the ground that a defense is not stated or has no merit. When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law because they either do not apply under the factual circumstances of the case, or fail to state a defense (*Lewis v US Bank National Association*, 186 AD3d 694 [2d Dept. 2020]; *Shah v Mitra*, 171 Ad3d 971 [2d Dept 2019]). On a motion pursuant to CPLR 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211(a)(7), and the factual assertions of the defense will be accepted as true.

Here, Defendants assert nine affirmative defenses in their Answer, namely breach of contract, illegal contract, illusory contract, lack of subject matter jurisdiction, the contract caused its own breach, criminal usury, unconscionability/adhesion contract, unenforceable default fee, and Broker/ISO. However, each affirmative defense is merely stated in a conclusory fashion without any factual allegations or details to support the defenses (*see* CPLR 3013, 3018). While a party may remedy any defects in a pleading by submitting evidence in opposition to a motion to

dismiss (*see Lewis*, 186 AD3d at 697; *Benjamin v Yeroushalmi*, 178 AD3d 650 [2d Dept 2019]), Defendants have failed to do so.

Accordingly, the branch of Plaintiff's motion to dismiss Defendants' Affirmative Defenses pursuant to CPLR 3211(b) is granted.

Plaintiff further requests that the caption be amended to reflect Pinnacle Business Funding LLC d/b/a Pinnacle Business Funding NY LLC as the nominal Plaintiff. Leave to amend pleadings should be freely given (CPLR 3025 [b]) and in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*Lucido v. Mancuso*, 49 AD3d 220, 222 [2d Dept. 2008]; *Nationstar Mtge., LLC v Grunwald*, 203 AD3d 1170 [2d Dept. 2022]).

Pinnacle initially commenced this action naming Pinnacle Business Funding LLC as the plaintiff. Pinnacle later established that it is authorized to do business in New York as Pinnacle Business Funding NY LLC. In Defendants' prior motion (Motion Sequence No. 1), this Court held "while the issue of contracts or transactions entered into under the real and not the fictitious name has not generally been discussed in caselaw, in the majority of cases which have addressed the validity and enforceability of contracts and transactions entered into with personas who use fictitious name instead, if no harm or injury resulted to the other party from this fact, then non-compliance does not defeat recovery" (NYSCEF Doc. 16; *see also Mendelberg Aff. at Ex. D*, p.3 (citing case law). Further, Defendants never addressed this aspect of Plaintiff's motion.

Defendant's memorandum in opposition again asserts that this case lacks subject matter jurisdiction. In motion sequence number 1, Defendants also argued that the Court lacked subject matter jurisdiction on the grounds that Plaintiff was a foreign corporation not authorized to do business in New York. The Court denied Defendants' motion, and held that, under Limited Liability Law § 808, there is subject matter jurisdiction.

Defendant also argues that that agreement constitutes a criminally usurious loan. "The rudimentary element of usury is the existence of a loan or forbearance of money, 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 AD3d at 754, N.Y.S.3d 325 [2d Dept 2022]; *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 Ad3d 664, 122 N.Y.S.3d 309 [2d Dept 2020]). "To determine whether a transaction constitutes a usurious loan, it 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" (*LG Funding*, 181 Ad3d at 664 [internal quotation marks omitted]).

"The court must examine whether the plaintiff is absolutely entitled to [\*15] repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. 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 recourse should the merchant declare bankruptcy" (*id.*).

Here, the court initially notes that the Agreement explicitly states: "the transaction encompassed by this Agreement is not a loan" and that Merchant and Company Defendants are not borrowing money from Plaintiff. While not dispositive, other factors demonstrate that the Agreement here was a merchant agreement and not a loan. Specifically, the terms of the Agreement contain a reconciliation provision which allows for adjustments to the payments made by Merchant Defendant to plaintiff (*see Principis Capital*, 201 AD3d at 754). As the amount of the payments could change, the terms of the Agreement were not finite (*id.*). Here, the Agreement allows Defendant to request that Plaintiff "conduct a reconciliation in order to ensure that the amount that [Plaintiff] has collected equals the Specified Percentage of Merchant(s)'s Receivables under this Agreement." Thus, as the amount of the Daily Remittance could change, the term of the Agreement was not finite (*id.*). Further, the agreement explicitly states "Any Merchant going bankrupt or going out of business or experiencing a slowdown in business or a delay in collecting Receivables will not on its own without anything more be considered a breach of this Agreement."

The fact that the Agreement contains a personal guarantee authorizing Plaintiff to collect from guarantor Muharib does not indicate that the Agreement was a loan. In *Principis Capital*, a case which dealt with an alleged breach of contract of a substantially similar future receivables agreement which contains a similar reconciliation agreement provision, as well as a personal guarantee, was held to be a merchant agreement rather than a loan. The Second Department ruled that the company defendant failed to raise a question of fact on summary judgment as to whether the agreement was a loan (*see Principis Capital*, 201 Ad3d at 754-755). In sum, the totality of the evidence fails to demonstrate that the Agreement was a usurious loan.

Finally, Defendant’s last arguments address the default fees. However, in the reply affirmation, Plaintiff notes that “Pinnacle is not seeking default or attorneys’ fees on its summary judgment motion. It is only seeking the contractual balance.” Therefore, this point is moot.

Accordingly, it is hereby

ORDERED, that (1) Plaintiff is granted summary judgment on its Complaint pursuant to CPLR 3212(a) against the Defendants, jointly and severally, in the amount of \$88,152.0, with interest thereon at 9% per annum from October 5, 2022; (2) ordered that Defendants’ Affirmative Defenses are dismissed; (3) ordered that the caption of this action is amended as follows:

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PINNACLE BUSINESS FUNDING LLC  
D/B/A PINNACLE BUSINESS FUNDING NY LLC,

Index No: 504416/2023

Plaintiff,

-against-

ANTHONY S. MUHARIB D/B/A ONLINE BONDS  
and ANTHONY S. MUHARIB,

Defendants.

-----X

All other issues not addressed herein are either without merit or moot.  
This constitutes the decision and order of the Court.

Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**