SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8
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FIJI FUNDING,

Plaintiff, Decision and order

- against - Index No. 505256/2024

THE ACADEMY AT PENGUIN HALL, INC, MARTINS CONSTRUCTION and MARY B MARTIN,

Defendants, August 6, 2024
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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

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 defendants have opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On April 20, 2023, the plaintiff a merchant cash advance funding provider entered into a contract with defendants, a girls preparatory high school in Massachusetts. Pursuant to the agreement the plaintiff purchased $721,645 of defendant's future receivable for $505,000. The defendant Mary Martin guaranteed the agreement. The plaintiff asserts the defendants breached the agreement on January 24, 2024 by preventing the withdrawal of a daily remittance. Thus, the plaintiff asserts the defendants paid $174,951 and now owe $685,867.50. 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.

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 business record exception to the hearsay rule is codified in CPLR §4518. Essentially, there are three foundational requirements which must be satisfied before any part of a business record may be admitted. Thus, it must be demonstrated that the record was made in the regular course of business, that it was the regular course of business to make such a record and that the record was made close in time to the act or transaction or occurrence (CPLR 4518(a), People v. Kennedy, 68 NY2d 569, 510 NYS2d 853 [1986]). Thus, the proponent must establish the records contain routine and regularly conducted business activity that is necessary for the performance of the business's

functions, there are procedures for the habitual and systematic making of such records and that the records are made close in time to the event to insure accuracy (Kennedy, supra).

Moreover, in addition to the above foundational requirements "a proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (Citibank N.A. v. Cabrera, 130 AD3d 861, 14 NYS3d 420 [2d Dept., 2015]). Further, the actual business records substantiating the default must be submitted (U.S. Bank National Association v. Kahn Property Owner LLC, 206 AD3d 850, 168 NYS3d 349 [2d Dept., 2022]). Thus, where a party introduces evidence of the existence of outstanding balances, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept., 2012]). In this case, the plaintiff submitted the affidavit of Moshe Greenes a manager of the plaintiff who stated that he reviewed the plaintiff's records in connection with the loan extended in this case. He further stated that all the documents he reviewed were maintained in the regular course of business and all such records were made near their occurrence. Mr. Greenes stated that the "records were made at or near the time of occurrence of the matters set forth by, or from information transmitted by, a person with knowledge

of those matter [sic]" and that he is "responsible, among other duties, to maintain documents and records relating to accounts that are in active litigation or collections" and that he has "personal knowledge relating to how records are maintained, including but not limited to, business records related to Defendants" (see, Affidavit of Moshe Greenes, ¶¶10, 11, 12 [NYSCEF Doc. No. 7]). Thus, the plaintiff has established the admissibility of the records relied upon since Mr. Greenes had knowledge of the plaintiff's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017]). Thus, in American Funding Services v. T.N. Eldridge Developments LLC, 2023 WL 8357446 [Supreme Court New York County 2023] the court concluded the manager "reviewed the records of the Plaintiff, and he has knowledge about how the records are kept and maintained. He also indicated that the documents he is relying on were made in the ordinary course of business" (id). Those assertions were sufficient to consider the records properly admitted as business records.

Likewise, in this case Mr. Greenes has submitted an affidavit which avers he is fully familiar with the records in this case, that the records are kept in the ordinary course of business and that the records were made near the time of the occurrence. Thus, the plaintiff has adequately presented sufficient evidence the defendant has failed to make the required

payments. The defendants argue that the affidavit of Mr. Greenes is insufficient because although he stated that "plaintiff's business records are maintained in Plaintiff's systems and it is Plaintiff's standard business practice to record and maintain all records within Plaintiff's systems" he did not explain the system to which he referred. However, that is not a valid basis upon which to raise any questions of fact. The plaintiff has adequately satisfied all the elements necessary to submit the statements establishing the defendants have failed to satisfy their obligations pursuant to the merchant agreement.

The defendants further 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 request that FF conduct a reconciliation in order to ensure that the amount that FF has collected equals the Specified Percentage of Merchant(s)'s Receivables under this Agreement" (see, Standard Merchant Cash Advance Agreement, ¶4 [NYSCEF Doc. No. 2]).

The defendants argue that the reconciliation provision is invalid because the reconciliation provision was not mandatory. However, there is no basis to assert the reconciliation provision in this case was discretionary. It is true that discretionary language has been held insufficient to permit reconciliation and consequently those agreements were really loans (see, McNider Marine LLC v. Yellowstone Capital, 2019 N.Y. Misc. LEXIS 6165 [Supreme Court Erie County 2019]). As noted, a careful examination of the provision demonstrates the merchant "may" seek reconciliation, however, there is no such discretion on the part of the plaintiff, wherein such reconciliation is obligatory. Thus, the language in the agreement in this case states that when the merchant provides notice of a need to adjust the daily remittance the plaintiff "will complete each reconciliation requested by any Merchant within two business days after receipt of proper notice of a request for one accompanied by the information and documents required for it" (supra). Further, the agreement states that "if a reconciliation determines that FF

collected more than it was entitled to, then FF will credit to the Account all amounts to which FF was not entitled" (supra). Thus, the reconciliation provision is valid.

The defendant next argues the bankruptcy provision provides recourse in case the defendant declares bankruptcy. The agreement merely states that the merchant "represents, warrants, and covenants that as of the date of this Agreement, it does not contemplate and has not filed any petition for bankruptcy protection under Title 11 of the United States Code" and that the merchant does not anticipate filing any such bankruptcy petition (see, Standard Merchant Cash Advance Agreement, ¶27 [NYSCEF Doc. No. 2]). Thus, the agreement is valid in this regard.

Further, there is no argument the agreement does not contain a definite term. The specific daily remittence does not mean the agreement contains time-constricted payment obligations. As noted, the reconciliation provision resolves this question.

The defendants next argue that the acceleration provisions of the agreement, whereby a breach of any nature makes the total amount immediately due demonstrates the agreement is really a loan and hence usurious. First, there are no cases that hold the existence of an acceleration clause means the agreement is somehow invalid. Specifically, any acceleration clause does not mean the agreement was not contingent.

Thus, there have been no questions of fact presented

concerning the validity of the agreement. Therefore, based on the foregoing, the motion seeking summary judgement is granted. However, questions have been raised concerning the amount already paid and the amount owed. The parties will be notified of a hearing before a judicial hearing officer where these issues will be resolved.

So ordered.

ENTER:

DATED: August 6, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC