Fresh Funding Solutions, Inc. v Tru Realty LLC
2024 NY Slip Op 32777(U)
June 26, 2024
Supreme Court, New York County
Docket Number: Index No. 653776/2022
Judge: Nicholas W. Moyne
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NICHOLAS W. MOYNE — *Justice* **PART** **41M**

---X

FRESH FUNDING SOLUTIONS, INC.,

Plaintiff,

- v -

TRU REALTY LLC,SARAH KIRSCH RICHARDSON

Defendant.

---X

INDEX NO. 653776/2022

MOTION DATE 04/24/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

This is an action by the plaintiff, Fresh Funding Solutions, Inc. ("Fresh Funding" or "plaintiff"), to recover for damages arising out of a merchant breach of a sale agreement and a breach of guaranty allegedly sustained on or about August 22, 2022, when defendants, Tru Realty LLC ("Tru Realty") and Sarah Kirsch Richardson ("Richardson"), (collectively "defendants"), without demonstrating hardship or an Overage through a Reconciliation Notice as required under the Sale Agreement, ceased remitting any portion of the Monthly Percentage or any Future Receipts to Fresh Funding and placed a stop payment (R29) on the ACH Authorization provided to plaintiff for the Approved Account.

Fresh Funding now moves for an order, pursuant to CPLR§ 3212, granting summary judgment on the plaintiff's first and second causes of action, and CPLR § 3211(b), granting dismissal of the defendants' affirmative defenses on the grounds that they lack merit. This motion is unopposed and for the reasons set forth below, the motion is granted.

Background:

On May 12, 2022, Fresh Funding entered into a sale agreement ("Sale Agreement") with defendant Tru Realty as the Merchant and with defendant Richardson identified as the Principal of the Merchant and as guarantor (*see* NYSCEF Doc. No. 14). Pursuant to the Sale Agreement, Fresh Funding purchased $130,150.00 (the "Amount Sold") in Future Receipts from Tru Realty for a purchase price of $95,000.00 (the "Purchase Price"), less disclosed processing fees (*Id.*). Future Receipts are defined as "Merchant's future accounts and contract rights to all payments to be made in any form arising from or related to the sale of goods and/or services to Merchant's customers" (*Id.* ¶ 1). Under the terms of the Sale Agreement, Tru Realty was required to remit 25% of its monthly Future Receipts (the "Monthly Percentage") until Fresh Funding had received the Amount Sold in full (NYSCEF Doc. No. 13 ¶ 6). On an interim basis, Tru Realty agreed to remit $2,711.00 per week to Fresh Funding (the "Collected Amount") and agreed to deposit all funds arising from Future Receipts into an Approved Account (*Id.*). Accordingly, Tru Realty executed an Authorization Agreement for Direct Deposits ("ACH") authorizing Fresh Funding to ACH debit the Collected Amount from the Approved Account (NYSCEF Doc. No. 14 ¶¶ 15; 16). The Sale Agreement included both mandatory reconciliation and adjustment provisions, ensuring that the Monthly Percentage ultimately governed over the Collected Amount (*Id.* at 5-6). As owner and Principal of the Merchant Tru Realty, Richardson guaranteed the Sale Agreement (*Id.* at 17). Therefore, Richardson assumed the obligations of, and jointly and severally guaranteed the truth, accuracy, and completeness of all the representations, warranties, and covenants in the Sale Agreement (*Id.*).

The Sale Agreement identified several instances that would constitute a breach, including but not limited to Tru Realty's revocation or termination of the ACH Authorization, placing a

block on the Approved Account, and/or breaching any provision of the Sale Agreement (NYSCEF Doc. No. 14 ¶¶ 5, 20; at 16). Tru Realty initially remitted $37,960.00 in Future Receipts to Fresh Funding (*see* NYSCEF Doc. No. 15). However, Fresh Funding alleges that on or about September 1, 2022, without demonstrating hardship or an Overage through a Reconciliation Notice as required under the Sale Agreement, Tru Realty ceased remitting any portion of the Monthly Percentage or any Future Receipts and placed a stop payment (R29) on the ACH Authorization for the Approved Account (*see* NYSCEF Doc. No. 13). Subsequently, plaintiff commenced this action, naming both Tru Realty and Richardson as defendants, and asserting claims sounding in breach of contract and arising out of the defendants' alleged breach of the Sale Agreement.

Discussion:

CPLR § 3212

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion must also demonstrate, *prima facie*, that the affirmative defenses raised by the opposing party are inapplicable (*S. Nassau Med. Group, P.C. v 105 Rockaway Realty, LLC*, 208 AD3d 812, 814 [2d Dept 2022]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff has established that defendants breached the contract.

Fresh Funding is asserting claims of breach of contract, specifically merchant breach of a sale agreement, arising out of the defendants' alleged failure to perform under the terms of the

Sale Agreement. The elements of a breach of contract claim are (1) the existence of a valid contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; (4) and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Therefore, to make out a *prima facie* case on a breach of contract claim and demonstrate entitlement to summary judgment, the plaintiff must establish all the required elements of the claim (*Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]).

Fresh Funding has sufficiently met its *prima facie* burden, warranting summary judgment on the breach of contract claim. Plaintiff has established the existence of a valid contract, the Sale Agreement, provided in Exhibit A, which was entered into by plaintiff and defendants on May 11, 2022 (*see* NYSCEF Doc. No. 14). Additionally, through the Affidavit of Mark Deeter, Asset Manager of Fresh Funding, and as shown in the Remittance History provided in Exhibit B, plaintiff has established that it performed under the terms of the Sale Agreement by means of payment of the purchase price (NYSCEF Doc. No. 13 ¶ 18; NYSCEF Doc. No. 15; *Bethpage Fed. Credit Union v Bouzaglou*, 183 AD3d 541, 542 [1st Dept 2020] [affidavit based upon documentary evidence is sufficient to comply with the requirement of personal knowledge]). Fresh Funding has adequately established Tru Realty's breach of the Sale Agreement. The breach is evidenced by Tru Realty failing to remit the Monthly Percentage after September 1, 2022, without requesting a reconciliation or adjustment, or demonstrating that either were warranted because it ceased generating business receipts, as required under the Sale Agreement (*see* NYSCEF Doc. No. 13; 15). Plaintiff has established that as a result of defendants' breach, it has been damaged in the amount of the unpaid Amount Sold. As per the terms of the Sale Agreement, in the event of any such breach, "[plaintiff] shall be entitled to all remedies available

under law," including "damages equal to the Amount Sold less the amount of funds arising from Future Receipts received by [plaintiff]" (NYSCEF Doc. No. 13 ¶¶ 12-13, 20-22; No. 14 p. 10, ¶ 20). Therefore, plaintiff has established its *prima facie* entitlement to judgment as a matter of law insofar as it has demonstrated a breach of contract claim based on defendant Tru Realty LLC's breach of the Sale Agreement. As there was no opposition, the motion for summary judgment on this claim may be granted.

Plaintiff has established that defendants' affirmative defenses are inapplicable in this action.

In their answer, defendants listed eleven affirmative defenses, claiming the defenses were applicable "to all causes of action" (*see* NYSCEF Doc. No. 4). It is well settled that "a party cannot employ a catch-all provision in an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party" (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015]). "[N]either plaintiff nor the court ought to be required to sift through a boilerplate list of defenses, or 'be compelled to wade through a mass of verbiage and superfluous matter,' to divine which defenses might apply to the case" (*Id.* at 79; quoting *Barsella v City of New York*, 82 AD2d 747, 748 [1st Dept 1981]).

Therefore, while defendants' answer sets forth several affirmative defenses; none are supported by any allegations or evidentiary support to establish their applicability to the claims in this case (*see* NYSCEF Doc. No. 4 ¶¶ 27-38). Considering, defendants' list of affirmative defenses consists of merely vague or boilerplate language that not only were inadequately pled but is predominately a laundry list of defenses that are inapplicable. Therefore, aside from the few plausible or relevant defenses discussed in more detail below, the remainder of defendants' affirmative defenses may be dismissed.

Plaintiff has established that defendants' jurisdiction defense is deficient as a matter of law.

Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum that will resolve any disputes over the interpretation or performance of the contract (*Brooke Group v JHC Syndicate 488*, 87 NY2d 530, 534 [1996]). Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements (*Id.*). It is well settled that parties to an agreement may consent to submit to the jurisdiction of a court that would otherwise not have personal jurisdiction over them (*Banco do Commercio e Industria de Sao Paolo, S.A., v Esusa Engenharia e Construccoes, S.A.*, 173 AD2d 340, 341 [1st Dept 1991]).

The Sale Agreement states, in clear and unequivocal language, that jurisdiction and venue would be proper in the State of New York, County of New York (*Haag v Barnes*, 9 NY2d 554, 559-60 [1961] [finding that "while the parties' choice of law is to be given considerable weight, the law of the jurisdiction with the 'most significant contacts' is to be applied"}. The parties therefore consented to jurisdiction and venue being proper in New York when all parties signed the Sale Agreement (NYSCEF Doc. No. 14 ¶ 11). Further, both parties had significant contacts relating to the Sale Agreement as Fresh Funding's principal place of business is located in New York, and the Collected Amount was directed there by defendants (*see* NYSCEF Doc. No. 14). Therefore, as the applicability of the defense is flatly contradicted by the terms of the signed Sale Agreement, Fresh Funding has demonstrated they are entitlement to summary judgment and dismissal of the personal jurisdiction defense.

Plaintiff has established that defendants' usury defense fails as a matter of law because it is contradicted by the Sale Agreement and appellate authority.

Sale Agreement

Fresh Funding has established that the Sale Agreement constitutes a purchase of future receivables and not a loan. Usury laws only apply to loans or forbearances, not investments and if the transaction is not a loan, there can be no usury (*Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 744 [1992]). Appellate courts have found that MCA agreements structured like the one in this case are not loans (*Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507, 507 [1st Dept 2018]; *Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]). Therefore, the usury defense fails on the grounds that Fresh Funding has established that the Sale Agreement could not be seen as a loan.

Moreover, New York courts use the *LG Funding, LLC* Test in order to determine whether a repayment is a loan (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665-6 [2d Dept 2020]). Usually, courts weigh three factors to determine 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.*).

As for the first factor, the key factor cited by courts in determining that a transaction is not a loan is the presence of a reconciliation provision which allows merchants to adjust payments based on cash flow, paying less and receiving refunds when doing poorly, and paying more when doing well (*Quicksilver Capital, LLC v Obioha*, 2020 NY Misc LEXIS 1983 at *7 [Sup Ct NY Co May 11, 2020]). In an analogous case to the one at bar, the court held that a similar merchant cash agreement was not a loan as a matter of law based on the agreement's mandatory language (*Vernon Cap. Grp. LLC v Walnut Spring Farms, LLC*, 2022 NY Misc LEXIS 4004 *19 [Sup Ct, Kings County 2022]). In *Vernon Cap. Grp. LLC*, the court noted the mandatory language, stating that the Daily Remittance rate "shall" reflect a good faith estimation

based on recent revenues, indicated the remittance amount could change and the agreement's term was not fixed (*Id.* at *19). Likewise, Section 8 of the Sale Agreement in the present case clearly provides the Merchant with a right of retroactive reconciliation, as it states: "if Merchant provides a timely Reconciliation Notice to Purchaser at the Designated Email, Purchaser will review, and if Purchaser determines there is an Overage, will reconcile Merchant's Approved Account in an amount equal to the Overage ('Month Reconciliation')...If the Merchant obtains a Monthly Reconciliation in two successive months, the Merchant may apply, via the Designated Email, for a downward adjustment of the Collected Amount so that the Collected Amount withdrawn is consistent with the Monthly Percentage" (NYSCEF Doc. No. 14 ¶ 8). The mandatory reconciliation clause ensures that the Merchant will remit the Amount Sold based on an agreed percentage of the Receipts generated after the contract execution, rather than following a fixed repayment schedule (*Id.*). Therefore, the first factor clearly favors Fresh Funding.

As for the second factor, if a transaction has a non-finite term it is seen as a purchase of future receivables, rather than a loan (*Pirs Cap., LLC v D &M Truck, Tire & Trailer Repair Inc.*, 69 Misc 3d 457, 463 [Sup Ct, NY County 2020]). To determine this element, the court should look to see whether the amount of the payments could change (*Principis Capital, LLC v I Do, Inc., et al.*, 201 AD3d 752, 754 [2d Dept 2022] ["The terms of the agreement specifically provided for adjustments to the monthly payments made by I Do to the plaintiff based on changes in I Do's monthly sales. Concomitantly, as the amount of the monthly payments could change, the term of the agreement was not finite."]). In Fresh Funding's case, mere non-payment of the Collected Amount did not constitute a breach and there is no set date for repayment. The Sale Agreement expressly provides that "[b]ecause the transaction evidenced by this Agreement is not a loan, if Merchant's business slows down and Merchant's Future Receipts decrease or if

Merchant closes its business or ceases to process payment devices and Merchant has not violated any of the representations, warranties and covenants of this Agreement, there shall be no default or breach of this Agreement" (NYSCEF Doc. No. 14 ¶ 20). Thus, the second factor strongly weighs in favor of Fresh Funding.

As for the third factor, the Sale Agreement could be controlling over whether bankruptcy is considered an event of default (*Principis Capital, LLC* at 754 [no contractual provision establishes that a declaration of bankruptcy would constitute an event of default]). In the *Principis Capital, LLC* case, the court explicitly looked to see if there was any contractual provision in the agreement that named bankruptcy as a form of default (*Id.*). Since there were none, the court found that this factor favored the plaintiff, Principis Capital, LLC (*Id.*). Similarly, under the Sale Agreement at issue in this case, bankruptcy is not stated as an event of default (NYSCEF Doc. No. 14 ¶¶ 20-21). Therefore, the third factor also favors Fresh Funding.

It is clear that under the factors outlined in the *LG Funding, LLC* Test, the Sale Agreement in this case would not constitute a loan. Going beyond the *LG Funding, LLC* Test, courts also look to whether the merchant has represented that the transaction is a sale of receipts rather than a loan (*Quicksilver Capital, LLC* at * 8, [representation by merchant that MCA agreement "shall not be construed as a loan" was relevant in determining the "true nature of the agreement"]). Here, it is expressly agreed in the Sale Agreement that the transaction was a risk-based purchase of potential future receipts at a discount, and not a loan (NYSCEF Doc. No. 14 ¶¶ 1, 20). Accordingly, plaintiff has met its burden of establishing the inapplicability of defendants' affirmative defenses and therefore, the motion is granted in its entirety.

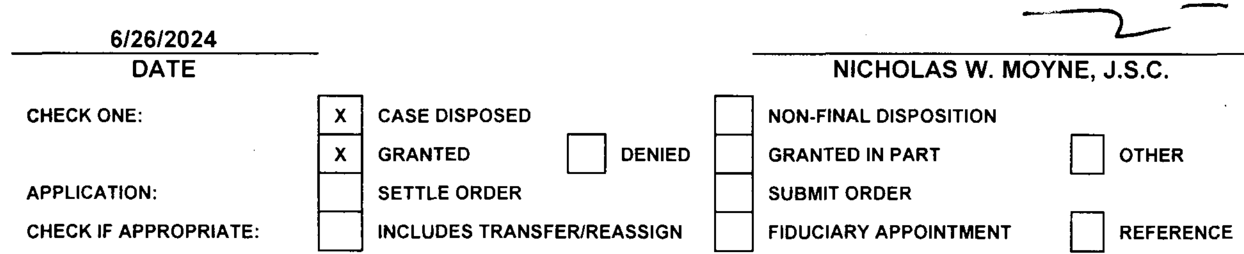
Accordingly, it is hereby

ORDERED that plaintiff Fresh Funding Solutions, Inc.'s motion is GRANTED; and it is further

ORDERED that defendants Tru Realty LLC's and Sarah Kirsch Richardson's affirmative defenses are hereby dismissed; and it is further

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff, Fresh Funding Solutions, Inc. and against defendants, Tru Realty LLC and Sarah Kirsch Richardson, in the amount of $ 92,190.00 together with interest at the rate of ________ % per annum from the date of September 1, 2022, until the date of the decision and order on this motion, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.



6/26/2024
DATE

NICHOLAS W. MOYNE, J.S.C.

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