DMKA LLC v Yellow Steel Inc.
2024 NY Slip Op 33218(U)
September 6, 2024
Supreme Court, Kings County
Docket Number: Index No. 529398/2021
Judge: Ingrid Joseph
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.

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 9th day of September 2024.

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

----------X

DMKA LLC d/b/a THE SMARTER MERCAHNT,
Plaintiff(s)

-against-

YELLOW STEEL INC. d/b/a YELLOW STEEL INC d/b/a YELLOW STEEL and DUANY PANTOJA GARCIA,
Defendant(s)

----------X

Index No: 529398/2021
Motion Seq. 1

AMENDED ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed	10; 12; 16
Exhibits Annexed/Reply.....	13-15; 18; 27
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	24-26

In this action, DMKA LLC d/b/a The Smarter Merchant ("Plaintiff") moves (motion seq. 1) for summary judgment against Yellow Steel, Inc. d/b/a/ Yellow Steel Inc d/b/a Yellow Steel ("Yellow Steel") and Duany Pantoja Garcia ("Garcia") (Collectively "Defendants") pursuant to CPLR 3212 in the sum of $76,510.00 with interest thereon from October 15, 2021, as well as costs and disbursements. Defendants have opposed the motion.

This matter arises out of a contractual dispute between the parties wherein pursuant to a Purchase and Sale of Future Receivables Agreement (NYSCEF Doc. 13) ("Agreement") Plaintiff agreed to purchase rights to Yellow Steel's future account receivables having a face value of $81,000.00 with an agreed upon purchase price of $60,000.00. Garcia agreed to guarantee any, and all amounts owned to Plaintiff from Yellow Steel upon a breach in performance. In its complaint, Plaintiff asserts causes of action for breach of contract, breach of personal guarantee, and for attorney's fees.

In support of its motion, Plaintiff argues that it remitted the purchase price for the future receivables to Yellow Steel as agreed upon and fully complied with its obligations and duties under the agreement. Plaintiff states that while defendants initially met their obligations under the Agreement, on or about October 15, 2021, Yellow Steel violated the terms of the Agreement by intentionally impeding and preventing Plaintiff from making agreed upon ACH withdrawals from the agreed upon bank account. Additionally, Plaintiff alleges that Defendants entered into another merchant cash advance agreement in violation. Plaintiff contends that Yellow Steel made payments totaling $14,580.00 and currently owes

$66,420.00. Plaintiff asserts that Defendants also owe $2,500.00 for a "Block Account" fee, $2,500.00 for a Default Fee, $90.00 for Non-Sufficient Fees, and $5,000.00 for a Stacking Fee. In total, under the Agreement, Plaintiff claims damages in the amount of $76,510.00.

In opposition, Defendants argue that Plaintiff did not establish any foundation for any business records submitted by the Plaintiff. Defendants also argue that the Agreement was a criminally usurious loan because the agreement does not contain a mandatory reconciliation provision and provides Plaintiff with full and complete recourse against Defendant Garcia in the event of Yellow Steel's bankruptcy. Defendants further contend that the default fees sought by the Plaintiff are unenforceable.

"Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction occurrence or event, shall be admissible in evidence in proof of an act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." (CPLR 4518 [a]).

As a foundation for the business records, Plaintiff submitted the Affidavit of Plaintiff's principal, Aaron Cohen (NYSCEF Doc. 12).

Paragraph 2 of the Affidavit states the following:

> "The business records annexed to this Affidavit are made in the regular course of business and are maintained under my supervision and control. The records are made in the regular course of Plaintiff's business at or around the time of the transaction reflected therein (or within a reasonable time thereafter). The information reflected in the records was given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately."

The Court finds that the Plaintiff's submission of Mr. Cohen's affidavit is sufficient to establish the foundation requirements for a business record's admissibility as set forth by CPLR 4518 (a).

It is well established that "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" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's*

Automatic Transmission Co., 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

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" (*LG Funding, LLC v. United Senior Props. of Olathe, LLC,* 181 A.D.3d 664, 665, 122 N.Y.S.3d 309). To determine whether a transaction constitutes a usurious 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. 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.* at 665-666; *Principis Capital, LLC v I Do, Inc.,* 201 A.D.3d 752 [2d Dept. 2022]).

Defendants assert that the agreement is a loan because the Agreement failed to include a mandatory reconciliation provision and Plaintiff has full and complete recourse against Defendant Garcia once Yellow Steel filed for Bankruptcy. The Court first looks to find if the Agreement contains a mandatory reconciliation provision.

Paragraph 7 of the agreement states in part:

> "Seller agrees to provide Buyer any information requested by Buyer to assist in this reconciliation, Upon reasonable verification of information, Buyer shall adjust the Daily Amount on a going-forward basis, whether upward or downward, to more closely reflect the Seller's actual Future Receipts. Buyer may request that Seller provide Buyer with updated information from time to time, including, without limitation, all bank information and/or financials to determine whether the Daily Amount should be adjusted on a going-forward basis, whether upward or downward, to more closely reflect the Seller's actual future receipts. Seller Recognizes and Agrees that it is its sole responsibility to make an adjustment request, and that, in the event Seller fails to make an adjustment request as set forth in this section, Seller waives any argument that the daily amount was too high for a given period."

The Court finds that the Agreement contains a mandatory reconciliation provision. The Agreement provides that Yellow Steel must request an adjustment and provide any information requested by the Plaintiff. When upon reasonable verification of any information requested, the Plaintiff shall adjust the daily amount on a going-forward basis. Contrary to Defendants' assertion, the Agreement, with the word shall, makes reconciliation by the Plaintiff mandatory once the requirements set forth by the Agreement are met.

The second factor that Courts consider is whether there is a definite term or a date certain by which payment in full is due. If there is no such provision, the agreement is not a loan. Here, because the Daily Amount was subject to mandatory and regular adjustment – the Purchase Agreement has no definite term and no absolute payment obligation.

Next, the Court will review whether the Plaintiff had complete and full recourse against Defendant Garcia once Yellow Steel filed for bankruptcy.

Page 13 paragraph 6 of the Agreement States:

> "Should there be an Event of Default, as defined in the Agreement, Buyer may seek recovery from Guarantor(s) for all of Buyer's losses and damages, including, without limitation, by enforcement of Buyer's rights under this Personal Guaranty of Performance without first seeking payment from Seller or any other guarantor, or any other guaranty. The foregoing is in addition to all feed on Appendix 1 of the Agreement which Buyer may seek from Guarantor(s) too, as well as reasonable attorney's fees and costs associated with any lawsuit and/or collection arising out of, or related to, the agreement."

The Court finds that the Agreement does not provide Plaintiff with complete and full recourse. Under the Agreement Plaintiff may seek recovery from Defendant Garcia should there be an Event of Default. The Court finds in light of the absence of a contractual provision establishing that a declaration of bankruptcy constitutes an event of default, the Agreement provides for no recourse once Yellow Steel filed for bankruptcy (*see Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022] [holding that plaintiff established its prima facie entitlement to summary judgment by showing that no contractual provision existed establishing bankruptcy as an event of default]).

As a general matter parties are free to agree to a liquidated damages clause "provided that the clause is neither unconscionable nor contrary to public policy" (*Truck Rental-A-Ctr. V Puritan Farms* 2nd, 41 NY2d 420, 424 [1977]). Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable. A provision which requires damages grossly disproportionate to the amount of actual damages provides for a penalty and is unenforceable (*Id*).

Defendants contend that the contractual fees sought by the Plaintiff are unenforceable. Here, the Court finds that the contractual fees are neither unconscionable nor contrary to public policy and are therefore enforceable.

In addition to the contractual fees, Plaintiff asserts a cause of action for attorney's fees. "Under the general rule, attorney's fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*A.G. Ship Maint. Corp v Leazak*, 69 NY2d 1, 5 [1986]). However, in their motioning papers, Plaintiff does not point to a contractual or statutory provision entitling them to attorney's fees. Absent such provisions, Plaintiff is not entitled to attorney's fees.

All other issues not addressed herein are either without merit or moot.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment is granted, and it is further,

ORDERED, that Plaintiff is entitled to, and the Clerk of Kings County is directed to enter judgment in favor of DKMA LLC. against Yellow Steel Inc. and Duany Pantonia Garcia jointly and severally, in the sum of $76,510.00 with interest thereon from October 15, 2021, the date of default until the date of entry of the Judgment, and the costs and disbursements of this action.

ORDERED, that Plaintiff's request for Attorney's fees is denied.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice