

**Novus Capital Funding II LLC v Mantis Homes LLC**

2024 NY Slip Op 33759(U)

October 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 537768/2023

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS – PART 24

-----X  
NOVUS CAPITAL FUNDING II LLC,

Mot. Seq. # 1

Plaintiff,

Index # 537768/2023

-against-

**DECISION and ORDER**

MANTIS HOMES LLC D/B/A MANTIS HOMES, GREEN BUG  
PRODUCTIONS LLC, and ANN M. CLARK,

Defendants.  
-----X

**HON. LISA S. OTTLEY**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on April 15, 2024.

Papers	Numbered
Notice of Motion and Affirmation .....	1, 2, 3 [Exh. A-D]
Affirmation/Affidavit in Opposition.....	5
Memoranda of Law.....	4, 6

Plaintiff, Novus Capital Funding II LLC, moves by notice of motion for an order pursuant to CPLR § 3212 granting plaintiff summary judgment against defendants, Mantis Homes LLC d/b/a Mantis Homes, Green Bug Productions LLC, and Ann M. Clark, jointly and severally; an order of attachment pursuant to CPLR § 6201 enjoining defendants from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the properties, or any assets of defendant Mantis Homes LLC d/b/a Mantis Homes, Green Bug Productions LLC; an order of disclosure pursuant to CPLR § 6220 for defendants to execute and provide any documents necessary to effect payment of the judgment to plaintiff; and awarding plaintiff costs, disbursements, and attorney's fees. Defendants oppose plaintiff's motion on the grounds that plaintiff has failed to file a statement of material/undisputed facts; plaintiff's motion is premature; plaintiff has provided no documentary evidence that resolves all factual issues as a matter of law; and triable issues of fact exist as to the alleged amount owed and whether the agreement is a usurious loan.

This action was commenced by summons and verified complaint alleging that on or about November 2, 2023, the defendants entered into a written purchase and sale of future receivables contract whereby it sold \$59,960.00 of its future merchant receivables to plaintiff for a sum of \$40,000.00. According to the agreement, the future receivables (12 % of defendant's revenue) were to be paid to the plaintiff in the amount of \$499.67 from the business defendants' daily revenue subject to reconciliation, until the purchase price for the purchased revenue was paid in full. Performance by the defendant, Mantis Homes LLC d/b/a Mantis Homes, Green Bug Productions LLC, was guaranteed by the defendant, Ann M. Clark. The complaint asserts defendants' default under the contract and attendant guaranty. The defendants are credited with payments totaling \$12,991.42 but failed to make any additional

payments starting on December 18, 2023, leaving a balance owed of \$46,968.58. Defendants also incurred a non-sufficient funds fee of \$200.00 and default fee of \$15,499.63, increasing the total amount allegedly owed to plaintiff to \$62,668.21. Plaintiff is seeking attorneys' fees in connection with this action in the amount of \$1,250.00.

### Discussion

The defendants argue that plaintiff's motion is procedurally defective; in that, to establish a prima facie entitlement to summary judgment, plaintiff has not complied with Uniform Rule 202.8-g, by failing to provide a Statement of Material Facts. The Uniform Rules state that "the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement in numbered paragraphs." This court's rules do not expressly state same as a requirement. Furthermore, this court is not required to deny plaintiff's motion for summary judgment because of plaintiff's failure to submit a statement of material facts. See, Taveras v. Incorporated Village of Freeport, 225 A.D.3d 822, 207 N.Y.S.3d 620 (2<sup>nd</sup> Dept., 2024), where the court held that "the rule permits a court to require that parties submit a separate statement of material facts with any motion for summary judgment, but it does not obligate a court to impose such a requirement, and even if the court's part rules contained such a requirement, the defendants' failure to comply therewith 'did not compel the court to deny [their] motion'."

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2<sup>nd</sup> Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." See, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

In support of its motion for summary judgment, the plaintiff has submitted the following: revenue purchase agreement (Exh. "A"), payment history (Exh. "B"), and an affidavit by Ekaterina Marciante, plaintiff's Collection Manager.

The court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances." See, K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc.3d 807, 57 N.Y.S.3d 625 (Sup. Ct., Westchester Co., 2017). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. See, Rubenstein v Small, 273 A.D. 102, 75 N.Y.S.2d 483 (2<sup>nd</sup> Dept., 1947). 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. See, LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309 (2<sup>nd</sup> Dept., 2020). However, if the agreement was found to be a loan as asserted by defendants, criminal usury would be a defense to its enforcement. See, Principis Capital, LLC v I Do, Inc., 201 A.D.3d 752, 160 N.Y.S.3d 325 (2<sup>nd</sup> Dept., 2022).

After considering the three factors above, as well as the context of the agreement in its entirety, the court finds the agreement is a valid agreement to purchase future account

receivables, and not a disguised loan. The agreement does not explicitly state that reconciliation is at the sole discretion of the plaintiff, but instead states, inter alia, that the defendants shall have the right, at its sole and absolute discretion, subject to the reconciliation procedures, to request retroactive reconciliation. The terms of the agreement were not finite as the amount of the daily payments were subject to reconciliation. The terms of the agreement specifically provided for reconciliation adjustments to the daily payments made by the defendants to plaintiff based on changes in defendants' daily sales. Furthermore, no contractual provision existed establishing that a request by the defendants for an adjustment or reconciliation, a declaration of bankruptcy, or an admission of its inability to repay its obligation would constitute an event of default. See, Principis Capital, LLC v I Do, Inc. supra. Notably, the contract itself under Article 16(d): Risk Sharing Acknowledgements and Arrangements, states that the defendants and plaintiff agree that the purchase price is paid to the defendants in consideration for the acquisition of the purchased future receipts and that payment of the purchase price is not intended to be, nor shall be construed as a loan.

The court finds that the plaintiff has satisfied its burden in making a prima facie showing of its entitlement to summary judgment by submitting evidence showing defendants' default under the contract and guaranty. The court further finds that the plaintiff established the essential elements of a breach of contract cause of action, to wit, the existence of a contract, the plaintiff's performance under the contract and the defendant's breach of the contract, and the resulting damages. See, Liberty Equity Restoration Corporation v. Park, 160 A.D.3d 628, 75 N.Y.S.3d 47 (2<sup>nd</sup> Dept., 2018). In opposition to plaintiff's motion for summary judgment, the defendants have submitted a memorandum of law and an affirmation from counsel, who does not have personal knowledge of the facts surrounding the alleged breach of the agreement. Such submission which disputes plaintiff's prima facie case, is without probative value and cannot raise a triable issue of fact. See, McCovey v. Williams, 105 A.D.3d 819, 962 N.Y.S.2d 690 (2<sup>nd</sup> Dept., 2013); Morissaint v. Raemar Corp., 271 A.D.2d 586, 706 N.Y.S.2d 165 (2<sup>nd</sup> Dept., 2000). Lastly, the defendants primarily relied on the case of AKF, Inc. v. Western Foot & Ankle Center, 632 F. Supp. 3d 66 (E.D.N.Y. 2022) to argue that the subject agreement was a usurious loan. However, the decision of AKF, Inc. v. Western Foot & Ankle Center was vacated on June 14, 2024, and involved a secured creditor since the loan was secured by collateral.

The court reaches a different conclusion, however, with respect to the default fee of \$15,499.63, which states that the defendants shall pay to plaintiff, as additional damages, any reasonable expenses incurred by the plaintiff in connection with recovering the monies due to the plaintiff. The court deems this fee to be a penalty, which the plaintiff's proof does not support.

As to the defendants' argument that the plaintiff's motion for summary judgment is premature due to outstanding discovery, the court finds the argument unavailing. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. See, Singh v Avis Rent A Car Sys., Inc., 119 A.D.3d 768, 989 N.Y.S.2d 302 (2<sup>nd</sup> Dept., 2014). Here, the mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion. See, Lopez v WS Distrib., Inc., 34 A.D.3d 759, 825 N.Y.S.2d 516 (2<sup>nd</sup> Dept., 2006).

The plaintiff's motion for an order of attachment pursuant to CPLR § 6201 and order of disclosure pursuant to CPLR § 6220 is denied as the plaintiff has not made a prima facie showing that the defendants, with intent to defraud their creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. See, Corsi v Vroman, 37 A.D.3d 397, 829 N.Y.S.2d 234 (2<sup>nd</sup> Dept., 2007).

Accordingly, plaintiff's motion for summary judgment pursuant to CPLR § 3212 is granted, and it is hereby

**ORDERED**, the plaintiff shall submit to the Judgment Clerk for review a proposed money judgment in the amount of \$47,168.58, which includes the outstanding balance of \$46,968.58 and non-sufficient funds fee of \$200.00, together with statutory interest from date of default of December 18, 2023, costs, and disbursements, as taxed by the Clerk, on notice to all parties and/or their respective counsel, and it is further

**ORDERED**, that plaintiff's counsel submit an affirmation for legal services rendered for this court to consider granting it's request for attorney's fees.

The foregoing constitutes the decision and Order of this Court.

Dated: Brooklyn, New York  
October 15, 2024

  
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HON. LISA S. OTTLEY, J.S.C.  
**HON. LISA S. OTTLEY**

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KINGS COUNTY CLERK  
FILED