

**Fora Fin. Asset Securitization 2021, LLC v Grill on
2nd LLC**

2024 NY Slip Op 34101(U)

November 20, 2024

Supreme Court, New York County

Docket Number: Index No. 153814/2024

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

FORA FINANCIAL ASSET SECURITIZATION 2021, LLC,

Plaintiff,

- v -

GRILL ON 2ND LLC, GARRETT DOYLE

Defendant.

-----X

INDEX NO. 153814/2024

MOTION DATE 07/25/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

This action arises out of a Purchase and Sale of Future Receivables Agreement (the “Agreement”) and a personal guaranty of performance (the “Guaranty”) between the Plaintiff, Fora Financial Asset Securitization 2021 LLC (“FFA 2021”), and the Defendant, Grill on 2nd LLC, d/b/a Tuttle Bar and Grill, and Garret Doyle.¹

The Agreement, executed on or about August 6, 2021, included Fora Financial Advance, LLC (“FFA Purchaser”) purchasing 11.70% of Future Sale Proceeds from Seller (Grill on 2nd LLC), until FFA Purchaser has received the sum of \$186,000.00 (the "Purchased Amount") in exchange for an immediate lump-sum cash payment of \$150,000.00 (the "Purchase Price") from FFA Purchaser. *See* NYSCEF DOC. 2. Additionally, Defendant Garrett Doyle, as Guarantor, “personally and unconditionally guaranteed the performance by Seller of its obligations under the Agreement.” *Id.*

¹ The Court would like to thank Hailee Stangeby for her assistance in this matter.

On or about November 17, 2021, FFA Purchaser sold and assigned the Revenue Advance to Plaintiff whereby Plaintiff acquired all rights, title, and interest to said Revenue Advance. *See* NYSCEF DOC. 2. Plaintiff alleges that Defendant intentionally interfered with FFA 2021's right to “obtain the Purchased Amount by placing a Stop Payment on the Remittance Account on December 31, 2021[1] and Seller failed to provide copies of all documents and requested information related to Seller's financial or banking affairs within five (5) calendar days after requested by Purchaser on January 7, 2022.” *See* NYSCEF DOC. 2. Plaintiff further alleges that Defendant was served a notice of default, which Plaintiff states did not receive a responsive reply. *See id.*

Plaintiff filed their cause of action alleging breach of contract, breach of guaranty, conversion, and for account stated, alleging damages of \$78,908.97. Defendants raised several affirmative defenses, including failure to state a claim, that Plaintiff was barred from recovery under doctrine of “unclean hands,” that Plaintiff and Assignor (FFA Purchaser) engaged in deceptive business practices, and that the agreement is further in violation of New York State banking laws by calling for a usurious interest rate. Defendant also filed a counterclaim, alleging that the terms and conditions of the agreement were purposely and intentionally vague to avoid the strict requirements for loans under New York State banking laws and General Obligations Laws, and that these terms and conditions of the agreement are “tantamount to a loan document,” and argues that upon finding this agreement to be akin to a loan, that it contains a usurious interest in violation of NY General Obligations Law §5-501(1). *See* NYSCEF DOC. 9.

Plaintiffs move, pursuant to CPLR § 3211(b), that this Court should dismiss the Defendants’ affirmative defenses, and, pursuant to CPLR § 3211 (a)(1), and (7), dismiss the

Defendants' counterclaim. Defendant moves for an order dismissing the Complaint herein, pursuant to CPLR §3211(a)(7).

Motion to Dismiss Standard

Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]. "[S]uch motion may be appropriately granted only where the documentary evidence utterly refutes plaintiffs factual allegations." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 [2022]. A paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable". *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171A.D.3d189, 193 [1st Dept 2019].

Furthermore, it is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011].

Discussion

Here, Defendant asserts that this Merchant Cash Advance Agreement is "tantamount to a loan," and contained a usurious interest in violation of New York State Law. According to well-established case law, "unless a principal sum is repayable absolutely, the transaction is not a

loan.” *Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752, 754, 160 N.Y.S.3d 325, 327 (2d Dep't 2022). The Court disagrees.

To determine if an agreement is a loan or a transaction contemplated by a merchant agreement: (1) whether there is a reconciliation provision; (2) whether the agreement has an indefinite term; and (3) where the plaintiff has any recourse should the merchant declare bankruptcy. *See Kennard L. P.C. v. High Speed Cap, LLC*, 199 A.D.3d 1406, 1406, 154 N.Y.S.3d 522 (4th Dep't 2021); *Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752, 754, 160 N.Y.S.3d 325 (2d Dep't 2022) (citing *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 665-66, 122 N.Y.S.3d 309 (2d Dep't 2020)); see also *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807, 817, 57 N.Y.S.3d 625 (Sup. Ct. West. Cnty. 2017).

Upon reviewing the documentary evidence, the Agreement clearly (1) contained express and mandatory reconciliation provisions, (2) did not impose a finite term, and (3) the defendant did have recourse should it go bankrupt. As to reconciliation provisions, this factor was satisfied in provision 1.3(b) and (c), where the Agreement states:

If Purchaser received an amount greater than the Purchased Percentage of Seller's Future Sale Proceeds during the look-back period, then Purchaser shall remit the excess amount to Seller. If Purchaser received an amount less than the Purchased Percentage of Seller's Future Sale Proceeds during the look back period, then Seller shall remit the amount of the deficit to Purchaser. Seller or Purchaser shall make any Adjusted Remittance within 30 days...

See NYSCEF DOC. 3

Additionally, the Agreement did not impose a finite term, where provision 1.1(d) states: “[t]here is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Purchaser.” *See id.* Finally, Provision 1.1(d) shows that the Agreement offered no recourse in the event of bankruptcy, stating:

Seller going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Purchaser is entering into this Agreement knowing the risks that Seller's business may slow down or fall, and Purchaser assumes these risks based on Seller's representations, warranties and covenants in this Agreement.

See NYSCEF DOC. 3

As to Defendant's affirmative defenses, including failure to state a claim, that Plaintiff engaged in deceptive business practices, the doctrine of "unclean hands," and that the Agreement was a usurious loan, this Court finds that each of these affirmative defenses lack merit. Defendant fails to provide any specific allegations as to "unclean hands" and deceptive business practices, and the affirmative defense of this Agreement being a usurious loan is redundant to its counterclaim. Finally, Plaintiff has stated a cause of action that is sufficient to survive this motion to dismiss. It is therefore

ORDERED that the defendants' affirmative defenses and counterclaim are dismissed; and it is further

ADJUDGED that Defendant's motion to dismiss the complaint in its entirety is denied.

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11/20/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE