Greenwich Capital Mgt. L.P. v Alaska Fire & Flue, LLC
2024 NY Slip Op 35268(U)
March 22, 2024
Supreme Court, Westchester County
Docket Number: Index No. 69736/2023
Judge: Linda S. Jamieson

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RECEIVED NYSCEF: 03/22/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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GREENWICH CAPITAL MANAGEMENT LIMITED PARTNERSHIP,

Plaintiff,

-against-

ALASKA FIRE AND FLUE, LLC, and FORREST HOLMES SMITH,

Defendants.

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Index No. 69736/2023

DECISION AND ORDER

The following papers numbered 1 to 7 were read on the motion (seq. no. 1) by plaintiff Greenwich Capital Management Limited Partnership ("plaintiff") for an Order pursuant to CPLR § 3212 granting plaintiff summary judgment on the six causes of action set forth in plaintiff's Verified Complaint dated October 25, 2023 (the "Complaint"):

Papers	Numbered
Notice of Motion, Affirmation and Exhibits	1
Plaintiff's Memorandum of Law	2
Plaintiff's Statement of Undisputed Material Facts	3
Affidavit and Affirmation in Opposition	4
Defendants' Statement of Undisputed Material Facts	5
Affirmations and Exhibits in Reply	6
Memorandum of Law in Reply	7

PROCEDURAL BACKGROUND

This action arises from a dispute regarding the alleged failure by defendants Alaska Fire and Flue LLC ("Alaska") and its principal, Forrest Holmes Smith ("Holmes") (together, "defendants"), to pay plaintiff amounts owed pursuant to a Purchase and Sale of Future Receivables agreement dated June 15, 2023 (the "Agreement") and a related Security Agreement and Personal Guaranty dated June 15, 2023 (the "Guaranty"). *See* NYSCEF Doc. No. 1 at ¶¶ 1-17.

Specifically, the Complaint alleges that on June 15, 2023, plaintiff and Alaska entered into the Agreement, pursuant to which Alaska, which sells and installs stoves, fireplaces, and chimney products, agreed to sell plaintiff $214,500.00 of its future receivables (the "Purchased Amount") for an agreed amount of $150,000.00, with plaintiff receiving from Alaska weekly ACH remittances of $4,667.40. *See* NYSCEF Doc. No. 1 at ¶¶ 6-8 and Ex. 1. It alleges that Alaska represented in the Agreement, *inter alia*, that it had no plans in place to permanently shut its businesses within the following 12 months, that it intended to operate in the ordinary course for the next 12 months, and that it would not, without plaintiff's express prior written consent, enter into any agreement to sell, convey, or otherwise transfer any portion of Alaska's future receivables or permit the creation of any liability, lien, or encumbrance thereupon. *Id.* The Complaint alleges that a default would occur under the Agreement if Alaska breached any covenant therein, in which case plaintiff's remedies would include declaring the full uncollected portion of the Purchased Amount to be immediately due and payable, along with plaintiff's related costs and attorneys' fees. *Id.*

It further alleges that Alaska's obligations pursuant to the Agreement were secured by way of defendants' joint execution of the Guaranty, also on June 15, 2023. *See* NYSCEF Doc. No. 1 at ¶¶ 9-13 and Ex. 2. Specifically, the Complaint alleges that pursuant to the Guaranty, Alaska unconditionally granted plaintiff a continuing security interest in and lien upon all of its then owned or thereafter acquired assets (collectively, the "Alaska Collateral"), including, *inter alia*, all of its real property, all of its present and future accounts, and all proceeds thereof. *Id.* It further alleges that in the Guaranty, as security for Holmes performing his duties and obligations thereunder, and as an inducement to plaintiff to enter into the Agreement, Holmes granted plaintiff a first priority continuing security interest in and lien on certain additional collateral, including all of Holmes' investment property and present and future accounts related to Alaska (collectively, the "Holmes

Collateral", and together with the Alaska Collateral, the "Collateral"). *Id.* The Complaint also alleges that on June 20, 2023, to perfect its security interest in the Collateral and to notify others of its interest therein, plaintiff filed a UCC-1 Financing Statement with the Department of Natural Resources of the State of Alaska and listed defendants as debtors (the "UCC-1 Statement"). *Id.* at ¶ 13 and Ex. 3.

The Complaint alleges that on or before October 17, 2023, Alaska defaulted under the Agreement by: (1) making known its intent not to fulfill one or more of its duties and obligations thereunder; (2) intentionally interfering with plaintiff's rights to receive the purchased receivables collected by Alaska on plaintiff's behalf; (3) revoking the ACH authorization granted to plaintiff pursuant to the Agreement; and (4) otherwise failing to properly remit the purchased receivables to plaintiff (collectively, the "Alaska Default"). *See* NYSCEF Doc. No. 1 at ¶¶ 14-17. It further alleges that as a result of the Alaska Default, Holmes was required to perform Alaska's obligations pursuant to the Agreement, but failed to do so (the "Holmes Default", and together with the Alaska Default, the "Defaults"). *Id.* The Complaint alleges that as a result of the Defaults, plaintiff was entitled to, without notice, exercise its rights as a secured creditor pursuant to the UCC, enforce its remedies of default against defendants, and recover all amounts due, including costs, attorneys' fees, and interest. *Id*. It further alleges that as a result of the Defaults, defendants owe plaintiff the sum of $143,011.45, which represents the uncollected receivables and contractual costs and fees, as well as plaintiff's costs, attorneys' fees, and interest. *Id*.

Based upon the foregoing allegations, the Complaint asserts: (1) a first cause of action for breach of contract against Alaska; (2) a second cause of action for foreclosure of security interest against defendants; (3) a third cause of action for breach of guaranty against defendants; (4) a fourth cause of action for unjust enrichment against defendants; (5) a fifth cause of action for conversion against defendants; and (6) a sixth cause of action for replevin against defendants. *See* NYSCEF Doc. No. 1 at ¶¶ 18-53.

On November 28, 2023, defendants filed an Answer in which they, *inter alia*, denied the material allegations of the Complaint and asserted 12 affirmative defenses in response thereto. *See* NYSCEF Doc. No. 7.

Following joinder of issue, plaintiff made the instant motion (seq. no. 1) for an Order pursuant to CPLR § 3212 granting plaintiff summary judgment in its favor and against defendants on all six causes of action in the Complaint. *See* NYSCEF Doc. Nos. 8-17. Defendants oppose the motion. *See* NYSCEF Doc. Nos. 22-24.

THE RELEVANT LEGAL STANDARD

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this [*prima facie*] burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012), *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Vega*, 18 NY3d at 503.

Accordingly, "summary judgment is appropriate where only one conclusion may be drawn from the established facts" (*see Jones v Saint Rita's R.C. Church*, 187 AD3d 727, 792 [2d Dept 2020]), or where a cause of action and/or the type of damages sought "fails as a matter of law." *See Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 (2008) (reversing the denial of summary judgment where a plaintiff's cause of action "fails as a matter of law"); *accord BBCN Bank v 12th Ave. Rest. Group Inc.*, 150 AD3d 623, 624 (1st Dept 2017) (holding that the Supreme Court should have granted summary judgment dismissing a cause of action that "fails as a matter of law").

THE FIRST AND THIRD CAUSES OF ACTION FOR BREACH OF CONTRACT

With respect to the first and third causes of action sounding in claims of breach of contract, it is well-settled that "[t]he essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *Blank v Petrosyants*, 203 AD3d 685, 688 (2d Dept 2022), *quoting Liberty Equity Restoration Corp. v Yun*, 160 AD3d 623, 626 (2d Dept 2018).

Having reviewed the parties' submissions, the Court determines that plaintiff has established *prima facie* entitlement to summary judgment regarding liability with respect to its first cause of action for breach of the Agreement and its third cause of action for breach of the Guaranty.

Specifically, through the affirmation of plaintiff's General Counsel, Richard Gipstein, Esq. ("Gipstein"), the documentary evidence cited therein and annexed to the accompanying affirmation from plaintiff's counsel, as well as the documentary evidence annexed to the Complaint, which is verified by Gipstein, plaintiff has established with respect to the first cause of action that: (1) plaintiff has performed its obligations pursuant to the Agreement; (2) Alaska has materially breached the Agreement by the aforementioned Alaska Default, *i.e.*, by: (a) making known its intent not to fulfill one or more of its duties and obligations thereunder; (b) intentionally interfering with plaintiff's rights to receive the purchased receivables collected by Alaska on plaintiff's behalf; (c) revoking the ACH authorization granted to plaintiff pursuant to the Agreement; and (d) otherwise failing to properly remit the purchased receivables to plaintiff; and (3) plaintiff incurred monetary damages as a direct result of Alaska's material breach of the Agreement. *See* NYSCEF Doc. Nos. 1-5; 9-15; *see also* *Giannakopoulos v Figame Realty Mgt.*, 219 AD3d 803, 805 (2d Dept 2023) (affirming the Supreme Court's granting plaintiffs summary judgment regarding liability on their breach of contract claim where "[t]he plaintiffs established, *prima facie*, that the defendants breached the provisions of the license"); *Heredia v C.S. Realty Assoc. LLC*, 217 AD3d 496, 498 (1st Dept 2023) (holding that claimants were properly awarded summary judgment on their breach of contract claim where "[t]hey established *prima facie* that the . . . agreement with E & O contained an insurance procurement provision" and that E & O had not "complied with the insurance procurement requirement").

Regarding the third cause of action for breach of the Guaranty, plaintiff through the same submissions has also established, *prima facie*, that: (1) plaintiff performed its obligations under the Agreement; (2) Holmes materially breached his obligation under the Guaranty to perform Alaska's obligations pursuant to the Agreement, but failed to do so (the aforementioned Holmes Default); and (3) plaintiff incurred monetary damages as a direct result thereof. *See* NYSCEF Doc. Nos. 1-5; 9-15; *see also Giannakopoulos*, 219 AD3d at 805; *Heredia*, 217 AD3d at 498.

In opposition to plaintiff's *prima facie* showing of entitlement to summary judgment regarding liability on the first and third causes of action, defendants have failed to establish the existence of material issues of fact which require a trial concerning either of these two claims sounding in allegations of breach of the Agreement and the Guaranty, respectively. *See* NYSCEF Doc. Nos. 22-24. Defendants' submissions, which are comprised of an attorney affirmation, an affidavit from Holmes, and a Statement of Undisputed Material Facts, are conclusory, fail to annex any documentary evidence in support of their assertions, and in some instances directly contradict one another; and as such they are wholly insufficient to defeat plaintiff's *prima facie* showing of entitlement to summary judgment regarding liability on its two breach of contract claims.

Specifically, the Court does not credit defendants' assertion that the existence of five material issues of fact requires the denial of this branch of plaintiff's motion. *See* NYSCEF Doc. No. 22 at ¶¶ 18-22.

First, the Court does not agree with defendants' contention that there is a material issue of fact concerning whether the Agreement is a "loan agreement" such that it is usurious and unenforceable. As the Appellate Division, Second Department, explained in prominently citing to this Court's decision in *K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 816 (Sup Ct., Westchester Cty May 4, 2017):

> 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 (*see Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 598 NE2d 7, 586 NYS2d 240 [1992]; *Abir v Malky*, Inc., 59 AD3d 646, 649, 873 NYS2d 350 [2009]). To determine whether a transaction constitutes a usurious loan, it "must be 'considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it'" (*Abir v Malky, Inc.*, 59 AD3d at 649, *quoting Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895, 814 NYS2d 551 [2006]). The court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" (*K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 816,

> 57 NYS3d 625 [Sup Ct, Westchester County 2017]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v Small*, 273 App Div 102, 75 NYS2d 483 [1947]). <u>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</u> (*see K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d at 816-819; *see also Funding Metrics, LLC v D & V Hospitality, Inc.*, 62 Misc 3d 966, 970, 91 NYS3d 678 [Sup Ct, Westchester County 2019]).
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> *See LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665-666 (2d Dept 2020) (emphasis added).

The Court's review of the plain and unambiguous terms of the Agreement, through the lens of this Court's holding in *K9 Bytes* as amplified and affirmed by the Appellate Division's above-quoted ruling in *LG Funding*, demonstrates that all three aforementioned factors support a finding that repayment pursuant to the Agreement is contingent such that it is a valid contract for the purchase and sale of future receivables and not a usurious loan as claimed by defendants.

First, defendants' counsel's claim that there is an issue of fact regarding whether the Agreement includes a reconciliation provision is flatly contradicted by Holmes' sworn admission that "there was a reconciliation provision to the agreement" (*see* NYSCEF Doc. No. 22 at ¶ 18; NYSCEF Doc. No. 23 at ¶ 9) and is belied by the clear inclusion of a reconciliation provision in Article 4 of the Agreement's Payment Addendum, which states:

> True-Up. <u>Within ten (10) business days following the end of a calendar month, either Merchant or Purchaser may request a reconciliation of past payments by delivering a written request to the other party that expressly references this Paragraph 4</u>. In the event of such a request, Merchant shall promptly provide to Purchaser any and all information and documentation described in Section 2.5 of the Agreement for the period (the "True-Up Period") beginning on the Effective Date and ending on the last day of the calendar month preceding the date of such request that is reasonably necessary to calculate the actual amount of Specified Receivables (based on Merchant's Actual Sales Receipts) that should have been paid by Merchant to Purchaser pursuant to the terms of the Agreement during the True-Up Period. <u>If it is determined that such actual amount of Specified Receivables that should have been paid by Merchant during the True-Up Period differs from the amount actually paid by Merchant during the True-Up Period, then Merchant and Purchaser shall reconcile such payments</u> (i.e., in case of an underpayment, Merchant shall pay to Purchaser the amount of any net deficit in the payments, and in case of an overpayment, Purchaser shall pay to Merchant the amount of any net excess of the payments) within ten (10) business days of such determination. *See* NYSCEF Doc. No. 2 at p. 16, Art. 4 (emphases added).

Second, the fact that the Agreement has no finite term further supports a finding that it is an enforceable contract for the purchase and sale of future receivables and is not a usurious loan. This is made clear by Article 1.2 of the Agreement, which states as follows in no indefinite terms:

> **This Transaction is NOT A LOAN**. This transaction is a sale of a portion of Merchant's Future Receivables and, as such, this Agreement has no predeterminable term. If Merchant's business declines or if Merchant's business fails before Purchaser collects the Purchased Amount of Future Receivables purchased hereunder (and Merchant has not violated, or deliberately frustrated performance of, the terms of this Agreement, and Merchant has not otherwise deceived Purchaser), Merchant will not be in default under this Agreement and Purchaser will have no recourse. Purchaser is entering into this Agreement knowing the risks that Merchant's business may decline or fail, and Purchaser assumes these risks based on Merchant's representations, warranties, and covenants in this Agreement (designed to give Purchaser a reasonable and fair opportunity to receive the benefit of its bargain). *See* NYSCEF Doc. No. 2 at p. 2, Art. 1.2 (emphasis in original).

Third, the fact that the Agreement does not include any recourse for plaintiff should Alaska declare bankruptcy further confirms the Court's determination that the Agreement is not a usurious loan as asserted by defendants. Indeed, the only references to bankruptcy in the Agreement are set forth in Articles 3.1(b) and 3.2(k). Article 3.1(b) merely notes that "Merchant has never commenced any case or proceeding seeking protection under any bankruptcy or insolvency law, nor has

Merchant had any such case or proceeding commenced against it. Merchant is not contemplating commencing any such case or proceeding, nor does Merchant have any reason to suspect that any such case or proceeding might be commenced against it." *See* NYSCEF Doc. No. 2, p. 5 at Art. 3.1(b). Article 3.2(k) similarly does not include any recourse for plaintiff should Alaska declare bankruptcy, and simply states that "Merchant shall give Purchaser written notice two (2) business days prior to filing any voluntary bankruptcy under Title 11 of the United States Code or within two (2) business days after an involuntary bankruptcy has been filed against Merchant." *See* NYSCEF Doc. No. 2, p. 6 at Art. 3.2(k).

Accordingly, all three aforementioned factors from *K9 Bytes* and *LG Funding* support a finding that repayment pursuant to the Agreement is contingent, such that it is a valid contract for the purchase and sale of future receivables and not a usurious loan as claimed by defendants. *See K9 Bytes*, 56 Misc 3d at 818 (holding that "[h]aving weighed all of the factors, the court finds that the Arch agreements are sufficiently risky such that they cannot be considered loans, as a matter of law. Under no circumstances could Arch be assured of repayment, because its agreements are contingent on a merchant's success, and the term is indefinite"). Indeed, in an unpublished Decision and Order dated March 17, 2022 in the matter captioned *Greenwich Capital Management Limited Partnership v Blurock, LLC et al.* (Westchester County Sup. Ct. Index No. 52838/2021), the Court analyzed a substantively identical "Purchase and Sale of Future Receivables" contract entered into by the same plaintiff from this lawsuit and similarly determined that such agreement "cannot be considered a loan, as a matter of law," and rejected the defendants' assertion therein that the contract should be deemed a usurious loan. *See* NYSCEF Doc. Nos. 62-63 at pp. 4-6. As such, the Court declines to credit defendants' four related arguments that summary judgment should be denied due to the presence of triable issues of fact concerning whether the Agreement: (1) is a "loan agreement" such that it is usurious and unenforceable; (2) includes a reconciliation provision; (3) establishes a "finite term agreement"; and (4) allows plaintiff recourse in the event of Alaska's bankruptcy petition and/or allows recourse based upon a reconciliation provision. *See* NYSCEF Doc. No. 22 at ¶¶ 18-21.

The Court also does not agree with defendants' fifth and final contention, namely that there exists a triable issue of fact concerning whether plaintiff fraudulently induced defendants to enter into the Agreement and the Guaranty by making illusory promises. *See* NYSCEF Doc. No. 22 at ¶ 22.

Holmes' brief, conclusory and self-serving assertion that he was fraudulently induced into entering into the contractual agreements is not supported by any documentary evidence whatsoever, and is belied by the documentary evidence furnished by plaintiff, such that it is inadequate to defeat plaintiff's *prima facie* showing of entitlement to summary judgment regarding liability on its first and third causes of action. *See* NYSCEF Doc. Nos. 1-5; 9-15; *see also Casteel USA, Inc. v V.C. Vitanza Sons, Inc.*, 170 AD2d 568, 569 (2d Dept 1991) (holding that "[t]he defendant's unsubstantiated and conclusory allegation that it was fraudulently induced into agreeing to the contract . . . is insufficient to create a genuine issue of fact. The defendant failed to put forth evidence showing any misrepresentation by the plaintiff") (internal citation omitted); *Dworkin Constr. Corp. v Til-Mar Design*, 2018 NYLJ LEXIS 1185, *4 (Sup. Ct. N.Y. Cty. Apr. 12, 2018) (noting that "[i]n opposition, defendant argues, in conclusory fashion, that it was fraudulently induced to enter into the subcontract and should not be bound by the subcontract's limitations provision. Defendant's argument is not persuasive. It points to neither case law nor specific facts that warrant this court ignoring the plain and unequivocal language of the subcontract").

Therefore, the branches of plaintiff's motion seeking summary judgment on its first and third causes of action for breach of contract are granted with respect to liability, and because the Court on this Record cannot render a determination regarding damages, counsel should be prepared to address the issue of the determination of the amount of plaintiff's damages at the conference that is scheduled for April 2, 2024 at 10:30 a.m. *See Giannakopoulos*, 219 AD3d at 805 (holding that "the plaintiffs were entitled to summary judgment on the issue of liability" for their breach of contract claim where "[t]he plaintiffs established, *prima facie*, that the defendants breached the provisions of the license" and "[i]n opposition, the defendants failed to raise a triable issue of fact"); *Heredia*, 217 AD3d at 498 (affirming the Supreme Court's award of summary judgment regarding claimants' breach of contract claim where "[t]hey established *prima facie* that the . . . agreement with E & O contained an insurance procurement provision, and E & O failed to raise an issue of fact by submitting . . . any proof showing that it had complied with the insurance procurement requirement").[1]

[1] In light of the Court's awarding plaintiff summary judgment regarding liability on its first and third causes of action for breach of contract, the Court searches the Record and dismisses as redundant plaintiff's self-described "alternative" fourth cause of action for unjust enrichment. *See* NYSCEF Doc. No. 17 at p. 5; *see also* CPLR § 3212(b) (stating that "[i]f it

THE SECOND CAUSE OF ACTION FOR FORECLOSURE OF SECURITY INTEREST

Pursuant to Article Nine of the UCC, when a debtor signs a security agreement and a creditor secures its claims by filing a UCC-1 financing statement, UCC § 9-501(1) "grants a secured party the right, after a debtor's default, to foreclose or otherwise enforce the security interest by any available judicial procedure." *Bank of Tokyo Trust Co. v Urban Food Malls*, 229 AD2d 14, 24 (1st Dept 1996), *citing* NY UCC § 9-501(1); *see* NY UCC §§ 9-501 to 9-511, 9-607, 9-609, 9-610.

Plaintiff has established *prima facie* entitlement to summary judgment regarding liability with respect to its second cause of action, as its submissions unambiguously reflect that in the Guaranty, defendants granted plaintiff a security interest in and to the Collateral, and that plaintiff perfected its security interest in the Collateral by way of its June 20, 2023 filing of the UCC-1 Statement. *See* NYSCEF Doc. Nos. 2-4; NYSCEF Doc. No. 15 at ¶¶ 3-6. Defendants' submissions in opposition, which are wholly silent with respect to the issue of the UCC-1 Statement, do not establish the existence of material issues of fact which require a trial concerning this claim. *See*

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shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion"); *Bsi v Raimo*, 195 AD3d 590, 594 (2d Dept 2021) (stating that "[a]lthough the defendants did not move for summary judgment . . . Under the circumstances presented, the Supreme Court properly searched the record and awarded summary judgment to the defendants").

NYSCEF Doc. Nos. 22-24. And as noted above, the Court does not credit defendants' claim that five purported triable issues of fact preclude summary judgment in plaintiff's favor generally.[2]

Accordingly, the branch of plaintiff's motion seeking summary judgment regarding liability on its second cause of action for foreclosure of security interest is granted with respect to liability, and because the Court on this Record cannot render a determination regarding damages, counsel should be prepared to address the issue of the determination of the amount of plaintiff's damages at the conference that is scheduled for April 2, 2024 at 10:30 a.m., which damages may include a judgment of foreclosure upon plaintiff's security interest in the Collateral. *See* NY UCC §§ 9-501 to 9-511, 9-607, 9-609, 9-610; *see also Bank Leumi USA v GM Diamonds, Inc.*, 2016 N.Y. Misc. LEXIS 4986, **10-11 (Sup. Ct. N.Y. Cty. Feb. 8, 2016) (awarding plaintiff summary judgment on a claim for foreclosure of security interest and noting that plaintiff "has established its entitlement to foreclose on the Security by producing the Security Agreement, the Installment Note, the Forbearance Agreement, and the affidavit of [the] Deputy Head of

[2] Although plaintiff in its Notice of Motion fails to seek summary judgment dismissing the affirmative defenses set forth in defendants' Answer (*see* NYSCEF Doc. No. 8), the Court notes that any and all defenses concerning the five triable issues of fact cited by defendants in an effort to defeat this motion – which were rejected by this Court – are without merit as a matter of law and provide no basis for the denial of plaintiff's summary judgment motion.

Diamond and Jewelry Finance for Bank Leumi, attesting to [defendant]'s nonpayment under the Installment Note and Forbearance Agreement").

The Court cautions, however, that plaintiff is entitled to only one potential recovery in this action, and the Court will not permit plaintiff to improperly obtain any manner of a double recovery by foreclosing on the Collateral if plaintiff is made whole by monetary damages, or by seeking monetary damages if plaintiff is made whole by foreclosing on the Collateral. As such, plaintiff should be prepared to elect its remedies. *See Aurora Loan Services, LLC v Lopa*, 88 AD3d 929, 932 (2d Dept 2011) (noting that "once a remedy at law has been resorted to, it must be exercised to exhaustion before a remedy in equity, such as foreclosure, may be sought").

THE FIFTH AND SIXTH CAUSES OF ACTION

Because the fifth cause of action for conversion and the sixth cause of action for replevin involve the same underlying facts as the first and third causes of action for breach of contract and seek the same relief as the second cause of action for foreclosure of security interest, *i.e.*, plaintiff's entitlement to the Collateral, the Court searches the Record pursuant to CPLR § 3212(b) and dismisses the fifth and sixth causes of action as duplicative. *See 111 W. 57th Inv. LLC v*

111W57 Mezz Inv. LLC, 192 AD3d 618, 621 (1st Dept 2021) (stating that "we agree with Supreme Court that the cause of action for conversion is duplicative of the UCC claim"), *citing Stillwater Liquidating LLC v Partner Reins. Co., Ltd.*, 2017 N.Y. Misc. LEXIS 487, **24-25 (Sup. Ct. N.Y. Cty. Jan. 23, 2017), *aff'd* 151 AD3d 585 (1st Dept 2017); *Ocean Park Apts., Inc. v Maxem Realty LLC*, 2023 N.Y. Misc. LEXIS 2084, **7-8 (Sup. Ct. Kings Cty. Apr. 27, 2023) (dismissing causes of action for conversion and replevin and holding that "both conversion and replevin [claims] are duplicative of a breach of contract cause of action where these claims are based upon contractual violations"); *Sovereign Bank v Green Bean Trading Corp.*, 2011 N.Y. Misc. LEXIS 693, *4 (Sup. Ct. N.Y. Cty. Jan. 3, 2011) (stating that "[p]laintiff's third cause of action for replevin is duplicative of its first for breach of contract, therefore, plaintiff's third cause of action is severed and dismissed").

CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment (seq. no. 1) is granted in part and denied in part. Specifically, plaintiff is granted summary judgment with respect to liability concerning its first, second, and third causes of action. At the conference that is scheduled for April 2, 2024 at 10:30 a.m., counsel should be prepared to address the issue of the amount of damages to which plaintiff is entitled on those three claims.

Plaintiff's summary judgment motion is otherwise denied, and the fourth, fifth and sixth causes of action are hereby dismissed pursuant to CPLR § 3212(b).

The foregoing constitutes the decision and order of the Court.[3]

Dated: White Plains, New York
March 22, 2024

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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[3] All other arguments raised on this motion and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.