Royal Bus. Group, LLC v Sky Airparts Intl. Inc.

2025 NY Slip Op 30508(U)

February 10, 2025

Supreme Court, Monroe County

Docket Number: Index No. E2023002948

Judge: Daniel J. Doyle

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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROYAL BUSINESS GROUP, LLC,

Plaintiff, Index # E2023002948

-vs-

SKY AIRPARTS INTERNATIONAL INC. D/B/A SKY AIRPARTS INTERNATIONAL and NORMAN CHANCE,

Defendants.

Special Term
August 27, 2024

Appearances on Submission

- *for Plaintiff*
- *for Defendants*

DECISION

Doyle, J.

This is a merchant advance agreement case. Pending before the Court is Plaintiff's motion for summary judgment.

For the reasons set forth herein, the motion for summary judgment is **DENIED**.

LAWSUIT FACTS

The parties entered into an agreement on December 28, 2022 whereby Plaintiff agreed to purchase 17% of Company Defendant's future receivables having an agreed upon value of $304,681.05. The Individual Guarantor agreed to guaranty all amounts owed to Plaintiff from the Company Defendant upon a breach in performance.

Plaintiff alleges that it remitted the purchase price, and that the Company Defendant initially met its obligations. It is alleged that the Company Defendant stopped making payments to Plaintiff and otherwise breached the Agreement by intentionally impeding and preventing Plaintiff from making the agreed ACH withdrawals from the bank account while conducting regular business operations.

It is alleged that the Company Defendant made payments totaling $26,743.20, leaving a balance due of $277,937.85. Plaintiff also seeks attorney's fees and costs.

LEGAL ANALYSIS

A party seeking summary judgment "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 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id. See also, Christopher P. v. Kathleen M.B., 174 A.D.3d 1460 (4th Dept. 2019). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324.

"'It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." Katz v. Beil, 142 A.D.3d 957, 964 (2nd Dept. 2016) (citation omitted).

Plaintiff submits the Affidavit of Abraham Felsenstein, owner of Plaintiff, who avers to the making of the agreement and the periodic amounts that were to be collected. Felsenstein indicates that Defendants never requested a reconciliation. It is alleged that Defendant defaulted under the agreement by intentionally interfering with Plaintiff's right to collect the periodic payments. See Affidavit of Abraham Felsenstein, ¶13 (NYSCEF Doc. #9). Specifically, Felsenstein states that ten attempted debits by Plaintiff were rejected "for insufficient funds as evidence by the return code 'R01' on the remittance history and failing to provide Plaintiff with advance notice or an explanation of the rejected transactions." Id.

Here, Plaintiff fails to establish prima facie entitlement to summary judgment. The reconciliation provision at issue in this action provides:

> 4. Changes to the Periodic Amount (IMPORTANT PROTECTION FOR SELLER). The initial Periodic Amount is intended to represent the Specified Percentage of Seller's periodic Future Receipts. Seller or RBG may request an adjustment to the Periodic Amount to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Seller agrees to provide RBG any information requested by RBG to assist in this reconciliation. Within five days of RBG's reasonable verification of such information, RBG shall adjust the Periodic Amount on a going-forward basis to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. RBG will notify Seller prior to any such adjustment.

> After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Periodic Amount until any subsequent adjustment. To request an adjustment to the Periodic Amount call 786-472-6630 or email us at accounting@royalbusinessgroupllc.com.

(NYSCEF Doc. #10).

"'When determining whether a transaction is a loan, substance—not form—controls.'" Oakshire Properties, LLC v. Argus Cap. Funding, LLC, 229 A.D.3d 1199, 1200-01 (4th Dept. 2024), *quoting* Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 334 (2021). The transaction at issue before the court "'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.'" Id. at 1201 (citation omitted). "The primary question is 'whether the [purported lender] is absolutely entitled to repayment under all circumstances [because, u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan.'" Id. "There are generally three factors that must be weighed to determine whether a repayment is absolute: '(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' or go out of business." Id.

The true nature of the agreement presented to the court for enforcement is relevant irrespective of whether a reconciliation is requested by a party. The terms of the agreement at issue before the court are determinative. See Crystal Springs Cap., Inc. v. Big Thicket Coin, LLC, 220 A.D.3d 745, 748 (2nd Dept. 2023).

Here, the agreement contains a provision purporting to provide a right of reconciliation. However, while the presence of a purported reconciliation provision is "an

indication of whether an agreement constitutes a loan" and regardless of the inclusion of the "buzz" words purporting to confer such protection, the court must assess whether the agreement at issue before it "make[s] clear on its face whether it conferred that right." Kapitus Servicing, Inc. v. Point Blank Constr., Inc., 221 A.D.3d 532, 534 (1st Dept. 2023). If there is no true obligation to reconcile, despite the inclusion of a purported reconciliation provision, the true nature of the agreement will be called into question.

In the case at bar, the purported reconciliation provision provides that "Seller agrees to provide RBG any information requested by RBG to assist in the reconciliation." The provision continues that "[w]ithin five days of RBG's reasonable verification of such information," the periodic amount shall be adjusted. This provision raises a question as to Plaintiff's entitlement to summary judgment because Plaintiff's obligation to reconcile is unclear. Pursuant to the purported reconciliation provision, Plaintiff has the unfettered right to demand any and all information it wants and then can determine whether there is "reasonable verification" for the reconciliation request. The terms of the purported reconciliation provision do not clearly confer a right of reconciliation, as Plaintiff could, at will, abridge that right by demanding any and all information for as long as it wants and then also has the unrestrained ability to determine whether the information provided is reasonably verified.

As Plaintiff fails to establish prima facie entitlement to summary judgment on the agreement at issue, the motion for summary judgment is **DENIED**.

Defendants shall submit a proposed order to opposing counsel for approval, and thereafter to the Court, by March 11, 2025.

Signed at Rochester, New York on February 10, 2025.

HONORABLE DANIEL J. DOYLE
Supreme Court Justice