Newco Capital Group VI LLC v Renovationninjas LLC
2025 NY Slip Op 30751(U)
March 3, 2025
Supreme Court, New York County
Docket Number: Index No. 453178/2022
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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NEWCO CAPITAL GROUP VI LLC,

Plaintiff,

- v -

RENOVATIONNINJAS LIMITED LIABILITY COMPANY D/B/A RENOVATIONNINJAS, RENOVATIONNINJAS LIMITED LIABILITY COMPA, RENOVATION NINJAS LLC, RENOVATION NINJAS, and MARIAM FOUZIA

Defendants.

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INDEX NO. 453178/2022

MOTION DATE 09/11/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

In this breach of contract action, plaintiff Newco Capital Group VI LLC (Newco), entered into a revenue purchase agreement (the Agreement) on or about December 17, 2021, in which it agreed to purchase future receivables of defendants Renovationnijas Limited Liability Company d/b/a Renovationninjas, Renovationninjas Limited Liability Compa, Renovation Ninjas LLC, and Renovation Ninjas (collectively the Merchant). Specifically, the Agreement provided for Newco to pay the Merchant an upfront sum of $75,000.00 (the Purchase Price) and in exchange, the Merchant would remit $105,750.00 (the Purchased Amount) of its future receivables to Newco, to be paid at a rate of 15% of Merchant's weekly receipts (the Specified Percentage) (*see* Agreement, NYSCEF No. 52). The Agreement also provided defendant Miriam Fouzia (Fouzia or Guarantor) would guarantee Merchant's performance under the

Agreement and thus would be fully responsible for all unremitted payments in the event of Merchant's breach (*id.*).

On February 16, 2022, Newco commenced this underlying breach of contract and breach of guaranty action, suing for violation of the Agreement, alleging that Merchant stopped payments to Newco after remitting only $23,135.00, despite still conducting business and collecting receivables. Newco further alleges Fouzia is responsible for paying it the money owed under the Agreement's guaranty provision. In addition to the balance of the unremitted Purchased Amount, $82,615.00, Newco seeks a default fee in the amount of $2,500.00, a Not Sufficient Funds (NSF) fee in the amount of $35.00[1], and attorneys' fees in the amount of $24,784.50,[2] for a total amount of $109,934.50, plus interest. In response, defendants deny Newco's allegations and raise several affirmative defenses, including that the Agreement was an unenforceable loan pursuant to New York's usury laws.

ARGUMENTS

Newco now moves for summary judgment on the complaint, pursuant to CPLR § 3212, claims it has made a prima facie showing entitling it to judgment as a matter of law, and seeks, jointly and severally, $109,934.50 in damages, plus interest from February 11, 2022, the date of defendants' default. Defendants oppose the motion and request dismissal of the action.[3] Specifically, defendants argue the Agreement is an unenforceable usurious loan because it obligated defendants to repay the Purchased Amount within a definitive time period, at an

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[1] Newco was allegedly blocked from withdrawing money from the Merchant's authorized bank account (NYSCEF No. 53 ¶ 15; *see also* 53, Appendix A ¶¶ C & D).

[2] This amount was calculated as follows: purchased amount less amount remitted by Merchant equals the remaining balance [$105,750.00 - $23,135.00 = $82,615.00] thirty percent of the remaining balance equals [$82,615.00 x 30% = $24,784.50] (*see* NYSCEF No. 55, ¶ 3.4).

[3] While defendants have not moved for dismissal of the action, CPLR 3212 (b) allows the Court to grant such relief without the necessity of a cross-motion.

interest rate in excess of forty-one percent,[4] without any actual ability to reconcile the repayment, irrespective of the terms and provisions of the Agreement. Defendants further argue that a request for reconciliation of the weekly remittance amount was made, and ultimately refused by Newco (Affidavit of Mariam Fouzia, NYSCEF No. 61, ¶ 7).

In reply, Newco maintains it established its prima facie burden entitling it to judgment as a matter of law. Newco argues defendants' arguments lack merit and that Merchant never actually made a request for reconciliation as claimed, nor does Merchant submit proof of any such request. Newco further argues defendants failed to properly respond to Newco's statement of material facts, in the required correspondingly numbered paragraphs, pursuant to 22 NYCRR 202.8-g (c). Therefore, according to Newco, defendants have failed to raise any genuine issues of material fact, as defendants do not actually respond to, or challenge any of the facts asserted by Newco.

DISCUSSION

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Matter of Newman*, 231 AD3d 12, 22 [1st Dept 2024] [internal quotation marks and citation omitted]). "[T]he movant 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" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012] [internal quotation marks and citation omitted]). "Once this showing has been made, the burden shifts to the party opposing the motion for summary judgement to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

[4] Defendants assert "the agreement represents defendants borrowing $75,000.00 with a repayment amount of $105,750.00 representing the stated nominal interest charge of 15% which equals the annual percentage rate (APR) of over 41% which exceeds both civil and criminal usury thresholds" (NYSCEF No. 63 Memo in Opp).

which require a trial of the action" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal citation and quotation marks omitted]). Where the moving party fails to make such a showing, the motion must be denied without regard to the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). "Since [summary judgment] deprives the litigant of [its] day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Defendants primarily argue the Agreement constituted a usurious loan. While General Obligations Law sec. 5-521(1) does not provide for a corporation to raise the usury defense, the Court of Appeals has clarified that "this bar does not preclude a corporate borrower from raising the defense of 'criminal usury' (i.e., interest over 25%) in a civil action" (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 326 [2021]; *see also* Penal Law sec 190.40). Upon examination of the Agreement, Merchant has checked the box for "LLC" as the "Type of Entity" under Merchant's legal name, indicating Merchant is a corporate entity (*see* NYSCEF No. 55). Therefore, the 41+% interest rate alleged in this case permits Merchant to raise a usury defense pursuant to New York's Penal Law.

The Court must first determine whether the transaction described in the Agreement actually constitutes a loan by Newco to Merchant. To determine the true nature of the agreement, the agreement "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" (see *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] [internal citations and quotation mark omitted]). In other words, while the agreement proclaims itself a contract for the sale of receivables, "substance- not form- controls. . . . [P]arties who are

not directly exposed to market risk in the value of the underlying assets are likely to be lenders, not investors. "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 AD3d 664, 665 [2d Dept 2020]). "[U]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*Oakshire Props., LLC v Argus Capital Funding, LLC*, 229 AD3d 1199, 1201 [4th Dept 2024] [internal quotation marks and citation omitted]). Therefore, in determining whether a transaction constitutes a loan, a court must determine whether an alleged lender is absolutely entitled to repayment under all circumstances (*see id.*). Generally, the Court evaluates three elements to determine whether a repayment is absolute: whether the agreement contains a reconciliation provision; whether the agreement has a finite term; and whether there is any recourse should the merchant go out of business or declare bankruptcy (*see LG Funding*, 181 AD3d at 666). Where the contract at issue contains a reconciliation provision, an indefinite term, and limited recourse in the event a company declares bankruptcy, the transaction is not considered to be a loan (*see Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]).

First, the Agreement contains a reconciliation provision. That provision provides that, "[a]s long as an Event of Default, or breach of this agreement, has not occurred, Merchant, may request a retroactive reconciliation of the total Remittance Amount," and "[a]s long as an Event of Default, or breach of this agreement, has not occurred, Merchant may give notice to Newco to request a decrease in the Remittance, should [it] experience a decrease in its Future Receipts" (*see* NYSCEF No. 55, ¶¶ 1.3 & 1.4). Merchant argues that the reconciliation provision is illusory, that Merchant requested a reconciliation and was denied (Fauzia Aff, ¶ 7). However,

Merchant claims only that it "contacted the plaintiff to request reconciliation" (*id.*) and that "according to the agreement entitled Revenue Purchase Agreement, requests for reconciliation are not required to be in writing" (*id.*, ¶ 9). However, the Revenue Purchase Agreement does require requests under the reconciliation provision to be made in writing, by email, and attaching bank account statements and other financial information (NYSCEF Doc. No. 2 ¶ 1.3). Merchant has not provided any evidence of emailing the request or providing the required information. Other than a self-serving affidavit, it also provides not evidence it was entitled to a reconciliation under the Agreement if it had provided the required documentation. Therefore, defendants have failed to show a disputed issue of material fact regarding this element and this element weighs in favor of plaintiff.

Second, the term of the Agreement was not finite as the amount of the weekly payments made by the Merchant could change, causing the term of the Agreement to be indefinite (*see Principis,* 201 AD3d at 754). Additionally, in the Agreement, Newco "acknowledges that it may never receive the Purchased Amount in the event that the Merchant does not generate sufficient revenue" (*see* NYSCEF No. 55 at p 2). This factor also weighs in favor of plaintiff.

Third, the Agreement provides "Merchant going bankrupt or going out of business, or experiencing a slowdown in business, or a delay in collecting its receivables, in and of itself, does not constitute a breach of this Agreement" (*id.*). However, the Agreement provides Newco with a security interest in all accounts, equipment, and inventory, among other items, which the Agreement provides Newco would be authorized to realize without seeking leave from the Bankruptcy Court, in the event Merchant files for bankruptcy protection (*id.* at 6). Newco also has recourse against the Guarantor in the event of nonpayment. Accordingly, the factor of recourse weighs in favor of this Agreement being a loan. In evaluating Newco's risk in this

transaction, it appears that, according to the terms of the Agreement, Newco has taken on some risk of not being paid on the planned schedule but takes on limited risk that it would not be satisfied eventually, given the recourse reserved to it in the Agreement. With two of the three factors weighing in favor of the Agreement being a sale, rather than a loan, and with no triable issue of material fact, as a matter of law, Newco has established that the transaction set forth in the Agreement is not a loan, thus, defendants' usury defense also fails matter of law.

Newco has further established its prima facie burden and entitlement to judgment on its breach of contract and breach of guaranty claims. Relying on the submission of the affidavit of Newco manager Phillip Scaglione (NYSCEF No. 53) and accompanying documentation, Newco shows the existence of a valid contract between the parties, performance of the contract by the injured party (Newco), a breach by the Merchant, and the resulting damages (*see Rabinowitz v Clarke*, 230 AD3d 1077, 1077 [1st Dept 2024]). Here, Newco has demonstrated that it paid the Merchant the $75,000.00 purchase price for its receivables, that the Merchant stopped making receivables payments to Newco before the full contractual amount of receivables had been paid, and that the Merchant remains in business (*see* NYSECF Nos. 55-59).

In opposition to Newco's prima facie showing, defendants do not dispute the existence of the Agreement and the personal guaranty, or the execution of the same.[5] Defendants also do not dispute that Newco fulfilled its obligations under the Agreement, or that defendants remitted payments to Newco totaling $23,135.00, then stopped depositing receivables. Instead, defendants singularly argue that the Agreement was a usurious loan. However, as the Court has already determined that the Agreement was not a loan, defendants' arguments fail to raise a

[5] Fouzia admits in her affidavit that she executed the Agreement on December 17, 2021 (*see* NYSCEF No. 61).

triable issue of fact.[6] Newco is therefore entitled to damages in the amount of $85,150.00, representing the unpaid receivables balance of $82,615.00, a default fee in the amount of $2,500.00, and an NSF fee in the amount of $35.00.

Newco has also established its entitlement to attorneys' fees. Generally, a prevailing party may only be awarded attorneys' fees based on a statute or contractual provision (*see EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551, 553 [1st Dept 2019]). Paragraph 3.4 of the Agreement states, "[u]pon the occurrence of an Event of Default, and [Newco] retains an attorney or law firm to enforce this Agreement, Merchant and Guarantor agree that a fee equal to 30% of the Remaining Balance (purchased amount less amount remitted by Merchant) ("Attorney's Fees") shall be immediately assessed Merchant and Guarantor agree that the calculation for Attorney's Fees is reasonable" (*see* NYSCEF No. 55, ¶ 3.4).[7] This language provides the parties' unmistakably clear intent to permit Newco to recover attorneys' fees in this type of action (*see Sage Sys., Inc. v Liss*, 39 NY3d 27, 33 [2022]).

Therefore, Newco is granted judgment entitling it to attorneys' fees in the amount of $24,784.50. However, as "[a]ttorney fees are not damages for breach of any substantive provision of a contract… [and]… represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been determined" (*Solow Mgt. Corp. v*

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[6] Defendants argue the balance sought by Newco of $109,934.50 is lacking evidentiary support such as a payment history (see NYSCEF Nos. 62 ¶ 4, 63 p 10). However, Newco has submitted on this record a transaction history (NYSCEF No. 56).

[7] Paragraph 3.5 entitled "Costs" further states, "Merchant shall pay to Newco all reasonable costs associated with (a) an Event of Default, (b) breach by Merchant of the Covenants in this Agreement and the enforcement thereof, and (c) the enforcement of Newco's remedies set forth in this Agreement, including but not limited to court costs and attorneys' fees" (*see Id.* at ¶ 3.5).

Tanger, 19 AD3d 225, 226-7 [1st Dept 2005]), interest on this amount shall accrue only from the date at which judgment is entered and not from the date of default.[8]

CONCLUSION AND ORDER

For the reasons discussed above, it is

ORDERED that the motion by plaintiff Newco Capital Group VI LLC for summary judgment on the complaint is granted, and plaintiff is awarded a judgment against defendants, jointly and severally, in the principal amount of $85,150.00, plus interest from February 11, 2022, together with attorneys' fees in the amount of $24,784.50, and costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that plaintiff shall serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

This constitutes the decision and order of the Court.

3/3/2025
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

[8] The date when interest begins to accrue when attorneys' fees are recoverable based on breach of a contract is when the Court finally determines the party seeking the fees to be the prevailing party (*see 1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 503 [1st Dept 2010]).