Novus Capital Funding II LLC v Long Van Nailcare, Inc.
2025 NY Slip Op 31963(U)
April 28, 2025
Supreme Court, Kings County
Docket Number: Index No. 508388/2023
Judge: Lisa S. Ottley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24
--x
NOVUS CAPITAL FUNDING II LLC,

Plaintiff,

-against-

LONG VAN NAILCARE, INC., d/b/a TIPSY NAIL AND SALONBAR LAKE MARY and LONG MINH HO,

Defendants.
--x

Mot. Seq. # 1

Index #508388/2023

DECISION & ORDER

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 September 16, 2024.

Papers	Numbered
Notice of Motion and Affirmation..	1& 2 [Exh. A-E]
Affidavit in Opposition..	3
Memoranda of Law...	4 and 5

The plaintiff commenced this action to recover damages for breach of contract and breach of the personal guaranty against the defendants for a sum certain totaling $19,422.00, which includes the balance due under the terms of the contract, a default fee and insufficient funds fee. Plaintiff moves pursuant to CPLR §§ 3212 and 6220 for summary judgment in its favor against defendants, and enjoining defendants from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the properties, or any assets of defendant, Long Van Nailcare, Inc., d/b/a Tipsy Nail and Salonbar Lake Mary. Defendants, Long Van Nailcare, Inc., d/b/a Tipsy Nail and Salonbar Lake Mary, and Long Minh Ho, as guarantor, oppose plaintiff's motion the ground that there are material issues of fact which preclude summary judgment from being granted.

The underlying action seeks damages based on an alleged breach of a purported Revenue Purchase Agreement entered into between the parties on or about January 23, 2023. Plaintiff alleges that pursuant to the Agreement, plaintiff purchased $29,980.00 of future revenue generated during the course of defendants' business; disbursed $20,00.00 as the agreed upon purchase price for the purchased revenue, minus the contractual origination fee of $2,000.

The plaintiff submitted proof of an executed written contract and proof of the defendants' breach. In opposition to the plaintiff's motion, the defendants argue economic duress, and that the agreement is a loan and usurious. In addition, defendants argue that the plaintiff fails to set forth the basis upon which the calculation of the amounts allegedly due and owing are based and why it is entitled to additional fees which are "highly suspect." In addition, defendants argue that plaintiffs' records should not be admitted as a business record pursuant to CPLR 4518.

After careful review of the moving papers and opposition thereto, the court finds as follows:

First, this court will address defendants' argument as to the admissibility of the documents pursuant to CPLR 4518, submitted in support of plaintiff's motion for summary judgment. In opposition, defendants argue that the plaintiff's Collections Manager, Ekaterina Marciante, does not have sufficient knowledge to lay a proper foundation for the admissibility of the records annexed to plaintiff's motion. More specifically, defendants argue that the affidavit of Ekaterina Marciante does not state that the records were made in the regular course of business, and merely states that the claim is based upon her "personal knowledge of the facts, circumstances and events that are the subject of this action."

CPLR § 4518 provides, *inter alia*, that any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. See, *CPLR § 4518.*

In addition to these statutory requirements, the Court of Appeals has held that "[u]nless some other hearsay exception is available, admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he [or she] is under a business duty to report it to the entrant." *See, Johnson v. Lutz*, 253 N.Y. 124, (1930); *Global Merchant Cash Inc., v. LPZ Carriers LLC.*, 81 Misc.3d 1236(A), 202 N.Y.S.3d 729 (Sup. Ct., Kings Co., 2024). A proper foundation for the admission of the business record must be provided by someone with personal knowledge of the maker's business practices and procedures when a party relies on that exception to the hearsay rule in attempting to establish its prima facie case. See, *U.S. Bank N.A. v. Zakarin*, 208 A.D.3d 1275, 175 N.Y.S.3d 284 (2nd Dept., 2022].

The court finds that the subject affidavit establishes that the records annexed were created in the regular course of plaintiff's business. The affiant, Ekaterina Marciante, states that she manages the day-to-day operations of Novus Capital and supervises all aspects of plaintiff's business operations; the customer relationship management system (CRM) which is utilized to enter and maintain all aspects of plaintiff's financial transactions, such as disbursement amounts and dates, as well as remittance amounts and dates. Ms. Marciante also states that the records are entered in plaintiff's regular practice at or near the time of the events being recorded. (See, NYSCEF Doc. No. 14). Moreover, the plaintiff's affiant asserts that she has personal knowledge

of the agreement, proof of wire transfer, and payment history. *See, JP Morgan Chase Bank, N.A. v. RADS Group, Inc.*, 88 A.D.3d at 767, 930 N.Y.S.2d 899 (2nd Dept., 2011). The court finds that the plaintiff has demonstrated that the records relied upon in the affidavit are admissible under the business records exception to the hearsay rule. *See, CPLR 4518(a); HSBC Mtge. Servs., Inc. v Royal*, 42 A.D.3d 952, 37 N.Y.S.3d 321 (2nd Dept., 2016).

Summary Judgment

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 (2nd 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).

Whether the agreement to purchase future accounts receivable is a loan with a usurious interest in excess of New York State's permitted civil rate (see, *Adler v. Marzario*, 200 A.D.3d 829, 155 N.Y.S.3d 337 (2nd Dept., 2021), the language purporting to state its nature is not conclusive, rather, the contract 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, L.G. Funding, LLC v. United Senior Props. Of Olathe, LLC, LLC*, 181 A.D.3d 664, 665, 122 N.Y.S.3d 309 (2nd Dept., 2022). The court will look at whether the purchasing party is entitled to repayment under all circumstances, as unless the principal sum is repayable absolutely, the transaction cannot be a loan. Three factors are usually weighed to determine whether the 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, L.G. Funding, LLC v. United Senior Props. Of Olathe, LLC, supra.*

If the agreement is found to be a loan, criminal usury would be a defense to its enforcement, rendering it void (*see Davis v. Richmond Capital Group, LLC*, 194 A.D.3d 516, 517, 150 N.Y.S.3d 2). "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, *Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752, 160 N.Y.S.3d 325 (2nd Dept., 2022); citing, *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 665, 122 N.Y.S.3d 309 (2nd Dept., 2022).

In the case at bar, the agreement does not set a finite term for repayment. It indicates that the agreement is for estimated payments that could be debited at 12% of the defendants' revenue. In addition, the agreement provides a reconciliation clause (See NYSCEF Doc. #17, p. 4-5 paragraphs 10 through 11) under Seller's Right for Reconciliation and Request for Reconciliation Procedure. The defendants could request reconciliation via a written

reconciliation request to the purchaser, to reconcile the amount the purchaser is receiving.

Accordingly, 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 accounts receivable, and not a disguised loan. The agreement states on Page 1 at the very top page "Future Receivables Sale and Purchase Agreement, and on p. 4 at Section III it states, "Sale of Purchased Future Receipts," which does not support defendants' argument that the agreement was misrepresented as a loan. (See, NYSCEF Doc. #17, annexed as Exh. "A" to the moving papers).

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 defendants' claim that the agreement was misrepresented, which defendant, Long Minh Ho, understood to be a loan, and that as guarantor, he was under economic duress, and fraudulently induced into signing the contract is unpersuasive. Defendants also argue that requests were made to plaintiff for an adjustment or reconciliation of the weekly remittance amount but has not annexed any documentation showing his requests for reconciliation to support this claim, which defendants argue was rejected by the plaintiff. Under the terms of the contract, the request was to be in writing. As indicated above, the contract has been considered in its totality and is not a loan disguised as a purchase future accounts receivable and is therefore not usurious. *See*, *Tender Loving Care Homes, Inc., v. Reliable Fast Cash, LLC*, 76 Misc.3d 314, 172 N.Y.S.3d 335 (Sup. Ct., Richmond Co., 2022). The defendants have failed to raise a triable issue of fact which would preclude summary judgment from being granted.

Furthermore, the court finds that the plaintiff established the essential elements of a cause of action for breach of contract, to wit, the existence of a contract, the plaintiff's performance under the contract and the defendant's breach of contract, and the resulting damages. *See*, *Liberty Equity Restoration Corporation v. Park*, 160 A.D.3d 628, 75 N.Y.S.3d 47 (2nd Dept., 2018).

The court reaches a different conclusion, however, with respect to the Default Fee of $4,931.77, included in plaintiff's total amount due and owing, due to defendants' breach. The court deems the enumerated fee to be a penalty, which the plaintiff's proof does not support. In addition, the request for attorneys' fees is denied. The plaintiff's attorney has not submitted an affirmation in support enumerating the hours, hourly rate and work done, for this to court to determine reasonable attorney's fees.

Accordingly, plaintiff's motion for summary judgment is granted as follows, and it is hereby

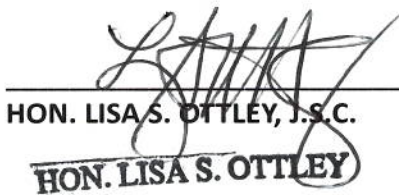
ORDERED that the defendants are enjoined from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the properties, or any assets of defendant, Long Van Nailcare, Inc. d/b/a Tipsy Nail and Salonbar Lake Mary, and it is further

ORDERED, that the Clerk of the Court enter judgment in favor of plaintiff against the defendants, Long Van Nailcare, Inc., d/b/a Tipsy Nail and Salonbar Lake Mary, and Long Minh Ho, (Guarantor), and it is further

ORDERED, that plaintiff is directed to submit for review by the Clerk of the Court, a proposed money judgment, in the amount of $14,490.23, with interest at 9%, from March 9, 2023, plus $150.00 (insufficient funds fee), together with statutory costs and disbursements, less the default fee(s) enumerated in the Agreement, on notice to all parties and/or their respective counsel.

The foregoing constitutes the decision and Order of this Court.

Dated: Brooklyn, New York
April 28, 2025



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

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