Thriveway Funding Group LLC v Kismet Enters., LLC
2025 NY Slip Op 34496(U)
November 20, 2025
Supreme Court, Kings County
Docket Number: Index No. 512952/2025
Judge: Carolyn E. Wade
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At an I.A.S. Trial Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 20 Day of November, 2025

Hon. Carolyn Wade, Justice

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THRIVEWAY FUNDING GROUP LLC,

Plaintiff,

- against -

KISMET ENTERPRISES, LLC D/B/A FILTA ENVIRONMENTAL KITCHEN SOLUTIONS, LAUREN MARIE WANCO and DEMETRI A. WANCO,

Defendants.

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DECISION AND ORDER

Index No. 512952/2025

Calendar Nos. 44 and 45

Oral Arg. Nov. 5, 2025

Based on the foregoing papers, NYSCEF Documents No. 13-44, and after oral argument, it is decided and ordered that Plaintiff's Motion to Dismiss Defendants' affirmative defenses and for Summary Judgment is **GRANTED** in favor of Plaintiff and against Defendants, jointly and severally, in the amount of **$153,911.80**. Additionally, Defendants' cross-motion to dismiss the Complaint is **DENIED** in its entirety.

BACKGROUND

By Future Receivables Sale and Purchase Agreement, dated October 30, 2024 ("Agreement"), Defendant Kismet Enterprises, LLC d/b/a Filta Environmental Kitchen Solutions ("Kismet") sold $210,000.00 of its Future Receipts to Thriveway Funding Group, LLC ("Thriveway") for an upfront payment of $150,000.00, less disclosed and agreed-upon origination fees and balance transfers. See NYSCEF Doc. No. 19. Defendants Lauren Marie Wanco and Demetri A. Wanco ("Guarantors') individually guaranteed Kismet's performance under the Agreement. *Id.* at p. 16.

The Agreement states that Thriveway is purchasing 29% of Kismet's daily receipts ("Specified Percentage"). See Agreement at p. 1. The Agreement required Kismet to deposit all its business receipts into a designated account, out of which Thriveway was authorized to ACH debit $1,600.00 each business day until the purchased amount of business receipts was remitted in full. *Id.* Sections 10 through 14 of the Agreement provide Kismet with a mandatory right of reconciliation of past payments and prospective adjustment of future payments to align them to the Specified Percentage of actual receipts. *Id.* at p. 4. The repayment "term" is potentially "infinite." *Id.* at § 2. Section 16 of the Agreement provides and explains that Thriveway absorbs the risk that Kismet will not generate receipts as anticipated and that Kismet's bankruptcy is not an event of default.

Thriveway performed under the Agreement by paying for the purchased receipts. See NYSCEF Doc. No. 20. On March 6, 2025, Thriveway agreed to accept reduced daily payments of $400.00. *Id.* On March 26, 2025 and March 27, 2025, ACH debits were rejected due to a stop payment. *Id.* While Kismet subsequently made several $400.00 daily payments, those payments ceased on April 17, 2025, when Defendant Wanco advised Thriveway that Kismet would cease to perform its contractual obligations and thus, the ACH debits were again rejected due to a stop payment. *Id.* Based on the stop payments, the event of default occurred. See Agreement at § 27. No dispute exists regarding the unremitted amount of purchased receipts is $115,436.10.

LEGAL ANALYSIS

As an initial matter, Defendants' allegation that Thriveway did not meet the publication requirements of the LLC Act is moot. Based on proof of publication e-filed by Thriveway (NYSCEF Docs. Nos. 34 and35), Kismet has advised the Court that they "are satisfied that plaintiff filed proof of publication of its articles of organization." See NYSCEF Doc. No. 44. Defendants' contention that Thriveway waived Defendants' breaches, by filing suit after several additional payments were made, is without merit or support within the record. The undisputed payment history reflects that, on March 26 and 27, 2025, Kismet breached the Agreement, that those payments were not made up, and that Thriveway filed suit only after Kismet again breached the Agreement, by stopping payment again and never thereafter resuming any

payments. Defendants cite to no law to support their contentions, that a party waives its contractual rights by accepting partial payment *prior* to commencing suit or that the filing of a suit, in and of itself, constitutes a waiver.

Defendants further assert that the Agreement is usurious. The Agreement, however, contains a mandatory reconciliation and adjustment provision, has no finite term for repayment, and does not render bankruptcy an event of default. See *True Bus. Funding, LLC v Guerrero A. Construction Corp.*, 239 AD3d 787 [2d Dept 2025]. Kismet's failure to not request a reconciliation, and failure to demonstrate a valid excuse for ceasing to perform, negates any contention that reconciliation was illusory.

Section 29 of the Agreement provides that, in an event of default, the full uncollected Purchased Amount becomes immediately due and payable along with Thriveway's reasonable expenses and attorneys' fees incurred in enforcing the Purchase Agreement.

> 29. Seller's Obligations Upon Default. Upon occurrence of an Event of Default due to Seller's breach of its obligations under this Agreement, Seller shall immediately deliver to Buyer the entire unpaid portion of the Purchased Amount. In addition, Seller shall also pay to Buyer, as additional damages, any reasonable expenses incurred by Buyer in connection with recovering the monies due to Buyer from Seller pursuant to this Agreement, including without limitation the costs of retaining collection firms and REASONABLE ATTORNEYS' FEES and disbursements (collectively, "Reasonable Damages"). The parties agree that Buyer shall not be required to itemize or prove its Reasonable Damages and that the fair value of the Reasonable Damages shall be calculated as thirty-three percent (33%) of the undelivered portion of the Purchased Amount of Future Receipts upon the occurrence of an event of default, or ninety five hundred dollars ($9,5000.00), whichever is greater.

Thus, contrary to Defendants' contention, the Agreement specifically affords Thriveway the right to recoup its reasonable attorneys' fees and the costs. The Agreement further provides Thriveway with the right to forego an inquest and obtain a judgment in the amount of 33% of the undelivered portion of the Purchased Amount, which, in this case, is $38,478.70, or $9,500.00, whichever amount is greater. Defendants further argue that liquidated damages are never permitted in contractual disputes. This contention is meritless. In *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420 [1977], the Court established the general rule that:

> A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is

> plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.

Id. at 425. The party seeking to avoid liquidated damages has the burden to prove that the stated liquidated damages are an unenforceable penalty. See *JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 381 (2005). This burden is satisfied through evidence demonstrating that "actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses" See *Pool Doctor Mgt. Serv., Inc. v Bd. of Managers of the Meadowlands Estates Condominium, Inc.*, 216 AD3d 1117, 1119-20 [2d Dept 2023].

In support of its motion, Thriveway annexes the affidavit of Eliran Dahan, the Managing Member of Thriveway, who substantiated the fees and costs typically incurred in enforcing a breach of these agreements. See NYSCEF Doc. 16 at ¶ 22. In response, Defendants do not argue that $38,478.70 is grossly disproportionate or was not foreseeable. Moreover, Defendants do not submit evidence that actual damages were readily ascertainable at the time the Agreement was entered into. See *Pool Doctor Mgt. Serv., Inc. v Bd. of Managers of the Meadowlands Estates Condominium, Inc.*, 216 AD3d 1117 [2d Dept 2023] (80% liquidated damages clause held enforceable).

Accordingly, it is

ORDERED that judgment to Plaintiff and against Defendants, jointly and severally, in the amount of **$153,911.80** with statutory interest thereon at 9% per annum, from **April 18, 2025**, is **GRANTED**, and it is further

ORDERED that Defendants' affirmative defenses are **DISMISSED, WITH PREJUDICE**, and directs the Clerk of the Court to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
NOV 24 2025
KINGS COUNTY CLERK'S OFFICE

ENTER:

HON. CAROLYN E. WADE, JSC

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT