SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LG FUNDING, LLC,

Plaintiff,

- against -

SNOWSTAR, INC. d/b/a BJ ADAMS AND COMPANY, INC., MICHAEL ADAMS a/k/a MICHAEL BRYSON ADAMS and BARBARA ADAMS a/k/a BARBARA ANN ADAMS,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 606811/17
Motion Seq. No.: 01
Motion Date: 10/03/17
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits and Memorandum of Law	1
Memorandum of Law in Opposition	2
Reply Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §§ 3211(a)(1) and (7), for an order dismissing defendants' affirmative defense and counterclaim; and moves, pursuant to CPLR § 3212, for an order granting it summary judgment. Defendants oppose the motion.

This breach of contract action was commenced with the filing and service of a Summons and Verified Complaint on or about July 12, 2017. *See* Plaintiff's Affirmation in Support Exhibit D. Issue was joined on or about August 14, 2017. *See* Plaintiff's Affirmation in Support Exhibit

J.

Joseph Lerman ("Lerman"), Managing Member of plaintiff corporation, submits, in pertinent part, that "[o]n December 28, 2016, LG and Snowstar entered into a written Merchant Agreement, ..., whereby Snowstar sold LG $214,263.80 ('Purchased Amount') of Snowstar's accounts, contract rights, and other obligations arising from or relating to the payment of monies from Snowstar's customers and other third party payors ('Receivables') for the sum of $150,890.00 ('Purchase Price'), to be paid to LG from 15% of Snowstar's daily revenue, with the payments to LG to be capped at $4,865.00 per week. Snowstar agreed that in the event of its default under the contact, the full uncollected Purchased Amount plus all fees due under the Merchant Agreement would become immediately due and payable in full to LG. Michael and Barbara executed guarantees of performance of all the representations, warranties, and covenants made by Snowstar in the Merchant Agreement.... On December 29, 2016, LG paid Snowstar the Purchase Price.... Snowstar breached the Merchant Agreement by defaulting on its representations and warranties to LG under the Merchant Agreement by failing to direct Snowstar's payments to LG, by blocking LG's access to a designated bank account ('Designated Account') from which Snowstar agreed to permit LG to withdraw Receivables, by failing to deposit Receivables into the Designated Account, by disposing of Snowstar's assets without LG's prior express written consent, and/or by depositing Receivables into a bank account other than the Designated Account. LG held Snowstar in breach of the Merchant Agreement on April 13, 2017.... Snowstar owes LG $146,153.80 of the Purchased Amount. Snowstar owes LG $2,500 for a default fee. In Appendix A to the Merchant Agreement, Snowstar agreed to pay LG this amount if Snowstar would default under the agreement.... Snowstar owes LG $50.00 for Not

Sufficient Funds ('NSF') fees. In Appendix A to the Merchant Agreement, Snowstar agreed to pay LG a $50 NSF fee for each instance in which a withdrawal by LG from the Designated Account would be rejected.... In total, Snowstar owes LG $148,703.80 under the Merchant Agreement. LG requests $37,175.95 for its reasonable attorney's fees. The Merchant Agreement contains a provision that I am advised requires Snowstar to pay LG's reasonable attorney's fees if LG prevails in this action." *See* Plaintiff's Lerman Affirmation in Support Exhibits A-C; Plaintiff's Rosen Affirmation in Support.

Counsel for plaintiff argues that defendants' affirmative defenses and counterclaims should be dismissed because the Merchant Cash Advance that is the subject of this action is a legal transaction for the purchase of receivables that is not a loan and is not usurious. Counsel asserts that, "[a] merchant cash advance ('MCA') is a specialized form of factoring in which a merchant sells its future receivables for a discounted amount is (*sic*) paid up front. The advantage to an MCA transaction is that it typically provides merchants with access to funds much faster than applying for a traditional loan from a lending institution. An MCA agreement should be upheld as a transaction for the sale of account receivables and not as a loan subject to usury laws where the money advanced to the merchant is not repayable in the absolute."

Counsel for plaintiff adds that, "[h]ere, the MCA agreement is complete, clear, and unambiguous on its face and is entitled to enforcement according to the plain meaning of its terms. The language of the MCA agreement evidences a clear intent by the parties to enter into a transaction for the purchase of receivables and not a loan. The MCA agreement itself states that the transaction is not intended to be a loan. There is no indication that Defendants believed that the MCA agreement was a loan or that they were paying interest thereunder. The conduct of the

parties entering into the MCA agreement further shows that the parties intended to enter into a transaction for the purchase of receivables because Plaintiff fully performed under the (*sic*) by paying for the receivables and the obligor Defendant partially performed by delivering Plaintiff part but not all of the receivables. There is no indication that Defendants objected to the terms of the MCA agreement. In short, there is nothing to rebut the presumption that the MCA agreement is enforceable. The MCA agreement is missing several material terms that typically define a loan of money. There is no promissory note. There is no maturity date. The amount owed never increases with time. There are no scheduled payments or a fixed repayment term. The guarantee is no broader than the obligations under the MCA agreement, and the guarantor's payment requirements are no greater than that of the merchant's. The money advanced by Plaintiff is not repayable in the absolute. Defendants' payments under the MCA agreement were wholly contingent on the performance of their own business. Plaintiff assumed the risk that there would be no receivables and therefore no payment. Attempting to calculate a corresponding interest rate for the transaction would require unwarranted speculation.... The express language of the MCA agreement, the attendant circumstances, and the business relationship between the parties establishes that the parties intended the MCA agreement to constitute a purchase of receivables and not a loan." *See* Plaintiff's Lerman Affirmation in Support Exhibits A and K-O.

In opposition to the motion, counsel for defendants argues that plaintiff's motion to dismiss the affirmative defenses and counterclaims should be denied because plaintiff failed to establish that the Merchant Cash Advance was not a loan and not usurious. Counsel asserts, in pertinent part, that, "[t]o determine whether a transaction is an actual sale versus a loan coupled with a security interest, the Court must look at 'the substance of the relationship between [the parties], and not simply the labels attached to the transaction.' [citation omitted].... Where a

lender purchases accounts receivables, the lender rather than the borrower bears the risk of non-performance. Where the lender only holds a security interest in a loan, the borrower remains liable for the debt and bears the risk of non-payment.... Here, Plaintiff never undertook any action under the agreement to assume any risk.... Plaintiff attempts to mischaracterize the terms of the underlying agreement as a 'Merchant Agreement' in order to avoid complying with New York lending and usury laws.... Thus, although the form of this Agreement does not exactly resemble a loan, the **unconditional and absolute promise to repay** the cash advances is a key attribute that makes this Agreement a loan rather than a purchase of future accounts receivables."

Counsel for defendants further argues that, "[p]laintiff's motion should also be denied because (1) there are triable issues of material fact regarding the alleged breach of contract; (2) there are disputable material facts denying Plaintiff's right to attorney's fees; and (3) there are disputable material facts concerning the validity of the individual guarantees. Here, there can be no breach of contract if the underlying agreement of a criminally usurious loan in the guise of an agreement for the purchase of accounts receivables. As asserted previously, here, Plaintiff attempts to mischaracterize the terms of the underlying agreement as a 'Merchant Agreement' in order to avoid complying with New York lending and usury laws. 'When determining 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.' [citation omitted]. It is well settled that the maximum annual interest rate that may be charged for a loan or forbearance of any money, goods, or things, is 16% and any interest rate charged in excess of this, is a civil usury. [citation omitted]. In contrast, under New York Penal Law § 190.40, '[a] person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other

property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.' [citation omitted]. Generally, corporations are barred from asserting the usury defenses, however, where GOL § 5-521(3) does not apply, a corporation can raise the defense of criminal usury. [citation omitted]. In addition, where a guarantor cannot use a usury defense because the corporation is precluded from using a civil usury defense, if the interest rate is so egregious, the guarantor and corporate entity can avoid itself of the defense of the criminal usury. [citation omitted].... For those reasons, there is, at the least, a factual dispute regarding whether the underlying agreement here was truly a sale of accounts receivables or in fact a criminally usurious loan."

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fotanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011)

quoting Schumacher v. Manana Grocery, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs' factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."' *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v.*

Alexander's Inc., 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a

motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

"The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages." *Kausal v. Educational Prods. Info.*, 105 A.D.3d 909, 964 N.Y.S.2d 550 (2d Dept. 2013); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 921 N.Y.S.2d 260 (2d Dept. 2011); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 893 N.Y.S.2d 237 (2d Dept. 2010); *Furia v. Furia,* 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dept. 1986).

"In New York, there is a presumption that a transaction is **not** usurious. As a result, claims of usury must be proven by clear and convincing evidence, a much higher standard than the usual preponderance. [citation omitted]. In determining whether a transaction is a loan or not, the Court must examine whether or not defendant is absolutely entitled to repayment under all circumstances. 'For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard.' [citation omitted]. Many trial courts have examined similar [merchant] agreements in the last several

years, and have largely determined that most of them are not loans, but purchases of receivables. [citations omitted]." *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807, 57 N.Y.S.3d 625 (Supreme Court Westchester County 2017) *citing Giventer v. Arnow*, 37 N.Y.2d 305, 372 N.Y.S.2d 63 (1975) and *quoting Rubenstein v. Small*, 273 A.D. 102, 75 N.Y.S.2d 483 (1st Dept. 1947).

The Court in *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, *supra*, found that there are certain factors that a court should look for to see if repayment is absolute or contingent. "The first, and the one cited by each and every court that found that the transaction was not a loan, is whether or not there is a reconciliation provision in the agreement. The reconciliation provisions allow the merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof).... If there is no reconciliation provision, the agreement may be considered a loan.... The next provision that is deemed quintessential is whether the agreement has a finite term or not. If the term is indefinite, then it 'is consistent with the contingent nature of each and every collection of future sales proceeds under the contract.' [citation omitted]. This is because defendants' 'collection of sales proceeds is contingent upon [plaintiffs'] actually generating sales and those sales actually resulting in the collection of revenue.'" *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, *supra*, *quoting IBIS Capital Group, LLC v. Four Paws Orlando, LLC*, 2017 WL 1065071 (Supreme Court, Nassau County, March 10, 2017).

Having weighed these factors, the Court finds that the Merchant Agreement in the instant action cannot be considered a loan as a matter of law. Under no circumstances could plaintiff be assured of repayment, because the subject Merchant Agreement is contingent on defendants' success and the term is indefinite. *See* Plaintiff's Affirmation in Support Exhibit A; *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, *supra*; *IBIS Capital Group, LLC v. Four Paws Orlando,*

LLC, supra.

Therefore, based upon the evidence and legal arguments made in the papers before it, the Court finds that plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact with respect to its claims.

Since plaintiff demonstrated *prima facie* entitlement to summary judgment, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

The Court finds that defendants failed to demonstrate an issue of fact which precludes summary judgment.

Accordingly, based upon the above, plaintiff's motion, pursuant to CPLR §§ 3211(a)(1) and (7), for an order dismissing defendants' affirmative defense and counterclaim; and, pursuant to CPLR § 3212, for an order granting it summary judgment, is hereby **GRANTED**. And it is further

ORDERED that plaintiff is directed to submit to the clerk a judgment against defendants, jointly and severally, in the sum of $148,703.80, with interest thereon from April 13, 2017, reasonable attorney's fees in the sum of $37,175.95, plus costs and disbursements of this action.

This constitutes the Decision and Order of this Court.

ENTERED
DEC 12 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
December 7, 2017