SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 151765/2017

TBF FINANCIAL, LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

BRIGHT KIDS NYC INC. d/b/a BRIGHT KIDS NYC and BIGE DORUK,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this action for, *inter alia*, breach of contract, plaintiff TBF Financial, LLC ("TBF Financial") moves, under CPLR 3212, for summary judgment against defendants Bright Kids NYC Inc. d/b/a Bright Kids NYC ("Bright Kids NYC") and Bige Doruk ("Doruk") (collectively "defendants"). After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff TBF Financial commenced this action by filing a summons and verified complaint on February 23, 2017 against Bright Kids NYC and Doruk. Plaintiff alleged that defendants had defaulted on making required payments on several loans that TBF Financial's predecessor-in-interest had made to Bright Kids NYC. (Doc. 9 at 2–13.) According to plaintiff,

Celtic Bank made loans to Bright Kids NYC, and Doruk personally guaranteed the satisfaction of Bright Kids NYC's obligations under the loans. (Doc. 7 at 2.) The loans were then sold and assigned by Celtic Bank to Kabbage, Inc. ("Kabbage"), which subsequently sold and assigned the loans to TBF Financial. (*Id.*) TBF Financial alleged five causes of action in its complaint against Bright Kids NYC: (1) breach of a business loan agreement, (2) recovery on an account stated, (3) unjust enrichment, (4) foreclosure on the security interests, and (5) replevin. (Doc. 9 at 8–9, 10–12.) The complaint asserted a claim for breach of guaranties against Doruk. (*Id.* at 9–10.) TBF Financial seeks $46,284.12 against both defendants. (*Id.* at 11–12.) On May 12, 2017 defendants filed an answer setting forth thirteen affirmative defenses against plaintiff's claims. (Doc. 5 at 2–3.)

TBF Financial now moves, pursuant to CPLR 3212, for summary judgment for the full sums demanded in the complaint and to strike defendants' affirmative defenses contained in their answer. (Doc. 6.) TBF Financial submits a purchase agreement, a bill of sale and assignment, several business loan agreements, and a schedule of amounts due under the loans in support of its motion. (Docs. 9–10.)

POSITIONS OF THE PARTIES:

In support of its motion for summary judgment, TBF Financial argues that Bright Kids NYC executed business loan agreements evidencing the loans that Celtic Bank had made, that Doruk executed guaranties for the fulfillment of Bright Kids NYC's duties under the loans, and that defendants defaulted on their monthly payments in April of 2016. (Doc. 7 at 4.) Therefore, TBF Financial asserts, defendants "have no defenses to this [a]ction whatsoever." (*Id.*; *see also* Doc. 11 at 4.)

TBF Financial further argues that this Court must strike defendants' affirmative defenses, which are as follows: (1) plaintiff's claims are barred by the doctrine of unclean hands; (2) plaintiff has failed to state a claim; (3) the statute of limitations bars this action; (4) plaintiff lacks standing to litigate this matter; (5) plaintiff lacks capacity to bring the action; (6) the action cannot be maintained because plaintiff has failed to join all necessary parties; (7) CPLR Article 16 limits defendants' liability; (8) the complaint fails to state a cause of action; (9) the action is barred by the doctrine of laches; (10) plaintiff has failed to mitigate any damages; (11) there is no privity between plaintiff and defendants; (12) plaintiff has failed to comply with a condition precedent to the commencement of this action; and (13) the rate of interest on the loans is usurious under New York law. (Docs. 5; 11 at 5–9.) TBF Financial asserts that this Court must strike the foregoing affirmative defenses not only because they are insufficiently pleaded, but also because they fail as a matter of law. (Doc. 11 at 5–9.)

In opposition, defendants maintain that TBF Financial's motion for summary judgment is premature because the parties have not even held a preliminary discovery conference and thus no discovery has been conducted at this point. (Doc. 14 at 2.)

Defendants further assert that, substantively, the motion must be denied because the documentary evidence that TBF Financial submitted fails to establish its entitlement to judgment as a matter of law. (*Id.*) Specifically, they argue that the business loan agreements which TBF Financial submitted do not establish that Celtic Bank loaned capital to defendants. (*Id.* at 5.) TBF Financial submitted twelve separate documents purporting to show such loans. (Docs. 9 at 40–86; 10 at 1–96.) According to defendants, eight of those documents contain no indication of ever being executed by any party, and the other four do not contain any signatures (Doc. 14 at 5), but do contain checked boxes stating that "Merchant [Bright Kids NYC] or Owner [Doruk]

understand that it has the responsibility to read this Agreement and have had an opportunity to do so." (Doc. 10 at 50, 62, 74, and 86.) However, there is no indication that either Bright Kids NYC or Doruk checked those boxes or that they even saw the documents. (Doc. 14 at 5.) Indeed, defendants maintain that they never signed such documents (*id.* at 8–9) and that TBF Financial lacks personal knowledge regarding the formation of the business loan agreements, as those documents appear to have been originally executed by Celtic Bank (*id.* at 9–11). Therefore, defendants argue, TBF Financial has not proffered evidence of a contract under which defendants may be liable. (*Id.* at 5.)

Defendants also argue that TBF Financial has no standing to bring this action. (*Id.* at 14.) TBF Financial asserts that it has standing and capacity to maintain this action because it is suing on loans that, although originally executed by Celtic Bank, were ultimately assigned to plaintiff. (Doc. 11 at 8.) TBF Financial submitted a "Non-Recourse Receivables Purchase Agreement" purporting to show the assignment of Celtic Bank's rights under the loan agreements to Kabbage (Doc. 9 at 22–32), and it also submitted a "Bill of Sale and Assignment" purporting to show Kabbage's assignment of those rights to TBF Financial (*id.* at 34).

However, defendants nonetheless allege that plaintiff lacks standing to bring this suit because six of the business loan agreements that plaintiff proffered into evidence were executed after Celtic Bank assigned its rights to Kabbage. (Doc. 14 at 14–15.) In other words, defendants argue that plaintiff cannot sue under the last six loan agreements because Celtic Bank had already assigned its rights away at that point, and therefore Kabbage could not have assigned any rights as to the last six loan agreements to TBF Financial. Moreover, with respect to the six loan agreements predating Celtic Bank's assignment, defendants argue that the purported assignments from Celtic Bank to Kabbage and from Kabbage to TBF Financial are defective because both the

Non-Recourse Receivables Purchase Agreement and the Bill of Sale and Assignment do not make any specific reference to the loans on which plaintiff is now suing. (*Id.* at 15–16.)

Furthermore, defendants claim that they cannot be liable under the alleged loans because the loans are unenforceable for criminal usury. They argue that, under New York law, the interest rate charged on a loan cannot exceed twenty-five percent per year. (*Id.* at 16.) Because all of the loan agreements charge an interest rate in excess of that limit, defendants maintain that the loans are criminally usurious. (*Id.* at 16–17.)

In addition, defendants assert that TBF Financial's non-contractual claims—recovery on an account stated, unjust enrichment, foreclosure on the security interests, and replevin—must fail either because TBF Financial did not have any prior business dealings with defendants or because there are outstanding issues of fact that preclude TBF Financial's entitlement to summary judgment on those causes of action. (*Id.* at 17–19.)

Finally, defendants urge that Doruk is not liable for breach of guaranties because, much like the business loan agreements purportedly executed between Celtic Bank and Bright Kids NYC, Doruk's signature does not appear on any of the documents, which contain provisions stating that the "Owner [Doruk] personally guarantees the performance of all the covenants of Merchant [Bright Kids NYC] in this Agreement . . . ." (*Id.* at 11.) Although boxes next to these provisions are checked, defendants argue that it is unclear whether Doruk marked those boxes, that plaintiff's claims against Doruk for breach of personal guaranties are barred by the statute of frauds, that the alleged business loan agreements bind only Bright Kids NYC and not Doruk, and that, even if a checked box represents a signature or consent to a particular agreement provision, Doruk cannot be held liable as she did not "sign" the agreements in her personal capacity. (*Id.* at 11–14.)

In reply, TBF Financial argues that defendants do not deny the existence of the loans and guaranties, and therefore that defendants have "fail[ed] to address the fact of the indebtedness and what they undeniably owe to the creditor." (Doc. 16 at 2–3.) TBF Financial also argues that the documentary evidence—i.e., the purchase agreement, the bill of sale and assignment, the business loan agreements, and the schedule of amounts due under the loans—establish the existence of defendants' debt under the loans. (*Id.* at 3–4.)

TBF Financial further asserts that defendants are liable because plaintiff is a holder in due course, as TBF Financial is the ultimate assignee of Celtic Bank and Kabbage. (*Id.* at 4–7.) In support of this argument, plaintiff cites UCC § 9-403, which provides that someone who "takes an assignment: (1) for value, (2) in good faith, (3) without notice of a claim of a property or possessory right to the property assigned, and (4) without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument" is a holder of the assignment in due course. (*Id.* at 6.) Plaintiff argues that it meets all of these requirements. (*Id.*)

Plaintiff maintains that it had business dealings with both defendants, insofar as plaintiff loaned money to them. In support of this assertion, TBF Financial submits a letter that it sent to defendants on January 5, 2017 advising them of their default under the loans. (*Id.* at 7–8.)

Moreover, TBF Financial asserts that the loan agreements are admissible evidence of the purported notes between plaintiff and defendants because they conform with the Electronic Signatures in the Global and National Commerce Act.[1] (*Id.* at 11.) That act provides that "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record" (*id.*) may

[1] *See* 15 USC § 7006(5).

constitute a binding signature. Because defendants could only apply for the loans by checking the boxes on the loan agreements, TBF Financial argues that Bright Kids NYC and Doruk are liable under the loan obligations. (*Id.* at 10–12.)

With respect to defendants' arguments that the loans are unenforceable because they are usurious, TBF Financial argues that Utah law, not New York law, governs the loan agreements by their own terms. (*Id.* at 8.) In this regard, TBF Financial argues that the loans are not usurious because Utah law does not specify any ceiling for interest rates. (*Id.*)

In regard to defendant Doruk, TBF Financial asserts that unconditional guaranties are consistently upheld by New York courts and that, in the instant case, the unequivocal terms of the personal guaranty provisions in the loan agreements render Doruk personally liable to plaintiff. (*Id.* at 9.)

Finally, TBF Financial claims that its summary judgment motion is not premature because defendants have not served any discovery demands, because defendants have not identified what discovery is necessary to litigate this action, and because discovery is stayed pursuant to CPLR 3214(b) pending the outcome of the instant motion. (*Id.* at 12.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie demonstration of entitlement to judgment as a matter of law on the undisputed facts. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) In so doing, the movant must tender sufficient evidence to establish the absence of any issue of material fact. (*See Ayotte v Gervasio*, 81 NY2d 1062 [1993].) If the movant satisfies this initial showing, then the burden shifts to the opposing party to raise a genuine, triable issue of fact with admissible evidence. (*See Mazurek v Metro. Museum*

of Art, 27 AD3d 227, 228 [1st Dept 2006].) If the opposing party fails to make that showing, then summary judgment must be granted. (*See Oates v Marino*, 106 AD2d 289, 291 [1st Dept 1984]) (granting summary judgment where the opposing party could not establish a triable issue of fact). However, if the moving party fails to make a prima facie demonstration of entitlement to judgment as a matter of law, then the court must deny the motion regardless of the sufficiency of the opposing papers. (*See Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] (internal quotations omitted).)

a. Is TBF Financial Entitled to Summary Judgment Against Defendant Doruk?

"[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446–47 [1st Dept 2012].) "To be enforceable, a special promise to answer for the debt or default of another must be in writing and subscribed to by the party against whom enforcement is sought." (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989].)

Here, a review of the submitted materials establishes that the loan agreements contain the following language:

> **Owner's [Doruk's] Personal Guarantee of Merchant's [Bright Kids NYC's] Performance of Merchant Contractual Covenants.** Owner personally guarantees the performance of all of the covenants of Merchant in this Agreement, specifically including the Merchant Contractual Covenants . . . . (Owner does not absolutely guarantee that sufficient future receivables will be generated or Proceeds collected to equal the Specified Amount sold to Company.)

(*See, e.g.*, Docs. 9 at 42, 54–55, 66–67; 10 at 4–5, 16–17.)

Although this language unequivocally binds the guarantor to ensure the satisfaction of "Merchant's" obligations under the loan agreements, this Court concludes that plaintiff has nevertheless failed to establish its prima facie showing of entitlement to summary judgment. Importantly, none of the cited provisions—indeed, none of the cited loan agreements—contain any signatures by any party. (*See, e.g.*, Docs. 9 at 40–50, 52–62, 64–74; 10 at 2–12; 14–24.) In an affidavit, defendant Doruk alleged: "I had never previously seen these documents, and I never signed or executed such documents. I certainly never agreed to be personally liable for the debts of BRIGHT KIDS or signed anything that said [I] would." (Doc. 14 at 22.) (*See Lane Crawford Jewelry Ctr., Inc. v Han*, 222 AD2d 214, 214–15 [1st Dept 1995] ("The validity of the signature on the guaranty was critical because, without a memorandum of such a promise signed by the party to be charged, a guaranty cannot be enforced.").)

Although defendants' affidavits state in a conclusory manner that defendant Doruk executed the agreements (*see, e.g.*, Docs. 16 at 10–12; 17 at 5–7), the absence of signatures on the agreements, as well as Doruk's denial that she ever signed the same, means that there is a disputed issue over the facts that precludes plaintiff from establishing a prima facie case for summary judgment. And, while TBF Financial asserts that Doruk consented to the terms of the loans by checking the boxes on the agreements (Doc. 16 at 10–12), no documentation containing metadata to prove that Doruk actually checked the boxes on those agreements has been submitted. (*See Dartnell Enters., Inc. v Hewlett Packard Co.*, 33Misc3d 1202[A], *3 [Sup. Ct., Monroe County 2011] (defining "metadata" has secondary information that describes electronic documents' origins and usage, and ordering the disclosure of metadata information where it was material and necessary in the prosecution of the action).) Here, the metadata information

concerning the purported loan agreements is necessary because that information may establish whether the parties checked the boxes on the loan agreements.

In addition to the absence of signatures indicating that the parties submitted to such loan agreements, this Court also notes that plaintiff has proffered insufficient documentation establishing that Doruk actually received the loan capital from TBA Financial. Although TBF Financial argues that Doruk does not deny the existence of the loans and guaranties (Doc. 16 at 2–3) and submits a schedule of the amounts owed (Doc. 10 at 97–100), no documentation, such as bank wires or loan checks, have been submitted showing an actual transfer of money from TBF Financial to defendants. Summary judgment must therefore be denied as to defendant Doruk.

b. Is TBF Financial Entitled to Summary Judgment Against Defendant Bright Kids NYC?

Defendant Bright Kids NYC also categorically denies executing the loan agreements (Doc. 14 at 8–9), and the documents referenced above do not contain any signatures by Bright Kids NYC (*see, e.g.*, Docs. 9 at 40–50, 52–62, 64–74; 10 at 2–12; 14–24). The same issue of fact that exists in this case as to defendant Doruk—whether the parties signed the agreements—also exists as to defendant Bright Kids NYC. Similarly, there is an issue of fact with regard to whether defendant Bright Kids NYC received the loan capital from plaintiff. Summary judgment is therefore not warranted.

In addition, no discovery in this case has taken place at all. Given the existence of a material dispute as to whether defendants ever executed the loan agreements, the process of discovery may lead to evidence showing that either they did or did not. (*See Solano v Skanska*

USA Civ. N.E. Inc., 148 AD3d 619, 619–20 [1st Dept 2017] (denying summary judgment motion as premature when further discovery could resolve outstanding issues of material fact).)

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff TBF Financial, LLC's motion for summary judgment against defendants Bright Kids NYC Inc. d/b/a Bright Kids NYC and Bige Doruk is denied; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, defendants are to serve a copy of this order with notice of entry on plaintiff and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

ORDERED that the parties are to appear for a preliminary discovery conference on January 29, 2019 at 2:15 PM in Room 280 at 80 Centre Street; and it is further

ORDERED that this constitutes the decision and order of this Court.

10/17/2018
DATE

KATHRYN E. FREED, J.S.C.

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