MCA Master Fund (MMF) v Universal Scrap Motors Inc.
2021 NY Slip Op 30097(U)
January 14, 2021
Supreme Court, Nassau County
Docket Number: 603376/2020
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MCA MASTER FUND (MMF),

Plaintiff,

-against-

UNIVERSAL SCRAP MOTORS INC DBA UNIVERSAL SCRAP MOTORS and MARIA Z ALVAREZ,

Defendants.

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IAS Part 12
Index No. 603376/2020
Mot. Seq. No. 002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers were reviewed in preparing this Decision and Order:

Plaintiff's Notice of Motion, Affirmation, Affidavits & Exhibits.....1
Defendants' Affirmation in Opposition & Exhibit.....2
Plaintiff's Reply Affirmation.....3

In this action, plaintiff MCA Master Fund (MMF) seeks to recover the sum of $48,971.00 owed under an agreement with defendant Universal Scrap Motors Inc (Universal) for the purchase of receivables. Universal's obligations under the Agreement were guaranteed by defendant Maria Z. Alvarez. MMF also seeks $12,242.75 in counsel fees pursuant to the contract and now moves for summary judgment pursuant to CPLR 3212. Defendants oppose the application on the grounds that the agreement is, in substance, a criminally usurious and unenforceable loan. For the reasons set forth below the motion is granted.

BACKGROUND

On February 13, 2020 MMF and Universal executed an agreement pursuant to which MMF purchased $44,970.00 of Universal's future receivables for $30,000.00 (hereinafter the

"Agreement"). Under the terms of the Agreement, MMF was to be paid 25% of Universal's daily revenue up to the "Specific Daily Amount" of $999.33 per day, Monday through Friday. MMF was to collect the receivables from a designated Universal bank account. However, according to Tiffanie Sabater, a member of MMF, Universal almost immediately blocked MMF's access to the account, in violation of the Agreement. MMF was only able to debit Universal's account once. Ms. Sabater attests that MMF attempted to resolve Universal's default, to no avail, and that Universal never requested any reconciliation of the payments under the Agreement prior to its default. MMF claims that it is owed $43,971.00 of the purchased amount plus a "blocked account" fee and "default fee," totaling $48,971.00.

Universal's president, defendant Alvarez, does not deny that Universal received the amount due it under the contract. Nor does she deny that Universal has failed to make the required payments to MMF. Instead, Alvarez asserts that Universal simply did not have the funds to pay MMF—not that it "intentionally" blocked access to its account. And because she guaranteed Universal's obligations, Alvarez argues, the transaction was, in truth, a usurious loan that is unenforceable. Universal contends that the requirement to repay MMF at a rate of $999.33 per day essentially imposes an interest rate that far exceeds the amount allowable under New York State Penal Law. Because repayment to MMF was not absolute, the transaction was not a disguised loan and MMF is entitled to judgment.

LEGAL ANALYSIS

The central issue before this court is whether the Agreement constitutes a receivables purchase or a usurious loan.

It is the movant who has the burden to establish its entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR § 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d

Dept. 1996). Where the movant fails to meet its initial burden as the movant, the motion for summary judgment should be denied. *U.S Bank N.A. v. Weinman,* 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979). The drastic remedy of summary judgment should be granted only if there are no material issues of fact. *Andre v. Pomeroy,* 35 N.Y.2d 361, 364 (1974).

In analyzing the usury defense raised in revenue purchase cases, courts must consider the transaction "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." *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664 (2d Dept. 2020). To assess whether a transaction is a loan masked as a purchase for future receivables, it is necessary to examine whether the plaintiff is "absolutely entitled to repayment under all circumstances." *See K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807 (Sup. Ct. Westchester County 2017). In *LG Funding*, the Second Department set forth a three-part test to determine whether 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. *LG Funding, supra* at 666.

With respect to the first factor, the absence of a reconciliation agreement would point to a loan rather than a purchase of future receivables. *See id.; K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807 (Sup. Ct. Westchester County 2017); *Retail Capital, LLC v. Spice Intentions Inc.*, 2017 WL 123374 (Sup. Ct. New York 2017).

A reconciliation clause is present in the Agreement. It provides that,

> "[U]pon Merchant's request, and receipt of the Merchant's monthly bank statements, MMF shall, on or about the fifteenth day of each month, reconcile the Merchant's account by either crediting or debiting the difference between the amount debited and the Specified Percentage, from or back to the Merchant's bank account so that the amount debited each month equals the Specified Percentage."

Unlike the language of the reconciliation provision under scrutiny in *LG Funding*—which gave sole discretion to the plaintiff for any payment adjustments and was ultimately found to suggest that plaintiff's entitlement to repayment was absolute rather than contingent—here, MMF did not have discretion whether or not to reconcile. Rather, the Agreement *required* MMF to reconcile if Universal made such a request and provided its bank statements. Notably, Universal makes no allegation that it attempted to exercise its right to reconcile under the Agreement by requesting an adjustment of the amounts to be collected to account for the actual amount of its daily receivables.

The second factor is whether the agreement at issue has a finite term. Ordinarily, a loan has a face value repayable (with interest) over a finite period that is defined in the transaction documents. A non-finite term within an agreement suggests that it is one for a purchase of future receivables. *See Pirs Capital, LLC v. D&M Truck, Tire & Trailer Repair Inc.*, 69 Misc.3d 457 (Sup. Ct. New York 2020). Here, the Agreement provides that it has an "indefinite term" and remains in effect until Universal's obligations are "fully satisfied." The indefiniteness of the Agreement supports the contention that it is contingency based and not absolute. *See IBIS Capital Group, LLC v. Four Paws Orlando LLC*, 2017 WL 1065071 (Sup. Ct. Nassau County 2017) (finding the agreement's lack of specific ending date was consistent with the contingent nature of the collection of future sales proceeds).

Lastly, the third factor pertains to whether the purchaser, here MMF, has any recourse should the merchant (Universal) declare bankruptcy. If the purchaser does have recourse, particularly through a personal guaranty, the balance tips towards the

transaction being treated as a loan. *Pirs Capital, LLC v. D&M Truck, Tire & Trailer Repair Inc.*, 69 Misc.3d 457 (Sup. Ct. New York 2020). In this case, the Agreement does not indicate that bankruptcy of Universal is an event of default. The Agreement merely provides that Universal "warrants that it does not anticipate filing any such bankruptcy petition and it does not anticipate that an involuntary petition will be filed against it."

Based on the foregoing, as a matter of law, the Agreement cannot be considered a loan. MMF has established entitlement to summary judgment on its claims. Universal failed to create an issue of fact. Therefore, MMF's motion for summary judgment is granted. MMF is entitled to judgment in the amount of $48,971.00, plus interest from February 18, 2020.

With respect to counsel fees, an inquest is required to determine the amount owed. Accordingly, it is hereby

ORDERED, that subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least ten (10) days prior thereto, this matter shall appear before the Honorable Leonard D. Steinman on **January 28, 2021 at 10:00 a.m.** for a virtual Inquest (via Microsoft TEAMS) to determine the amounts owed to plaintiff for counsel fees; and it is further

ORDERED, that the failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the Inquest; and it is further

ORDERED, that plaintiff's counsel shall serve a copy of this order upon defendant by regular mail within (10) days of the date of this order.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: December 28, 2020
Sea Cliff, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.