At a Term of the Supreme Court, in and for the County of Monroe, Hall of Justice, Rochester, New York.

PRESENT: HON. SAM L. VALLERIANI
Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

KODIAK FUNDING, LLC,
Plaintiff(s),

-vs-

GOLDEN HOSPITALITY LLC
D/B/A GOLDEN HOSPITALITY;
BUDGET INN OF STAUNTON and
SHAWNDA MARIE SHARMA,
Defendant(s).

DECISION

INDEX No.: E2022001777

APPEARANCES:

Attorney for Plaintiff : *Steven W. Wells, Esq.*
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Lancaster, NY 14086

Attorney for Defendants: *William Y. Fowlkes, Esq.*
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Sam L. Valleriani, J.

Plaintiff, Kodiak Funding, LLC, moves for summary judgment on the claims alleged in the complaint including breach of contract, personal guaranty, unjust enrichment, and dismissal of defendant's affirmative defenses. Plaintiff seeks an award of damages in the amount of $14,666.00.

Defendants oppose the motion asserting plaintiff has not met its initial burden, and defendants have raised triable issues of fact.

On January 7, 2022 the parties entered into a document identified as a receivables purchase agreement whereby plaintiff purchased from defendant merchant 25 percent of the defendants' total future accounts receivables until the plaintiff received $8,880.00 for the cost or payment of $6,000.00 from plaintiff to defendants (plaintiff's Ex. A purchase agreement). Under the agreement, the parties agreed to an initial daily payment of $99.00 until the full amount was paid which could be changed and adjusted based upon merchant's revenue (*see id.*). Plaintiff alleges that defendants made payments in the amount of $2,574.00 leaving a balance of $6,306.00 with additional costs including eleven non sufficient fund charges totally $385.00, eight missed payment fees in the total amount of $280.00, a UCC fee in the amount of $195.00, blocked account fee in the amount of $2,500.00, and a default fee in the amount of $5,000.00 all due under the terms of the agreement (complaint NYSCEF Dkt 1). Plaintiff alleges that defendants violated the express covenants of the agreement by changing the designated bank account, placing a stop payment order or otherwise interfering with plaintiff's ability to collect future receivables (*see id.*). Plaintiff asserts the total amount owed is $14,666.00. (*see id.; see also* affidavit of Ludwig Papp dated May 2, 2022).

Summary Judgment

It is well settled law that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, [1986],[citations omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). On a motion for summary judgment, the Court must view the evidence as true, and in a light most favorable to the

nonmoving party. (*Hartford v General Accident*, 177 AD2d 1046, [4th Dept 1991]). The Court's function is "issue finding rather than issue determination." (*Patton v Matusik*, 16 AD3d 1072, [4th Dept 2005]).

Once the movant meets its initial burden, the non-moving party "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." (*Zuckerman v New York*, 49 NY2d 557, 565 [1980]). The opponent must "lay bare his proofs (in admissible form) and make an evidentiary showing that there exist genuine, triable issues of fact." (*Oats v Marino*, 106 AD2d 289, 291, [1st Dept 2008]).

The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant[s]' failure to perform, and (4) resulting damage. (*see Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

Here, plaintiff has met its initial burden by submitting the executed written agreement, proof that they performed and proof that defendants failed to perform or defaulted thereunder resulting in plaintiff's damages (*see* affidavit of Ludwig Papp dated May 2, 2022). Defendants cite several cases urging that the affidavit of Ludwig Papp is insufficient to support summary judgment as it contains inadmissible hearsay (affirmation of W. Fowlkes, Esq. dated July 14, 2022). The cases in support of defendants' position challenging the admissibility of Papp's affidavit were foreclosure cases where the affiant failed to identify and submit the business records relied on in making their calculations (*see Bank of NY Mellon v Davis*, 193 AD3d 803 [2d Dept 2021]; *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]; *JPMorgan v Grennan*, 175 AD3d 1513 [2d Dept 2019]). Here, Mr. Papp, the CEO averred that he reviewed the books and records pertaining to this file which records are made in the regular course of

business maintained under his supervision and control (*see* affidavit of L. Papp; *see All Burough Grp. Med. Supply, Inc. v GEICO*, 43 Misc3d 27 [2d App. Term 2013]; *see also 830 Eighth Ave. v Global*, 198 AD3d 404 [1st Dept 2021]). Mr. Papp submitted the records he relied on which included the contract, proof of funding, and the remittance history (*see id.* Ex. A-C). Although Mr. Papp did not identify the specific code he avers that debits were rejected on correlating dates in the remittance history coded R01 for insufficient funds, and the stop payments on three dates coded R08 (*see id.*). The specific codes are more fully identified in Mr. Papp's reply affirmation (*see* reply affidavit L. Papp, July 18, 2022). No payments were made after March 2, 2022 as evidenced in the remittance history (*see id.*). The court finds that Mr. Papp's affidavit does not rely on inadmissible hearsay as the appropriate records have been submitted. Since plaintiff has met its initial burden, it is incumbent upon defendants to make an "evidentiary showing that there exist genuine, triable issues of fact (*see Oats v Marino*).

Aside from the issues raised and addressed above, defendants further argue that plaintiff's papers are insufficient to dismiss the affirmative defenses since plaintiff has only addressed the one affirmative defense of usury with specificity. Plaintiff asserts the remaining affirmative defenses are without merit and boilerplate which defendants claim is insufficient to warrant summary judgment. Plaintiff was not required to address boilerplate affirmative defenses lacking in merit (*see LaSalle Bank v Kosarovich*, 31 AD3d 904,906 [3rd Dept 2006]). Once plaintiff met its burden of producing the agreement, proof of funding and defendants' default under the terms, the burden shifted to defendants to raise a triable issue of fact (*see id.*). Defendants have failed to raise an issue of fact. Even accepting defendants' claim that the bank froze the account, defendants have failed to raise an issue of fact regarding the default based upon the stop payment.

Mr. Papp in reply has submitted sufficient admissible evidence showing that defendants, in fact, placed a stop payment on the account (reply affidavit L. Papp dated July 18, 2022, ¶5; remittance history).

Plaintiff has specifically addressed defendants' affirmative defense alleging the agreement to be a loan agreement with usury interest in its motion for dismissal. The agreement is not a loan agreement, thus the defense of usury is inapplicable under the facts of this case (*see Principis Capital v I Do Inc.*, 201 AD3d 752 [2d Dept 2022]). In determining whether the agreement is a loan, the courts typically weigh three factors: "(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 id.*, internal quotations and citations omitted). Here, the agreement contained none of the requisite loan agreement factors which impose interest rate limitations. The agreement stated in clear boldface language that it was a purchase agreement, and the reconciliation clause provided that if the defendant seller was not in breach of the agreement and went into bankruptcy in the regular course business seller would owe nothing to buyer (*see id.*, *see also Womack v Capital Stack*, 2019 WL 4142740 [US District Court, SD NY, August 30, 2019, Carter, J.]; purchase agreement). Further contrary to defendants' assertion, the agreement did not contain a finite term, but rather periodic payments projected upon the accounts receivables (*see id.*).

Unconscionability of Default Charges

Defendants claim that the default charges are unconscionable since under the particular facts, in that the default fees exceed the original amount owed. "An unconscionable contract has been defined as one which is grossly unreasonable or unconscionable in light of the mores and

business practices of the time and place to be unenforceable according to its literal terms. As a general preposition, unconscionability *** requires some showing of the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (*Warren Electrical v Davidson*, 284 AD2d 502 [3rd Dept 2001], [internal quotations and citations omitted]). The parties are sophisticated business owners, and defendants are not "commercially illiterate consumer[s] beguiled into a grossly unfair bargain by a deceptive vender" (*see id.*, citation and internal quotation mark omitted). Defendants further claim that the default (liquidated) damages is disproportionate to the foreseeable losses (*see Truck Rent-A-Ctr. v Puritan Farms*, 41 NY2d 420, 425,426 [1977]). In *Truck Rent-A-Center* the Court of Appeals actually upheld the liquidated damages despite the damages for wrongful breach being almost twice as much as the original amount owed [$48,134.17 vs $92,341.79] (*see id.*). The Court of Appeals did find that default fees 7 ½ times the stipulated amount owed was unconscionable (*see Trustee of Columbia v D'Agostino Supermarkets, Inc.*, 36 NY3d 69 [2020]). A liquidated damages clause providing for two times the existing rent per month for a holdover was found not to be disproportionate to the probable loss (*see Tenber Assoc. v Bloomberg L.P.*, 51 AD3d 573 [1st Dept 2008]). It is unclear whether the parties were represented at the time of the agreement. However, the parties were sophisticated business entities, and the terms of the agreement were negotiated, thus this court finds that the damages clause spelled out in detail in the agreement which provided damages of approximately two times the amount owed under the facts of this case is not "conspicuously disproportionate to the [plaintiff's] foreseeable loses" (*Res Exhibit v Genesis Vision, Inc.*, 155 AD3d 1515, 1520 [4th Dept 2017] [internal citation and quotation omitted]).

Waiver

Additionally, defendants claim that plaintiff waived its right to declare defendants in default reciting emails where Mr. Papp agreed to a three day hold for defendants to straighten out purported banking issues. The cases cited by defendants in support of their position that plaintiff waived defendants' default support the opposite conclusion that plaintiff did not waive any rights under the agreement (*see Fundamental Portofolio v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96[2006]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY3d 966 [1988]). Plaintiff clearly stated that he would provide defendants a specified three day time period to clear up their purported banking issues. There was no clear intent to relinquish a contractual right (*see id.*). Moreover, the parties agreement contained a no oral modification clause requiring a writing signed by one of plaintiff's executive officers (*see* agreement ¶24). Defendants have not raised nor does the court find that an unsigned written text message is sufficient to constitute a signed writing resulting in the waiver of plaintiff's contractual rights under the facts presented herein. Moreover, plaintiff has provided proof that he did not remit during that three day agreed to period.

Lastly, defendants do not deny signing the personal guaranty nor otherwise dispute the guaranty outside the arguments raised to the underlying breach of contract cause of action. Upon review, defendants have failed to raise a triable issue of fact in regard to liability, damages or the validity of the personal guaranty.

Accordingly, plaintiff is granted summary judgment on liability, dismissal of defendants' affirmative defenses, the validity of the personal guaranty and damages. Plaintiff sought damages in their complaint in the amount of $14,666.00 plus interest, costs, disbursement and

attorney's fees. In their motion for summary judgment they have requested damages in the amount of $14,666.00 without request for counsel fees. The court awards damages in the amount of $14,666.00. If plaintiff seeks counsel fees, they will have to make a motion with appropriate supporting documentation. This constitutes the decision of the court. Any relief not specifically granted is denied. Plaintiff shall submit the order Via NYSCEF for defendants' review within five days.

Dated: 7/27/2022

HON. SAM L. VALLERIANI
Supreme Court Justice