Vernon Capital Group LLC v Walnut Spring Farms L.L.C.
2022 NY Slip Op 32731(U)
August 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 518021/20
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of August, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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VERNON CAPITAL GROUP LLC,

Plaintiff,

-against-

Index No.: 518021/20

(Mot. Seqs. 2, 3)

WALNUT SPRING FARMS L.L.C., TECHNICAL COMMUNICATIONS L.L.C., TECH COM LLC, Y2K COMMUNICATIONS, INC. and PHILLIP GENE MCCOY,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	35-38, 40-46, 48-49
Opposing Affidavits (Affirmations)	49, 52
Reply Affidavits (Affirmations)	52, 55, 53, 54

Upon the foregoing papers, plaintiff Vernon Capital Group LLC (plaintiff or VCG) moves (in motion sequence [mot. seq.] two), for an order: (1) pursuant to CPLR 3212, granting it summary judgment on all of the causes of action the verified complaint, (2) dismissing defendants' affirmative defenses, and (3) awarding it costs, expenses and disbursements.

Defendants Walnut Spring Farms L.L.C., Technical Communications L.L.C., Tech Com LLC, Y2K Communications, Inc. (collectively, Company Defendants or Merchant) and defendant Phillip Gene McCoy (McCoy or Guarantor) cross-move (in mot. seq. three) for an order, pursuant to CPLR 3212, dismissing the action on the ground that the transaction is a criminally usurious loan, and thus, is unenforceable.

Background

The Agreement

On September 20, 2019, plaintiff and Company Defendants entered into a "Secured Merchant Agreement" (Merchant Agreement) and a "Security Agreement and Guaranty" (Security Agreement), which incorporated the Secured Merchant Agreement (collectively, the Agreement). Pursuant to the Merchant Agreement, plaintiff agreed to buy $236,910.00 (Purchase Amount) of the Company Defendants' future receivables for a sum of $159,000 (Purchase Price), with the Purchase Amount to be remitted to plaintiff from 25% of Company Defendants' future receivables at a "Daily Remittance" rate of $1,699.00. The Merchant Agreement provided that "VGC will debit the Daily Remittance each business day from only one depositing bank account. . . into which Merchant and Merchant's customers shall remit the Receipts from all Transactions, until such time as VCG receives payment in full of the Purchased Amount." In addition, Guarantor executed a guarantee of performance of all representations, warranties and covenants made by Company Defendants in the Merchant Agreement.

The Merchant Agreement also stated:

> "THIS IS NOT A LOAN. Merchant is selling a portion of a future revenue stream to VCG at a discount, not borrowing money from VCG. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by VCG. The Daily Remittance is a good faith approximation by VCG and Merchant of (a) the Purchased Percentage multiplied by (b) the gross revenues of Merchant during the previous calendar month divided by (c) the number of business days in the previous calendar month. The initial Daily Remittance shall be as described above. . . [T]he Daily Remittance may be subject to adjustment as set forth in Paragraph 1.4, provided Merchant is not in default of this Agreement."

The Merchant Agreement also contained the following reconciliation provision:

> "1.4 **Adjustments to the Daily Remittance**. If an Event of Default has not occurred, every two (2) calendar weeks after the funding of the Purchase Price to Merchant, either party may give notice to the other to request an increase or decrease in the Daily Remittance. The amount may be increased if the amount remitted to VCG was less than the Purchased Percentage of all revenue of Merchant for the previous two weeks or decreased if the amount received by VCG was more than the Purchased Percentage of all revenue of Merchant during the previous two weeks. The modified Daily Remittance shall a good faith approximation by VCG and Merchant of the (a) Purchased Percentage multiplied by (b) the gross revenues of Merchant during the previous two weeks divided by (c) the number of business days in the previous two weeks".

With respect to notices, the Merchant Agreement stated:

> "4.3 **Notices.** All notices, requests, consents, demands, and other communications hereunder shall be delivered by certified mail, return receipt requested, to the respective parties to this Agreement at the addresses set forth in this Agreement. Merchant and each Guarantor shall promptly notify VCG of any change of address(es). Notices to VCG shall become effective only upon receipt by VCG. Notices to Merchant and any Guarantor shall become effective three days after mailing."

With respect to the parties' liability for damages, the Merchant Agreement stated:

> "1.8 **No Liability**. In no event will VCG be liable for any claims asserted by Merchant or each Guarantor under any legal theory for lost profits, lost revenues, lost business opportunities, exemplary, punitive, special, incidental, indirect, or consequential damages, each of which is waived by both Merchant and each Guarantor. In the event these claims are nonetheless raised, Merchant and each Guarantor will be jointly and severally liable for VCG's attorney' fees and expenses resulting therefrom in accordance with Paragraph 3.4."

The Security Agreement provided that it "constitute[s] a security agreement under the Uniform Commercial Code" and that:

> "Merchant and each Guarantor grants to VCG a security interest in and lien upon: (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are each defined in Article 9 of the Uniform Commercial Code (the 'UCC'), now or hereafter owned or acquired by Merchant and/or each Guarantor, (b) all proceeds, as that term is defined in Article 9 of the UCC, (c) all funds at any time in the Merchant's and/or Guarantor's(s') Account, regardless of the source of such funds, (d) present and future electronic check transactions, and (e) any amount which may be due to VCG under this Security Agreement, including but not limited to all rights to receive any payments or credits under this Security Agreement (collectively, the "Collateral"). Merchant agrees to provide other security to VCG upon request to secure Merchant's obligations under this Security Agreement. Merchant agrees that, if at any time there are insufficient funds in Merchant's Account to cover VCG's entitlements under this Security Agreement, VCG is granted a further security interest in all of Merchant's assets of any kind whatsoever, and such assets shall then become Collateral ("Additional Collateral"). These security interests and liens will secure all of VCG's entitlements under this Security Agreement and any other agreements now existing or later entered into between Merchant, VCG, or an affiliate of VCG is authorized.
>
> This security interest may be exercised by VCG without notice or demand of any kind by making an immediate withdrawal| or

freezing the Collateral."

The Security Agreement further provided that "[e]ach Guarantor shall be jointly and severally liable, together with Merchant, for all amounts owed to VCG in the Event of Default."

On September 30, 2019, plaintiff paid Company Defendants the Purchase Price, minus agreed upon fees, for the future receivables. Payments were initially made pursuant to Agreement but stopped on February 13, 2020.

The Underlying Lawsuit

On September 24, 2020, plaintiff commenced this action by filing a summons and verified complaint. The complaint alleges that "Company Defendants . . . stopped making its payments to plaintiff and otherwise breached the Agreement by intentionally impeding and preventing plaintiff from making the agreed upon ACH withdrawals from the Bank Account while conducting regular business operations" (complaint ¶ 8). The complaint further alleges that "Company Defendants made payments totaling $120,430.00, leaving a balance due of $116,480.00" (*id.* ¶ 9). The complaint asserts three causes of action: (1) breach of contract, (2) personal guarantee, and (3) unjust enrichment. The complaint demands the amount owed plus interest, costs, disbursements, and attorney's fees.

On October 26, 2020, Company Defendants and Guarantor (collectively, defendants) filed a verified answer, admitting that certain ACH payments were made, but asserting that the Agreement was a criminally usurious loan.

On November 9, 2020, plaintiff filed a motion (mot. seq. one) for summary judgment. On December 17, 2020, defendants opposed the motion, and on January 4,

2021, plaintiff filed a reply. However, on January 6, 2021, plaintiff voluntarily withdrew its first summary judgment motion without prejudice to renew it, and then filed the instant summary judgment motion.

Plaintiff's Instant Motion for Summary Judgment

Plaintiff contends that it has met its prima facie burden on its breach of contract cause of action by demonstrating that: (1) it entered into the Agreement with Company Defendants to purchase future receivables, with Guarantor guaranteeing performance, (2) that plaintiff tendered the Purchase Price, (3) that Company Defendants stopped all payments on February 13, 2020 in breach of the agreement, and that (4) Company Defendants owe plaintiff $116,480.00.

In support, plaintiff submits two affidavits from Chana Rapoport (Rapoport), its managing member. Rapoport states that Company Defendants and Guarantor defaulted on the Agreement as of February 13, 2020 when they stopped making payments and breached its representations and warranties to plaintiff. She attests that plaintiff has not received any Receivables from Company Defendants since February 13, 2020, despite the fact that Company Defendants are still open for business. Rapoport states that as of January 5, 2022, Company Defendants have made payments of $120,430.00, leaving a balance of $116,480.00 of the purchase amount owed to plaintiff. Rapoport submits a copy of the Agreement as well as funding confirmation records showing payments made to plaintiff. Rapoport also submits account transaction records kept by plaintiff showing the dates that the Daily Remittance was paid and the amounts of the payments.

With respect to the personal guarantee cause of action, plaintiff argues that Guarantor breached the Agreement by failing to perform pursuant to the guaranty, in that Guarantor did not pay the outstanding balance in violation of the Agreement. In her affidavit, Rapoport attests that Guarantor has failed to perform as a guarantor and has failed to remit the monies owed to plaintiff pursuant to the agreement.

Plaintiff also contends that Company Defendants were unjustly enriched at its expense because it received funds from plaintiff while plaintiff was denied the benefit of is bargain. Plaintiff argues that it would be inequitable to permit Company Defendants to retain what rightfully belongs to plaintiff. Plaintiff further argues that defendants' discovery demands, which they claim are "entirely inappropriate," should be stayed pending resolution of the motion.

Defendants' Opposition and Cross Motion for Summary Judgment

In opposition to plaintiff's motion and in support of their motion for summary judgment, defendants contend that the Agreement was not a "purchase agreement" but rather a usurious loan. In that regard, defendants argue that the Agreement "has zero provision for VGC's purchase, transfer or acquisition of any invoice, bill, account or other indicia of a receivable" (*see* Defendants' Memorandum of Law at 1-2). Defendants claim that the ACH debits pursuant to the Agreement were unrelated to any of defendant Walnut Spring Farms, L.L.C.'s (Walnut) sales. Defendants argue that an agreement where money is advanced in exchange for future payments derived from receivables is called a "loan" by every commercial lender. Defendants further contend that the Agreement had a finite term in that it would take 201 days at the $1,699.00 Daily Remittance rate to pay it back.

Defendants also contend that the Agreement was not a merchant agreement because its reconciliation provision was an "after-the-fact hypothetical reconciliation", and that other provisions in the Agreement "completely insulated VCG from ever having to implement a reconciliation (*id*. at 2). In that regard, defendants argue that: (1) the Agreement stated that reconciliations had to be demanded by mail but omitted any address for such requests, (2) the Agreement provided that plaintiff had to accept certified mail notice of reconciliations for the requests to be effective, (3) there was no time frame for reconciliation, (4) there was no concrete manner in which reconciliation was to be calculated, (5) plaintiff had the power to delay reconciliation by demanding as much financial information as it wanted, (6) the Agreement allowed plaintiff to "grab" all assets of a debtor whenever it wanted and for any reason, (7) the Agreement required Company Defendants to immediately apprise plaintiff of any financial deterioration, (8) a reconciliation request, by its nature, alerted plaintiff to a deterioration, prompting plaintiff to grab all remaining money and assets, and (9) the Agreement prohibited any lawsuit by debtor, so no legal redress is provided for if reconciliation was delayed or refused. Defendants further contend that their only practical redress if it ran low on funds was to stop plaintiff's debit, which the Agreement deemed a default. In addition, defendants argue that the Agreement's true nature as a loan is demonstrated by the Security Agreement, which eliminated all risk to plaintiff, since it permitted plaintiff to immediately "grab" all of Company Defendants' assets.

In further support of their contentions, defendants submit an affidavit from Guarantor, Walnut's, owner. In addition to making some of the same arguments as in the

memorandum of law, Guarantor argues that the permissive term "may" in the reconciliation provision did not compel reconciliation. Guarantor also states that there was no provision to stop plaintiff's debit. Guarantor further states that there was no evidence that there was ever a reconciliation. Guarantor alleges that defendants sent plaintiff a discovery request as to whether plaintiff ever refunded to a merchant any excess sums debited based on specific percentages of a merchant's actual receipts, or whether any merchant had received a reconciliation under the terms of the merchant agreement. Plaintiff has not responded to that request.

Plaintiff's Reply and Opposition to Cross-Motion

In opposition to defendants' cross motion, plaintiff contends that other than an affidavit from Guarantor, defendants have not provided either an affirmation from counsel or any documentary evidence in support of their motion. Plaintiff notes that Guarantor has not denied that defendants entered into an Agreement with plaintiff, that Company Defendants received $149,485.00, that they did not request a reconciliation, that they experienced a slowdown in receivables, or that there is not a balance of $116,480.00 due to plaintiff pursuant to the Agreement.

Plaintiff contends that the Agreement is not a usurious loan because it contained a reconciliation provision, and contends that *Adar Bays, LLC v GeneSYS ID, Inc*., (27 NY3d 320 [2021]) cited by defendants, contains a narrow holding that does not apply to the facts here.

Plaintiff contends that it is self-evident from the language of the Agreement that upon a reconciliation request from the Company Defendants, plaintiff was required to

provide a reconciliation, as the Agreement states that plaintiff must remit funds back to Company Defendants "if the amount received by VCG was more than the Purchased Percentage of all revenue of Merchant during the previous two weeks." Plaintiff argues that contrary to defendants' contentions, the term "may" in the reconciliation provision merely states that plaintiff "may" be required to remit funds or "may" demand more funds from defendants. Plaintiff contends that the word "may" "is solely going on what plaintiff would need to do once a reconciliation was effectuated and not that plaintiff 'may' comply with the clear mathematical analysis provided once a reconciliation was effectuated" (Plaintiff's Reply Memo of Law at 10). Plaintiff also contends that the provision also states that the reconciliation is to take place in good faith.

With respect to defendants' argument that there is no address provided for notice of reconciliation, plaintiff notes that the Agreement provided an address, telephone and fax number for plaintiff at the bottom of every page of the Agreement. With respect to defendants' argument that there was no mailing address for reconciliation provided, plaintiff contends that this argument is spurious because defendants are not even claiming that they ever requested a reconciliation that was denied by plaintiff. With respect to defendants' argument that plaintiff could demand as much financial information as they needed and delay reconciliation indefinitely, plaintiff argues that it needs to review Company Defendants' financial statements and cannot pre-determine in an Agreement which documents would be needed and how long it would take.

Plaintiff further contends that the Agreement has no finite term, no end date and no sunset provision, but relies solely on Company Defendants' receivables. Plaintiff points

to the language of the Agreement which states that there is no interest rate or time period for collection of the Purchase Amount by plaintiff. In addition, plaintiff argues that the fact that it has no recourse if defendants declare bankruptcy demonstrates further that the Agreement is not a loan. Plaintiff also highlights the plain language in the Agreement that "[t]his is not a loan." Plaintiff further cites to multiple cases in which agreements similar to the Agreement have been deemed a purchase and sale, rather than a loan, including cases where the agreement also contained a security agreement.

In response to defendants' request for discovery as to whether plaintiff has ever implemented a reconciliation, plaintiff contends that defendants do not claim that they requested a reconciliation, and therefore such a document request is untenable.

Defendants' Reply

In reply, in addition to reiterating the contentions in their moving papers, defendants dispute plaintiff's contention that the reconciliation agreement was mandatory, arguing that it was permissive and insulated plaintiff from any reconciliation. Defendants also note that the fact that notices were to be served by certified mail and became effective only upon receipt by plaintiff further insulated plaintiff from reconciliation, because plaintiff could refuse certified mail. Defendants further argue that the fact that the Agreement had a "no liability" provision meant that plaintiff could insulate itself from lawsuits and prevent legal redress.

Discussion

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence

in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tristate Cleaning Solutions, Inc. v Landco H & L, Inc*., 204 AD3d 1064, 1065-106 [2d Dept 2022; *Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016]). Here, plaintiff has met its prima facie burden by submitting proof of an executed written contract, by submitting the Agreement and proof of the defendants' breach by submitting proof of nonpayment under the Agreement (*see Principis Capital, LLC v I Do, Inc*., 201 AD3d 752, 754 [2d Dept 2022]).

Likewise, plaintiff has met its prima facie burden of demonstrating its unjust enrichment cause of action. "The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Betz v Blatt*, 160 AD3d 696, 701 [2d Dept 2018]; *Travelsavers Enterprises, Inc. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 [2d Dept 2017] [internal quotation marks omitted]). Plaintiff has demonstrated that it paid the Purchase Price to Company Defendants and that Company Defendants retained the Purchase Price without paying the Purchase Amount, or even a Daily Remittance that would total the Purchase Amount, to plaintiff.

Plaintiff has also met its burden of demonstrating prima facie entitlement to summary judgment as a matter of law against Guarantor, as the execution of an unqualified guarantee renders a guarantor personally liable for the obligations of an obligor under a contract to the same extent as the obligor (*see Desiderio v Devani*, 24 AD3d 495, 497 [2d Dept 2005]). Here, plaintiff has met its burden by submitting the Agreement, which contains the Security Agreement evidencing Guarantor's obligation to pay in the event that Company Defendants do not, as well bank account debits which demonstrate that plaintiff was not paid (*see Valley Natl. Bank v INI Holding, LLC*, 95 AD3d 1108, 1108 [2d Dept 2012]; *Imperial Capital Bank v 11-13-15 Old Fulton D, LLC*, 88 AD3d 652, 653 [2d Dept 2011]).

In opposition, defendants have failed to establish, by admissible evidence, the existence of a triable issue of fact as to whether the Agreement was in fact a usurious loan.

"The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (*Principis Capital*, 201 AD3d at 754; *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). "To determine 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" (*LG Funding*, 181 AD3d 664 [internal quotation marks omitted]).

> "The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. Usually, courts weigh three factors when determining 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" (*id*.).

Here, the court initially notes that the Agreement explicitly states: "This is not a Loan" and that Company Defendants are not borrowing money from plaintiff. While not dispositive, other factors demonstrate that the Agreement here was a merchant agreement and not a loan. Specifically, the terms of the Agreement contained a reconciliation provision which allowed for adjustments to the monthly payments made by Company Defendants to plaintiff based on Company Defendants' revenue (*see Principis Capital*, 201 AD3d at 754). As the amount of the monthly payments could change, the terms of the Agreement were not finite (*id*.). Under the terms of the Agreement, either plaintiffs or Company Defendants may seek an increase or a decrease of the Daily Remittance rate. This is in contrast to the contract at issue in *LG Funding, LLC*, where the Appellate

Division held that there were issues of fact as to whether the contract was a usurious loan in part because it contained language that the plaintiff "may, upon [defendant's] request, adjust the amount of any payment due under this Agreement at [its] sole discretion and as it deems appropriate" (*LG Funding*, 181 AD3d at 666 [emphasis supplied]).

Defendants' contention that the term "may" in the reconciliation provision of the Agreement demonstrates that reconciliation was permissive rather than mandatory, and therefore illustrates that the Agreement was a loan, is unconvincing. By its terms, the reconciliation permitted any party to the Agreement to request reconciliation, which supports a more fair and equitable reading of the Agreement. Thus, while plaintiff "may" have requested that the Daily Remittance amount be modified downward upon a showing of lowered revenue, Company Defendants "may" have likewise requested an upward modification of the Daily Remittance amount if the Company Defendants became more profitable. The court interprets the "may" language to indicate either party could take advantage of reconciliation upon request. Moreover, the reconciliation provision contains mandatory language that the Daily Remittance rate "shall" be a good faith estimation of the Purchased Percentage multiplied by Company Defendants' gross revenues during the previous two weeks divided by the number of business days in the previous two weeks. As the amount of the Daily Remittance could change, the term of the Agreement was not finite (*see Principis Capital*, 201 AD3d at 754).

Contrary to defendants' contention, while the Agreement may not have contained an address at which to request reconciliation, the Agreement contained a printed phone number, fax number and email address for plaintiff on the bottom of every page of the

Agreement. Thus, even if Company Defendants did not have plaintiff's address, which the court finds unlikely given the parties' business relationship, Company Defendants had several ways to contact plaintiff in order to obtain a mailing address to request reconciliation. In any event, defendants do not contest plaintiff's contention that the Company Defendants never requested reconciliation.

In addition, a review of the Agreement indicates that that it did not eliminate all risk, which would be an indicia of a loan rather than a merchant agreement. To that end, there was no provision in the Agreement establishing that a bankruptcy would constitute an event of default (*see* Agreement Terms and Conditions, Section 3.1). Further, unlike in *Davis v Richmond Capital Group, LLC* (194 AD3d 516 [1st Dept 2021]), where the court indicated that "provisions making rejection of an automated debit on two or three occasions without prior notice an event of default entitling defendants to immediate repayment of the full uncollected purchased amount" may be an indicia of a usurious loan, here, the Agreement does not contain such a provision (*see* Agreement Terms and Conditions, Section 3.1). Rather, under the Agreement, it is the failure to notify plaintiff 24-hours in advance of the insufficient funds that is listed as an event of default (*id*. Section 3.1 [d]).

Nor does the fact that the Agreement contained a personal guarantee authorizing plaintiff to collect from Guarantor indicate that the Agreement was a loan. While "provisions authorizing defendants to collect on the personal guaranty in the event of the business's inability to pay or bankruptcy" may be one indicia of a usurious loan (*see Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]), here, evaluating the agreement as a whole, the court finds that it is a merchant agreement rather than a loan.

This interpretation is supported by the Second Department's decision in *Principis Capital*. In that case, which dealt with an alleged breach of contract of a substantially similar future receivables agreement which contained a similar reconciliation agreement provision, as well as a personal guarantee, was held to be a merchant agreement rather than a loan. The Second Department ruled that the company defendant failed to raise a question of fact on summary judgment as to whether the agreement was a loan (*see Principis Capital*, 201 AD3d at 754-755). Likewise, the First Department, in evaluating a substantially similar receivables contract which contained similar "may" language in its reconciliation provision, as well as a personal guarantee agreement, held that such a contract was not a usurious loan (*see Champion Auto Sales LLC v Pearl Beta Funding, Inc*., 159 AD3d 507 [1st Dept], *lv denied* 31 NY3d 910 [2018] [affirming lower court's dismissal of complaint seeking to vacate a judgment of confession based on documentary evidence]). One recent lower court decision noted that there have been at least 38 recent New York State Court cases considering merchant agreements substantially similar to the one in the instant matter, and all have been determined to be merchant agreements and not loans, and were not usurious (*see Yellowstone Capital LLC v Central USA Wireless LLC*, 60 Misc 3d 1220 (A) [Sup Ct, Erie County 2018]). In sum, the totality of the evidence fails to demonstrate that the Agreement was a usurious loan. Consequently, defendants have failed to meet their prima facie burden on their motion without regard to plaintiff's opposition (*see Winegrad,* 64 NY2d at 853).

The court has considered the parties' remaining contentions and finds them to be unavailing.

Conclusions

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. two), for an order, pursuant to CPLR 3212, granting it summary judgment against defendants on all of the causes of action in the verified complaint and dismissing defendants' affirmative defenses is granted to the extent that plaintiff is entitled to summary judgment on its first cause of action for breach of contract against the Company defendants, and on its second cause of action on the guarantee against the individual defendant, but the third cause of action, for unjust enrichment, is dismissed[1]; and it is further

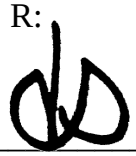
ORDERED that defendants' cross motion (mot. seq. three), for an order, pursuant to CPLR 3212, dismissing the action on the ground that the transaction is a criminally usurious loan, is denied in its entirety.

Settle a judgment on notice for the sum demanded in the complaint, $116,480.00, together with interest from the date the action was commenced, September 24, 2020, and the costs and disbursements of the action, against all defendants jointly and severally.

All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R:



Hon. Debra Silber, J. S. C.

[1] An unjust enrichment cause of action is "predicated on a theory of implied contract or quasi-contract and is not viable where there is an express agreement that governs the subject matter underlying the action" (see *Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1097, 43 N.Y.S.3d 381 [2d Dept 2016]; *Pickard v Campbell*, ___AD3d___, 2022 NY Slip Op 04442, *3 [2022]).