

<b>Fundura Capital Group v Hi-Power Solar, LLC</b>
2022 NY Slip Op 33214(U)
September 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 533377/21
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: TRIAL TERM PART 35 x  
FUNDURA CAPITAL GROUP,

Plaintiff(s),  
-against-

Index No: 533377/21

DECISION AND ORDER

HI-POWER SOLAR, LLC D/B/A HI-POWER BUILDERS  
and RONALD J. ROMERO,

Defendant(s)

x

Recitation as required by CPLR 2219(a), of the papers considered in defendants’ order to show cause for injunctive relief.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	9-16, 19
Cross-motion and supporting papers.....	
Answering Affidavits.....	23-27, 29-33
Memoranda of Law.....	17, 28

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action, inter alia, to recover damages for breach of contract and breach of guaranty, the defendants move [seq. no. 1], by order to show cause, for an order pursuant to N.Y. UCC § 9-625 and CPLR § 5240, et .seq., (1) vacating, striking and releasing any and all enforcement devices issued by plaintiff, anyone acting in concert with plaintiff, and anyone acting on plaintiff’s behalf or at its direction, to collect upon or assist in the collection of the alleged debt, including but not limited to the UCC-1 Financing Statement served upon defendant’s customers; (2) directing plaintiff to direct anyone acting on its behalf or at its direction to cease all efforts to enforce or collect upon the alleged debt including, without limitation, all banks, marshals, and all other person acting on plaintiff’s behalf with respect to any UCC Financing Statements, UCC Lien Notices, Notices of Levy, property executions, subpoenas, or restraining notices; and (3) directing that all monies held on behalf of the plaintiff, or released to the plaintiff, in connection with the plaintiff’s efforts to collect upon the alleged debt, including but not limited to all monies held and/or released due to the UCC-1 Financing Statement served upon Defendant’s customers or any other UCC Financing Statements or Lien notices or restraints on defendants’ accounts be immediately returned to the defendants, and further awarding defendants’ damages to the extent applicable.

On October 14, 2021, plaintiff, a business that provides cash advances to merchants in return for a percentage of their future receivables, and defendant Hi-Power Solar, LLC d/b/a Hi-Power Builders [Hi-Power], allegedly entered into a written merchant agreement, pursuant to which Hi-Power sold and the plaintiff purchased 45% of Hi-Power's total future accounts receivables for the sum of \$500,000 (the purchase price). In exchange for the purchase, Hi-Power was obligated to deposit its receivables into an approved bank account and plaintiff was permitted to electronically debit from that account a daily remittance of \$9,000 until plaintiff received the sum of \$675,000 (the purchase amount). The agreement provided that in the event of a default under its terms, plaintiff was entitled, among other remedies, to bring an action for breach of the agreement and monetary damages, as well as for costs, expenses, and attorney's fees. The defendant Ronald J. Romero personally guaranteed performance of all the representations, warranties, and covenants made by Hi-Power in the agreement.

Concurrently with the execution of the agreement, the parties entered into a security agreement, which granted plaintiff a security interest in, among other things, all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, and provided plaintiff the right to notify Hi-Power's account debtors at any time. On October 18, 2021, plaintiff perfected its security interest in Hi-Power's collateral under the security agreement by the filing of a UCC Financing Statement with the State of Hawaii's Bureau of Conveyances.

Plaintiff commenced this action against defendants for breach of contract and breach of guaranty, alleging that it funded the \$500,000 as provided for in the agreement, less the disclosed upfront fees, and that Hi-Power, after making payments totaling \$342,000, defaulted under the agreement by closing its account, placing a stop on the remittance, and leaving an outstanding balance of \$333,000. It is further alleged that Hi-Power also defaulted under the agreement by entering into two additional merchant cash advances in November 2021 through another merchant cash advance company.

Defendants now seeks a preliminary injunction to stay plaintiff's enforcement of the alleged debt and security interest against the assets and customers of Hi-Power and its guarantor Romero on the grounds that (1) plaintiff's UCC Financing Statement is defective on its fact for listing a representative, rather than plaintiff, as the secured party; (2) the underlying agreement constitutes a criminally usurious loan which is void as a matter of law; (3) plaintiff fraudulently induced defendants into executing the agreement; (4) plaintiff allegedly breached the implied covenant of good faith and fair dealing; and (5) the agreement, even if enforceable, was not breached.

"On a motion for a preliminary injunction, the movant has the burden of demonstrating that (1) the movant will likely succeed on the merits of the action, (2) the movant will suffer irreparable injury absent the issuance of a preliminary injunction, and

(3) the balance of equities is in favor of the movant (*Melrose Credit Union v Itskovich*, 2022 NY Slip Op 04799 [2d Dept 2022]).

Here, Hi-Power does not demonstrate a likelihood of success on the merits, and, therefore, is not entitled to a preliminary injunction.

First, contrary to defendants' contentions, plaintiff's UCC-1 Financing Statement, which was filed in Hawaii, is not defective for listing plaintiff's representative, rather than plaintiff, as the secured party. Hawaii's Uniform Commercial Code [UCC] provides that a financing statement is sufficient if it "[p]rovides the name of the secured party or a representative of the secured party" (Haw.Rev.Stat. § 490:9-502[a][2]). Hawaii's UCC further provides that the "[f]ailure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement" (Haw.Rev.Stat § 490:9-503[f]). Therefore, plaintiff's filing statement is in compliance with the Hawaii UCC statutes and is sufficient.

Moreover, defendants fail to demonstrate that the agreement in issue is a usurious loan. Unlike a loan, repayment under this agreement is not absolute. The agreement provides for a reconciliation provision, is not finite, and provides no recourse in the event of bankruptcy (*see Principas Capital, LLC v I Do, Inc.*, 201 AD3d 752 [2d Dept 2022]); *cf. LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 663 [2d Dept 2020]). Defendants make no showing that the agreement's reconciliation provision is illusory or that the repayment percentage was based on something other than an estimate of its revenues. Additionally, the existence of the guaranty does not turn this agreement into a loan. The guaranty is not unconditional. The agreement specifically provides that the "[g]uarantor(s) will not be personally liable for any amount due under this Agreement unless Merchant commits an Event of Default..." The guaranty, therefore, does not change the risk undertaken. Likewise, the execution of the security agreement providing a security interest to protect plaintiff's ultimate ability to collect is full entitlement, is insufficient, alone, to establish that the purchase agreement is a loan (*see NY Capital Asset Corp. v F & B Fuel Oil Co., Inc.* 58 Misc.3d 1229[A] [Sup. Ct. Westchester Cty 2018]).

Further, as it is not shown that the agreement is actually a loan, defendants' claims that plaintiff misrepresented the true nature of the agreement and procured the agreement by fraud is without merit. Defendants, also fail to allege in non-conclusory fashion sufficient facts to support a defense that the plaintiff breached the implied covenant of good faith and fair dealing.

Finally, defendants make no showing that they did not breach the agreement, but instead experienced a slowdown which affected their ability to generate receivables. No documentation or other proofs are offered to support this defense. Defendants do not

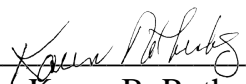
even submit evidence of any efforts they made to request an adjustment to their remittance as provided for under the agreement.

Based on the foregoing, defendants' order to show cause is denied in its entirety.

This constitutes the decision/order of the Court

Dated: September 20, 2022

Enter,

  
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Hon. Karen B. Rothenberg  
J.S.C.