

**Liberty Funding Solutions, LLC v Desalis Pretzels  
LLC**

2023 NY Slip Op 31672(U)

May 15, 2023

Supreme Court, New York County

Docket Number: Index No. 531569/2022

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 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 15<sup>th</sup> day of May, 2023.

PRESENT: HON. CARL J. LANDICINO,  
Justice.

-----X  
LIBERTY FUNDING SOLUTIONS, LLC,

Index No. 531569/2022

*Plaintiff,*

-against-

DECISION AND ORDER

DESALIS PRETZELS LLC DBA PHILLY PRETZEL FACTORY; A&T DESALIS PRETZEL LLC; DESALIS PRETZEL LLC and TIMOTHY DESALIS,

Motion Sequence #1

*Defendants.*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed .....	9-16, 18-22,
Opposing Affidavits (Affirmations) .....	
Reply Affidavits (Affirmations) .....	
Memorandum of Law .....	17, 23, 28.

After a review of the papers and oral argument, the Court finds as follows:

In this action to recover damages for the breach of a contract for the assignment of future receivables, the Plaintiff, Liberty Funding Solutions, LLC, moves for an order pursuant to CPLR § 3212 granting summary judgment in its favor.

“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 vs. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923, *citing Winegrad vs. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316; *Zuckerman vs. City of New York*, 49 N.Y.2d 557). The

essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach (*see Arnell Const. Corp. v. New York City Sch. Const. Auth.*, 144 A.D.3d 714, 715, 41 N.Y.S.3d 101, 103; *Legum v. Russo*, 133 A.D.3d 638, 639, 20 N.Y.S.3d 124).

The Plaintiff established its *prima facie* entitlement to summary judgment by showing that: (1) the parties entered into a contract for the assignment of future receivables together with a related Guaranty; (2) Plaintiff performed its obligations under the contract by tendering the purchase price of \$40,000.00, subject to fees provided for in the agreement, and (3) Defendants breached their contractual obligations under the contract on or about September 30, 2022, by failing to give Plaintiff 24 hours advance notice that there were insufficient funds in the subject Account such that attempted debits were rejected, and failing to make any further remittances; and (4) Plaintiff was apparently damaged in the sum of \$9,132.76 (comprising the outstanding balance due and owing), plus fees and costs.

The Plaintiff, as contended by the Defendants, is not precluded from recovery on the basis that the transaction between the parties was a usurious loan. The Appellate Division, Second Department has been clear in its holding in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312:

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 (*see Seidel v. 18 E. 17th St. Owners*, 79 N.Y.2d 735, 586 N.Y.S.2d 240, 598 N.E.2d 7; *Abir v. Malky, Inc.*, 59 A.D.3d 646, 649, 873 N.Y.S.2d 350). 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'" (*Abir v. Malky, Inc.*, 59 A.D.3d at 649, 873 N.Y.S.2d 350, quoting *Ujueta v. Euro--Quest Corp.*, 29 A.D.3d 895,

895, 814 N.Y.S.2d 551 [internal quotation marks omitted]). The court must examine whether the plaintiff “is absolutely entitled to repayment under all circumstances” (*K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807, 816, 57 N.Y.S.3d 625 [Sup. Ct. Westchester County]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v. Small*, 273 App.Div. 102, 75 N.Y.S.2d 483). 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 (*see K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d at 816--819, 57 N.Y.S.3d 625; *see also Funding Metrics, LLC v D & V Hospitality, Inc.*, 62 Misc.3d 966, 91 N.Y.S.3d 678, 970 [Sup. Ct. Westchester County]).

Further, as the amount of the daily payments could possibly change if a reconciliation took place, the term of the agreement was not finite. Further, while the Agreement provides an estimated term of 8 months, it is nevertheless indefinite. Finally, there were no provisions in the Agreement that a declaration of bankruptcy would constitute a default under the Agreement.

However, the Plaintiff is not entitled to recover a default fee as requested in the sum of \$1,800.00. A default fee constitutes an unenforceable penalty and not recoverable liquidated damages. In *Truck Rent-A-Center Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425, the Court of Appeals held:

The rule is now well established. A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. (*City of Rye v Public Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 473, *supra*; *Wirth & Hamid Fair Booking v Wirth*, 265 N.Y. 214, 223, *supra*; *Curtis v Van Bergh*, 161 N.Y. 47; *Ward v Hudson Riv. Bldg. Co.*, 125 N.Y. 230, *supra*; Restatement, Contracts, § 339.) If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced. (*Equitable Lbr. Co. v IPA Land Dev. Corp.*, 38 N.Y.2d 516, 521-522, *supra*; *Seidlitz v Auerbach*, 230 N.Y. 167, 172-173; 14 NY Jur, Damages, § 155.) In interpreting a provision fixing

damages, it is not material whether the parties themselves have chosen to call the provision one for "liquidated damages", as in this case, or have styled it as a penalty. (*E.g.*, *Wirth & Hamid Fair Booking v Wirth*, 265 N.Y. 214, 225, *supra*; *Ward v Hudson Riv. Bldg. Co.*, 125 N.Y. 230, 234, *supra*.)

In *Perseus Telecom, Ltd. v Indy Research Labs, LLC*, 41 N.Y.2d 420, 425, the Court of Appeals held:

A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.

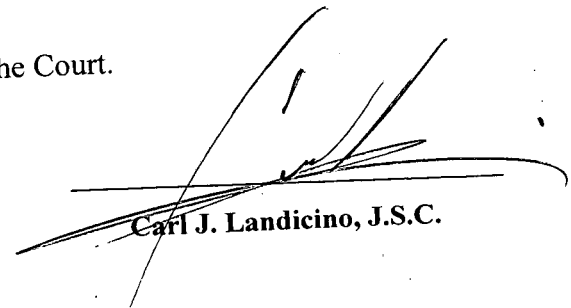
Plaintiff is entitled to the total amount owed under the agreement less the amount repaid, with interest from the date of breach. The default fee is denied.

For the above reasons, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted solely to the extent that Plaintiff is entitled to an award in the sum of \$7,340.00 with interest from October 1, 2023. The Plaintiff may settle a judgment on notice together with a copy of this decision and order, to the Defendants (by certified mail) within 30 days of entry of the Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
Carl J. Landicino, J.S.C.