SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8
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LIBERTAS FUNDING, LLC,

Plaintiff, Decision and order

- against - Index No. 521299/2022

PATMOS PROPERTY GROUP LLC; PATMOS PROPERTY GROUP HOLDINGS LLC; SAVINGS MORTGAGE INC and MICHAEL JOYCE, MARK SULEK,

Defendants, May 24, 2023
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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #2

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 arguing there are no questions of fact the defendants owe the money sought. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On September 14, 2020, the plaintiff a merchant cash advance funding provider entered into a contract with defendants who reside in Pennsylvania. Pursuant to the agreement the plaintiff purchased $268,000 of defendant's future receivable for $200,000.00. The defendants guaranteed the agreement. The plaintiff asserts the defendants stopped remittances in May 2022 and now owe $147,596.38. This action was commenced and now the plaintiff seeks summary judgement arguing there can be no questions of fact the defendants owe the amount outstanding and judgement should be granted in their favor. The defendants

oppose the motion arguing there are questions of fact which preclude a summary determination at this time.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (Citibank N.A. v. Cabrera, 130 AD3d 861, 14 NYS3d 420 [2d Dept., 2015]). In this case, the plaintiff submitted the affidavit of Ricky Palacio a a customer service representative of the plaintiff who stated that he reviewed the plaintiff's records in connection with the loan extended in this case. He further stated that all the documents he reviewed were maintained in the regular course of business and all such records were made near their occurrence with someone who had knowledge at that time and that the plaintiff's standard practice is to keep such records in the ordinary course of

business. Thus, the plaintiff has established the admissibility of the records relied upon since Mr. Palacio had knowledge and familiarity of the plaintiff's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017]). Further, there is no merit to the argument that Libertas has no standing to even commence this action. Moreover, there is no merit to the argument the actual copy of the agreement entered into between the parties has not been presented to the court for review. Therefore, the plaintiff established its entitlement to summary judgement.

The defendants argue the agreement in this case was a usurious loan and thus is unenforceable. In this case, there are no questions of fact the agreement was a cash advance agreement and not a usurious and unenforceable loan. The agreement contained a reconciliation provision which conclusively establish the agreement was not usurious (see, K9 bytes, Inc., v. Arch Capital Funding LLC, 56 Misc3d 807, 57 NYS2d 625 [Supreme Court Westchester County 2017]). The defendants argue the reconciliation provision in the contract was merely illusory and thus not a true reconciliation provision, hence the contract was a loan and was usurious.

The courts have developed three criteria evaluating whether a particular arrangement is a loan or a merchant case advance. First, whether there is a reconciliation provision, whether the

agreement has an indefinite term and lastly, whether the funder has recourse if the merchant declares bankruptcy (IBIS Capital Group LLC v. Four Paws Orlando LLC, 2017 WL 1065071 [Supreme Court New York County 2017]). Thus, a reconciliation provision demonstrates, without any evidence to the contrary, that the plaintiff is not entitled to repayment in all circumstances. In this case the reconciliation provision is mandatory, supporting the simple conclusion the agreement is not a loan (see, Tender Loving Care Homes Inc., v. Reliable Fast Cash LLC, 76 Misc3d 314, 172 NYS3d 335 [Supreme Court Richmond County 2022]). This is particularly true where the "merchant never made such a written request or provided its bank statements or other information, such that neither a reconciliation nor an adjustment was ever performed" (see, affidavit of Ricky Palacio, ¶10 [NYSCEF Doc. No. 44]). Thus, there can be no violation of the reconciliation provision where the defendants "have not alleged that reconciliation did not in actuality function as agreed (or, indeed, that" the defendants "ever even requested reconciliation)" (see, Streamlined Consultants Inc., et., at., v. EBF Holdings LLC, 2022 WL 4368114 [S.D.N.Y. 2022]).

The defendants counter that indeed reconciliation requests were forwarded to the plaintiff. However, email requests seeking a minimum weekly payment were really requests for an adjustment of the weekly delivery contained within Article 12 of the

Merchant Agreement. Paragraph 12(b) of the agreement states that "no Adjustment shall take place until and unless Reconciliation for at least one (1) Reconciliation Month takes place resulting in reduction of the total amount debited from Merchant's Approved Bank Account during the Reconciliation Month by at least 20% in comparison to the amount that would have been debited during that month without Reconciliation" (see, Agreement of Sale of Future Receipts, ¶12(b) [NYSCEF Doc. No. 45]). Thus, no adjustment is possible without a prior reconciliation. The mere fact the plaintiff accommodated the defendants and actually reduced the weekly amount owed does not mean the reconciliation provision was ever utilized and surely does not establish or even raise any questions of fact the reconciliation provision was illusory thereby rendering the agreement a usurious loan.

Therefore, no issues of fact have been raised which would demand a denial of the motion for summary judgement. Consequently, the motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: May 24, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC