SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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STRATEGIC FUNDING SOURCE, INC.,

Plaintiff,

- v -

TAKEASTROLE, LLC, and JENELLE STROLE,

Defendants.

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INDEX NO. 654376/2020

MOTION DATE 10/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 6, 7, 8, 9, 10, 11, and 12

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion to dismiss the complaint is granted in accordance with the following memorandum decision.

Background

Plaintiff and defendant Takeastrole, LLC ("Takeastrole"), are parties to two Merchant Cash Advance Agreements, pursuant to which Plaintiff purchased $15,870 of Takeastrole's future receivables for $11,500 (NYSCEF Doc. No. 3). Defendant Jenelle Strole is one of two listed guarantors of the agreements (*id.* at 8, 15). Relevant to the instant motion, the agreements, which are largely identical, lack specific reconciliation provisions regarding adjustment of the amount collected by plaintiff from Takeastrole. In addition, the agreements list, as an event of default, "any proceeding [that] shall be instituted by or against [Takeastrole] or any owner/guarantor seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts" (*id.* at 4, ¶ 3.1[c]; 11, ¶ 3.1[c]). Upon notice of any event of default, "the entire [outstanding balance] shall become immediately due

and payable," and plaintiff "may enforce the provisions of the Merchant Security Agreement and Guaranty against each owner/guarantor" (*id.* at 4, ¶ 3.2; 11, ¶ 3.2).

Plaintiff alleges that as of June 11, 2014, defendants had shifted Takeastrole's receipts to "a non-designated and unauthorized credit card processor" (complaint, NYSCEF Doc. No. 1, ¶ 12), preventing plaintiff from collecting its daily percentage of Takeastrole's receivables. Accordingly, plaintiff brings causes of action for breach of contract, account stated, and on the guaranty, for $27,788.66, which total encompasses the outstanding balance and contractual fees. Defendant, by this motion, seeks dismissal of the complaint on the grounds that the agreements are in fact usurious loans disguised as sales of receivables, and plaintiff may not recover under a usurious agreement.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

"A party raising a usury defense must satisfy a heavy burden" (*Pirs Capital, LLC v D&M Truck, Tire & Trailer Repair Inc.*, 69 Misc 3d 457, 460 [Sup Ct, NY County, 2020]). Usury only applies to a "loan or forbearance of any money, goods or things in action" (General Obligations Law § 5-501; *Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]). In other words, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli*, 170 AD2d at 434). "The court will not assume that the parties entered into an unlawful agreement . . . . [W]hen the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]).

In the case of the agreement herein, there are three factors to consider in determining whether the transaction should be considered a loan or a sale of receivables: "(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" (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). These factors are not dispositive, since ultimately if the advanced sum is repayable absolutely then the agreement is a loan (*id.* at 666). In addition, courts may consider factors such as a discretionary reconciliation provision, default provisions entitling the lender to immediate repayment, and collection on the personal guaranty in the event of default or bankruptcy filing in determining whether such agreements "were loans subject to usury laws" (*Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

Here, the agreements appear to be usurious loans. Of the three factors set forth in *LG Funding, LLC,* only one favors construing the agreements as sales of receivables, specifically, that the agreements are for an indefinite term. However, the agreements lack any form of reconciliation provision, and allow for plaintiff to enforce the agreement against both defendants even in light of a bankruptcy proceeding filed by either defendant. A key feature of purchases of future receivables is that they are "sufficiently risky such that they cannot be considered loans, as a matter of law, [because] under no circumstances could [plaintiff] be assured of repayment, because its agreements are contingent on a merchant's success, and the term is indefinite" (*Pirs Capital, LLC*, 69 Misc 3d at 464). The provisions stating that bankruptcy is an event of default allowing plaintiff to seek payment of the full amount, or to enforce the agreement against both defendants herein, however, "suggest that the plaintiff did not assume the risk that [merchant] would have less-than-expected or no revenues" (*LG Funding, LLC*, 181 AD3d at 664; *see also Davis*, 194 AD3d at 517). This is particularly true in conjunction with the lack of any reconciliation provision as to the daily amount debited by plaintiff from Takeastrole (*Davis,* 194 AD3d at 517 ["Plaintiffs also allege sufficiently that the subject agreements were loans subject to usury laws, to wit, the discretionary nature of the reconciliation provisions, the allegations that defendants refused to permit reconciliation, the selection of daily payment rates that did not appear to represent a good faith estimate of receivables . . . ."]).

By subtracting the purchase price from the amount of receivables purchased and converting the result into a percentage of the purchase price, both agreements effectively charge 38% interest on the amount loaned. The Penal Law provides that the charging of interest on a loan or forbearance greater than 25% per year, or the equivalent rate for a shorter or longer period, is criminally usurious (Penal Law § 190.40). Plaintiff may not recover under the

agreements, as they charge a criminally usurious rate of interest (General Obligations Law § 5-521[3]; *Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 326 [2021]).

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the action.

This will constitute the decision and order of the court.

ENTER:

9/5/2023								
DATE					LOUIS L. NOCK, J.S.C.			
CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE