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SPEEDY FUNDING, LLC

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RED DOOR REALTY GROUP LLC
HAAN, MARK STEVEN

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WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

SPEEDY FUNDING LLC,

Plaintiff,

-vs-

RED DOOR REALTY GROUP LLC
and MARK STEVEN HAAN,
Defendants.

Decision, Order, and Judgment
Index No. E2022010367

Appearances:

Steven W. Wells, Esq., Wells Law P.C., for the Plaintiff
Amos Weinberg, Esq., for the Defendants

Daniel J. Doyle, J.

Plaintiff initiated this action by the filing of a Summons and Complaint in December of 2022 alleging that the defendants breached a sale of a receivables agreement (hereinafter "agreement")[1] and seeking resultant damages and the awarding of attorneys' fees.[2] Defendants Red Door Realty Group, LLC and Mark Steven Haan (hereinafter "defendants") answered the complaint and asserted counterclaims, and affirmative defenses.[3]

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[1] NYSCEF Docket #s 2 and 13.
[2] The Verified Complaint contains two causes of action: (1) breach of contract; and (2) enforcement on a personal guarantee. (NYSCEF Docket # 1.)
[3] NYSCEF Docket # 6.

Plaintiff now moves to dismiss the counterclaims and for summary judgment on the 1st and 2nd causes of action in the complaint. For the reasons set forth below, the motion to dismiss the counterclaims is GRANTED. The motion for summary judgment is DENIED. Furthermore, pursuant to CPLR Rule 3212(b) summary judgment is awarded to the defendants herein, and the complaint is dismissed.[4]

The Motion to Dismiss is Granted

"On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [citation omitted].) "At the same time, however, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.'" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [citation omitted].) "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton*, 29 NY3d at 142.)

[4] "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." (CPLR Rule 3212[b].)

The defendants allege two specific counterclaims: (1) "Fraudulent, Deceptive and Predatory Commercial Practices" and (2) Unconscionability. Plaintiff moves to dismiss both counterclaims. The defendants did not file opposition papers opposing the plaintiff's motion.

As plaintiff correctly notes "[t]he doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery. Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause (*see*, UCC 2–302; *Pearson v. National Budgeting Systems, supra*; *Cowin Equipment Co. Inc. v. General Motors Corp.*, 734 F.2d 1581 (11th Cir.), *citing Bennett v. Behring Corp.*, 466 F.Supp. 689, affd. on other grounds 737 F.2d 982 (11th Cir.))." (*Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 606 [2nd Dept. 1987].) Thus, the counterclaim alleging unconscionability must be dismissed.

As to the counterclaim alleging "Fraudulent, Deceptive and Predatory Commercial Practices" to the extent the defendants are alleging either fraud or a General Business Law § 349 cause of action the counterclaim must be dismissed. If the counterclaim alleges that the agreement is a loan with a criminally usurious interest rate, the counterclaim must be dismissed.

"Section 349 (a) of the General Business Law encompasses deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of

any service in this State. Section 349 governs consumer-oriented conduct and, on its face, applies to virtually all economic activity (*Karlin v. IVF Am.*, 93 N.Y.2d 282, 290, 690 N.Y.S.2d 495, 712 N.E.2d 662). Generally, claims under the statute are available to an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising (*Genesco Entertainment v. Koch*, 593 F.Supp. 743, 751 (S.D.N.Y. 1984))." (*Small v. Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999].)

As the Court of Appeals noted in *Plavin v. Grp. Health Inc.* (35 NY3d 1, 10 [2020]) "a plaintiff claiming the benefit of either section 349 or 350 "must charge conduct of the defendant that is consumer-oriented" or, in other words, "demonstrate that the acts or practices have a broader impact on consumers at large" (*Oswego*, 85 N.Y.2d at 25, 623 N.Y.S.2d 529, 647 N.E.2d 741)." Defendants fail to allege sufficient facts that any improper acts they allege are committed by plaintiff have a "broader impact" on consumers at large- as opposed to only businesses that seek to enter into sales of their future receivables.

The agreement itself is documentary evidence. (*150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 AD3d 1 [1st Dept. 2004].) "It is well established that affidavits and other evidentiary materials are admissible to support a motion to dismiss pursuant to CPLR 3211(a)(7) (*see Liberty Affordable Hous., Inc. v. Maple Ct. Apts.*, 125 A.D.3d 85, 88–91, 998 N.Y.S.2d 543 [4th Dept. 2015]), and it is equally well established that

such affidavits and materials will warrant dismissal under that provision if they " 'establish conclusively that [the] plaintiff has no cause of action' " (*id.* at 89, 998 N.Y.S.2d 543, quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]; *see generally Warney v. State of New York*, 16 N.Y.3d 428, 434–435, 922 N.Y.S.2d 865, 947 N.E.2d 639 [2011])." (*Jeanty v. State*, 175 AD3d 1073, 1074 [4th Dept. 2019].)

To the extent that the defendants allege that the plaintiff engaged in fraud by failing to disclose the payment terms of the sale, that the agreement could be assigned, that a security interest was granted, provisions for service of process, all of those disclosures were contained in the underlying agreement.

Additionally, to the extent the defendants allege a counterclaim based upon the argument that the agreement was a loan, and not a sale of receivables, and its terms resulted in an usurious interest rate, that argument fails. Resolution of this issue depends upon whether the contract was a loan agreement, or a merchant funding agreement.

> To determine whether a transaction constitutes a usurious loan: "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" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d at 665-666 [citations and internal quotation marks omitted]).

(*Principis Cap., LLC v. I Do, Inc.*, 201 AD3d 752, 754 [2nd Dept. 2022].)

The agreement between plaintiff and defendants contained a mandatory right of reconciliation. The agreement did not have a finite term and was subject to a "downturn" in Defendants' business. Finally, the agreement did not make as a condition of default the Defendants filing for bankruptcy. Thus, the agreement was not a loan contract, and it is not subject to the usury laws. (*Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752 [2nd Dept. 2022].)

As the agreement was not a loan, the criminal usury counterclaim must be dismissed. Additionally, defendants cannot assert criminal usury as a counterclaim to seek recovery. (*See LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2nd Dept. 2020]: "[a]lthough the defendants may assert criminal usury as an affirmative defense (*see* General Obligations Law § 5-521[3]; Limited Liability Company Law § 1104[c]; Penal Law § 190.40; *Fred Schutzman Co. v Park Slope Advanced Med.*, PLLC, 128 A.D.3d 1007, 1008, 9 N.Y.S.3d 682; *Blue Wolf Capital Fund II, L.P. v American Stevdoring, Inc.*, 105 A.D.3d 178, 184, 961 N.Y.S.2d 86; *Nikezic v. Balaz*, 184 A.D.2d 684, 685, 585 N.Y.S.2d 86; *Intima-Eighteen, Inc. v. Schreiber Co.*, 172 A.D.2d 456, 457, 568 N.Y.S.2d 802), they may not assert criminal usury as the basis for a counterclaim (*see Intima-Eighteen, Inc. v. Schreiber Co.*, 172 A.D.2d at 457, 568 N.Y.S.2d 802).")

The counterclaims are dismissed.

Motion for Summary Judgment is Denied as to Plaintiff; Granted as to Defendants

A party seeking summary judgment pursuant to CPLR 3212 must make prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact. (*Iselin & Co. Inc v Landau*, 71 NY2d 420 [1988].) Summary judgment may only be granted when "it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function". (*Suffolk County Dep't of Soc. Servs. v James M.*, 83 NY2d 178, 182 [1994].) Only when the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 851 [1985].)

Plaintiff failed to meet its initial burden in establishing entitlement to summary judgment.

The agreement that is attached as both an exhibit to the complaint and in plaintiff's motion papers states that it is between "Speedy Funding, LLC, a Connecticut limited liability company"[5] and the defendants, who are domiciled in

[5] The agreement states that plaintiff's address is 157 Church St., New Haven CT 06510.

Michigan. Additionally, contrary to the assertion in the complaint that the agreement contained an express provision where the parties consented to the jurisdiction of New York court, the agreement states that it:

> . . . shall be governed by and construed in accordance with the laws of the state of Connecticut without regards to any applicable principals of conflicts of law. Except required to enforce a security interest or otherwise required by applicable law any suit action or proceeding arising hereunder or the interpretation performance or breach hereof shall if the Company so elects be instituted in any court sitting in Connecticut to the exclusion of all other forums (the "Acceptable Forums") . . .[6]

Other provisions of the agreement refer to Connecticut law.

The complaint alleges that the plaintiff is a New York limited liability company. In its motion papers, plaintiff again asserts it a New York limited liability company, alleging it entered into the agreement with the defendants, and attaching the agreement which states a similarly named Connecticut company entered into an agreement with the defendants. Nowhere in plaintiff's papers does it allege or establish that the plaintiff was assigned the contract by the Connecticut company that entered into the agreement or that it is affiliated with the Connecticut company that entered into the agreement.

[6] See Merchant Agreement (NSYCEF Docket # 2) at 4.6.

""Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties" (*Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 104, 878 N.Y.S.2d 97)". (*CDJ Builders Corp. v. Hudson Grp. Const. Corp.*, 67 AD3d 720, 722 [2nd Dept. 2009].) Here, there plaintiff failed to establish that it entered into the agreement or that it had the required privity between the parties. Thus, it failed to meet its initial burden to establish entitlement to summary judgment.

Additionally, assuming arguendo, that the plaintiff established contractual privity between the plaintiff and the defendants, the defendants have established that this Court lacks jurisdiction.

The record establishes that the agreement was between a Connecticut company and a corporate defendant and individual defendant domiciled in Michigan. The agreement does not vest New York courts with jurisdiction. The forum selection clause vests jurisdiction in Connecticut. Additionally, the agreement between a Connecticut corporation and a foreign corporation for the sale of receivables does not fall within an exception contained in Business Corporation Law § 1314 that would allow this Court to exercise jurisdiction. (*Techo-TM, LLC v. Fireaway, Inc.*, 123 AD3d 610 [1st Dept. 2014].) Finally, plaintiff did not establish that either defendant has any personal or business connections in New York, or transacted any business in New York related to the underling agreement, sufficient

to allow this Court to exercise jurisdiction over the defendants. (*Greenblatt v. Gluck*, 15 AD3d 317 [4th Dept. 2005].)

This Court lacks jurisdiction to enforce the terms of the agreement.

Finally, as the plaintiff herein failed to submit any evidence – or even allege- that the Connecticut company that entered into the agreement was a subsidiary or parent corporation of the plaintiff, the Court must find that the plaintiff did not enter into the contract with the defendants and lacked contractual privity. (*See e.g., Am. Express Nat'l Bank v. Pino Napoli Tile & Granite, LLC*, 79 Misc. 3d 668 [NY Sup. Ct. 2023].)

Upon its authority to search the record and award summary judgment to a non-moving party,[7] the Court awards summary judgment to defendants and the complaint is dismissed.

Based upon the foregoing, and the papers filed herein,[8] it is hereby

ORDERED that plaintiff's motion to dismiss the counterclaims is GRANTED; and it is further

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[7] See CPLR Rule 3212(b).

[8] Notice of Motion (NYSCEF Docket # 8); Memorandum of Law in Support (NYSCEF Docket # 9); Notice of Motion (NSYCEF Docket # 11); Affidavit in Support of Motion with exhibits (NYSCEF Docket #s 12-15); Affirmation in Support of Motion with exhibits (NYSCEF Docket #s 16-21); Memorandum of Law in Support (NYSCEF Docket # 22); Statement of Material Facts (NYSCEF Docket # 23); Affidavit in Opposition with exhibits (NYSCEF Docket #s 25-27); Memorandum of Law in Opposition (NYSCEF Docket # 28); Response to Statement of Material Facts (NYSCEF Docket # 29).

ORDERED that the plaintiff's motion for summary judgment on the 1st and 2nd causes of action is DENIED; and is further

ORDERED that upon a search of the record pursuant to CPLR Rule 3212(b) the Court GRANTS summary judgment to the defendants and the complaint is dismissed.

Dated: December 15, 2023

Hon. Daniel J. Doyle
Supreme Court Justice