At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 5th day of November, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

UNION FUNDING SOURCE, INC., Plaintiffs, - against - D & S TRUCKING LLC, MARCHAND'S RECOVERY SERVICE LLC, AND DANIEL LEE MARCHAND, Defendants.	Index No.: 504150/2021 Motion Seq. # 2 DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Plaintiff's Notice of Motion	1
Affirmation and Exhibits	2
Plaintiff's Affidavit	3
Defendants' Affirmation in Opposition & Exhibits	5
Defendants' Memo of Law	6
Plaintiff's Reply Affirmation, Affidavit & Exhibits	7
Plaintiff's Reply Memo of Law	8

Upon the foregoing papers Plaintiff, UNION FUNDING SOURCE, INC., (UFS), moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment in its favor. Plaintiff commenced the instant action on or about February 22, 2021 seeking damages for alleged breach of contract against D & S TRUCKING LLC (D & S), MARCHAND'S RECOVERY SERVICE LLC (Recovery) and DANIEL LEE MARCHAND (Marchand) as guarantor. Plaintiff also seeks damages against all defendants for Unjust Enrichment.

BACKGROUND

The contract in the instant case is entitled "Future Receivables Sale and Purchase Agreement (Agreement)" and was executed on or about January 14,2021. Marchand signed on behalf of D & S and as Guarantor. Every place where a space was provided for a signature by

someone on behalf of UFS was left blank[1]. Pursuant to the agreement, Plaintiff purchased from Defendant-Seller $15,000 worth of receivables with the "Purchased Percentage" listed at 25%. The agreement provided that Plaintiff would have the right to deduct a daily remittance from Defendant-Seller's bank account at the rate of $372.50 per day until such time as the total amount of $22,350 was received.

The Agreement also provides that 24-hour notice must be provided to UFS if the bank account from which the withdrawals are made does not have sufficient funds so that Plaintiff can withdraw $372.50 on any particular day. According to UFS, on January 28, February 11, February 12, February 15, and February 16 of 2021 Plaintiff was unable to withdraw $372.50 from the designated account. Moreover, Plaintiff alleges this was not due to insufficient funds, but rather, because Defendant-Seller issued stop payments for withdrawals on those dates. Plaintiff further claims this is a breach of the agreement.

Defendants served an answer to the complaint herein on or about June 3, 2021. The answer contained 18 affirmative defenses. In opposition to the instant motion for summary judgment Defendants assert among other claims that the Agreement isn't a contract to buy receivables but rather, is a criminally usurious loan. Additionally, Defendants contend that the instant motion for summary judgment is premature as no discovery has been exchanged.

DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact. ***Jablonski v Rapalje, 14 AD3d***

[1] The Agreement filed as an exhibit to the moving papers is missing pages 8-12. A complete copy, still missing Plaintiff's signature, was annexed to the Reply papers.

484, 486 (2nd Dept 2005). On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and is required to accept the opposing party's version of the facts as true. ***Rizk v Cohen, 73 NY2d 98 (1989); Schaffer v Simms Parris, 82 AD3d 867 (2nd Dept 2011).*** The court may not determine issues of credibility or fact, but rather identify whether questions of fact exist requiring resolution by a jury. ***Sillman v Twentieth Century–Fox Film Corp, 3 NY2d 395, 404 (1957); Marcum, LLP v Silva, 117 AD3d 919, 920 (2nd Dept 2014).***

In the instant case, Plaintiff, as the moving party, has the burden of establishing 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. ***Ciccone v Bedford Cent School Dist., 21 AD3d 437,438 (2nd Dept 2005), leave to appeal denied, 6 NY3d 702 (2005).*** Once this showing is made, the burden shifts to the Defendants to raise a triable issue of fact. ***Zuckerman v City of New York, 49 NY2d 557, 562 (1980).*** If Plaintiff fails to meet this initial burden, summary judgment must be denied "regardless of the sufficiency of the opposing papers" ***Vega v Restani Constr Corp, 18 NY3d 499, 503 (2012).***

Plaintiff contends that the agreement in dispute is not a loan as claimed by Defendants, but rather is a contract for the purchase of future receivables. Additionally, Defendants contend that as a loan the amount of interest is usurious. The determinative factor in deciding if the agreement in dispute is a loan or contact for the purchase of future receivables is whether or not repayment is absolute. Contracts that require absolute payment constitute a loan and those that are contingent are agreements for the purchase of future receivables. ***Advance Services Group LLC v Acadian Properties Austin, LLC, 70 Misc3d 1225(A) (S. Ct., Kings County, 2021).*** In making such a determination the Court must consider three factors: 1) does the

agreement have a reconciliation provision; 2) does it have a finite term; and 3) is there any recourse should the merchant declare bankruptcy. ***LG Funding LLC v United Senior Props, 181 AD3d 664, 665 (2d Dept 2020).***

Courts have consistently held that any reconciliation provision that is left to the sole discretion of the alleged purchaser of the future receivables suggests that payment is absolute. ***Id. at 666.*** The within agreement does not use the words "sole discretion" in the paragraph entitled reconciliation. However, paragraph 6.10 of the Agreement provides: "Merchant agrees that in every instance in which Merchant's rights under this Agreement are contingent upon first obtaining UFS's consent, such consent may be withheld, granted or Conditioned at UFS's sole and absolute discretion." The law is clearly established that courts must consider these transactions in their totality and determine their real character, rather than the name or form it has been given. ***Id. at 666.*** Therefore, when considering the within Agreement as a whole it is clear that UFS's intention was that payment would be absolute.

In the instant matter it is unclear if this Agreement has a finite term. It states in relevant part, that the term begins on the date that the future receivables are purchased and expires when the Merchant's obligations are fully satisfied. However, UFS has the right to accelerate the payments or extend the time in which the Merchant has to repay. If Defendants file for bankruptcy or are placed under an involuntary filing, UFS is immediately entitled to enforce the guaranty and enter a confession of judgment against D & S. These provisions make bankruptcy a default under the Agreement entitling UFS to an immediate judgment against D & S.

Upon weighing the foregoing three factors this Court finds that the Agreement in dispute is in fact a loan. In the case at bar, the payment is absolute and there is no recourse for

bankruptcy are factors that outweigh whether or not the Agreement has a finite term.

Defendants are not required to persuade the Court against summary judgment. ***Voss v Netherlands Ins Co, 22 NY3d 728, 734, (2014).*** Additionally, if the party moving for summary judgment is the plaintiff, the prima facie burden of proof should be directed not only to the elements of each cause of action on which the motion is based, but also, mustrefute any affirmative defenses asserted in the Defendants' answer as to that cause of action. ***Vita v. New York Water Waste Servs., LLC, 34 AD3d 559, 559 (2nd Dept 2006); Mc Kinneys, Practice Commentaries, CPLR§ 3212***.

Plaintiff has failed entirely to eliminate all questions of fact or refute the affirmative defenses asserted by Defendants. Therefore, Plaintiff is not entitled to an order granting summary judgment in its favor. ***Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 (1998); Zuckerman v City of New York, 49 NY2d 557, 562 (1980)***. Accordingly, Plaintiff's motion is denied in its entirety. The Plaintiff's remaining contentions are without merit.

This is the Decision and Order of the Court.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN