

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 509327/21  
Motion Date: 5-16-22  
Mot. Seq. No.: 01, 02

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MERCHANT BUSINESS SOLUTIONS LLC,

Plaintiff,

-against-

**DECISION/ORDER**

TERRY R. NELSON,

Defendant.

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The following e-filed documents listed by NYSCEF as item numbers 13-34 were read for this motion.

In this action for breach of a contract for the sale of future receivables, the plaintiff, MERCHANT BUSINESS SOLUTIONS LLC, move for an order granting summary judgment on the claims asserted in the Verified Complaint (Mot. Seq. # 1). The defendant, TERRY R. NELSON, opposes the motion and cross-moves for summary judgment dismissing the complaint (Mot. Seq. # 2).

In opposition to the motion and in support of the cross-motion, the defendant contends that the contract between the parties involves an unenforceable usurious loan. 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).

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Generally, 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 LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312; *Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752, 754, 160 N.Y.S.3d 325, 327). In *LG Funding, LLC, supra.*, the contract at issue contained a provision suggesting that the defendant merchant's obligation to repay was absolute and not contingent on its actual accounts receivable. In this regard, the contract provided that if the merchant declared bankruptcy, such would be considered a default under the contract, entitling the plaintiff to immediate full repayment of any of the unpaid purchased amount. The contract further provided that in the event the defendant merchant filed for bankruptcy or was placed under an involuntary filing, the plaintiff would be entitled to enforce the provisions of the personal guaranty executed by the guarantor and the defendant merchant would be required to deliver to the plaintiff a confession of judgment in the amount of the purchased amount, and the plaintiff would be allowed to enter the confession of judgment as a judgment.

The *LG Funding, LLC* Court construed these provisions as suggesting that the plaintiff did not assume the risk that the defendant would have less-than-expected or no revenues. Under these circumstances, the Court affirmed the lower Court's determination denying that branch of the plaintiff's motion which was pursuant to CPLR 3211(a)(1) and (7) to dismiss the affirmative defenses alleging that the transaction at issue was a criminally usurious loan. The defendant in this case makes the same claim.

Further, since the plaintiff failed to demonstrate the absence of triable issues of fact as to whether the transaction constituted a criminally usurious loan, the *LG Funding, LLC* Court affirmed the lower Court's determination denying that branch of the plaintiff's motion which was *for summary judgment on the complaint.*

In this case, as in *LG Funding, LLC*, in the event the defendant merchant filed for bankruptcy or was placed under an involuntary filing, the defendant merchant would be considered in default and the plaintiff would be entitled to enforce the provisions of the personal

guaranty. Further, as in *LG Funding, LLC*, defendant merchant and guarantor signed a confession of judgment that could be entered on their default.

For the above reasons, in accordance with the holding *LG Funding, LLC*, in it is hereby

**ORDERED** that the motion and cross-motion are **DENIED**.

This constitutes the decision and order of the Court.

Dated: November 14, 2022.

**P.P.S.**

**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

KINGS COUNTY CLERK  
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