SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

MCA SERVICING COMPANY,	:	
		Index #: 034901/2023
Plaintiff,	:	(Motion Sequence 1 & 2)
-against-	:	**DECISION AND ORDER**
NIC'S PAINTING, LLC, LORRAINE WILLIAMS, MD., INC, SAINT MATTHEWS PRIMITIVE CHURCH CEMETERY ASSOCIATION, INC., ST. MATTHEWS PRIMITIVE BAPTIST CHURCH, INC., NILOR HOLDINGS, LLC, ISLAND MIKE HANDYMAN LLC d/b/a NIC'S PAINTING, and NICHOLAS CAMPBELL RAHMING,	:	
Defendants.	:	

PRESENT: HON. KEITH J. CORNELL, A.J.S.C.

Before the Court is the motion pursuant to CPLR § 3212 for summary judgment submitted by MCA Servicing Company ("MCA" or "Plaintiff") against each of the above captioned Defendants and the motion to dismiss pursuant to CPLR § 3211 submitted by Defendant Nic's Painting, LLC. The Court has read and considered NYSCEF documents 22-48 in deciding the motions.

Background

On June 8, 2023, Defendant Nicholas Campbell Rahming entered into a Revenue Purchase Agreement ("RPA") with MCA on behalf of the company, Nic's Painting, LLC ("Merchant").[1] Mr. Rahming also personally signed the agreement as guarantor. Per the terms of the RPA,

[1] The RPA lists additional defendants Lorraine Williams, MD., Inc, Saint Matthews Primitive Church Cemetery Association, Inc., St. Matthews Primitive Baptist Church, Inc., Nilor Holdings, LLC. It is not clear if these are other names under which Defendant Nic's Painting, LLC does business or other entities that are owned by Nicholas Campbell Rahming or other entities that have judgments against Defendant Nic's Painting, LLC.

Merchant sold $100,750.00 of its future receivables to MCA for $65,000.00. Merchant agreed to an aggressive repayment schedule, which allowed MCA to debit the amount of $5,927.00 from Merchant's bank account every week until $100,750.00 was collected by Plaintiff. Theoretically, the purchase amount and repayment was set at 10% of Merchant's receivables. Based on the schedule, Merchant had 17 weeks (or approximately four months) to bring in about $1,007,500.00 in receivables.

This action was commenced by way of a Summons and Complaint filed on October 3, 2023. (NYSCEF Doc. 1). Plaintiff alleged that Defendants breached the RPA after remitting $67,569.00, leaving a balance of $33,181.00. Plaintiff also alleged that Defendants owed $490.00 in bounced check fees, $3,000.00 for a default fee, and $9,954.30 in attorneys' fees, for a total of $46,625.30.

On October 15, 2023, defense counsel filed an answer to the complaint on behalf of the corporate Merchant, the personal guarantor, and all of the other named defendants. (NYSCEF No. 4, 10). In addition to denying the allegations in the complaint, Defendants asserted 32 affirmative defenses, including that the RPA is an unconscionable agreement. Defendants also filed discovery demands on that date. (NYSCEF Docs. 5-9).

On January 11, 2024, Plaintiff filed copies of a Notice to Admit and Demand for Interrogatories (NYSCEF Docs. 11-12), which were served on Defendants by NYSCEF on that date. A reply date to the discovery was set for 20 days from the date of service. Plaintiff also filed its responses to Defendants' demand for a Bill of Particulars and Defendants' demand for discovery.[2] Rather than waiting for a response to their own discovery demands, on January 12,

[2] As the response to the interrogatories, Plaintiff made 21 general objections to the demands, then for each specific demand, replied that "Subject to and without waiving the General Objections, Plaintiff further objects to this demand on the basis that it is overbroad, vague, unduly burdensome, and seeking information not material and necessary to

2024, Plaintiff moved for summary judgment pursuant to CPLR § 3212 on the claims of breach of contract and the personal guarantee. In support, Plaintiff submitted the attorney affirmation of Adam Nichols, Esq., of Piekarski Law PLLC, the affidavit of Nick Kolesar, a Manager of MCA, and a statement of material facts (NYSCEF Doc. 23-25). Plaintiff also submitted a copy of the RPA, the transaction history, proof of funding, copies of the pleadings, and copies of the two discovery demands served the day before (NYSCEF Docs. 26-30). Mr. Kolesar affirmed that Merchant breached the RPA on September 1, 2023 when Plaintiff attempted to collect its daily remittance and the bank returned the code "R01 – Insufficient Funds" and Merchant failed to timely request a reconciliation. (NYSCEF Doc. 25 ¶ 8).

Between January 17 and January 26, 2024, Defendants filed a response to Plaintiff's notice to admit, a memorandum of law in opposition to the motion for summary judgment, the attorney affirmation of Mr. Dominick Dale, Esq., the affidavit of Defendant Nicholas Rahming[3], and a cross-motion to dismiss the complaint. (NYSCEF Doc. 33, 35-45). In his affidavit, Mr. Rahming denied that he owes the funds demanded. (NYSCEF Doc. 45 ¶ 15). He alleges that in September 2023, he called Oran, his contact at MCA, because he could not continue to make his payments due to the death of two of his brothers. (¶ 6). He claims that Oran denied him the right to reconcile and told him to call Plaintiff's attorney. (¶ 9). Defendant alleges that he then reached out to Simon Leifer at Piekarski Law PLLC, who also allegedly rejected the request to reconcile. (¶ 10-11).

Defendant states that he was desperate for funding when he entered into the RPA. He alleges that he had no negotiating power with Plaintiff. He claims that he did not have any say in

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this action and not reasonably calculated to lead to the discovery of admissible or relevant evidence" approximately 35 times. Plaintiff also directed Defendants to Plaintiff's exhibits A-D.

[3] Defendant's affidavit was notarized in Florida, where he resides. His affidavit does not contain the certificate of conformity required by CPLR § 2309(c).

the amount or percentage of receivables that he sold, the frequency of payment, or the amounts of the payments. (¶¶ 17-19). He states that the "10%" amount is a ruse, and he actually was required to sell 100% of his receivables. (¶ 20). Finally, Defendant states that he is a resident of Florida, his business does not conduct any business in New York, and litigation in New York is extremely burdensome for him. (¶ 23).

In the memorandum of law, Defendants argue that the RPA is an unconscionable contract. (NYSCEF Doc. 36 ¶ 12). They also argue that there are significant issues of material fact outstanding. Defendants argue that Plaintiff's documents are inadmissible hearsay. Defendants argue that Plaintiff's affiant failed to lay a proper foundation for the business records. Defendants argue that the RPA is actually an illegal usurious loan. Finally, Defendants argue that the default fees and attorney's fees are unenforceable penalties.

In reply, Plaintiff argues that the RPA is not a loan and is not subject to the laws against usury. Plaintiff cites to cases that have concluded that the RPA is not a loan. Plaintiff points out that the RPA specifically states that Defendant was not borrowing money from Plaintiff. Plaintiff points out that the agreement includes a reconciliation provision. Plaintiff argues that Defendants do not offer any evidence that they actually requested reconciliation or an adjustment to the weekly payment.

Plaintiff argues that the business records offered as proof of funding and default were properly authenticated by Plaintiff's manager, Nick Kolesar. Plaintiff argues that the agreement is not unconscionable. Finally, Plaintiff argues that it is entitled to its liquidated damages for the default fee and the attorneys' fees. Plaintiff argues that Defendants have not offered any proof that actual damages were readily ascertainable at the time that the parties signed the contract.

In the motion to dismiss, Defendants argue that Plaintiff does not have legal standing to commence an action in New York because MCA Servicing Company is not registered to do business in New York. In response, Plaintiff argues that MCA Servicing Company is a properly registered assumed name of Newco Capital Group VI LLC.

Discussion

The remedy of summary judgment is a drastic one, and it should only be granted when it is clear no triable issue of material facts exists. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Andre v. Pomeroy, 35 N.Y.2d 361 (1974). The proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winograd v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985); see Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The evidence submitted must be in admissible form. See, e.g., JP Morgan Chase Bank, N.A. v RADS Group, Inc., 88 A.D.3d 766, 767 (2d Dept. 2011) (summary judgment denied because plaintiff failed to demonstrate admissibility of defendant's payment history). Once a *prima facie* showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. Alvarez, *supra*. As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. See Phillips v. Kantok & Co., 31 N.Y.2d 307 (1982); Andre, *supra*. On a motion for summary judgment, the Court's role is issue finding, not issue determination. See Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. See Gitlin v. Chirkin, 98 A.D.3d 561 (2d Dept. 2012); Dowsey v. Megerlan, 121 A.D.2d 497 (2d Dept. 1986). Even if the plaintiff's motion is unopposed, summary judgment should not be granted merely because the party against whom judgment is sought failed to submit opposition papers. See Liberty Taxi Mgt., Inc v. Gincherman, 32 A.D.3d 276, 277 fn. 1 (1st Dept. 2006) (citing Vermont Teddy Bear Co., v. 1-800 Beargram Co., 373 F.3d 241 (2d Cir. 2004) ("the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the…court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement as a matter of law")).

To establish a *prima facie* claim for breach of contract, a plaintiff must establish the existence of a contract, that plaintiff performed pursuant to the contract, that defendant breached its contractual obligations, and that plaintiff was damaged as a result of the breach. See Dee v. Rakower, 112 A.D.3d 204 (2d Dept. 2013). Here, Plaintiff tendered the Revenue Purchase Agreement, proof of funding, and an allegation of default. Specifically, Plaintiff alleges that pursuant to Section 3.1(d) of the RPA, Merchant defaulted when it "fail[ed] to request a Reconciliation or Adjustments to the Remittance pursuant to Paragraphs 1.3 & 1.4 (as appropriate) within 1 business day of a Merchant's Remittance returned of insufficient funds in the Account such that the ACH of the Remittance amount was not be honored by Merchant's bank." [sic]. (NYSCEF Doc. 2, page 4). As evidence of the default, Plaintiff submits a document entitled "transaction history" (NYSCEF Doc. 15) that was prepared by Plaintiff. This document lists the dates on which Plaintiff debited the Merchant's bank account and whether payment "cleared" or "bounced."

Defendants do not deny that Merchant failed to make the weekly payment starting on September 1, 2023 but they do argue that Plaintiff breached the agreement first by failing to give them a chance to reconcile so that their payment accurately reflected 10% of their daily receipts. Aff. of Rahming ¶ 14 (NYSCEF Doc. 45). Therefore, a material fact remains at issue, that is, whether Defendants defaulted pursuant the contract.

More important, however, is a most fundamental question: whether the RPA is void and unenforceable, either because it is an illegal usurious loan or a fundamentally unconscionable contract. If the RPA is a loan masquerading as an asset purchase – a wolf in sheep's clothing – and if a calculation of the transaction's cost reveals a usurious rate of interest, then the RPA is unenforceable. See Crystal Springs Capital v. Big Thicket Coin, LLC, 220 A.D.3d 745 (2d Dept. 2023). The Court is concerned that this RPA is in fact a usurious loan or an unconscionable contract, despite Plaintiff's vociferous claims to the contrary. The RPA Agreement bears a striking resemblance to the loan agreements that were found to be usurious and unconscionable in Crystal Springs Capital, *supra*, and People v. Richmond Capital Group, LLC, NYLJ, Sep. 20, 2023 at p.17, col.2, 2023 NYLJ LEXIS 2487 (Sup. Ct. NY Co. 2023). This contract also resembles the contracts recently alleged to be usurious loans by the New York State Attorney General in a new petition filed against over 30 companies on March 5, 2024. In the newest matter, the AG accuses these companies of exploiting small businesses through fraudulent loans with extremely high interest rates that are disguised as "Merchant Cash Advances." See "Attorney General James Sues Large-Scale Predatory Lending Operation Targeting Small Businesses," Press Release of the NYSOAG, March 5, 2024 (https://ag.ny.gov/press-release/2024/attorney-general-james-sues-large-scale-predatory-lending-operation-targeting); Rick Tannenbaum, "New York Attorney

General Sues Suffern-Based Merchant Cash Advance Lender For Fraud," Rockland County Business Journal, March 20, 2024.

Courts, in determining whether a transaction constitutes a usurious loan, must consider the transaction in its entirety and judge the same "'by its real character, rather than by the name, color, or form which the parties have seen fit to give it.'" LG Funding, LLC v. United Senior Props of Olathe, LLC, 181 A.D.3d 664, 665 (2d Dept. 2020) (internal citation omitted). A loan is characterized by an absolute entitlement to repayment under all circumstances. See K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc.3d 807, 816 (Sup Ct. Westchester Co. 2017). In assessing whether the transaction is a loan, Courts generally weigh three factors: "(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, 181 A.D.3d at 666.

This agreement includes a reconciliation provision, which purports to adjust the repayment amount based on 10% of the Merchant's receivables. However, Defendants allege that the reconciliation provision is illusory, as Merchant was not allowed to reconcile. In this case, the alleged default was failure to request a reconciliation within one business day of a bounced remittance. However, Defendants allege that their attempts to reconcile were denied. Further, there is no evidence that the initial repayment amount was actually based on legitimately projected receivables. Defendant Rahming alleges that the amount of receivables purchased was falsely identified as 10%, when they were actually 100% of Merchant's receivables. See Rahming Aff. ¶ 20 (NYSCEF Doc. 45).

The security agreement also suggests that this is actually a loan, rather than a bona fide purchase of future receivables. The Merchant must grant Plaintiff a security interest in all of

Merchant's assets if, at any time, there are insufficient funds in Merchant's account for Plaintiff to remit payment to Plaintiff. While the guarantee signed by the Merchant's owner purports to guarantee performance only, upon the occurrence of a default, the Merchant's owner becomes jointly and severely liable for the amounts owed. And although bankruptcy is not identified as an event of default, the agreement creates a security interest in every tangible aspect of the business and allows for recovery personally against the Merchant's owner, negating any protections that would accompany a bankruptcy filing by the Merchant.

Finally, upon an Event of Default, Plaintiff may "accelerat[e] the full uncollected Purchase Amount." Were this a bona fide purchase of receivables, the Plaintiff would have every interest in making sure that Merchant continues to successfully operate its business so that it could continue to collect receivables. Plaintiff would actively work to adjust the payment so that the Merchant's operating accounts were not totally depleted.

An unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of "an absence of meaningful choice on the part of one of the parties" (procedural unconscionability) together with "contract terms which are unreasonably favorable to the other party" (substantive unconscionability). King v. Fox, 7 N.Y.3d 181, 191 (2006). Examples of procedural unconscionability include "high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties." Emigrant Mortg. Co., Inc. v. Fitzpatrick, 95 A.D.3d 1169, 1170 (2d Dept. 2012). Substantively unconscionable terms include "inflated prices, unfair termination clauses, unfair limitations on consequential damages, and improper disclaimers of warranty." Id.

Defendants argue that they were subject to inequality of bargaining power and a significance imbalance of understanding. Defendants argue that they were desperate for funding when they agreed to the contract. See Rahming Aff. ¶ 17-19 (NYSCEF Doc. 45). Defendants argue that the percentage of receivables that were sold was chosen by Plaintiff. Defendants allege that the method for setting this percentage was not disclosed and was not based on the Merchant's actual receivables. See id. ¶ 20, 22. Defendants allege that they did not even understand that they had sold 100% of their receivables until this lawsuit was commenced. See id. Finally, Defendants allege that Plaintiff did not allow Merchant to reconcile despite repeated requests. See id. ¶ 7-11.

This Court currently has dozens of matters on its docket filed by the various entities under which Plaintiff operates, including but not limited to NewCo Capital Group, Capytal.com, MCA Servicing, and Apollo Funding, all seeking judgments against small businesses located throughout the country who allegedly defaulted on RPAs after a few weeks or months. It appears that Plaintiff has a business of making loans under a variety of aliases to desperate small businesses, bleeding them dry, and then getting personal judgments against the owners. Plaintiff allegedly aggressively pursues these out-of-state, unsophisticated businesses, promising an advance on their collections. Plaintiff allegedly then presents them with a non-negotiable form contract that contains onerous repayment terms, hair-trigger events of default, and liquidated damages clauses that result in amounts owed that far exceed the value of the funds extended. While aggressive contract terms are not necessarily illegal, if the transaction is a subterfuge, it cannot be countenanced. This Court will not be used as a cudgel to enforce potentially illegal and/or unconscionable loans.

Recently, in Crystal Springs Capital, the Appellate Division, Second Department, held that a similar transaction constituted criminal usury. See id., 220 A.D.3d at 747. The Court held that

the Supreme Court erred in not dismissing the plaintiff's complaint on the basis of documentary evidence pursuant to CPLR § 3211(a)(1). The Appellate Division found that the merchant cash advance agreement was void as a matter of law. While the RPA in the instant case is not identical to the agreement before the court in Crystal Springs, the RPA's structure and administration by Plaintiff smacks of chicanery.

It is not the Court's function to investigate a litigant or to advocate for a litigant, but to assure that equity and justice are served. Here, there are significant issues as to (i) the true nature of the RPA, (ii) the alleged breach by Defendants, and (iii) damages. Therefore, this Court finds that many material issues of fact remain outstanding.

Finally, as to the motion to dismiss, Plaintiff has established that it has standing to bring this action. And it is

ORDERED, that Plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED, that Defendants' cross-motion to dismiss is DENIED; and it is further

ORDERED, that all counsel shall appear for a preliminary conference on June 6, 2024, at 9.30 A.M.; and it is further

ORDERED, that Defendant only may attend virtually by Teams;

ORDERED, that the attached Preliminary Conference Order shall be completed and submitted to the Court at the preliminary conference.

Dated: April 23, 2024
New City, New York

Hon. Keith J Cornell, A.J.S.C.

To: All counsel via NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

Plaintiff/Petitioner,

-against-

Defendant/Respondent.

PRELIMINARY CONFERENCE ORDER

Index No.

It is hereby stipulated and ordered that disclosure shall proceed as follows:

1. **Insurance Coverage** (CPLR 3101(f)) shall be furnished on or before _____;

2. **Bill of Particulars**, in compliance with 22 NYCRR 202.8 and 202.12:

   (a) Demand for Bill of Particulars shall be served on or before_____

   (b) Bill of Particulars shall be served on or before _____

3. **Medical Reports and Authorizations** shall be served as follows:

_____

_____

4. **Physical Examination**

   (a) Examination of Plaintiff on or before _____

   (b) Physician's report shall be furnished to Plaintiff on or before _____

5. **Depositions**

   (a) Party depositions to be completed on or before _____

   (b) Non-party depositions to be completed on or before _____

6. **Other Disclosure**

   (a) Demand for discovery and inspection shall be served on or before_____

   (b) Other interrogatories per CPLR § 3130 _____

(c) Objections, if any, to be stated on or before _____

(d) All parties shall exchange names and addresses of all potential witnesses, statements of opposing parties and photographs (or affidavit of none) on or before_____

(e) Authorization for employment records for the period_____ shall be furnished on or before _____

(f) Accident reports prepared in the regular course of business shall be exchanged pursuant to CPLR § 3101(q) on or before _____

(g) Plaintiff to provide authorizations for the following collateral source providers: _____ _____ (CPLR § 4545) on or before_____

7. **Expert Disclosure** – per CPLR or on or before _____

8. **Other**:_____;

9. **Compliance Conference** is scheduled for _____.

The parties are directed to notify the Court in writing if there are any issues with the above-mentioned discovery schedule. **Parties may not bring discovery motions without permission of the Court.**

No adjournments of these dates shall be granted, except with specific permission of the Court, for good cause shown. Failure to timely comply with the above dates may result in the imposition of sanctions, including the striking of pleadings and/or preclusion of evidence.

Attorney for Plaintiff:

_____

Attorney for Defendant:

_____

Dated: _____
New City, New York

So ordered:

_____
Hon. Keith J. Cornell, AJSC