SUPREME COURT- STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL/IAS PART12

PRESENT:

Hon. Thomas Rademaker, J.S.C.

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EMERALD GROUP HOLDINGS LLC D/B/A VITALCAP FUND

Index No: 607524/2022
Motion Seq. No.: 002
Motion Submitted: 3/19/2024

Plaintiff(s),

DECISION AND ORDER

-against-

EVOLUTION ENTERPRISE GROUP, LLC D/B/A EVOLUTION ENTERPRISE GROUP AND THOMAS DUANE RODERICK,

Defendant(s).

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The Plaintiff moves the Court pursuant to CPLR §3212 for an Order which seeks, *inter alia*, summary judgment against Defendant on the causes set forth in its Verified Complaint: Dismissing Defendant's affirmative defenses; and awarding Plaintiff costs, expenses, and disbursements. The Defendant opposes the Plaintiff's motion and contend that the agreement between the parties must be considered usurious.

Plaintiff commenced this action by filing a Summons and Complaint with the Court on June 19, 2022. The Plaintiff's Complaint consists of three causes of action including breach of contract, personal guarantee, and unjust enrichment. Issue was joined by the filing of an Answer with the

Court on July 14, 2022, in which the Defendant denied the allegations asserted in the Complaint, and filed a counter claim in which the Defendant seeks a declaration that the contract is criminal usurious and is void *ab initio*. The Court previously denied the Plaintiff's motion for summary judgment without prejudice to renew same at the completion of discovery. *(Emerald Group Holdings LLC v Evolution Enterprise Group, LLC*, May 9, 2023, Sup. Ct., Nassau County, Rademaker, J. Index No. 607524/2022, "Decision and Order," mot seq 001)

Subsequently, the parties represented to the Court that the discovery process was complete and that the matter can be certified ready for trial. (*Emerald Group Holdings LLC v Evolution Enterprise Group, LLC*, December 19, 2023, Sup. Ct., Nassau County, Rademaker, J. Index No. 607524/2022, "Certification Order") The instant motion was filed with the Court on November 22, 2023, well in advance of the Certification Order and the Note of Issue, which had been filed with the Court on February 23, 2024.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish

the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (see also *Andre v. Pomeroy*, 35 N2d 361 [1974]).

The Plaintiffs contends this matter is a "straightforward breach of contract case, with no triable issues of fact," and that the parties entered int a contract where Plaintiff paid Defendant a sum in advance to purchase a percentage of Defendant's future receivables, and that the Defendant breached the contract by failing to turn over the receivables to Plaintiff and to otherwise breach the covenants and warranties made in the contract. The Defendants dispute this characterization of the Plaintiff's claims, and contends that the transactions at issue were in actuality a loan pursuant to New York law and as such violate the Criminal Usury limitations set forth in the NY Penal Law Section 190.42.

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

The Defendant raises a question of fact as to whether or not the reconciliation provision of the Agreement was in fact a sham provision. Furthermore, the Defendant argues that the Plaintiff's

advance constitutes a loan, as was for a finite term of 30 weeks, and as such constitutes criminal usury.

Upon a careful review of the papers submitted in support and in opposition to the Plaintiff's motion, along with their respective annexed exhibits, and given the factual differences between the accounts of the parties, the Plaintiff's motion for summary judgment is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: March 20, 2024
Mineola, N.Y.

Hon. Thomas Rademaker, J. S. C.