SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

WEBFUND LLC d/b/a INSTAFUNDERS,

Plaintiff,

-against-

COMMERCE ON DEMAND LLC d/b/a GOOD TREE,
GOOD TREE HOLDINGS, LLC and
RASHAAN MALIK EVERETT,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 603713/2023
Motion Seq. No.: 04
Motion Date: 09/26/2023

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavits, Affirmation and Exhibits, Statement of Facts, Memorandum of Law	1
Affirmation in Opposition and Exhibits, Affidavit, Memorandum of Law, Response to Statement of Material Facts	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting summary judgment; and moves for an order dismissing defendants' affirmative defenses; and moves for an order awarding it costs, expenses and disbursements. Defendants oppose the motion.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about March 3, 2023. *See* Plaintiff's Affirmation in Support Exhibit D. Issue was joined on or about March 29, 2023. *See* NYSCEF Document No. 7. On or about July 20, 2023, plaintiff and defendants stipulated to consider

defendants' Amended Answer served *nunc pro tunc*. *See* NYSCEF Document No. 43; Defendants' Affirmation in Opposition Exhibit A.

In support of the motion, counsel for plaintiff asserts, in pertinent part, that, "[o]n or about June 10, 2022, Plaintiff, Company Defendants and Guarantor entered into an agreement (the 'Agreement') whereby Plaintiff agreed to buy $759,000.00 ('Purchase Amount') of Company Defendants' future receivables for a sum of $550,000.00 ('Purchase Price') with the Purchase Amount to be remitted to Plaintiff from 15 percent of Company Defendants' future receivables. In addition, Guarantor executed a guarantee of performance of all the representations, warranties, and covenants made by the Company Defendants in the contract with Plaintiff. The Agreement stipulates that Company Defendants and Guarantor consent that the Agreement would be governed by the laws of the State of New York, that New York is the 'Acceptable Forum', that the Acceptable Forum is convenient, that the parties are submitting to the jurisdiction of the Acceptable Forum and that the parties waive any and all objections to inconvenience of the jurisdiction or venue. Company Defendants and Guarantor consented to service of process being sent by First Class Mail and Email, complete five days after dispatch. On June 10, 2022, Plaintiff honored its end of the bargain and paid Company Defendants the Purchase Price, minus agreed to fees and less the prior balance, pursuant to the Addendum on page 14 of the Agreement, for the future receivables. Payments were initially made pursuant to the agreement but promptly stopped on or about December 16, 2022, thereby breaching the Agreement. On or about December 16, 2022, Company Defendants defaulted under the terms of the Agreement by breaching its (*sic*) representations and warranties to Plaintiff thereunder and by failing to properly direct payments to Plaintiff. Company Defendants materially breached

the Agreement by intentionally stopping to remit the purchased receivables to Plaintiff from the Bank Account without proper notice, without providing proper financial disclosures or a written request for reconciliation, and otherwise intentionally impeding and preventing Plaintiff from receiving the proceeds of the receivables purchased by them while conducting regular business operations thereby breaching the Agreement. Upon information and belief, Company Defendants are still open and in business and Plaintiff has not received any Receivables from Company Defendants since December 9, 2022. As of the date of this affirmation, Company Defendants have made payments totaling $481,937.60 leaving a balance of $277,062.40 of the purchase amount owed to Plaintiff. Company Defendants owe Plaintiff $27,706.24 for a Default Fee under the Agreement. By reason of the foregoing, Plaintiff has been damaged by Company Defendants' breach of the Agreement in the sum of $304,768.64. Guarantor has failed to perform the guarantee as guarantor failed to remit the $304,768.64 owed to Plaintiff pursuant to the Agreement." *See* Plaintiff's Affirmation in Support Exhibits A-C.

In further support of the motion, plaintiff submits the Affidavits of Shloime Nelken, an authorized representative of plaintiff corporation. *See* Plaintiff's Affidavits in Support.

In opposition to the motion, counsel for defendants asserts, in pertinent part, that, "Plaintiff requested to withdraw the prior summary judgment motion and defendants' cross motion. (Motions #002 and #003). In those prior motions, defendants conclusively proved that plaintiff lacks standing, furnishing numerous documents proving this. Rather than face up to the obvious lack of standing, plaintiff makes the same motion, #004, utterly ignoring all of the prior proof of its lack of standing. For this reason, alone, the motion must be denied. Defendants' memorandum of law submitted

on this motion, shows the obvious rule that prevents parties like plaintiff from abusing a summary judgment motion. To wit, the moving party is not allowed to ignore all of the uncomfortable facts that destroy it when making its motion only to turn around and first address them in a reply so that the responding party never gets a chance to address the plaintiff's allegations in the first instance. In moving again, plaintiff ignored the prior affidavit of defendants and the defendants' exhibits:... Defendants respectfully resubmit the prior affidavit of Rashaan Everett. His affidavit contested plaintiff's two prior motions, for a default judgment, but, also, for the same summary judgment. His prior affidavit is full of valid defenses that plaintiff previously saw when it was first filed, but which plaintiff failed to address on its instant motion #004. Among those defenses is:

➔ Mr. Everett's request for a reconciliation was ignored by plaintiff.

➔Notice under the contract to avoid an ACH-debit was made impossible.

➔The reconciliation provision was hopelessly confounded with conflicting thirty day vs two week provisions. ➔The entire agreement was illusory because the security interest provision let plaintiff grab all of the defendants' assets at any time for any reason or no reason at all." *See* Defendants' Affidavit in Opposition.

As indicated defendants submit the Affidavit of defendant Rashaan Malik Everett in opposition to the motion. *See id.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*,

49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

"The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages." *Kausal v. Educational Prods. Info.*, 105 A.D.3d 909, 964 N.Y.S.2d 550 (2d Dept. 2013); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 921 N.Y.S.2d 260 (2d Dept. 2011); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 893 N.Y.S.2d 237 (2d Dept. 2010); *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dept. 1986).

"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." *Principis Capital, LLC v. I Do, Inc., supra*; *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309 (2d Dept. 2020). "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." *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra*.

"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." *See id.*

Based upon the above, and a review of the papers in this matter, the Court finds the existence of triable issues of fact.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting summary judgment; and for an order dismissing defendant's affirmative defenses; and for an order awarding it costs, expenses and disbursements, is hereby **DENIED**. And it is further

ORDERED that a Preliminary Conference is scheduled to be held on **June 6, 2024**, by the filing of a Proposed Preliminary Conference Order. The parties are hereby directed to the court website (http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml) where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 22, 2024