

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,
Justice

-----X
WYNWOOD CAPITAL GROUP LLC,

Plaintiff,

-against-

GOD’S LOVE OUTREACH MINISTRIES d/b/a GOD’S
LOVE OUTREACH MINISTRIES, and ALLEN
SHAWNTIL TURNER,

Defendants.
-----X

TRIAL PART: 23

Index No.: 615253/2021

Motion Seq. Nos.: 001

Motion Submitted: 07/15/2022

DECISION AND ORDER ON
MOTION

The following papers have been read on this motion:

Plaintiff’s Notice of Motion and Supporting Papers.....	1
Defendant’s Affirmation in Opposition and Supporting Papers.....	2
Plaintiff’s Reply Memorandum of Law in Support of Summary Judgment.....	3

Upon the foregoing papers, the motion by the plaintiff, Wynwood Capital Group LLC [“plaintiff” or “Wynwood Capital”], for an Order granting it summary judgment pursuant to CPLR § 3212, is determined as hereinafter provided:

The plaintiff commenced the within action for breach of contract and personal guarantee by filing a Summons and Verified Complaint on December 6, 2021. Issue was subsequently joined by the defendant’s service of an Answer dated January 20, 2022.

The defendants, God’s Love Outreach Ministries d/b/a God’s Love Outreach Ministries, and Allen Shawntil Turner [“defendants”], through counsel, have opposed the plaintiff’s motion. The defendant’s counsel points out that the plaintiff’s counsel who filed the summary judgment motion was never properly substituted as counsel and that therefore the summary judgment motion is a nullity. (*Menendez v. Abingdon Ct. Owners Corp.*, 200 AD3d 464, 465 [1st Dept 2021]; CPLR

§ 321). The plaintiff's counsel does not address or otherwise respond to defense counsel's argument that, because no proper consent to change attorney has been filed, the attorneys who filed the plaintiff's summary judgment motion "have no standing to represent plaintiff" or file the summary judgment motion on the plaintiff's behalf. (*Menendez*, 200 AD3d at 465).

In view of the fact that the defendant counsel's failure to cite to any prejudice resulting from the failure to file a proper substitution of counsel, the Court will address the merits of the plaintiff's motion. On 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, by submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers". (*Alvarez*, 68 NY2d at 324). 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 557, 562-563 [1980]).

In this case, the plaintiff satisfied its *prima facie* burden, as it tendered sufficient evidence to establish that: 1) there was an agreement; 2) the plaintiff's performance pursuant to the contract; 3) defendant's breach of the contract; and 4) damages resulting from the breach. (*Citibank [South Dakota], N.A. v. Keskin*, 121 AD3d 635, 636 [2d Dept 2014]).

However, the defendants raised several triable issues of fact in opposition to the plaintiff's motion, as to whether the parties' agreement is in fact a criminally usurious loan. (*See, Principis Cap., LLC v. I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022], *LG Funding, LLC v. United Senior*

Props. Of Olathe, LLC, 181 AD3d 664 [2d Dept 2020]). As the Second Department held in the

Principis case:

“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 Cap., LLC*, 201 AD3d at 754.

In *LG Funding, LLC*, the Second Department held that a plaintiff failed to demonstrate the absence of triable issues of fact as to whether the transaction in that case constituted a criminally usurious loan, due to, *inter alia*, the fact that the reconciliation provision in that case afforded the plaintiff with the discretion to conduct a reconciliation. (*LG Funding, LLC*, 181 AD3d at 666 [“[t]he agreement provides that the plaintiff ‘may, upon [defendant’s] request, adjust the amount of any payment due under this Agreement at [plaintiff’s] *sole discretion* and as it deems appropriate”] [emphasis in original]). In this case, the plaintiff contends that the reconciliation provision is *mandatory*, and that therefore the parties’ transaction could not have been a loan. Plaintiff’s counsel cites to an excerpt of the subject reconciliation provision in support of the argument that it is a mandatory reconciliation provision.

However, plaintiff’s counsel omits relevant language, and the Court finds that when the reconciliation provision is read in its entirety, there is a triable issue of fact as to whether the reconciliation provision was mandatory or discretionary. To wit, the reconciliation provision provides that “[a] reconciliation may also be requested by email to [*sic*] and such notice will be deemed to have been received *if and when [plaintiff] sends a reply e-mail [but not a read receipt]*”

[emphasis supplied]. The language “if and when” indicates that it was in the plaintiff’s discretion as to whether to send a reply e-mail, which would begin the time on the plaintiff’s obligation to conduct the requested reconciliation. As the reconciliation provision in the parties’ agreement afforded the plaintiff with the discretion as to whether it was obligated to conduct the reconciliation, the plaintiff failed to establish the absence of triable issues of fact as to whether the reconciliation provision in the parties’ agreement was *discretionary*, the Court finds that there are issues of fact as to whether the parties’ transaction was a criminally usurious loan. (*Davis v. Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

In light of the foregoing, the plaintiff’s motion for summary judgment pursuant to CPLR § 3212 is DENIED, in its entirety.

Accordingly, it is hereby

ORDERED, that the plaintiff’s motion for summary judgment is DENIED, in its entirety; and it is further,

ORDERED, that counsel for all parties shall appear for a preliminary conference in the preliminary conference part on October 13, 2022, at 9:30 AM; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein are deemed DENIED.

This constitutes the Decision and Order of this Court.

Dated: September 20, 2022



HON. CONRAD D. SINGER, J.S.C.