

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 14
Present: Hon. Helen Voutsinas, J.S.C.

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Fox Capital Group, Inc.,

Plaintiff,
-against-

Index No.: 600051/2022
Motion Sequence No.: 001 & 002

God’s Love Outreach Ministries and
Allen Shawntil Turner,

Short Form Order

Defendants.
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The following papers were read on these motions:

Notice of Motion, Affirmation and Affidavits in Support, Exhibits and Memorandum of Law in Support.....	1
Notice of Cross Motion, Affidavit in Support of Cross Motion and in Opposition to Motion, Exhibits and Memorandum of Law.....	2
Affirmation in Opposition to Cross Motion and in Further Support of Motion, Memorandum of Law.....	3
Reply Memorandum of Law on Cross Motion	4

Upon the foregoing papers, plaintiff Fox Capital Group, Inc.’s (“Fox Capital”) motion for an Order pursuant to CPLR §3212 granting summary judgment to plaintiff and defendants God’s Love Outreach Ministries (“Outreach”) and Allen Shawntil Turner’s cross-motion for an Order pursuant to CPLR §3212 granting defendants summary judgment dismissing the action herein are determined as hereinafter provided.

In this action, plaintiff seeks to recover from defendants for alleged breach of a Revenue Purchase Agreement (commonly referred to as a “merchant cash advance” agreement) entered into between plaintiff and defendants on October 20, 2021 (the “RPA”). Pursuant to the terms of the RPA, Fox Capital purchased \$163,900.00 (“Purchased Amount”) of defendants Outreach’s future receipts, for an upfront sum of \$110,000.00 (“Purchase Price”) paid by Fox Capital. Pursuant to the RPA, Outreach agreed to provide daily payments (Monday through Friday) in the amount of \$5,463.33, estimated to be 15% of Outreach’s daily receipts, by ACH-debit from its bank account until Fox Capital received the full Purchased Amount of \$163,900.00. The RPA further provided that in the event of a default, the full uncollected Purchased Amount would become immediately due and payable. Defendant Allen Shawntil Turner executed a guaranty under which he personally guaranteed performance of Outreach’s obligations under the RPA.

In support of its motion, plaintiff submits the affidavit of Yosef Rapoport, who states that he is the managing member for plaintiff Fox Capital. Mr. Rapoport attests that plaintiff paid Outreach the Purchase Price pursuant to the RPA, and that on November 29, 2021, Outreach

breached the RPA by not paying the daily remittance of \$5,463.33 due under the RPA. Mr. Rapoport states further that Outreach further breached the RPA by, inter alia, failing to deposit its revenue into the bank account designated for that purpose.

Fox Capital asserts that of the \$163,900.00 Purchased Amount, Outreach delivered a total of \$43,706.64 prior to defaulting, leaving a Purchased Amount balance of \$120,193.36. Fox Capital also asserts that it is entitled to collect certain fees pursuant to the RPA, including a Default Fee of \$5,000.00. Plaintiff asserts that the total amount due is the remaining unpaid Purchase Price balance of \$120,193.36, plus fees in the amount of \$5,000.00, for a total amount due of \$125,193.36, with interest thereon from November 29, 2021, plus costs and disbursements.

In opposition to the motion and in support of their cross motion, defendants submit the affidavit of Dr. Allen Turner, who states that he is the owner and operator of Outreach. Defendants argue, in sum and substance, that regardless of the RPA's form and wording, the transaction between the parties was a loan, and had no relationship to the purchase of receivables or receipts. Defendants assert that plaintiff had zero risk under the terms of the RPA, as it had, in essence, the absolute right to draw \$5,463.33 from Outreach's account every day, with nothing under the RPA enabling Outreach to stop the debit until Fox Capital repaid itself the full Purchased Amount of \$163,900.00. Defendants argue that when viewed in its true nature, the transaction is a criminally usurious loan, with an annual interest rate of 403%.

Defendants cite to the Security Agreement provided for in the RPA in support of their argument that plaintiff could maintain or acquire control of all of defendants' assets and cash flow, at any time for any reason or no reason at all.

Defendants further contend that, although the RPA had a Reconciliation provision it was worthless because, inter alia, upon any reconciliation request, Fox Capital would learn that Outreach was in financial distress and could then exercise its unfettered right under the Security Agreement to obtain all of defendants' assets and cash flow. They argue that the very terms of the RPA completely insulated Fox Capital from ever implementing a reconciliation. Defendants argue that these and other provisions of the RPA removed all semblance of risk from Fox Capital, and that regardless of its wording, under the RPA, the fixed daily payment was required regardless of any receipts.

Defendants served a notice to admit, document demand and demand for bill of particulars, on January 25, 2022. Plaintiff served a response to the notice to admit, but failed to respond to the document demand and demand for a bill of particulars. Plaintiff argues that discovery is stayed pursuant to CPLR §3214[b], which provides that "service of a motion under rule 3211, 3212 or 3213 stays disclosure until determination of the motion unless the court orders otherwise." The Court notes that a preliminary conference has not been held in this matter.¹

It is well established that a proponent of a summary judgment motion must make a prima facie case of entitlement to judgment as a matter of law when there are no material issues of fact

¹ In Nassau County, the Court's form preliminary conference order provides, at paragraph 12: "Pursuant to CPLR 3214[b], service of a notice of motion under rule 3211, 3212 or 3213 shall NOT stay disclosure pending determination of the motion. [emphasis in original]"

(*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists. (*Id.* at 325; *Andre v. Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]).

In deciding a summary judgment motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]), and the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988]). Furthermore, the credibility of the parties is not an appropriate consideration for the Court. (*See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]). If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied. (*Celardo v. Bell*, 222 AD2d 547 [2d Dept 1995]).

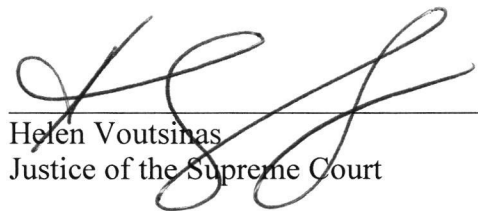
The Court finds that, based upon a review of the pleadings and matters raised in the parties' respective motion papers, the motions for summary judgment are premature and that defendants are entitled to the discovery requested. In addition, issues of fact exist as to whether the RPA was a criminally usurious loan.

Accordingly, plaintiff's motion for summary judgment and defendants' cross motion are **DENIED**, with leave to renew upon completion of discovery.

It is further **ORDERED** that a Preliminary Conference shall be held in this matter on May 2, 2022, virtually. Prior to the scheduled conference date, counsel shall confer and complete a proposed Preliminary Conference Stipulation and Order, which is available on the Court's website together with instructions on how to complete it and how to return it to the Court, at <http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>.

This constitutes the Decision and Order of the Court.

Dated: April 13, 2022
 Mineola, NY


 Helen Voutsinas
 Justice of the Supreme Court

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- Denied
- GIP
- Other

Check if appropriate:

- Schedule Appearance
- Settle Order
- Fiduciary Appointment
- Submit Order