SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

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22 Capital Inc.,

Plaintiffs,

- against -

ERS Homes LLC and Goldia Geraldine Mosley,

Defendants.

TRIAL/IAS PART 44
NASSAU COUNTY

INDEX NO.: 600659/2022

MOTION SUBMISSION DATE : 11/16/23

MOTION SEQUENCE NO.: 001, 003, 004

The following e-filed documents for Motion Sequence 001, 003 and 004 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 001
- Order to Show Cause and Affidavits/Affirmations... X
- Affidavits/Affirmations in Opposition..... N/A
- Reply Affidavit/Affirmation..... X

Motion Sequence 003
- Notice of Motion and Affidavits/Affirmations..... X
- Memorandum of Law in Support of Motion..... X
- Affidavits/Affirmations in Opposition..... X
- Memorandum of Law in Opposition of Motion..... X
- Reply Affidavits/Affirmations..... X

Motion Sequence 004
- Notice of Cross-Motion and Affidavits/Affirmations.... X
- Memorandum of Law in Support of Motion..... X
- Affidavits/Affirmations in Opposition..... X
- Memorandum of Law in Opposition of Motion..... X
- Reply Affidavits/Affirmations..... X

Plaintiff 22 Capital, Inc. ("22 Capital") moves this Court unopposed by way of Order to Show Cause (Motion Sequence 001) for an order granting a preliminary injunction restraining all funds in any PNC Bank Account (including the account ending in 8301) titled to defendant ERS Homes LLC ("ERS") and defendant Goldia Geraldine Mosley ("Mosley) up to the amount of $45,556.25.

22 Capital moves this Court by way of Notice of Motion (Motion Sequence 003) for an Order pursuant to CPLR §3215, directing the entry of a default in favor of 22 Capital and against ERS and Mosly, and pursuant to CPLR §5225 and §5227, upon the entry of a judgment in this action. ERS and Mosely opposed the motion and cross-move (Motion Sequence 004) for an Order deeming the proposed answer timely, denying the motion for a default judgment, and denying the attachment of ERS and Mosley' bank account. 22 Capital oppose the cross-motion and submits a reply to 22 Capital's opposition. ERS and Mosely submit a reply to 22 Capital's opposition.

This action arises out of a breach of contract claim. 22 Capital and ERS entered into a written contract, dated January 4, 2022, ("Agreement") whereby ERS sold 22 Capital $45,000.00 ("Purchased Amount") of ERS's future receivables ("Receivables") for the sum of $30,000.00 ("Purchase Price") to be paid to 22 Capital from 22% of ERS's daily revenue. The Agreement provided that in the event of a default, the full uncollected Purchased Amount plus all fees due under the Agreement would immediately become due and payable in full to 22 Capital. In addition, 22 Capital claims that if it prevails in any litigation between the parties, ERS is required to pay 22 Capital pre-judgment interest at a rate of 24% *per annum*. Defendant Goldia Geraldine Mosley ("Mosley") executed a guarantee of performance of all the representations, warranties, and covenants made by ERS under the Agreement.

22 Capital claims it performed under the Agreement by paying the Purchase Price to ERS. ERS allegedly breached the Agreement by defaulting on its payments to 22 Capital under the Agreement by preventing 22 Capital from collecting the Purchased Amount leaving a total outstanding balance of $36,445.00. 22 plus attorney fees.

"A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR [§]3215. Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer." (*DLJ Mtge. Capital, Inc. v. United Gen. Tit. Ins. Co.*, 128 A.D.3d 760, 761).

22 Capital in support of the motion submits affidavits of service of the , which constitute *prima facie* evidence that proper service was made on ERS and Mosely. (*Id.; Bankers Trust Co. of California, N.A. v. Tsoukas*, 303 AD2d 343). 22 Capital has also submitted proof constituting its claim by way of the affidavit of Justin Taylor ("Taylor"), and authorized representative of 22 Capital. (*Id.*). Taylor attests that the parties entered into the Agreement, which provided that 22 Capital agreed to pay ERS the Purchase Price in exchange for the Purchase Amount, which was guaranteed by Mosely pursuant to a guaranty of performance. Taylor states that 22 Capital paid

the Purchase Price. ERS stopped paying on or about January 14, 2022 leaving a total balance of $36,445.00 including fees. 22 Capital also established that ERS and Mosley did not file an answer within the time proscribed by the CPLR. Therefore, 22 Capital has demonstrated its entitlement to a default judgment in the total amount of $36,445.00.

In opposition, ERS and Mosely argue that 22 Capital did not properly calculate the time for ERS and Mosely to file an answer or otherwise appear in this action. Specifically, ERS and Mosley assert that 22 Capital filed a notice of rejection and motion for default judgment citing the ERS' and Mosley's failure to answer or appear. However, ERS and Mosely had filed a pre-answer motion to dismiss, which was later withdrawn, and the cross-motion was filed. CPLR §3211(f) provides that "service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." Additionally, CPLR §2103(c) provides that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state," which is how ERS and Mosely were served. Considering ERS and Mosely filed a pre-answer motion to dismiss before the instant motion was filed, the time for them to file an answer is extended under CPLR §3211(f) and an order granting 22 Capital a default judgment is not warranted.

Turning to ERS' and Mosely's cross-motion, ERS and Mosely argue that they need not establish a reasonable excuse for their default on the ground that they have a meritorious defense sounding in usury.

Generally, a "party seeking to vacate a default in appearing or answering pursuant to CPLR [§]5015(a)(1), and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action." (*Hamilton Pub. Relations v Scientivity, LLC*, 129 A.D.3d 1025, 1025). However, "[a] party is not necessarily required to establish a reasonable excuse in order to be entitled to vacatur in the interest of justice." (*Crystal Springs Capital, Inc. v Big Thicket Coin, LLC*, 220 AD3d 745, 746). In addition, a default may be vacated without establishing a reasonable excuse in the interest of justice on the ground that the agreement constituted a criminally usurious loan. (*Id.*). To determine whether a transaction constitutes a usurious loan "[t]he 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).

Here, ERS and Mosely have sufficiently asserted facts supporting their claim that the Agreement was a criminally usurious loan. In particular, ERS and Mosely contend that the Agreement insulated 22 Capital from any reconciliation because the total amount of the fixed payments that the Agreement required 22 Capital to be paid would take twenty-nine days, but a

reconciliation could not be completed before thirty-seven days, even if 22 Capital voluntarily expedited the reconciliation. ERS and Mosely maintain that a reconciliation request required ERS and Mosely to send "merchant statements." However, 22 Capital was entitled to demand any subsequent information, permitted 22 Capital to continue collecting from ERS's accounts during the reconciliation and, in the event of a default, the balance of the outstanding payments would become due immediately, which is akin to a finite term. (*Id.*). 22 Capital's argument in opposition that the Agreement is not a loan or usurious because it contained a reconciliation provision, does not have a finite term and does not provide 22 Capital with any recourse if ERS declares bankruptcy is unavailing in light of ERS' and Mosely's arguments. Therefore, ERS' and Mosely's answer should be deemed timely files.

As to the preliminary injunction sought by 22 Capital, it is well established that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position. (see, *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051; *Pearlgreen Corp. v. Yau Chi Chu*, 8 AD3d 460). The decision to grant a preliminary injunction is committed to the sound discretion of the court as the remedy is considered to be a drastic one. (see, *Tatum v. Newell Funding, LLC.*, 63 AD3d 911; *Bergen-Fine v. Oil Heat Inst., Inc.*,280 AD2d 504; *Doe v. Axelrod*, 73 NY2d 748). Consequently, a clear legal right to relief which is plain from undisputed facts must be established. (see, *Wheaton*, supra; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*,13 AD3d 334; *Blueberries Gourmet v. Aris Realty*,255 AD2d 348). Considering there are facts in dispute as to whether the Agreement constitutes a merchant cash advance or a usurious loan, a preliminary injunction is not warranted.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

Upon the foregoing, it is hereby

ORDERED, that 22 Capital's motion (Motion Sequence 001) for an order granting a preliminary injunction restraining all funds in any PNC Bank Account (including the account ending in 8301) titled to defendant ERS Homes LLC and defendant Goldia Geraldine Mosley up to the amount of $45,556.25 is denied, and it is further

ORDERED, that the temporary injunction restraining defendants ERS Homes LLC and Goldia Geraldine Mosley bank accounts (including the account ending in 8301) up to the amount of $45,556.25 is hereby lifted, and it is further

ORDERED, that plaintiff 22 Capital, Inc.'s motion (Motion Sequence 003) for an order granting it a default judgment against defendants ERS Homes LLC and Goldia Geraldine Mosley is denied, and it is further

ORDERED, that defendants ERS Homes LLC's and Goldia Geraldine Mosley's cross-motion (Motion Sequence 004) for an order deeming the proposed answer timely, denying the motion for a default judgment, and denying the attachment of their bank accounts is granted, and it is further

ORDERED, that defendants ERS Homes LLC and Goldia Geraldine Mosely proposed answer m shall be served pursuant to CPLR within thirty days from the date of this order, and it is further

ORDERED, that Counsel for all parties are directed to participate in a Preliminary Conference to be held on April 11, 2024. Counsel shall refer to the court's website (http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml) for the fillable Preliminary Conference form with instructions on how to fill it out and how to return it. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require.

The foregoing constitutes the decision and order of this Court.

ENTER:

HON. CATHERINE RIZZO, A.J.S.C.

Dated: February 27, 2024