

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21<sup>st</sup> day of January 2022

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
PRESENT: HON. INGRID JOSEPH, J.S.C

-----X  
Ein Cap, Inc

Plaintiff,

-against-

Mullen Technologies, Inc d/b/a Si-Nfuz/  
Mullen Car Rental & Leasing and David Michery  
-----X  
Defendants,

Index No. 506917/2020

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CLERK OF COURT  
KINGS COUNTY

Recitation, as required by CPLR '2219(a), of the papers considered in the review of the Motion(s):

Papers Numbered

- Notice of Motion and Affidavits/Affirmations Annexed..... 1, 2,3,
- Affirmation in Opposition Papers..... 4,5
- Reply to Opposition Papers..... 6, 7

This action was commenced by Plaintiff, Ein Cap, Inc ("Plaintiff") to recover damages for an alleged breach of contract pursuant to a receivable purchase agreement and personal guaranty that was entered into with defendants Mullen Technologies, Inc d/b/a/ Si-NFUZ/ Mullen Car Rental & Leasing ("Defendant-Seller) and David Michery ("Defendant-Guarantor").

Plaintiff moves for summary judgment on two of the three causes of action listed in the complaint, specifically, the breach of contract and breach of guaranty. Plaintiff claims that it is entitled to summary judgment since it established prima facie entitlement to judgment as a matter of law on its breach of contract action by providing proof of an existence of a contract between it and defendants, performance by Plaintiff, a breach of the agreement by Defendants and damages that resulted from the breach. Additionally, Plaintiff alleges that it has established prima facie entitlement to summary judgment as a matter of law on the guarantor cause of action since it

provided proof that establishes the existence of an obligation, the guaranty, and the failure of Defendant-Guarantor, to make payments pursuant to the terms of the obligation. In support of these claims Plaintiff submitted an affidavit of the Legal Admin of Ein Cap, Inc., Gerony Medina, who stated that Defendant-Seller sold its future receivables and sale proceeds with a value of \$262,325 to Plaintiff for the purchase price of \$175,000. Pursuant to the agreement, Defendant-Seller authorized Plaintiff to deduct a percentage of the daily sale proceeds every day from a designated business account until Plaintiff received the full purchase amount. Mr. Medina also stated in his affidavit that Defendant-Guarantor executed a personal guarantee of performance that Defendant-Seller would not breach the agreement and that Defendant-Guarantor would be liable to Plaintiff if Defendant-Seller failed to deposit the money in the business account. Mr. Medina also asserted that Defendant-Seller defaulted on a payment and now owes a balance of \$188,592.49. Plaintiff argues that the purchase agreement is not usurious and contains a valid reconciliation provision. Plaintiff highlights the fact that the agreement states that the Merchant is responsible for contacting Plaintiff at the beginning of each month and providing bank statements for the Account to reconcile on a monthly basis the daily payments made against the specific percentage which would permit Plaintiff to debit or credit the difference to Defendant-Seller so that payments made for a month in which a reconciliation is requested equals the specific percentage. Plaintiff addresses Defendants' illusory claim arguing that the Courts tend to enforce a bargain where the parties have demonstrated an intent to be contractually bound and the fact that it performed its part of the bargain and the Defendant-Seller partially performed its part renders the illusory argument moot. Plaintiff also rebuts Defendants' argument claiming that since the amount of the ACH Program Fee was not a sum certain the agreement was void. Plaintiff states that Defendant could have negotiated for a sum certain at the time it signed the agreement. Plaintiff maintains that all of the material terms were agreed to namely, the purchased amount, the purchase price, the specified percentage, the upfront fees, and the amount of the initial daily payment and that the fact that the ACH Program fee was not a sum certain does not render the agreement unenforceable. Moreover, Plaintiff states that the ACH Program fee was easily calculable to a certain sum based upon the percentage and the purchased amount.

Defendants in opposition allege that Plaintiff is not entitled to summary judgment since it has failed to establish a prima facie case. Defendants claim that the agreement is unenforceable

since its terms can be considered criminal usury. Defendants contend that the repayment was not contingent on its actual accounts receivables but rather on an automatic debit of a fixed daily payment each business day. Defendants also claim that the provisions of the agreement placed Plaintiff solely in charge of determining and implementing any reconciliation. Defendants argue that it had no right to cease Plaintiff daily automatic debits until Plaintiff implemented reconciliation. Defendants cite to *Matter of AH Wines, Inc. v. C6 Capital Funding LLC*, 2020 NY Slip Op 32699(U), 7-10 where the court held that the reconciliation provision was solely in C6's discretion and thus is usurious. Defendants state that the agreement did not compel them to stop their daily debit of the fixed daily payment of \$8744.17 upon any reconciliation request. Defendants aver that Plaintiff did not incur any risk in the agreement because the daily debit of \$8744.17 was not a percentage of Defendant-seller's daily profits but rather a fixed daily amount contrary to Mr. Medina's affidavit. Additionally, Defendants argue that Plaintiff did not state how the contract was breached or which contract provision was violated. Defendants also argue that the contract is unenforceable for lack of mutual obligation since one of the provisions provide for Plaintiff in its sole discretion to purchase the receipts on a date to be determined and may refuse to buy the purchased receivables with any reason or without a reason.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] and *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d at 853). However, once this showing has been made, 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 in the action (*Zuckerman v City of New York*, 49 at 562).

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 (*LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [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 (*Id.*). The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances(*Id.*). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan(*Id.*). 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(*Id.*).

Here, the reconciliation provision in the agreement is much like the reconciliation agreement in *LG Funding* since it states that 'EINC may, upon Merchant's request, adjust the amount of any payment due under this Agreement at EINC's sole discretion and as it deems appropriate'(see *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020])(finding that the provisions in the Merchant agreement suggest that the plaintiff did not assume the risk that Defendant would have less-than-expected or no revenues). Moreover, although there are provisions in the agreement that purports to state that the term of the agreement is infinite until paid in full there are contradictory provisions allowing for the Plaintiff to accelerate the due date and go after defendants upon any of the events of listed defaults. Thus, making the term of the agreement finite in the sole discretion of the Plaintiff. Lastly, the bankruptcy provision states that 'in the event that the Merchant files for bankruptcy protection or is placed under involuntary filing, Protections 2 and 3 are immediately invoked' (Merchant Agreement 2.9). The only provision that speaks of protections is under "Section III. Events of Default and Remedies 3.1 Events of Default. Protections against Default". Although this section does not explicitly have bankruptcy listed as an event of default the provision 2.9 that speaks of bankruptcy directs the reader to Section III and provision 3.1 (Merchant Agreement 2.9). Provision 3.2 includes the remedies in case of any of the named defaults which again allows the Plaintiff to accelerate the amount that is due and owing.

After weighing the factors set out in *LG Funding* the Court finds that this agreement is a loan for all intents and purposes. Therefore, the Court finds issues of fact exist as to whether the agreement constitutes a criminally usurious loan.

Accordingly, Plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

ENTER,



HON. INGRID JOSEPH, JSC

Hon. Ingrid Joseph  
Supreme Court Justice

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FILED

