At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the day of June 2024.

JUN 27 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

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FINTEGRA LLC,

Plaintiff,

-against-

DNA TELECOM INC D/B/A DNA TELECOM and DAVIN ORTIZ,

Defendants.

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DECISION AND ORDER

Index No.: 525923/2023
Motion Date: 3/13/2024
Mot. Seq. 1

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Plaintiff's Notice of Motion for Summary Judgment pursuant to CPLR 3212, dated October 10, 2023; Attorney Affirmation of David Fogel, affirmed on October 10, 2023; Affidavit of Jeanne Canigiani, duly sworn to on October 11th, 2023; Statement of Material Facts, Memorandum of Law, Exhibits 1-7.....	5-16
Defendants' Attorney Affirmation in Opposition, of Marshall E. Garson, Esq., affirmed on March 12, 2024; Memorandum of Law, Response to Statement of Material Facts.....	20-22
Plaintiff's Attorney Affirmation of David Fogel, affirmed on March 18, 2024, in Reply.....	23
Other.....	

MONTELIONE, RICHARD J., J.

This is an action for breach of contract commenced on September 7, 2023, involving the plaintiff's purchase of certain future receivables of $151,751.86 of defendant DNA Telecom Inc. for the payment of $110,000.00. Defendant Davin Ortiz is defendant DNA Telecom Inc.'s guarantor. Plaintiff claims Defendant DNA telecom Inc. defaulted on August 3, 2023. Issue was joined by defendants by filing a Verified Answer of September 18, 2024.

Plaintiff now moves for summary judgment and provided the court with an affidavit from Jeanne Canigiani which alleges that after the payment of applicable fees, the sum of $52,066.70

was remitted to plaintiff, leaving a balance owed of $104,133.30. The balance was allegedly taken directly from plaintiff's automated clearing house (ACH) processor and recorded electronically in plaintiff's computer software. Plaintiff also claims a "default fee" of $2,500.00, liquidated damages of $44,628.56, $100.00 for one stopped payment and $390.00 to cover plaintiff's cost for filing a UCC-1, totaling the sum of $151,751.86.

The defendants do not provide the court with any affidavit from an individual with personal knowledge but basis its opposition as a matter of law arguing that discovery is not complete and pursuant to CPLR 3212 "facts essential to justify opposition may exist but cannot then be stated" and therefore the motion should be denied. The defendants do not address and do not deny the existence of the contract and that certain payments were made, and certain ACH transactions were stopped. The defendants further argue that the contract was actually a loan and its terms usurious. Although defendants provide the court with statutory and case law regarding usurious loans, the issue is whether the subject contract is in fact a loan or a purchase of future receivables. Defendants argue that only the plaintiff controls the possibility of reconciliation under the purported loan agreement and therefore this provision made reconciliation "remote, highly improbable and at the complete discretion of the plaintiff." Section 4 of the contract follows (NYSCEF # 13):

> 4. Reconciliations. Any Merchant may give written notice to FINTEGRA requesting that FINTEGRA conduct a reconciliation to ensure that the amount that FINTEGRA has collected equals the Specified Percentage of Merchant's Receivables under this Agreement. Any Merchant may give written notice requesting a reconciliation by e-mail to reconciliations@getfintegra.com and such notice will be deemed to have been received if and when FINTEGRA sends a reply via email (but not a read receipt). If such reconciliation determines that FINTEGRA collected more than it was entitled to, then FINTEGRA will credit to the Account all amounts to which FINTEGRA was not entitled within seven days thereafter. If such reconciliation determines that FINTEGRA collected less than it was entitled to, then FINTEGRA will debit

> from the Account all additional amounts to which FINTEGRA was entitled within seven days thereafter. To effectuate this reconciliation, any Merchant must produce with its request the login and password for the Account and any and all bank statements and merchant statements covering the period from the date of this Agreement through the date of the request for a reconciliation. FINTEGRA will complete each such reconciliation within five business days after receipt of a written request for one accompanied by the information and documents required for it. Notwithstanding anything contained herein, FINTEGRA shall comply with each of Merchant's requests for such reconciliation provided that each request is made in accordance with the terms of this Section 4 and that no Event of Default has occurred prior to the expiration of the aforesaid period in which FINTEGRA has to complete the reconciliation irrespective of whether FINTEGRA has actual knowledge that an Event of Default has occurred or formally declared Merchant to be in default. Therefore, FINTEGRA shall not be required to complete a reconciliation if an Event of Default has occurred either prior to Merchants request for reconciliation or after the request was made but before the expiration of the aforesaid five business day period, even if FINTEGRA did not previously declare Merchant to be in default or if FINTEGRA learns of the occurrence constituting an Event of Default after Merchant made its request for reconciliation.

Defendants also argue that under the agreement, plaintiff has recourse should defendants declare bankruptcy which proves that the agreement is in fact a loan. The bankruptcy provision of the agreement follows:

> 28. No Bankruptcy. Each Merchant represents, warrants, and covenants that as of the date of this Agreement, it does not contemplate and has not filed any petition for bankruptcy protection under Title 11 of the United States Code and there has been no involuntary petition brought or pending against any Merchant. Each Merchant further warrants that it does not anticipate filing any such bankruptcy petition and it does not anticipate that an involuntary petition will be filed against it. Each Merchant further warrants that there will be no statutory presumption that it would have been insolvent on the date of this Agreement.
>
> 34. Events of Default. An "Event of Default" may be considered to have taken place if any of the following occur:
> (1)..., (2)..., (3)..., (4)...
> (5) Any Merchant transports, moves, interrupts, suspends,

dissolves, or terminates its business without the prior written consent of FINTEGRA other than a bankruptcy filing;

Standards of Motion for Summary Judgment

Motions for summary judgment must meet well known requirements notwithstanding any deficiencies in opposition papers. *See Ayers v City of Mount Vernon*, 176 AD3d 766, 769, 110 NYS3d 43, 46, 2019 NY Slip Op 07230, 2019 WL 5057893 [2d Dept 2019]:

> '[T]he proponent of a summary judgment motion 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 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). 'Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). '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' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *see Zuckerman v. City of New York*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).
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> The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and resulting damages (*see Webb v. Greater N.Y. Auto. Dealers Assn., Inc.*, 123 A.D.3d 1111, 1112, 1 N.Y.S.3d 212; *Kausal v. Educational Prods. Info. Exch. Inst.*, 105 A.D.3d 909, 910, 964 N.Y.S.2d 550; *see also Victory State Bank v. EMBA Hylan, LLC*, 169 A.D.3d 963, 965, 95 N.Y.S.3d 97; *Meyer v. New York–Presbyterian Hosp. Queens*, 167 A.D.3d 996, 997, 88 N.Y.S.3d 900).

Legal Standards for Determination of whether Document is a Loan or Asset Purchase of Future Receivables

The methodology for determining whether a merchant cash advance agreement is a purchase of future receivables or a loan is detailed in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309, 312 (2d Dep't 2020):

> 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.

The first factor of the test, whether there is a reconciliation provision, is determined by the merchant's ability to seek adjustments of the amount remitted to the purchaser. *See K9 Bytes, Inc. v. Arch Cap. Funding, LLC*, 56 Misc. 3d 807, 817, 57 N.Y.S.3d 625 (N.Y. Sup. Ct. 2017).

If the plaintiff is absolutely entitled to repayment under all circumstances, it is a loan. *Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 160 NYS3d 325, 2022 NY Slip Op 00203, 2022 WL 108391 [2d Dept 2022]. "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 Props. of Olathe, LLC*, 181 A.D.3d 664, 665, 122 N.Y.S.3d 309).

Legal Analysis

The plaintiff provided proof of an executed written contract, proof of its performance and proof of the defendants' breach which defendants do not dispute and therefore has met its *prima facie* burden. *See Ayers v City of Mount Vernon*, supra. However, the issue is whether the contract is enforceable as an asset purchase of future receivables or unenforceable because it is a loan which charges usurious interest. *See LG Funding, LLC v. United Senior Properties of Olathe, LLC*, supra.

The court's review of the "reconciliation" provision of the subject contract finds that it *does not provide for the adjustment of future weekly payments* but only provides that the vendor may request a reconciliation, "to ensure *that the amount that FINTEGRA has collected equals the Specified Percentage of Merchant's Receivables under this Agreement*." (Contract, NYSCEF # 13, ¶ 4). The receivables purchased are capped at $3,719.05 per week. (Contract, NYSCEF # 13, ¶ 3). "If such reconciliation determines that FINTEGRA collected less than it was entitled to, then FINTEGRA will debit from the Account all additional amounts to which FINTEGRA was entitled within seven days thereafter." (Contract, NYSCEF # 13, ¶ 4). Given that the reconciliation provision does not provide for any future reduction in payments but only insures that FINTEGRA's past accounting is accurate, the court finds there is no reconciliation provision that provides for the reduction of payments due to a downturn in business.

Under the agreement, bankruptcy is not a default under the contract, but under the specific language of the contract FINTEGRA is irrevocably appointed defendant DNA Telecom Inc.'s agent through a Power of Attorney that gives it unbridled authority to settle all obligations due to FINTEGRA upon its subjective finding of default. *See* Contract, NYSCEF # 13, ¶ 4urther,

> Each Merchant irrevocably appoints FINTEGRA as its agent and attorney-in-fact with full authority to take any action or execute any instrument or document to settle all obligations due to FINTEGRA, or, if FINTEGRA considers an Event of Default to have taken place under Section 34, to settle all obligations due to FINTEGRA from each Merchant, including, without limitation (i) to obtain and adjust insurance; (ii) to collect monies due or to become due under or in respect of any of the collateral (which is defined in Section 33); (iii) to receive, endorse and collect any checks, notes, drafts, instruments, documents, or chattel paper in connection with clause (i) or clause (ii) above; (iv) to sign each Merchant's name on any invoice, bill of lading, or assignment directing customers or account debtors to make payment directly to

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> FINTEGRA; and (v) to file any claims or take any action or institute any proceeding which FINTEGRA may deem necessary for the collection of any of the unpaid Receivables Purchased Amount from the Collateral, or otherwise to enforce its rights with respect to payment of the Receivables Purchased Amount.

Further, the contract is collateralized by a security interest in "(a) all accounts, including without limitation, all deposit accounts, accounts receivable, and other receivables, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are defined by Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by any Merchant." (Contract, NYSCEF # 13, ¶ 33).

There being no discernable avenue by which defendants can reconcile their account so as to reduce payments in the event of declining revenue, and there being a contractual provision giving the plaintiff irrevocable power of attorney authority to "take any action or execute any instrument or document to settle all obligations due to FINTEGRA," with FINTEGRA having a security interest in all defendant DNA telecom Inc.'s equipment, these "provisions suggest that the plaintiff did not assume the risk that (merchant) would have less-than-expected or no revenues." *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, 666, 122 NYS3d 309, 2020 NY Slip Op 01607, 1, 2020 WL 1161121 [2d Dept 2020]. This court finds the contract to be a collateralized loan.

There are issues of fact as to whether plaintiff has charged a usurious rate of interest which would result in voiding the loan. *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664, 122 NYS3d 309, 2020 NY Slip Op 01607, 2020 WL 1161121 [2d Dept 2020]. "The maximum interest rate permissible on a loan is 16% per annum, and any interest rate in excess of that amount is usurious (*see* General Obligations Law § 5–501[1]; Banking Law § 14–a[1]; *Matias v. Arango*, 289 A.D.2d 459, 460, 735 N.Y.S.2d 157)," *see O'Donovan v Galinski*, 62 AD3d 769, 769, 878 NYS2d 443, 444, 2009 NY Slip Op 03881, 2009 WL 1349708

[2d Dept 2009]. The defendants have not cross-moved to dismiss the complaint on the ground of usery.

The defendants have failed to meet their burden of showing that the default fee of $2,500.00 or the "liquidated damages" amount claimed of $44,628.56, for a total of $47,128.56, which constitutes 45.26% of the actual balance allegedly owed, has anything to do with losses that could not be anticipated at the inception of the contract or that actual damages cannot be proved. "The party challenging a liquidated damages clause must establish either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses (*see Bates Adv. USA, Inc. v 498 Seventh, LLC,* 7 NY3d 115, 120 [2006]; *JMD Holding Corp. v Congress Fin. Corp.,* 4 NY3d 373, 384 [2005]; *Truck Rent-A-Ctr. v Puritan Farms 2nd,* 41 NY2d 420, 424 [1977]), *see United Tit. Agency, LLC v Surfside-3 Mar., Inc.*, 65 AD3d 1134, 1135, 885 NYS2d 334, 2009 NY Slip Op 06536, 2, 2009 WL 2960327 [2d Dept 2009].

Based on the foregoing, it is

ORDERED that the plaintiff's motion for summary judgment is DENIED as the court finds the contract between the parties is a loan and there is a question of fact as to whether or not this loan was usurious; and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.

Hon. Richard J. Montelione

KINGS COUNTY CLERK
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