

**Novus Capital Funding II LLC v M Franklin Concrete  
Constr. LLC**

2024 NY Slip Op 34032(U)

November 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 507261/2023

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the \_\_\_\_ day of \_\_\_\_ 2024  
**NOV 06 2024**

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X  
NOVUS CAPITAL FUNDING II LLC,

Index No.: 507261/2023  
Mot. Seq. 2

Plaintiff,  
-against-

M FRANKLIN CONCRETE CONSTRUCTION LLC and  
MITCHELL DEVON FRANKLIN,

Defendants.

KINGS COUNTY CLERK  
FILED  
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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion for Summary Judgment; Affidavit of Facts sworn to by Ekaterina Marciante on December 14, 2023; Affirmation in Support affirmed by David J. Austin, Esq. on December 15, 2023; Memorandum of Law in Support; Exhibit 1-Revenue Purchase Agreement; Exhibit 2-Payment History; Exhibit 3-Summons and Complaint; Exhibit 4-Answer with Counterclaims.....	11-17
Defendants' Memorandum of Law in Opposition.....	21
Plaintiff's Memorandum of Law in Reply.....	22

MONTELIONE, RICHARD J., J.

Novus Capital Funding II, LLC (Plaintiff) commenced this action by filing a summons and complaint on March 8, 2023, alleging breach of contract, breach of personal guaranty, and a claim for account stated. Issue was joined by M Franklin Concrete Construction LLC and Mitchell Devon Franklin (Defendants) interposing an answer with counterclaims on April 11, 2023. Plaintiff moved to dismiss defendants' counterclaims pursuant to CPLR 3211(a)(7) for failure to state a cause of action (Motion Seq. No. 1). This court granted that motion on default. (NYSCEF Doc. No. 20).

Plaintiff now moves for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff, enjoining defendants from transferring, dissipating, assigning, conveying, encumbering, or otherwise disposing of the properties, or any assets of defendants, and for an order pursuant to CPLR 6220 directing defendants to execute and provide any documents necessary to effect payment of the judgment to plaintiff (Motion Seq. No. 2).

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Plaintiff and defendants entered into an agreement for the sale of future receivables (Agreement) on January 6, 2023, wherein defendant M Franklin Concrete Construction LLC (M Franklin Concrete) agreed to sell to plaintiff 12% of its future revenue up to the amount of \$22,485.00 in exchange for a purchase price of \$15,000.00. Additionally, the agreement incorporated a personal guaranty of performance from defendant Mitchell Devon Franklin (Franklin). Plaintiff alleges that, on March 7, 2023, defendant M Franklin Concrete breached the terms of the agreement and defendant Franklin breached the guaranty. Defendants contend that the agreement is unenforceable because it is a usurious loan. However, plaintiff contends that the explicit language of the agreement proves it is for a purchase of future receivables and not a loan.

Defendants' defense is only applicable if the agreement is for a loan, otherwise there can be no usury. (See *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 AD3d 664, 662, 122 NYS3d 309, 312 [2d Dept 2020]). In determining whether a transaction constitutes a loan or not, the court must consider it "in its totality" and judge it "by its real character, rather than by the name, color, or form which the parties have seen fit to give it." *Id.* at 665. The court's conclusion depends on whether the plaintiff is absolutely entitled to repayment under all circumstances; "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan." *Id.*

The methodology for determining whether a merchant cash advance agreement is a purchase of future receivables or a loan is detailed in *L.G. Funding*, 181 AD3d 664 at 666:

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 Misc3d 807, 816-17, 57 NYS3d 625 (N.Y. Sup. Ct. 2017)). If there is no reconciliation provision, the agreement may

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be considered a loan. *Id.* at 817. In this case, however, the Agreement contains a reconciliation provision, which supports a finding that the transaction was for future receivables. Section 10 of the Agreement provides that “If at any time during the term of this Agreement Seller will experience unforeseen decrease or increase in its Daily Receipts, Seller shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 11 below, to request retroactive reconciliation of the Initial Daily Installments for one (1) full calendar month immediately preceding the day when such request for reconciliation is received by [Novus Capital Funding]” (NYSCEF Doc. 3). The Agreement requires the Defendants’ request be in writing, so if it did indeed occur, Defendants should have submitted the written communication as evidence. However, Defendants do not assert that they requested an adjustment of the daily remittance amount, nor do they provide evidence demonstrating that any such request was made to plaintiff.

The second factor of the test is whether the Agreement has a finite or non-finite term for repayment. *LG Funding, LLC* 181 A.D.3d 664 at 666. Generally, if a transaction has a non-finite term, it is for a purchase of future receivables rather than a loan. *See Pirs Cap., LLC v. D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc3d 457, 463, 129 NYS3d 734, 740 [N.Y. Sup. Ct. 2020], judgment entered sub nom. *Pirs Cap., LLC v. D&M Truck, Tire & Trailer Repair Inc.* [N.Y. Sup. Ct. 2020]. Here, the Agreement’s repayment terms are non-finite. Section 2 of the Agreement provides that “This Agreement for the purchase and sale of Future Receipts does not have a fixed duration or term, which is potentially infinite. Subject to the provisions of Sections 10-13 hereof, the term of this Agreement shall commence on the Effective Date and expire on the date when the Purchased Amount and all other sums due to [Novus Capital Funding] pursuant to this Agreement are received by [Novus Capital Funding] in full” (NYSCEF Doc. 3). This language supports a finding that instead of having a finite term for repayment, the length of time for repayment is contingent on company Defendant’s actual accounts receivable, further supporting a finding that the transaction was for a sale of future receivables rather than a loan. *See LG Funding, LLC* at 666.

The third factor courts examine is whether there is any recourse in the agreement should the merchant declare bankruptcy. *See LG Funding, LLC* at 666. Here, Section 16(b) of the Agreement states the following:

“[Novus Capital Funding] agrees to purchase the Purchased Future Receipts knowing the risks that Seller’s business may slow down or fail,...[Novus Capital Funding]

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hereby acknowledges and agrees that Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations exclusively due to the following reasons:

- i. adverse business conditions that occurred for reasons outside Seller's control and not due to Seller's willful or negligent mishandling of its business;
  - ii. loss of the premises where the business operates (but not due to Seller's breach of its obligations to its landlord), provided however that Seller does not continue and/or resume business operations at another location;
  - iii. bankruptcy of Seller; and/or
  - iv. natural disasters or similar occurrences beyond Seller's control."
- (NYSCEF Doc. 3).

Therefore, because declaring bankruptcy is not a breach of or default under the Agreement, neither M. Franklin Concrete nor the guarantor would be liable and Plaintiff would not be entitled to the repayment of any of the unpaid purchased amount. *See LG Funding, LLC* at 666. However, Defendant has not declared bankruptcy, but has defaulted under Section 27 of the Agreement by intentionally impeding payments to Plaintiff.

Having weighed all three factors, the court finds that the Agreement between Plaintiff and Defendants is for the purchase of future receivables, and not a loan. Therefore, there can be no usury and Defendants' defense, which is dependent on their claim that the transaction was for a loan, cannot prevail.

Based on the foregoing, it is

**ORDERED**, that plaintiff's motion for summary judgment (MS #2) is GRANTED as to the remaining unpaid purchased revenue balance of \$14,615.25, together with statutory interest calculated by the clerk from March 7, 2023, the date of default, and costs and disbursements; and it is further


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**ORDERED**, that plaintiff shall settle a judgment on notice and include an attorney affirmation of legal services provided by plaintiff's counsel to the plaintiff, and sufficient information that will allow the court to determine reasonable attorneys' fees; and it is further

**ORDERED**, that all other requests for relief are DENIED.

This constitutes the decision and order of the court.

ENTER

  
\_\_\_\_\_  
Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK  
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