Byzfunder NY LLC v Love Factor, Inc.
2024 NY Slip Op 34182(U)
October 9, 2024
Supreme Court, Monroe County
Docket Number: Index No. E2023015570
Judge: Kevin M. Nasca

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

BYZFUNDER NY LLC D/B/A BYZFUNDER,

Plaintiff,

vs.

LOVE FACTOR, INC. (THE) D/B/A THE LOVE FACTOR, and MATTHEW WILEY RECKINGER-ROWE, KARISSA M. RECKINGER-ROWE,

Defendants.

DECISION, ORDER & JUDGMENT

Index No.: E2023015570

Upon plaintiff having filed a motion for summary judgment (NYSCEF Doc. Nos. 58-67) (Motion #3); defendants' opposition to Motion #3 (NYSCEF Doc. Nos. 70-76); plaintiff's memorandum of law in reply to Motion #3 (NYSCEF Doc. No. 77); and the matter having come before the court for oral argument, the following is the decision, order, and judgment of this court.

DECISION

This action was commenced on December 28, 2023. (NYSCEF Doc. No. 1). Defendants thereafter filed an answer on January 3, 2024. (NYSCEF Doc. No. 4). Plaintiff now moves for summary judgment against defendants in the amount of $56,577.18, plus interest at 9% from the date of defendants' breach, plus attorneys' fees, and costs and disbursements.

Summary judgment may only be granted where the moving party submits sufficient evidence to establish that they are entitled to judgment as a matter of law. CPLR 3212[b]; *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]. "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." CPLR 3212[b]. The moving party on a motion for summary judgment bears the burden of setting forth sufficient evidence to warrant judgment as a matter of law. *Paternostro v. Advance Sanitation, Inc.*, 126 AD3d 1376, 1377 [4th Dept 2015]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Lamberta v. Long Is. R.R.*, 51 AD2d 730, 730-731 [2d Dept 1976]. Once the movant has met this initial burden, the burden then shifts to the opponent of the motion to establish,

by admissible proof, the existence of genuine issues of material fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980].

A. Breach of Contract (First Cause of Action)

Plaintiff seeks summary judgment on its first cause of action for breach of contract against the merchant defendants.

"The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to that contract, (3) the defendant's breach of the contract, and (4) damages resulting from that breach". *Wedgewood Care Ctr. v. Kravitz*, 198 AD3d 124, 131 [2d Dept 2021] [citations omitted].

In this case, plaintiff has met its *prima facie* entitlement to summary judgment on a breach of contract claim by submitting proof that the parties entered into an agreement for the purchase and sale of future receivables, signed by Matthew Wiley Reckinger-Rowe and Karissa M. Reckinger-Rowe on behalf of defendant merchant, dated November 27, 2023 ("Agreement"). (NYSCEF Doc. No. 62). Pursuant to the terms of the Agreement, plaintiff purchased from defendants 10.61% of defendants' total future accounts receivable up to the sum of $42,900.00 in exchange for an up-front purchase price of $30,000.00. (NYSCEF Doc. No. 62). Under the Agreement, defendants were to authorize plaintiff to ACH debit or electronically transfer the estimated payment from the account on a weekly basis until defendants' obligation was paid in full. (NYSCEF Doc. No. 62). In support of its motion, plaintiff demonstrated that it transferred the $30,000.00, minus applicable fees, to defendants on November 27, 2023, in accordance with the Agreement. (NYSCEF Doc. No. 66). In further support of its motion, plaintiff submitted the remittance history for defendants' account, which demonstrated that the merchant defendant only remitted $1,340.63 of the purchased proceeds. (NYSCEF Doc. No. 63). Plaintiff also submitted an affidavit from Marshall Rosenblum, a Manager of Byzfunder NY LLC d/b/a Byzfunder, who is familiar with the facts and circumstances of the Agreement and plaintiff's business record keeping practices. (NYSCEF Doc. No. 26). CPLR 4518(a); *Unifund CCR Partners v. Youngman*, 89 AD3d 1377 [4th Dept 2011].

Based upon the foregoing, plaintiff sufficiently established through its records that there was an Agreement between the parties, that the merchant defendant incurred a debt based upon that Agreement, and that the merchant defendant breached the Agreement by failing to make the

continuing required payments pursuant to the terms of the Agreement. Therefore, plaintiff demonstrated that a balance in the amount of $41,559.37 is due and owing, in addition to a default fee in the amount of $2,500.00, and an NSF fee in the amount of $50.00. As to plaintiff's request for an award of attorney's fees in the amount of $12,467.81, counsel shall submit an affirmation of counsel in support of such relief requested, demonstrating the necessary services actually rendered. *Kamco Supply Corp. v Annex Contracting, Inc.*, 261 AD2d 363, 365 [2d Dept 1999]; *Mead v. First Tr. & Deposit Co.*, 60 AD2d 71, 78 [4th Dept 1977].

Defendants' opposition is premised upon the argument that the Agreement constitutes a usurious loan and that plaintiff's requested default fee and attorneys' fees are unenforceable penalties. The provisions of the Agreement in this matter reveal that this transaction was not a loan. Three factors are widely used to assess the true nature of a repayment obligation "(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. *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020]; *Samson MCA LLC v. Joseph A. Russo M.D. P.C./IV Therapeutics PLLC*, 219 AD3d 1126, 1128 [4th Dept 2023]. Here, the Agreement contains reconciliation provisions requiring adjustment of the remittance amount upon request based upon changes to the defendants' revenue (NYSCEF Doc. No. 62, Section 1.3); there is no payment schedule or finite term in which the purchased amount must be collected (NYSCEF Doc. No. 62, Section 1.2); nor is defendants' filing for bankruptcy an event of default (NYSCEF Doc. No. 62, Section 3.1).

Defendants also oppose the amount of default fees and attorneys' fees sought by plaintiff.[1] The Agreement provides a default fee in the amount of $2,500.00. "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977]. On the other hand, where "the amount of actual damages that would be suffered upon a breach is readily ascertainable when the contract is entered, or the amount fixed as liquidated damages is conspicuously disproportionate to the foreseeable losses, the liquidated damages provision is

[1] As the court directed plaintiff to submit an affirmation of counsel in support of such relief requested, demonstrating the necessary services actually rendered, the issue of attorneys' fees being an unenforceable penalty will not be addressed at this time.

unenforceable as a penalty." *Cent. Irr. Supply v. Putnam Country Club Assocs., LLC*, 57 AD3d 934 935 [2d Dept 2008]; *JP Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 NY3d 552, 563 [2021]. "Whether a contractual provision 'represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances.'" *RES Exhibit Servs. LLC v. Genesis Vision, Inc.*, 155 AD3d 1515, 1520 [4h Dept 2017].

Here, the court finds that the Default Fee is reasonable and customary, and not an unenforceable penalty. The parties were sophisticated business entities and the seller's obligations upon default were spelled out in detail in the Agreement, providing the amount of damages owed, which under the facts of this case is not conspicuously disproportionate to the plaintiff's foreseeable losses under the circumstances in the record. Furthermore, defendant Matthew Reckinger-Rowe's affirmation in opposition to plaintiff's motion is insufficient to establish that the default fee is unconscionable or contrary to public policy.

Since plaintiff has met its initial burden on a motion for summary judgment and defendants have failed to raise a triable issue of material fact in opposition, plaintiff is entitled to judgment as a matter of law on its first cause of action for breach of contract against the merchant defendant.

b. Breach of Guarantee (Second Cause of Action)

Plaintiff also seeks summary judgment on its second cause of action for breach of guarantee against defendants Matthew Wiley Reckinger-Rowe and Karissa M. Reckinger-Rowe.

While plaintiff is entitled to judgment against the merchant defendant for the breach of the Agreement, a triable issue of fact remains as to whether defendants Matthew Wiley Reckinger-Rowe and Karissa M. Reckinger-Rowe signed the guarantee in their personal or representative capacity. (NYSCEF Doc. No. 62). *L'Aquila Realty, LLC v. Jalyng Food Corp.*, 148 AD3d 1004, 1006 [2d Dept 2017]; *GMS Batching, Inc. v. TADCO Constr. Corp*, 120 AD3d 549, 552 [2d Dept 2014]; *Star Video Entertainment, LP v. J&I Video Distributing, Inc.*, 268 AD2d 423, 424 [2d Dept 2000]. The Agreement lists the "Guarantors" as "Matthew Wiley Reckinger-Rowe, President" and "Karissa M Reckinger-Rowe, President". In order to be enforceable, a guarantee must be in writing and executed by the person to be charged. GOL 5-701(a)(2). Furthermore, the intent to personally guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 AD2d 268 [1st Dept 2001]; *Salzman Sign Co. v. Beck*, 10 NY2d 63, 67 [1961].

Accordingly, summary judgment on plaintiff's second cause of action for breach of guarantee against defendants Matthew Wiley Reckinger-Rowe and Karissa M. Reckinger-Rowe is denied.

ORDER and JUDGMENT

Accordingly, it is hereby:

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment pursuant to CPLR 3212 on its first cause of action for breach of contract against Love Factor, Inc. (The) d/b/a The Love Factor (Motion #3), is **GRANTED in part**; and it is further

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment pursuant to CPLR 3212 on its second cause of action for breach of guarantee against defendants Matthew Wiley Reckinger-Rowe and Karissa M. Reckinger-Rowe (Motion #3), is **DENIED**; and it is further

ORDERED AND ADJUDGED that plaintiff is entitled to an award of $44,109.37,[2] with interest at the statutory rate of 9% from December 11, 2023 as against Love Factor, Inc. (The) d/b/a The Love Factor; and it is further

ORDERED AND ADJUDGED that plaintiff shall have thirty (30) days from the date of this Decision, Order and Judgment to submit an affirmation of counsel in support of its attorney's fees request. Failure to submit said affirmation of counsel within thirty (30) days shall constitute a waiver of attorney's fees.

Dated: October 9, 2024

HON. KEVIN M. NASCA
Supreme Court Justice

[2] The award of $44,109.37 consists of the balance due by Love Factor, Inc. (The) d/b/a The Love Factor in the amount of $41,559.37, in addition to a default fee of $2,500.00, and an NSF fee of $50.00.