

Specialty Capital, LLC v Gregory T. Harvey DDS, Inc.

2024 NY Slip Op 34376(U)

November 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 534503/2023

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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SPECIALTY CAPITAL, LLC,

Plaintiff,

-against-

GREGORY T. HARVEY DDS, INC., d/b/a GREGORY
T. HARVEY DDS, and GREGORY TODD HARVEY,

Defendants.

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HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment, submitted April 29, 2024.

Papers	Numbered
Notice of Motion and Affirmation for Summary Judgment.....	1&2 and 3 [Exh. A-E]
Affidavit in Opposition.....	6 [Exh. A]
Memoranda of Law.....	4 and 5

Plaintiff commenced this action to recover damages for breach of contract and breach of the personal guaranty against the defendants jointly and severally for a sum certain totaling, \$35,816.60.

The underlying action seeks damages based on an alleged breach of a purported Merchant Cash Advance Agreement entered into between the parties on or about June 20, 2023. Plaintiff alleges that pursuant to the Agreement, plaintiff purchased certain rights of business of defendants' future receivables at a face value of \$92,300.00. The purchase amount for the receivables was \$65,000.00. The Agreement required Gregory T Harvey, DDS, Inc., and Gregory Todd Harvey, to pay plaintiff by ensuring that the sale proceeds and receivables were deposited into a designated bank account permitting plaintiff to electronically debit from said account 12% of the defendants' weekly revenue/receivables, which would be credited toward the purchase amount. In addition, in connection with the Agreement, defendant, Gregory Todd Harvey, as guarantor, executed a Personal Guaranty of Performance.

Plaintiff moves for an order granting summary judgment pursuant to CPLR 3212 in its favor and against defendants. Defendants oppose the motion on the ground that there are material issues of fact, which preclude summary judgment from being granted.

CPLR 4518

Defendant contends that the affidavit of Boris Kalendarev, one of the Managing Members of Specialty Capital, LLC, is insufficient to lay a proper foundation for the admissibility of the business records that are annexed to the plaintiff's motion for summary judgment. The court finds this contention without merit.

Pursuant to CPLR 4518(a) the business records rule provides as follows:

"any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of business and that was the regular course of such business to make it, at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter."

Mr. Kalendarev's states that he is the keeper of the records for plaintiff, knows plaintiff's business practices and procedures, including those for making, maintaining, and using business records. He further states that it is one of his duties to review the records of plaintiff's transactions that are in default; it is the regular course of plaintiff's business to make its business records, which are made at or about the time of the event or transaction recorded either automatically by computer, or by employees under a duty to make the records all pursuant to plaintiff's established procedures. The court finds that the affidavit of Boris Kalendarev, satisfies the requirements identified in the statute. See, *Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 (2nd Dept., 2019).

Summary Judgment

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, *Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The court finds that the plaintiff has satisfied its burden in making a prima facie showing of its entitlement to summary judgment by submitting evidence showing

defendants' default under the Contract and Guaranty. Defendants' claim that the agreement was misrepresented as an agreement to purchase receivables which defendants believed to be a loan, and that as guarantor, Gregory Todd Harvey was fraudulently induced into signing the contract is unpersuasive. Defendants also argue they were not given an opportunity to reconcile the based on the weekly revenue/receivables. However, the defendants fail to annex any evidentiary proof as to communication with the plaintiff requesting an adjustment or reconciliation of the weekly remittance amount to support this claim. The request for reconciliation is to be made in writing, as per paragraph 1.4 of the Agreement.

As indicated above, the contract has been considered in its totality and is not a loan disguised as a purchase future accounts receivable and is therefore not usurious. See, Tender Loving Care Homes, Inc. v. Reliable Fast Cash, LLC, 76 Misc.3d 314, 172 N.Y.S.3d 335 (Sup. Ct., Richmond Co., 2022). The defendants have failed to raise a triable issue of fact which would preclude summary judgment from being granted.

Whether the agreement to purchase future accounts receivable is a loan with a usurious interest in excess of New York State's permitted civil rate (see, Adler v. Marzario, 200 A.D.3d 829, 155 N.Y.S.3d 337 (2nd Dept., 2021), the language purporting to state its nature is not conclusive, rather, the contract 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. See, L.G. Funding, LLC v. United Senior Props. Of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309 (2nd Dept., 2020). The court will look at whether the purchasing party is entitled to repayment under all circumstances, as unless a principal sum advanced is repayable absolutely, the transaction cannot be a loan. Three factors are usually weighed to determine whether the 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. See, L.G. Funding, supra. In the case at bar, the agreement does not set a finite term for repayment. It indicates that agreement is for estimated payments that could be debited at 12% of the merchant's receivables and was being debited weekly. In addition, the agreement provides a reconciliation clause (See, Exh. "A" to the moving papers, p. 3 of the Agreement, paragraph 1.4 and 1.5) which would allow for an adjustment of the percentage to reflect the actual future receipts more closely. The agreement also speaks to what would happen if the business went bankrupt; that the business would not owe anything to the buyer and would not be in breach of or default under the agreement. Accordingly, after considering the three factors above, as well as the context of the agreement in its entirety, the court finds the agreement is a valid agreement to purchase future accounts receivable, and not a disguised loan.

Furthermore, the court finds that the plaintiff established the essential elements of a breach of contract cause of action, to wit, the existence of a contract, the plaintiff's performance under the contract and the defendant's breach of the contract, and the resulting damages. See, Liberty Equity Restoration Corporation v. Park, 160 A.D.3d 628, 75 N.Y.S.3d 47 (2nd Dept., 2018).

Accordingly, plaintiff's motion for an order pursuant to CPLR 3212 granting summary judgment in plaintiff's favor, and it is hereby


ORDERED, that judgment is granted in favor of plaintiff against the defendants, Gregory T Harvey, DDS, Inc., d/b/a Gregory T. Harvey DDS, and Gregory Todd Harvey, jointly and severally in the amount of \$30,816.60, with interest from November 17, 2023, the date of the breach, plus costs and disbursements, and it is hereby

ORDERED, that the plaintiff submit a proposed Judgment to the Clerk of the Court for entry, in the amount of \$30,816.60, with interest from November 17, 2023, plus costs and disbursements.

The court denies plaintiff's request for the default fee of \$5,000.00.

This constitutes the decision and Order of this Court.

Dated: Brooklyn, New York
November 29, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
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