SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

----------X

AKF INC,

Petitioner,

- v -

GGM INDUSTRIES LLC,GUSTAVO A GARCIA

Respondent.

----------X

INDEX NO. 655841/2024

MOTION DATE 11/04/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, Petitioner's petition is granted.

On July 29, 2024, Petitioner entered into a receivables purchase agreement ("RPA") with Respondents. Petitioner alleges that in September, Respondents stopped providing bank records and then in October, Respondents stopped payments due to Petitioner. Petitioner brings the instant petition pursuant to CPLR § 7502(c) seeking a preliminary injunction restraining Respondents' bank accounts pending the resolution of the parties' arbitration. They allege that there is an outstanding balance due under the RPA of $97,153.20, that together with a breach administration fee consisting of 25% of the outstanding amount brings the total owed under the RPA to $121,441.50. Petitioner now seeks to have that amount frozen in aid of arbitration of this dispute. Respondents oppose.

This Court has Jurisdiction over Respondents

As a preliminary matter, Respondents argue that there is no jurisdiction here because both the corporate respondent and the individual respondent are located in Nevada, and they have never conducted business in New York. Petitioners point to CPLR § 7502(a)(i), which states that

if (as is the case here) it is not specified in the agreement, proceedings affecting arbitration are to be brought in the county where at least one of the parties is doing business. Petitioner states in their verified petition that their place of business is in New York County. Respondents claim that they were unaware that Petitioner was a New York entity until the lawsuit was brought, but the opening lines of the RPA clearly state that Petitioner is "located at 88 Pine Street, th floor, New York NY 10005" (sic). Therefore, under the CPLR this proceeding is properly brought in New York County. Furthermore, the RPA has a valid forum selection clause allowing Petitioner to bring any action arising out of disputes between the parties in New York courts.

Standard of Review under CPLR § 7502(c)

Because the Petitioner has moved in aid of arbitration pursuant to CPLR § 7502(c), the analysis for a preliminary injunction is somewhat different from the normal three-prong test. Under the standard test, a party seeking a preliminary injunction must demonstrate "(1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor." *35 N.Y. City Police Officers v. City of New York*, 34 A.D.3d 392, 394 (1st Dept. 2006). The relevant CPLR provision, however, states that a court may grant a preliminary injunction in aid of arbitration "only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." CPLR § 7502(c).

It has been unclear whether a court applies the standard preliminary injunction test, an ineffectual without provisional relief test, or a combination of the two in scenarios like the case at hand. *See, e.g., Witham v. VFinance Invs., Inc.*, 17 Misc. 3d 1136(A), at ***6 (Sup. Ct., NY County 2007); *Matter of Kadish v. First Midwest Sec., Inc.*, 115 A.D.3d 445, 445-46 (1st Dept. 2014). Within the First Department, generally a party seeking a preliminary injunction pursuant

to CPLR § 7502(c) must establish both that the arbitration award would be ineffectual without provisional relief and satisfy the traditional three-prong test for a preliminary injunction. *See Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. City of New York*, 112 A.D.3d 116, 118 (1st Dept. 2013); *but see Matter of Qwil PBC v. Landow*, 180 A.D.3d 593, 593 (1st Dept. 2020)(only applying the ineffectual without provisional relief test).

Petitioner Has Satisfied the Ineffectual Without Provisional Relief Test

Petitioners here argue that an arbitration award would be ineffectual without the requested preliminary injunction because of another pending case against Respondents for a breach of a similar agreement. They argue that without the preliminary injunction, there may be no funds available to collect should an arbitration award be made. Factors that have weighed in favor of the movant in the ineffectual test include threats of insolvency and diverting funds from an escrow account without explanation. *Port Auth. of N.Y. & N.J. v. Weiss & Hiller, P.C.*, 168 A.D.3d 648, 648 (1st Dept. 2019); *Matter of Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 82 A.D.3d 89, 94 (1st Dept. 2011). Here, when Respondents have stopped payments on the account in question and offered no explanation, and there is another case pending against them on a similar fact pattern, Petitioner has shown that an arbitration award would likely be ineffectual absent a preliminary injunction. Therefore, the analysis turns to the traditional three-prong test.

Petitioner Has Shown Likelihood of Success on the Merits

Respondents argue that Petitioner will not be able to succeed on the merits for several reasons: that the RPA is actually a contract of adhesion and therefore unenforceable; that there is no evidence that Petitioner performed under the RPA or that Respondents breached it; and finally, that there is no proof of damages sustained as a result of the alleged breach. Respondents

also argue that because the RPA in question was signed online, and that the Petitioner's website does not provide a copy of the agreement, the RPA is invalid.

The RPA is Not a Loan

Turning first to the argument that the RPA is an usurious loan and not a true receivables purchase agreement, Respondents largely point as proof to the interest rate. When determining whether a receivables purchase agreement is a loan or not, courts weigh three factors: "(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." *Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752, 754 (2nd Dept. 2022). Here, Petitioner has shown that the RPA has no finite payment term, contains a reconciliation provision that simply requires the Respondents to provide bank records (which they are alleged not to have done), and there are no protections for Petitioner in case of a bankruptcy. Petitioner has shown that they are likely to succeed on the merits to the extent that the RPA is a true receivables purchase agreement and not a loan as per the three-part test.

The RPA was Validly Signed Online

Respondents argue that the RPA is not valid because it was executed on Petitioner's website and the terms were not prominently posted on said website. But the agreement was actually sent to Respondents through Docusign, rather than on the Petitioner's website itself, and the person signing the agreement was required to scroll through the entire document in order to get to the signing page. Petitioner has provided ample proof of the Docusign history for the document in question, showing that Respondents both signed the RPA and were given a copy of the agreement before signing. Respondents' caselaw about passive assent to an online agreement

is not applicable to the facts here, where Respondent was sent a document through Docusign and was required to review the document before signing.

Respondents' Argument That They Did Not Understand the Terms of the Agreement Fails

Respondents also argue that although they signed the RPA, they did not materially understand the terms of the agreement and that the "core aspects" of the RPA was "misrepresented." But here, Respondents do not contest that they received the initial payment from Petitioner, made some payments in return from their receipts, and that they invoked the reconciliation clause of the RPA. A party to an agreement "cannot claim that [they were] compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement." *Allen v. Riese Org., Inc.*, 106 A.D.3d 514, 517 (1st Dept. 2013). Furthermore, when a party "accepts the benefits of a contract and fails to act promptly to repudiate it", they have ratified the contract. *Id.* Here, regardless of whether or not Respondents clearly understood the RPA, their actions subsequent to signing clearly ratified the agreement.

Petitioner Has Provided Adequate Proof of the Breach

Respondents argue that Petitioner has not provided adequate proof of their performance, Respondents' breach, or damages resulting from such a breach. But here, Petitioners have shown all of that through the verified petition and exhibits. They have provided the RPA and Funding Checkout documents, signed by Respondents. They have provided the completed reconciliation notice adjusting the remittance percentage for August based on Respondents' sales. The bank notice stating that Respondents stopped payment to Petitioner has been provided, as has the breach notice that Petitioner sent in response to the stopped payments. Petitioner has shown their business records stating the dates and amounts for the payments that Respondents made prior to stopping payment. Petitioner has met their burden of showing that there was an agreement, that

Respondents breached the agreement, and that Petitioner has suffered monetary damages as a result.

Petitioners Have Established Likelihood of Success on the Breach of Guaranty Claim

Respondents have argued that Petitioners cannot show that the individual respondent is liable under the personal guaranty that was executed in the RPA, because there is an "absence [of] any clear breach of contract by the Corporate Respondent." But, as established above, this argument fails because Petitioner has shown a clear breach of contract by the corporate respondent.

Respondents Have Not Met Their Burden on the Liquidated Damages Provision

Respondents argue that the liquidated damages provision in the RPA that grants Petitioner 25% of the total amount of outstanding monies in the event of a breach is an unenforceable penalty, on the grounds that it is disproportionate. Petitioners point to the collection costs they are forced to incur when pursuing merchants who are dissipating or hiding assets after a breach and argue that the amount is not disproportionate.

A liquidated damages provision that "requires damages grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable." *Trustees of Columbia Univ. in the City of N.Y. v. D'Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 75 (2020). The party who is seeking to render the provision void as a penalty bears the burden of establishing that the liquidated damages provision is disproportionate. *Id.* While there is no precise ratio or measurement for what makes a liquidated damages provision disproportionate, courts have upheld provisions granting landlords up to three times the amount of existing rent as valid liquidated damages. *Seymour v. Hovnanian*, 211 A.D.3d 549, 554 (1st Dept. 2022). But a provision of over seven times the amount due was deemed "obviously and grossly

disproportionate." *Columbia*, at 80. Here, the liquidated damages amounts to 25% of the unpaid amount, well below the up to three times unpaid rent that has been upheld as valid. Respondents have not met their burden of showing that the provision in question is an unenforceable penalty, and therefore the liquidated damages provisions does not impact Petitioner's likelihood of success on the merits.

Petitioner Has Established Irreparable Harm

Respondents argue that Petitioner has not established irreparable harm because: a) the harm is speculative; b) the harm is not imminent; and c) the harm consists solely of money damages. But given that Respondents have already blocked Petitioner from the bank account in question, refused to comply with the reconciliation provision in the RPA, and there is a similar pending case against Respondents, Petitioner has shown that the harm is not speculative and is imminent. Regarding the money damages question, important here is the fact that Petitioner is moving under CPLR § 7502(c). When a party moves pursuant to this provision, the fact that the harm in question consists solely of money damages is not a bar. *See County Natwest Sec. Corp. v. Jesup, Josephthal & Co.*, 180 A.D.2d 468, 469 (1st Dept. 1992); *see also Qwil* at 593.

The Balance of Equities Favors Petitioner

This prong of the preliminary injunction test examines the "relative prejudice to each party accruing from a grant or denial of the requested relief." *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 432 (1st Dept. 2016). Respondents argue that granting the preliminary injunction would harm their business reputation, goodwill and operations. Petitioner points to the reconciliation provision of the RPA that would allow Respondents to pay nothing if going through a financial hardship, the block Respondents placed on the bank account in question and their ceasing of communications with Petitioner, and the potential ineffectualness

of an arbitration award absent the preliminary injunction. One consideration here is that CPLR § 7502(c) states that a preliminary injunction like the one sought here would expire within 30 days if arbitration is not commenced and Respondents would then receive costs and fees. Overall, the balance of the equities slightly favors Petitioner, particularly since they have also established the other two prongs of the traditional preliminary injunction test and satisfied the ineffectual test. Accordingly, it is hereby

ADJUDGED that the petition is granted; and it is further

ORDERED that pending the resolution of the parties' arbitration and until further Order of the Court all funds in any accounts held by the Respondents at Bank of America, are restrained up to the amount of $121, 441.50.

20241217162042LFRANK6BA92370CAEF44BCB95108C59937EB78

12/17/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**