Circuit Court, 1st Judicial Circuit in and for Santa Rosa County.
Civil Division. Case No. 2017-CA-292.
November 29, 2018.
John F. Simon, Jr., Judge.

EBF PARTNERS, LLC,
Plaintiff,

v.

BURKLOW PHARMACY, INC. d/b/a BURKLOW PHARMACY; STEPHEN BURKLOW; MONIQUE BURKLOW,
Defendants.

ORDER ON PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on October 22, 2018, on the Amended Motion for Summary' Judgment and Memorandum of Law, filed by Plaintiff, EBF Partners, L.L.C. ("EBF" or "Plaintiff"), on July 13, 2018. The Court, having considered the Amended Motion, Defendants' written memorandum filed in opposition thereto, and the arguments of counsel, finds as follows:

I. Background

1. On April 19, 2016, EBF and Burklow Pharmacy, Inc. d/b/a Burklow Pharmacy ("Burklow Pharmacy") entered into a Purchase and Sale Agreement ("Agreement") by which Burklow Pharmacy sold its future receivables with a face value of $586,500.00 to EBF for an upfront discounted price of $425,000.00. As part of the Agreement, Burklow Pharmacy also entered into a security agreement, and the principals of Burklow Pharmacy, Stephen Burklow and Monique Burklow, entered a guaranty agreement.

2. Pursuant to the terms of the Agreement, Burklow Pharmacy was obligated to remit to EBF future receivables through daily debits representing 15% of Burklow Pharmacy's future receipts.

3. Importantly, the Agreement permitted Burklow Pharmacy to request that EBF reconcile its payments with actual receipts ("Reconciliation Clause"). It stated,

The Daily Payment amount is intended to represent the Specified Percentage of Seller's Future Receipts. Seller may request that EBF reconcile Seller's actual receipts by either crediting or debiting the difference back to or from the Account so that the amount EBF debited in the most recent calendar month equaled the Specific Percentage of Future Receipts that Seller collected in that calendar month.
4. Also significant to EBF's Amended Motion, Section 2.2 of the Agreement stated, in relevant part, that

Seller is selling a portion of a future revenue stream to EBF at a discount, not borrowing money from EBF. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by EBF. If Future Receipts are remitted more slowly than EBF may have anticipated or projected because Seller's business has slowed down, or if the full Purchase Amount is never remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business, and Seller has not breached this Agreement, Seller would not owe anything to EBF and would not be in breach of or default under this Agreement. (emphasis added).

Thus, by its plain language, the Agreement was for an indefinite term, contained a Reconciliation Clause, and did not guarantee EBF absolute repayment under all circumstances. Further, the Agreement did not consider the filing of bankruptcy as a default by Defendants.

5. The parties also agreed that if Burklow Pharmacy transferred or sold all or substantially all of its assets, such an act would constitute an "Event of Default" as defined in Section 3.1 of the Agreement. If such an event occurred, Plaintiff would be entitled to the full purchase amount of $586,500.00, along with all applicable fees. Additionally, Plaintiff would be entitled to enforce the personal guaranty and security agreements.

6. Burklow Pharmacy defaulted by transferring its assets in violation of the Agreement. As a result, EBF filed the present action seeking to collect $122,423.00 plus fees and costs due under the Agreement, guaranty, and security agreement.

II. Conclusions

In its Amended Motion for Summary Judgment, EBF asserts that Burklow Pharmacy defaulted under the Agreement by improperly transferring its assets. As a result, EBF contends that there exists no genuine issues of material fact, and it is entitled to judgment as a matter of law. In response, Defendants do not dispute that Burklow Pharmacy is in default under the terms of the Agreement. Instead, Defendants contend that the Agreement is a usurious loan, and therefore, unenforceable as a matter of law.

Under New York law, it is presumed that a transaction is not usurious.1 Thus, any claim of usury must be established by clear and convincing evidence. See Transmedia Rest. Co., Inc. v. 33 E. 61st. Rest. Corp., 710 N.Y.S. 2d 756, 760 (N.Y. Sup. Ct. 2000); Giventer v. Arnow, 333 N.E. 2d 366, 369 (N.Y. 1975). More importantly, the defense of usury only applies if the agreement in question is a loan or forbearance of money. If the Agreement is not a loan, usury is not a defense. See NY Capital Asset Corp. v. F & B Fuel Oil Co., Inc., 55 Misc. 3d 1229(A), at *5 (N.Y. Sup. Ct. Mar. 8, 2018) (citations omitted.) ("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.").

In determining whether a transaction is a loan, New York courts focus upon whether the plaintiff is entitled to absolute repayment under all circumstances or whether payment rests upon a contingency. See id. If repayment is absolute, the agreement is a loan, and the defense of usury may be applicable if its elements are established by clear and convincing evidence. On the other hand, if payment rests upon a contingency, the agreement is not considered a loan and is otherwise enforceable despite providing a return above the legal rate of interest See id.; see also Colonial Funding Network, Inc. v. Epazz, Inc., 252 F. Supp. 3d 274, 281 (S.D.N.Y. 2017) (citing Kelly, Grossman & Flanagan, L.L.P. v. Quick Cash, Inc., 35 Misc. 3d 1205(A), at *6 (N.Y. Sup. Ct. 2012) ("When payment or enforcement rests on a contingency, the agreement is valid though it provides for a return in excess of the legal rate of interest."). Factors to be considered in making this determination include whether the agreement contains a reconciliation clause,2 whether it is for a finite term or not,3 and whether the Plaintiff is afforded recourse in the event of a bankruptcy by Defendants.4

Applying these principles to the present case, it is abundantly clear that EBF is not absolutely entitled to repayment under all circumstances under the plain language of the Agreement. First, Burklow Pharmacy would not owe anything to EBF and would not be in breach or default under this Agreement if it filed bankruptcy or otherwise ceased operations in the ordinary course of business. Under such a scenario,

EBF would have no right to recoup its initial payment. (Section 2.2 of the Agreement). Second, Burklow Pharmacy agreed to sell EBF future receipts “without recourse [except] upon an Event of Default.” An Event of Default is explicitly defined in Section 3.1 of the Agreement and does not include a failure to pay the full purchase amount. Third, the Agreement contains a Reconciliation Clause, is for an indefinite term, and does not consider bankruptcy a default. Thus, it is not a loan under New York law and, as such, is not subject to the law of usury.5

Defendants, however, argue that the security and guaranty agreements ensure EBF's entitlement to recover the full purchase amount. Therefore, they conclude that the Agreement is a loan and that the defense of usury is applicable. The Court does not agree. EBF's right to absolute repayment is contingent upon an Event of Default as defined in Section 3.1 of the Agreement. Such events of default include, among other actions, Burklow Pharmacy's intentional interference with Plaintiff's recovery of receipts, or as here, the transferring of all or substantially all of the assets of the business. (See Section 3.1 of Agreement, generally). Significantly, a default under the Agreement does not include Burklow Pharmacy's failure to remit payments because it “ceases operations in the ordinary course of business” under which EBF would be entitled to nothing. Thus, the security and guaranty agreements do not guarantee EBF absolute repayment and do not convert the Agreement into a loan.6

Based upon the foregoing, the Court finds that there are no genuine issues of material fact, and Plaintiff is entitled to judgment as a matter of law. As such,

1. Plaintiff's Amended Motion for Summary Judgment is hereby GRANTED;

2. Plaintiff is entitled to a sum of $122,423.00, plus fees and costs; and

3. Any motion for attorneys' fees should be filed within 30 days of rendition of this Order.

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1The parties agree that, per the Agreement, New York law governs.

2Yellowstone Capital, L.L.C. v. Cent. USA Wireless, L.L.C., 60 Misc. 3d 1220(A), at *4 (N.Y. Sup. Ct. 2018) (“New York Courts have found that the presence of a reconciliation provision such as the one in this matter is a significant factor in determining that the agreement should be characterized as a purchase of accounts receivables as opposed to a loan.”).

3IBIS Capital Group, L.L.C. v. Four Paws Orlando L.L.C., No. 608586/16, 2017 WL 1065071, at *5 (N.Y. Sup. Ct. Mar. 10, 2017) (“The existence of this uncertainty in the length of the Agreement is an express recognition by the parties of the wholly contingent nature of this Agreement.”).

4F & B Fuel Oil Co., Inc., 58 Misc. 3d 1229(A), at *6 (determining a lack of recourse in the event of bankruptcy a significant factor weighing against a finding that an agreement is a loan).

5The Court's holding is consistent with numerous other New York cases rejecting the argument asserted by Defendants. See Colonial Funding Network, Inc., 252 F. Supp. 3d at 281 (holding that where a company sold $898,500 of its future receipts in exchange for upfront advances totaling $600,000, such a transaction was not a loan because the receipts were not payable absolutely); K9 Bytes, Inc. v. Arch Capital Funding, L.L.C., 57 N.Y.S. 3d 625, 633-34 (N.Y. Sup. Ct. 2017) (holding that the agreement for the

sale of future receivables was not a loan because repayment was contingent on the merchant's success and because the term of repayment was indefinite); Four Paws Orlando L.L.C., 2017 WL 1065071, at *6-7 (dismissing plaintiff's usury defense and counterclaims as a matter of law because the purchase and sales agreement set forth contingencies under which the business would no longer be obligated to deliver payment because "[t]he distinguishing hallmark of a loan is the lender's absolute right to repayment of the principal").

6See, e.g., Rapid Capital Fin., L.L.C. v. Natures Mkt. Corp., 66 N.Y.S. 3d 797, 801 (N.Y. Sup. Ct. 2017) (rejecting the argument by defendants that "their execution of a security agreement giving plaintiff a security interest in all Natures Market's accounts [shows that the] transaction must be a loan . . ."); Platinum Rapid Funding Grp. Ltd. v. VIP Limousine Servs., Inc., No. 604163-15, 2016 WL 6603853, at *4 (N.Y. Sup. Ct. Nov. 1, 2016) ("The personal guaranty is no broader than the obligations under the Agreement, and the requirement of payment by the Guarantor is no greater than that of the Merchant . . . Since the Agreement specifically provides that it involves the purchase of accounts receivable, and is not a loan, and does not require unconditional repayment by the Merchant or the Guarantor, it is not a loan. . .").

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