STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

SPIN CAPITAL,

Plaintiff,

-vs-

TEXAS MEDICAL CENTER SUPPLY, LLC
d/b/a TEXAS MEDICAL CENTER SUPPLY, et al.,

Index #: 130439-2021

Defendants.

Virtual Special Term - Via Microsoft Teams
August 2, 2022

APPEARANCES

Jacob Nemon, Esq.
Attorney for Plaintiff

Shane Heskin, Esq.
Attorney for Defendant

DECISION

Odorisi, J.

This is a collections lawsuit stemming from merchants cash advance agreements. Pending before this Court is Plaintiff's summary judgment and caption amendment motion [NYSCEF Docket # 17 - Motion # 1], which is **GRANTED IN PART AND DENIED IN PART** for the reasons set forth hereinafter.

LAWSUIT FACTS

Background Information

In May 2021, and again in June, Plaintiff - a New Jersey company - and Defendant Texas Medical Center Supply, LLC - a Texas company - entered into a Revenue Purchase Agreement ("Agreement") [Docket #'s 26 & 29]. Defendants Dimitri Menin, Jad Fathi

Shraim, and Omari Shafram guaranteed the payments thereunder. Defendants asked for a downward reduction of the remittance which was granted. Thereafter, Defendants allegedly had insufficient funds to support the automatic payments.

Procedural History

This action was commenced on August 30, 2021, seeking $1,803,892, and setting forth claims for:

* 1st - Breach of contract;
* 2nd - Breach of the personal guarantee;
* 3rd - Unjust enrichment; and,
* 4th - Conversion

[Docket # 19].

On October 1st, Defendants answered denying liability, and raised as affirmative defenses:

* Illegal contract;
* Fraudulent activity;
* Penal Law § 190.40;
* Unconscionability

[Docket # 20].

Plaintiff served a Notice to Admit on November 9th [Docket # 21]. Defendants did not respond to the same, so those items are deem admitted. See CPLR 3123 (a). Only after Plaintiff's summary judgment motion did Defendants seek discovery.

Brief Summary of Motion Contentions

By way of a motion filed May 3, 2022, Plaintiff seeks a summary judgment ruling on its First and Second Causes of Action, and also an order allowing a caption amendment

[Docket #'s 17-32].[1] Plaintiff, citing the lack of a Notice to Admit response, contends that Defendants breached the Agreements and Guarantees by not funding their designated bank account even though they had ample receivables. Plaintiff wants a $404,952 attorneys' fee award [40%]. As to the caption change, Defendant Texas Medical Center Supply, LLC changed its name to Texas Medical Technology, Inc. [Docket #'s 23-24].

Defendants oppose the motion on numerous grounds, the first being that the motion is premature without discovery [Docket #'s 40-48].[2] Defendants also argue that subject matter jurisdiction is lacking, and that the Agreements were usurious loans and therefore unenforceable.

Plaintiff replies that discovery is not needed, and it can sue in New York [Docket # 49-57].

LEGAL DISCUSSION

Plaintiff is entitled to summary judgment on its breach of contract claims, but not its full attorneys' fee award.

Threshold Procedural Issue

As a preliminary matter, this Court starts by addressing Defendants' objection to the motion as premature without more discovery. See e.g. Kai Lin v. Strong Health, 82 AD3d 1585, 1587 (4th Dept 2011) (in opposition to summary judgment motion, the opposing party did not demonstrate a reasonable attempt, prior to the motion, to obtain discovery; therefore, the motion was properly granted).

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[1] In its motion, Plaintiff voluntarily discontinued the Third and Fourth Causes of Action [Docket # 31, p. 1, n. 2].

[2] Defendants made several submissions after Plaintiff's reply [Docket #'s 60-63, 66-67], and Plaintiff also made one [Docket # 68].

The CPLR provides in relevant part that:

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

CPLR 3212 (f).

As to this subdivision, the Fourth Department has explained that:

> In opposing a summary judgment motion as premature pursuant to CPLR 3212 (f), "'the opposing party must make an evidentiary showing supporting [the conclusion that **facts essential to justify opposition may exist but cannot then be stated**, and] **mere speculation or conjecture [is] insufficient**'" . . . . The opposing party must show that the discovery sought would produce evidence **sufficient to defeat the motion** . . . and that " 'facts essential to oppose the motion were in [the **movant's] exclusive knowledge** and possession and could be obtained by discovery'"

Resetarits Const. Corp. v. Olmsted, 118 AD3d 1454, 1456 (4th Dept 2014) (emphasis added and internal citations omitted). See also Aldridge v. Rumsey, 275 AD2d 897, 897 (4th Dept 2000).

In this matter, Defendants' submission that Plaintiff's motion cannot even be heard based on incomplete discovery is without merit. See e.g. Guarino v. Mohawk Containers Co., Inc., 59 NY2d 753, 754 (1983) (affirming grant of summary judgment motion where the plaintiff's multi-month failure to seek further disclosure did "not interdict the grant of summary judgment"); Kuhn v. Camelot Ass'n, Inc., 82 AD3d 1704, 1705 (4th Dept 2011). As in Guarino, the present Defendants delayed in pursuing discovery. They answered in early October, ignored Plaintiff's Notice to Admit, and waited over seven months to seek

information from Plaintiff. Not all of that time was consumed by settlement negotiations. As a very key factor, Defendants did not interpose their own discovery devices until after Plaintiff moved for summary judgment. This type of failure to investigate cannot be condoned. See e.g. Walsh v. Aspen Sq. Mgt., Inc., 46 AD3d 1411, 1412 (4th Dept 2007) (reversing denial of summary judgment motion as the plaintiff did not demonstrate a reasonable attempt, prior to the motion, to pursue the discovery claimed to be necessary); Avraham v. Allied Realty Corp., 8 AD3d 1079 (4th Dept 2004) (affirming grant of summary judgment as the opposing party "failed to ascertain the facts due to [their] own voluntary inaction"). Defendants' lack of due diligence renders their cases of Genesee/Wyoming YMCA v. Bovis Lend Lease LMB, Inc., 98 AD3d 1242, 1245 (4th Dept 2012) and Coniber v. Ctr. Point Transfer Sta., Inc., 82 AD3d 1629 (4th Dept 2011) factually distinguishable.

Also, this Court is unconvinced that any information is exclusively within Plaintiff's possession. See e.g. Gannon v. Sadeghian, 151 AD3d 1586, 1588 (4th Dept 2017) (the opposing party failed to demonstrate that relevant evidence was exclusively within the knowledge and control of the movant).

In sum, "[m]ere hope that somehow . . . [defendants] will uncover evidence that will . . . [disprove] a case provides no basis pursuant to CPLR 3212 (f) for postponing a determination of a summary judgment motion." Mackey v. Sangani, 238 AD2d 919, 920 (4th Dept 1997) (rejecting contention that summary judgment motion was premature).

Motion Standard

The starting place for analyzing the merits of the motion for summary judgment is the CPLR itself, which provides in pertinent part that:

> 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. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. **The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.**

CPLR 3212 (b) (emphasis added).

CPLR 3212 (b)'s summary judgment provision means that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" necessitating a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986). Proof offered by a moving party must be in admissible form. See Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Dix v. Pines Hotel, Inc., 188 AD2d 1007 (4th Dept 1992). Failure of the moving party to make the statutorily required *prima facie* case mandates denial of the motion, regardless of the sufficiency of the opposing papers. See Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

Once a *prima facie* showing has been made, then "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 NY2d at 324. See also Mortillaro v. Rochester Gen. Hosp., 94 AD3d 1497, 1499 (4th Dept 2012). The motion proof is viewed "in the light most favorable to the

party opposing the motion." Robinson v. Strong Mem. Hosp., 98 AD2d 976 (4th Dept 1983). See also Branham v. Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 (2007). However, "[b]ald conclusory assertions, even if believable, are not enough [to defeat summary judgment]." S. J. Capelin Assoc., Inc. v. Globe Mfg. Corp., 34 NY2d 338, 342 (1974) ("A shadowy semblance of an issue is not enough to defeat the [summary judgment] motion"). See also Mallad Const. Corp. v. County Fed. Sav. & Loan Ass'n, 32 NY2d 285, 290 (1973); State Farm Fire & Cas. Co. v. Ricci, 96 AD3d 1571, 1574 (4th Dept 2012) (reversing denial of summary judgment motion as the opposing party's speculation was insufficient to overcome the same); Sullivan v. Welsh, 132 AD2d 945, 946 (4th Dept 1987). Neither are "merely conclusory claims." Stonehill Capital Mgt., LLC v. Bank of the W., 28 NY3d 439, 448 (2016).

In all, "[s]ummary judgment 'does not deny the parties a trial; it merely ascertains that there is nothing to try' . . . When properly employed, moreover, summary judgment is a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources." Matter of Suffolk County Dept. of Social Services on Behalf of Michael V. v James M., 83 NY2d 178, 182 (1994).

The above standard will next be applied to Plaintiff's motion.

Merits Review

Plaintiff demonstrated its entitlement to summary judgment for its two breach of contract claims. See e.g. Pyramid Brokerage Co. of Buffalo, Inc. v. Atlas Auto Glass, Inc., 39 AD3d 1176, 1178 (4th Dept 2007) (reversing and awarding the plaintiff summary judgment on contract claim).

The elements of a breach of contract claim are: the existence of a contract; the plaintiff's performance under the contract; the defendant's breach of that contract; and, resulting damage. See Niagara Foods, Inc. v. Ferguson Elec. Serv. Co., Inc., 111 AD3d 1374 (4th Dept 2013); Alikes v. Griffith, 101 AD3d 1597 (4th Dept 2012).

Here, Plaintiff's motion fulfilled the above elements. See e.g. WM. Schutt & Assoc. Eng'g & Land Surveying P.C. v. St. Bonaventure Univ., 151 AD3d 1634, 1635 (4th Dept 2017) (trial court properly granted that part of the plaintiff's motion concerning breach of contract inasmuch as the plaintiff met its initial burden of establishing all of the requisite elements). Many of those elements are set by Defendants' failure to respond to the Notice to Admit.[3] See Groeger v. Col-Les Orthopedic Assoc., P.C., 136 AD2d 952 (4th Dept 1988) (notice to admit is used to establish that certain facts are not in dispute). Additionally, Plaintiff supplied ample admissible proof to satisfy the same.

Furthermore, Defendants' defenses and motion opposition do not suffice to defeat the summary judgment application. See e.g. Champion Auto Sales, LLC v. Pearl Beta Funding, LLC, 159 AD3d 507 (1st Dept 2018) (evidence demonstrated that the underlying agreement was not a usurious transaction). First and foremost, Defendants' usury stance is undermined by the binding case of Kennard Law P.C. v. High Speed Capital LLC, 199 AD3d 1406 (4th Dept 2021). In Kennard Law P.C., the Fourth Department rejected an attempt to set aside a confession of judgment based upon the claim that the merchants cash advance agreement was really a usurious loan. Although Plaintiff cited it [Docket # 32, p. 13], Defendants did not address Kennard Law P.C. in their opposing Memorandum

[3] Defendants' do not respond to this problem in their motion filings.

of Law [Docket # 40]. At oral argument, Defendants finally discussed Kennard Law P.C. and tried to jettison the same due to the brevity of its decision, but this Court does not accept that invitation to ignore Kennard Law P.C.. See also Seidel v. 18 E. 17th St. Owners, Inc., 79 NY2d 735, 744 (1992) ("if the transaction is not a loan, 'there can be no usury, however unconscionable the contract may be.'"); Giventer v. Arnow, 37 NY2d 305, 309 (1975) (usury defense must be established by "clear evidence as to all the elements essential thereto").

Defendants' case law does not compel a different result. For example, the citation to Adar Bays, LLC v. GeneSYS ID, Inc., 37 NY3d 320 (2021) does not defeat Plaintiff's motion as that case was not a merchants cash advance agreement, so it is inapposite. Defendants' post-reply submissions also do not convince this Court to abandon Kennard Law P.C..

Second, Defendants' subject matter jurisdiction assertion does dictate a motion denial as it was not pleaded as a defense. See generally Stewart v. Dunkleman, 128 AD3d 1338, 1341 (4th Dept 2015) (a "court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded . . . "). See also Macina v. Macina, 60 NY2d 691, 693 (1983); Diamond Roofing Co., Inc. v. PCL Props., 153 AD3d 1577, 1579 (4th Dept 2017). Even if the same is considered, it still falters as Plaintiff is an LLC, is authorized to do business in New York, and maintains its principal office here; thus, Business Corporation Law ("BCL") § 1314 does not apply [Docket #'s 49-51]. Moreover, Defendants consented to New York jurisdiction.

Despite the above, this Court declines to award Plaintiff its full contract-based attorneys' fees. See e.g. Owens v. Tompkins Bank of Castile, 170 AD3d 1683, 1685 (4th Dept 2019) (Supreme Court did not abuse its discretion in fixing attorneys' fee award).

Contingent fees are not impermissible (see Rules of Professional Conduct, Rule 1.5 (c); Mead v. First Tr. & Deposit Co., 60 AD2d 71, 76 (4th Dept 1977)), and can be set by contract. See A.G. Ship Maintenance Corp. v. Lezak, 69 NY2d 1, 5 (1986); Brownie's Army & Navy Store, Inc. v. E. J. Burke, Jr., Inc., 72 AD2d 171, 176 (4th Dept 1980). Nevertheless, a court always retains the authority to "look beyond the actual fee arrangement between plaintiff and counsel to determine whether that arrangement was reasonable and proportionate to the normal fee chargeable by attorneys in the context of this case." Equit. Lbr. Corp. v. IPA Land Dev. Corp., 38 NY2d 516, 521 (1976). See also First Nat. Bank of E. Islip v. Brower, 42 NY2d 471, 474 (1977) (recognizing "the traditional authority of the courts to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law"). This rule was enacted to recognize cases "'involving disparity of bargaining power or **oppressive practices' and prevent the contractual imposition of a penalty**." Brauer v. Cent. Tr. Co., 77 AD2d 239, 244 (4th Dept 1980) (emphasis added). See also Indus. Equip. Credit Corp. v. Green, 62 NY2d 903, 906 (1984) (the value of the legal services should be established before inclusion in the judgment).

Under the foregoing rules, this Court finds that the requested attorneys fees of $404,952 needs to be tested via additional submissions. See Liberty Enterprises, LLC v. Adamsons, 12 AD3d 1182, 1183 (4th Dept 2004). A reduced award is highly likely. See

e.g. Red Cr. Nat. Bank v. Blue Star Ranch, Ltd., 58 AD2d 983 (4th Dept 1977) (finding no error in reducing attorneys' fees, after a hearing, from agreed upon contact percentage rate).

Finally, the Court approves of Plaintiff's unopposed application to amend the caption.

In sum, Plaintiff is awarded summary judgment, but with a yet to be determined attorneys' fee amount, and is also awarded an amended caption.

CONCLUSION

Based upon all of the foregoing, it is the Decision of this Court that Plaintiff's motion is **GRANTED IN PART AND DENIED IN PART**. The summary judgment motion is **GRANTED** as to the First and Section Causes of Action, and also the request to amend the caption. The motion is **DENIED** as to the full attorneys' fee request. Rather, Plaintiff has **fourteen (14)** days to submit an attorney affirmation detailing it's counsel's efforts in this matter to support a reasonable attorneys' fees amount.

Accordingly, and as the prevailing party, Plaintiff is directed to E-file a Proposed Order within **forty (40)** days.

Signed at Rochester, New York on August 29, 2022.

HONORABLE J. SCOTT ODORISI
Supreme Court Justice