ORDERED.

Dated: January 18, 2023

Grace E. Robson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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In re Richert Funding, LLC, as substantively consolidated with Dwight Donald Richert and Holly Berry Richert Debtor.	Case No. 6:18-bk-06276-GER Chapter 7
Soneet R. Kapila, as Chapter 7 Trustee of the Bankruptcy Estate of Richert Funding, LLC, substantively consolidated with Dwight Donald Richert and Holly Berry Richert, Plaintiff, v. Rackwise, Inc. and Rackwise Funding II, LLC, Defendants.	Adv. No. 6:21-ap-00056-GER

ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court upon the Motion for Partial Summary Judgment[1] filed by Plaintiff/Chapter 7 Trustee Soneet R. Kapila (the "Plaintiff") seeking summary judgment on Count I of the Amended Complaint[2] against Defendant Rackwise, Inc. for breach of promissory note. The material facts are not in dispute. For the reasons stated below, partial summary judgment is granted in favor of the Plaintiff.

Material Facts Not in Dispute

A. Richert Funding, LLC ("Richert Funding") was a Florida company whose principal place of business was located at 4319 35th Street, Suite A, Orlando, Florida 32811. Richert Funding's primary business was accounts-receivable factoring.

B. Rackwise, Inc. is a Nevada corporation with its principal place of business in Denver, Colorado.

C. Rackwise Funding II, LLC ("Rackwise Funding") is a Colorado limited liability company with its principal place of business in Denver, Colorado.

D. Patrick Imeson ("Mr. Imeson") is a principal of Rackwise, Inc. and Rackwise Funding.

E. Richert Funding and Rackwise, Inc. entered into two Factoring and Security Agreements dated February 9, 2012 and August 30, 2017 (the "Factoring Agreements").

F. In order to obtain additional time to pay the amounts owed to Richert Funding, on June 18, 2018, Rackwise, Inc. executed a promissory note (the "Note")[3] in favor of Richert

[1] *Trustee's Motion for Partial Summary Judgment on Count I of the First Amended Complaint and Supporting Memorandum of Law* (the "Motion for Partial Summary Judgment") (Doc. No. 53).
[2] *First Amended Complaint* (the "Amended Complaint") (Doc. No. 41).
[3] Doc. No. 41, ¶ 24; Doc. No. 42, ¶ 24.

Funding in the amount of $12,129,791.96. Rackwise, Inc. is identified as the "Payor" under the Note and Richert Funding is identified as the "Lender." [4]

G. The Note was signed by Mr. Imeson, in his capacity as the Chief Restructuring Officer of Rackwise, Inc.

H. The Note specifies that the "proceeds of the Note will be used by the Payor to pay Lender for aged out factored receivables" advanced by Richert Funding.

I. The Note provides that interest will accrue on a monthly basis "at the rate of nine percent (.75%) per month." Upon default the interest rate under the Note "shall be the sum of the then current rate plus five percent (5%), for a total of fourteen percent (14%)." Furthermore, the Note states that "[i]nterest on this Note shall be calculated on the basis of a 360 day year consisting of twelve 30-day months."

J. The maturity date of the Note is December 31, 2020.

K. Paragraph 3 of the Note provides: "The Notes are convertible during their term at the option of [Richert Funding]."

L. The Note allows for prepayment of "all or any portion of [Rackwise, Inc.'s] obligations under the Note"; however, prepayment is "[s]ubject to the conversion rights."

M. The Note contains the following default provision:

> Event of Default will be deemed to have occurred if . . . [p]ayor fails to pay within five (5) days after written notice from Lender any Principal Amount then due and payable on this Note, or within fifteen (15) days after written notice from Lender any interest or other amount then due and payable on this Note . . . .

N. If Rackwise, Inc. defaulted under the Note, Richert Funding "may declare, by notice of default given to Payor, the entire outstanding Principal Amount of this Note, together

[4] Doc. No. 53-3.

with all accrued, unpaid interest thereon and any other amounts due hereunder, immediately due and payable."

O. The Note is governed by Colorado law.

P. On October 11, 2018, Richert Funding was placed into an involuntary bankruptcy under Chapter 7 of the Bankruptcy Code.[5] The case was then converted to a case under Chapter 11.[6]

Q. The Plaintiff was appointed as Chapter 11 trustee of Richert Funding on October 29, 2018.[7]

R. The case was subsequently reconverted to a case under Chapter 7, and the Plaintiff was then appointed as the Chapter 7 trustee. [8]

S. On February 25, 2021, the Plaintiff sent written notice that Rackwise, Inc. was in default under the Note (the "Notice of Default").[9] The Notice of Default states that "Rackwise has paid neither the interest nor the principal under the Note." The Notice of Default also states that "Rackwise has five days to pay the Note in full" otherwise "the interest rate will increase to the default rate of 14% per year."

T. Rackwise, Inc. did not pay any amounts due under the Note within five days of the Notice of Default.

U. The Plaintiff initiated this adversary proceeding against Rackwise, Inc. and Rackwise Funding (collectively, the "Defendants") by filing a multicount complaint on April 8, 2021.[10]

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[5] *In re Richert Funding, LLC*, Case No. 6:18-bk-06276-GER, Doc. No. 1. All references to the Bankruptcy Code refer to Title 11 of the United States Code.
[6] *See* Case No. 6:18-bk-06276-GER, Doc. No. 21.
[7] *See* Case No. 6:18-bk-06276-GER, Doc. No. 35.
[8] *See* Case No. 6:18-bk-06276-GER, Doc. No. 137.
[9] Doc. No. 53-4.
[10] *See Complaint* (Doc. No. 1).

V. The Plaintiff filed the Amended Complaint on July 18, 2022.[11]

W. The Defendants filed their Answer to the Amended Complaint on August 8, 2022.[12]

X. The Plaintiff filed this Motion for Partial Summary Judgment on November 11, 2022.

Y. The Defendants filed their Response on December 2, 2022.[13]

Z. On December 9, 2022, the Plaintiff filed his Reply.[14]

Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56(a), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[15] The moving party must demonstrate "the absence of a genuine dispute as to material fact."[16] A "material" fact is one that "might affect the outcome of the suit under the governing law."[17] A "genuine" dispute means that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[18] Once a moving party "adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial."[19] In determining entitlement to summary judgment,

[11] Doc. No. 41. Because the Plaintiff's Motion for Partial Summary Judgment only seeks partial summary judgment as to Count I, the Court will only address Count I.
[12] *Defendants' Answer to Amended Complaint and Affirmative Defenses* (the "Answer") (Doc. No. 42).
[13] *Defendants' Response to Plaintiff's Motion for Partial Summary Judgment* (the "Response") (Doc. No. 58).
[14] *Plaintiff Chapter 7 Trustee Soneet R. Kapila's Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment* (the "Reply") (Doc. No. 59).
[15] Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).
[16] *Find What Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (citing *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553).
[17] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).
[18] *Id.*
[19] *James River Ins. Co. v. Ultratec Special Effects Inc*, 22 F.4th 1246, 1251 (11th Cir. 2022) (quoting *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010)).

"facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[20]

Discussion

The Plaintiff seeks partial summary judgment on Count I of the Amended Complaint for all amounts due under the Note. The Plaintiff also seeks an award of attorneys' fees and costs under the Note.

Count I asserts breach of the Note. The Defendants admit that Rackwise, Inc. executed the Note and that the Note is payable to Richert Funding.[21] The Defendants further admit that Rackwise, Inc. failed to pay any amounts owed under the Note.[22] The Defendants do not allege any fraud or misrepresentation in connection with the execution of the Note. Rather, the Defendants argue that because the Note lacks an integration clause, the Court must permit parol evidence to show that the enforceability of the Note was contingent on a restructuring of the Defendants and conversion of debt to equity "that never came to fruition."[23] The Defendants cite to the deposition testimony of Mr. Imeson, who testified that the parties agreed that the Note was to be converted into equity under a global restructuring plan; Mr. Imeson went on to testify that neither the restructuring nor the conversion of debt to equity occurred.[24] The Defendants argue, therefore, that since the contingency did not occur, the Note is not enforceable.

Colorado Law Does Not Allow Parol Evidence to Alter the Express Terms of a Contract or Annihilate its Existence

Under Colorado law, it is permissible to introduce parol evidence to demonstrate that a written instrument was not to become a binding agreement until an agreed upon condition

[20] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007) (citing Fed. R. Civ. P. 56(c)).
[21] Doc. No. 42, ¶ 49.
[22] While this is denied in their Answer, Mr. Imeson testified that the Defendants failed to pay any amounts under the Note. *See* Doc. No. 53-2 at 6-7.
[23] Doc. No. 58 at 1; *accord* Doc. No. 42, ¶ 25.
[24] Doc. No. 53-2 at 9-10.

occurred.[25] Specifically, the Supreme Court of Colorado has held that "it is proper to show by parol evidence that the writing was never executed or delivered as a contract, or was not to become effective until some future day or the happening of some contingency."[26]

However, where the purpose of parol evidence is to do away with the written agreement of the parties, such evidence is not admissible.[27] Further, parol evidence may not be used "to vary the terms of an agreement in writing."[28] The Supreme Court of Colorado "has repeatedly held that the parol evidence rule excludes extrinsic utterances when their introduction would . . . contradict the terms of a written instrument."[29] Likewise, "[i]t is fundamental that a written instrument cannot be enlarged upon or varied by parol unless its terms are so ambiguous as to render uncertain the intent of the parties thereto."[30]

Mr. Imeson's testimony states that the Note was part of a restructuring of the Defendants and that the debt would have been converted to equity if the restructuring had gone through. Nowhere in the testimony cited by the Defendants does Mr. Imeson say that the Note is not payable because a restructuring did not happen. In fact, the Note provides that the Note is "convertible during [its] term at the option of [Richert Funding]." Therefore, even if a restructuring occurred prior to the Note's maturity, it would be Richert Funding's option on whether to convert the debt to equity. Mr. Imeson testified that there was no restructuring and no conversion of the debt to equity.

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[25] *Cosper v. Hancock*, 430 P.2d 80, 81 (Colo. 1967) (holding it was permissible to introduce parol evidence to show that there was an oral condition agreed by the parties to allow the buyer to inspect mining ore before the contract would become effective).
[26] *Witherspoon v. Pusch*, 349 P.2d 137, 138 (Colo. 1960).
[27] *Tarr v. Hicks*, 393 P.2d 557, 563 (Colo. 1964) (denying the use of parol evidence which did not merely seek to explain portions of an agreement but instead sought "to do away with the written agreement of the parties" entirely).
[28] *Cosper*, 430 P.2d at 81 ("Parol evidence to vary the terms of an agreement in writing is, of course, inadmissible, but parol evidence to show that no agreement, in fact, existed at all is admissible."); *see also Knuppel v. Moreland*, 366 P.2d 136, 138 (Colo. 1961) (holding that extrinsic evidence is inadmissible to contradict or vary the terms of a promissory note).
[29] *Knuppel*, 366 P.2d at 138 (citing *Alley v. McMath*, 346 P.2d 304 (Colo. 1959)).
[30] *Alley*, 346 P.2d at 304.

Even if the words used by Mr. Imeson at his deposition could be interpreted as conditioning the enforceability of the Note on a restructuring, by making this argument, the Defendants are seeking to nullify or annihilate the Note. Colorado law does not permit parol evidence to be used in this circumstance.[31]

Further, there is no ambiguity regarding the payment terms of the Note or that any conversion of the debt is at Richert Funding's option. The Note is clear and unambiguous that once Richert Funding sent written notice that the debt was due, Rackwise, Inc. had a specified number of days to pay, otherwise it was in default. Rackwise, Inc. does not dispute receipt of the Notice of Default from the Trustee or its failure to pay the Note. In response to the question, "But other than a global idea of doing a restructuring and conversion, is there any reason that this promissory note has not been paid?" Mr. Imeson replied, "Other than no money, no."[32] As such, the Defendants have failed to demonstrate the existence of an ambiguity or fulfilled contingency in the Note that would excuse payment.

Finally, the Court agrees with the arguments contained in the Motion for Partial Summary Judgment that the Defendants' affirmative defenses that apply to Count I fail as a matter of law.

Conclusion

For the foregoing reasons, the admission of parol evidence is impermissible under Colorado law and Defendants have not established any valid affirmative defense as to Count I. Therefore, the Court finds that there is no material fact in dispute that Rackwise, Inc. breached the

[31] *See Tarr*, 393 P.2d at at 563 (quoting *Grand Junction Gospel Tabernacle v. Orvis*, 157 P.2d 619, 620 (Colo. 1945)) ("It is not here a question of varying terms but the total nullification and annihilation of a written evidence of indebtedness admittedly executed and delivered and wholly free of any suggestion of fraud, deception, coercion, or mistake.").
[32] Doc. No. 53-2.

Note, and the Court finds it appropriate to grant summary judgment in favor of the Plaintiff as to Count I. Accordingly, it is

ORDERED:

1. The Motion for Partial Summary Judgment (Doc. No. 53) is **GRANTED**.

2. Summary judgment is entered in favor of the Plaintiff on Count I of the Amended Complaint.

3. The Plaintiff is entitled to reasonable attorneys' fees and costs as to Count I.

4. The Court reserves ruling on the amount of attorneys' fees and costs to be awarded to the Plaintiff.

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Attorney Esther McKean is directed to serve a copy of this Order on interested parties and file a proof of service within 3 days of entry of the Order.