

**Robin Funding Group LLC v
Southern Elite Roofing, Inc.**

2024 NY Slip Op 31583(U)

May 2, 2024

Supreme Court, New York County

Docket Number: Index No. 653430/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

-----X

ROBIN FUNDING GROUP LLC,

Plaintiff,

INDEX NO. 653430/2023

MOTION DATE 12/26/2023

MOTION SEQ. NO. 002

- v -

SOUTHERN ELITE ROOFING, INC., TEVOR P. MOORE,
VINCENT J. MERCALDO

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff brings the instant action to recover unpaid fees from defendants pursuant to a merchant cash advance agreement. Plaintiff moves for summary judgment and dismissal of defendants' counterclaims and affirmative defenses. Defendants oppose the instant motion and cross-move to dismiss the complaint and for default judgment as to its counterclaims. For the reasons set forth below, plaintiff's motion is granted in part and defendants' cross-motion is denied.

Applicable Law

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a

drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. Mere conclusions or unsubstantiated allegations are not sufficient. *Corcoran Group, Inc v Morris*, 107 AD2d 622, 624 [1st Dept 1985].

Discussion

The Court finds that plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law. At the outset, the affidavit in support of the motion contains an allegation that defendants initiated a “payment stopped” request that blocked plaintiff’s access to the funds. *See* NYCEF Doc. 25, ¶ 16. However, the record relied upon, the history of defendants’ account, has no indication of a stop payment request, the record merely indicated funds not received. *See* NYCEF Doc. 29.

Moreover, the Court notes that the default occurred on July 13, 2023, a Thursday, and this action was commenced on July 18, 2023, only 5 calendar days from the date of the default and less than 5 workdays from which the contract allowed defendants to seek reconciliation. The agreement also contains plaintiff’s risk acknowledgments that include “adverse business conditions” and on the instant motion plaintiff has not established did not exist. Thus, the Court finds that plaintiff has failed to establish a breach by defendants because it fails to establish defendant, Southern Elite Roofing, was generating sufficient receivables and the breach was not caused by an adverse business condition.

As to the portion of plaintiff’s motion that seeks dismissal of the counterclaims based upon CPLR § 3211(a)(7), the Court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994].

Plaintiff does not specifically indicate how the counterclaims are insufficient other than the conclusory statement that the claims fail to plead a cause of action. While plaintiff has equally failed to meet its burden with respect to dismissal of all of the counterclaims, a review of the counterclaims establishes that the fourth counterclaim, fraud, fails to state a cause of action and is refuted by the documentary evidence, namely the subject agreement.

Defendants' fourth counterclaim alleges that plaintiff intentionally misrepresented the nature of the transaction to avoid usury laws. The agreement however specifically identifies the nature of the transaction, and the Court rejects the argument that the underlying agreement is violative of the laws in this state. Accordingly, defendant's fourth counterclaim is dismissed.

Additionally, as to the remaining counterclaims, as the Court has discussed above, plaintiff has not sufficiently established that the remaining counterclaims fail to state a cause of action as the arguments in support of dismissal are conclusory and contain no factual or legal support. As is the same with respect to the portion of the motion that seeks dismissal of the affirmative defenses, plaintiff dedicates one sentence and in a conclusory fashion contend that the affirmative defenses do not contain "specific fact, date or allegation to support them". This one line is insufficient to establish entitlement to dismissal of the affirmative defenses, thus that portion of the motion is denied.

Defendants opposed the motion for summary judgment and simultaneously sought dismissal of the complaint and a default judgment of its counterclaims, based on plaintiff's failure to timely respond to the claims. Defendants contend that the portion of the motion to dismiss the counterclaims is untimely and thus this Court should grant it a default judgment on those claims.

An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim. *Zelnick v Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422 [2d Dept 1996].

Admittedly, the answer and the counterclaims are not verified by the defendants, however defendants have annexed one affidavit to the cross-motion. The Court finds however that this is insufficient to grant a default judgment as the affidavit was submitted by only one of the named defendants, in his individual capacity and the counterclaims are asserted in favor of the business as well as the other individual defendant. Consequently, defendants cross-motion for default judgment as to the counterclaims is denied.

As to the portion of defendants' motion that seeks dismissal of the complaint based on the allegation of an unenforceable loan agreement, as discussed above, that argument is rejected and thus the motion denied. Accordingly, it is hereby

ADJUDGED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the portion of plaintiff's motion that seeks dismissal of the counterclaims is granted in part in that defendants' fourth counterclaim is dismissed; and it is further

ADJUDGED that defendants' motion for default judgment as to its counterclaims is denied.

5/2/2024
DATE


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LYLE E. FRANK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE