Fenix Capital Funding LLC v South Florida Shells Inc.
2025 NY Slip Op 35256(U)
December 22, 2025
Supreme Court, Kings County
Docket Number: Index No. 531507/2025
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of December 2025

HONORABLE FRANCOIS A. RIVERA

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FENIX CAPITAL FUNDING LLC,

Plaintiff,

- against -

SOUTH FLORIDA SHELLS INC., D/B/A: SOUTH FLORIDA SHELLS INC, THE FIT LIFE, LLC, and RICHARD WILSON,

Defendants.

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DECISION & ORDER

Index No.: 531507/2025

Oral Argument: 12/19/2025

Cal. No.: 23

Ms. Seq. No.: 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on October 29, 2025, under motion sequence number one, by Fenix Capital Funding, LLC (hereinafter plaintiff or FCF) for an order pursuant to CPLR 3212 granting plaintiff summary judgment as against South Florida Shells Inc. d/b/a South Florida Shells Inc, The Fit Life, LLC, and Richard Wilson (hereinafter collectively the defendants) for a sum certain. The motion is unopposed.

-Notice of motion
-Affirmation in support
Exhibits A-F
-Affidavit in support[1]
-Statement of material facts[2]

BACKGROUND

On September 11, 2025, FCF commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (hereinafter "KCCO"). On October 11, 2025, the defendants joined issue by interposing and filing a joint verified answer with the KCCO. The verified complaint alleges fifty-one allegations of fact in support of five denominated causes

[1] The affirmation in support cites to the same exhibits as the attorney's affirmation in support of the motion.
[2] The statement of material facts cites to the same exhibits as the attorney's affirmation in support of the motion.

of action. The first cause of action is for breach of contract, the second is for unjust enrichment, the third is for fraud, and the fourth and fifth are for unlawful retention of collateral.

The verified complaint alleges the following salient facts, among others. On or about July 8, 2025, in consideration of the sum of $100,000.00, South Florida Shells Inc sold, assigned, and transferred to FCF 4.00% of its future sales proceeds, up to an aggregate amount of $143,000.00. A copy of the future receivable purchase agreement (hereinafter "the agreement") is annexed hereto as exhibit A. Pursuant to the agreement, payment of the future sales proceeds was to be made by daily ACH transfer from South Florida Shells Inc's bank account to FCF.

Defendant Richard Wilson executed a personal guaranty of payment if South Florida Shells Inc defaulted in its obligations under the agreement. The Fit Life, LLC further agreed to assume the obligations of the Merchant and to be jointly and severally liable to FCF for the total aggregate purchased amount pursuant to that certain cross-collateral addendum to the agreement.

FCF remitted the sum of $100,000.00, less processing fees, to South Florida Shells Inc and South Florida Shells Inc. received the same. The agreement granted FCF a security interest in all of defendants' assets, including without limitation, its then-existing and future receivables as they were generated in the ordinary course of business.

On or about September 5, 2025, South Florida Shells Inc defaulted under the agreement by failing to remit its sales proceeds to FCF as provided for in the agreement. Upon information and belief, South Florida Shells Inc breached its obligations under the agreement by placing a stop payment request to its bank for the ACH transfers or it closed the bank account in its entirety. Additionally, South Florida Shells Inc failed to request a reconciliation, demonstrate an excuse for its failure to perform, or demonstrated that it ceased operations.

Upon information and belief, South Florida Shells Inc. diverted its accounts receivable

despite remaining in business and continuing to generate revenue. In total, South Florida Shells Inc remitted the amount of $30,105.28 in accordance with the Agreement, leaving a balance of $112,894.72 remaining due and owing.

LAW AND APPLICATION

There is no opposition to the instant motion. However, "[a] summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion, (i.e., 'defaulted')" (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 278 n [1st Dept 2006], citing *Vermont Teddy Bear Co., v 1-800 Beargram Co.*, 373 F3d 241, 244 [2d Cir 2004] ["the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the . . . court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law"]; *see Cugini v System Lumber Co., Inc.*, 111 AD2d 114, 115 [1st Dept 1985]).

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issues of fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]).

In the case at bar, the only sworn testimony submitted by FCF in support of the motion was an affirmation of its counsel, Maksim Leyvi (hereinafter "Leyvi"), and an affidavit of Alexander Ryvkin, its collection manager (hereinafter "Ryvkin").

Levyi's affirmation demonstrated no personal knowledge of any of the transactional facts alleged in the complaint. "An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance" (*Nerayoff v Khorshad*, 168 AD3d 866, 867 [2d Dept 2019], citing *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

Ryvkin averred that he was the collection manage for FCF and, as such, had personal knowledge of its business practices and procedures. He further averred that the factual allegations proffered in support of the motion for summary judgment were derived from his review of the plaintiff's business records. He then described the documents annexed to the motion which included the agreement, a wire transfer confirmation, a payment ledger, and a UCC-1 Financing Statement.

It is noted that Ryvkin did not aver that he was a signatory to the agreement or that he participated in the execution of same. Ryvkin averred that the wire transfer confirmation, annexed as exhibit B to the motion, was proof of FCF's performance under the agreement. He also contended that the payment ledger, annexed as exhibit C, was proof of the defendants' default.

The wire transfer, however, was not authenticated by the maker, nor by anyone associated

with the financial institution of the initiator, nor by the recipient. The payment ledger contained entries referring to Automated Clearing House transactions without identifying the financial institutions which maintained the accounts for the parties. Furthermore, the payment log contained "R01", "R08", and FNX code notations which were not explained. In sum, the wire transfer and the payment ledger were introduced without a proper foundation under the business record exception to the hearsay rule.

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015]). Generally, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019] quoting *Standard Textile Co. v National Equip. Rental*, 80 Ad2d 911, 911 [1981]). "However, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business" (*Bank of N.Y. Mellon*, 171 Ad3d at 209).

Here, the payment ledger was submitted without explaining its source, or its meaning. It was neither self-explanatory nor self-admitting and there was an insufficient foundation for its admission as a business record. "[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (*Citibank, N.A. v Potente*, 210 AD3d 861, 862 [2d Dept 2022], quoting *Bank of N.Y. Mellon*, 171 AD3d at 205). Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay (*see Bank of N.Y. Mellon,* 171 AD3d at 198).

Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Cruz v Cruz*, 213 AD3d 805, 807 [2d Dept 2023]). For all the foregoing reasons FCF did not present prima facie evidence of the defendants' breach of the agreement.

Unjust Enrichment

"The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Sarker v Das*, 203 AD3d 973, 975 [2d Dept 2022], quoting *Financial Assistance, Inc. v Graham*, 191 AD3d 952, 956 [2d Dept 2021]).

A plaintiff's cause of action for unjust enrichment may not be maintained if a valid contract governing the subject matter exists. (*CSI Group, LLP v Harper*, 153 AD3d 1314, 1317 [2d Dept 2017], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Under such circumstances, recovery in quasi contract for events arising out of the same subject matter are generally precluded (*CSI Group, LLP v Harper*, 153 AD3d 1314, 1317 [2d Dept 2017], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Plaintiff's claims for breach of contract were undisputedly based on the agreement made between the parties. Consequently, plaintiff may not maintain a claim for unjust enrichment.

Fraud

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Atlasman v Korol*, 238 AD3d 826, 829 [2d Dept 2025], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

"A cause of action to recover damages for fraud cannot be sustained where 'the alleged misrepresentations amounted only to a misrepresentation of the intent or ability to perform under [a] contract'" (*id.*, quoting *Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012], and citing *Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC,* 194 AD3d 805, 807-808 [2d Dept 2021]). The verified complaint has alleged that the defendants fraudulently misrepresented their intention to perform under the agreement. The affidavit of Ryvkin did not address the cause of action for fraud.

Conversion

Plaintiff's fourth and fifth cause of action, described as unlawful retention of collateral, is for conversion. "To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*Amid v Del Col*, 223 AD3d 698, 700 [2d Dept 2024], quoting *RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP,* 195 AD3d 968, 970 [2d Dept 2021]).

FCF averred that pursuant to the terms of the agreement and related UCC-1 financing statement, it had a security interest in the defendants' assets and a right to immediate possession of same due to the defaults by defendants. FCF claimed that it demanded immediate possession of

the defendants' assets, which they refused. FCF claims that the defendants committed conversion by not turning over its assets to FCF.

FCF, however, did not make a prima facie showing of the defendants' breach of the agreement and, therefore, the collateral agreement was not activated. Furthermore, FCF's evidentiary submission did not show that the defendants exercised exclusive control over any specifically identifiable funds belonging to the plaintiff.

In sum, FCF has failed to make a prima facie showing of entitlement to summary judgment on any of the claims it has asserted against the defendants. The motion is therefore denied in its entirety without regard to the sufficiency, or lack thereof, of the opposing papers (*see Cugini v System Lbr. Co.*, 111 AD2d 114, 115 [1st Dept 1985]).

CONCLUSION

The motion by plaintiff FCF Services, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted against defendants South Florida Shells Inc., d/b/a: South Florida Shells Inc, The Fit Life, LLC and Richard Wilson is denied.

The foregoing constitutes the decision and order of the Court.

ENTER:

Thomas A. Raw

J.S.C.