

<b>Merchant Factors Corp. v B H Pet Gear LLC</b>
2021 NY Slip Op 31399(U)
April 13, 2021
Supreme Court, New York County
Docket Number: 655320/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

*Justice*

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MERCHANT FACTORS CORP.,  
  
Plaintiff,  
  
- v -  
  
B H PET GEAR LLC and MATTHEW DWECK,  
  
Defendants.

INDEX NO.	<u>655320/2018</u>
MOTION DATE	_____
MOTION SEQ. NO.	<u>001</u>
<b>DECISION + ORDER ON MOTION</b>	

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, the motion of plaintiff for summary judgment is granted, in accord with the following memorandum decision.

**Background**

Plaintiff Merchant Factors Corp. (“Plaintiff”) commenced this action to recover damages incurred as the result of a breach of an agreement between Plaintiff and defendant B H Pet Gear LLC (“BH”) for the purchase of future receivables (the “Agreement”), as guaranteed by defendant Matthew Dweck (“Dweck”). The complaint interposes causes of action for breach of contract, account stated, conversion, and unjust enrichment against BH and breach of guaranty and unjust enrichment against Dweck (NYSCEF Doc 1). Both defendants were served with process and appeared in the action by filing a joint answer asserting a general denial and five affirmative defenses (NYSCEF Doc 7). Plaintiff now moves for summary judgment in its favor, seeking judgment in the amount of \$286,608.34, with interest from the date of default. Plaintiff also seeks an award of attorneys’ fees and costs incurred enforcing the terms of the Agreement.

### Discussion

On a motion summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960], *rearg denied* 8 NY3d 934 [1960]).

Here, Plaintiff has met its *prima facie* burden by submitting the affidavit of Scott Adler, Senior Executive Vice President of Plaintiff, and attachments thereto (NYSCEF Docs 11-14). Annexed to the affidavit, Adler provides business records to demonstrate that BH entered into the Agreement with Plaintiff, whereby Plaintiff agreed to buy all rights to BH’s future receivables (NYSCEF Doc 12). Dweck signed the agreement as personal guarantor of performance (NYSCEF Doc 13). As further set forth in the affidavit, BH breached the Agreement by failing to make the payment due on October 1, 2018, and payments due thereafter, and has failed to repay the amount owed despite due demand. A copy of a “statement totaling the most current amounts owed by BH to Plaintiff” (Adler aff ¶ 10, exhibit 3). These items are sufficient to satisfy Plaintiff’s *prima facie* burden with respect to the causes of action for breach of contract, account stated, and breach of guaranty. Plaintiff’s causes of action for unjust enrichment and conversion stem from the same transactions as its claims for breach of contract and seek the same monetary damage. These causes of action are, therefore, dismissed as duplicative of the cause of action for breach of contract and breach of guaranty, and Plaintiff’s

motion is denied as to these causes of action (*Corsello v Verizon New York, Inc.*, 18 N.Y.3d 777, 790 [2012]).

In opposition, Dweck submits an affidavit in which he avers that he disputes the amount owed and objects to the statement of account submitted by Plaintiff in support of the motion (NYSCEF Doc 17). Dweck does not submit any documentary evidence of additional payments made or attest to the dates of any additional payments. In reply, Plaintiff submits a supplemental affidavit of Scott Adler, who attests that, “[i]n the ordinary course of its business, Plaintiff establishes online accounts for each of its clients” (Adler supp aff ¶ 3, NYSCEF Doc 24). Adler explains that it maintained such an online account for BH, who had access to monthly statements posted there during the relevant time period (*id.* ¶ 4-7). Copies of monthly statements for the relevant time period are attached to the affidavit (*id.*, exhibit 1, NYSCEF Doc 25). The two Adler affidavits and accompanying records are sufficient to demonstrate the amount owed by BH, and Plaintiff is entitled to summary judgment against both defendants. Plaintiff is also entitled to an award of reasonable attorneys’ fees, as provided for in the Agreement and the Guaranty.

Accordingly, it is

ORDERED that the motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of plaintiff Merchant Factors Corp. and against defendants B H Pet Gear LLC and Matthew Dweck, jointly and severally, in the sum of \$286,608.34, with interest at the statutory rate from October 1, 2018, as calculated by the Clerk, together with reasonable attorneys’ fees in an amount to be determined by a Judicial Hearing Officer (“JHO”) or Special Referee, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that a JHO or Special Referee shall be designated to determine the amount of plaintiff's reasonable attorneys' fees, which are hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the Decision and Order of this Court.

ENTER:

*Louis L. Nock*

<u>4/13/2021</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE