

**Strategic Funding Source, Inc. v Swaim**

2022 NY Slip Op 30294(U)

January 11, 2022

Supreme Court, New York County

Docket Number: Index No. 656857/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

*Justice*

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STRATEGIC FUNDING SOURCE, INC.,

Plaintiff,

- v -

BENJAMIN SWAIM,

Defendant.

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**INDEX NO.** 656857/2020

**MOTION DATE** 07/23/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18

were read on this motion for DEFAULT JUDGMENT.

LOUIS L. NOCK, J.

This is an action by a Revenue-Based Factoring company – plaintiff Strategic Funding Source Inc. – for enforcement of Merchant Agreements it entered into with non-party Dream Car Source.Com LLC (“Dream Car”) (NYSCEF Doc. No. 9). Defendant Benjamin Swaim is a guarantor of Dream Car’s obligations under those agreements (*see, id.*). Under the agreements, defendant’s guaranty is automatically triggered “[i]n the event that [Dream Cars] fails to make a payment or perform any obligation when due . . . [and plaintiff] may enforce its rights [against defendant/guarantor] . . . without first seeking to obtain payment from [Dream Cars] . . . .” (NYSCEF Doc. No. 9 at “GUARANTY.”) Plaintiff moves for a default judgment against defendant in connection with Dream Car’s defaults under said agreements.

A plaintiff that seeks entry of a default judgment for a defendant’s failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant’s default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v*

*Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

As to Liability:

Plaintiff has met its burden to demonstrate liability on defendant’s part on this motion by submission of the affidavit of service demonstrating service of the summons and notice and notice of electronic filing upon defendant (NYSCEF Doc No. 4), an affirmation of its counsel, Nikolaos D. Athanasopoulos, Esq., attesting to the default (NYSCEF Doc No. 7), and an affidavit of David Wolfson, vice president of plaintiff, which attests to the facts constituting plaintiff’s claim (NYSCEF Doc No. 6). The relevant Merchant Agreements, Demand Letter, and Merchant Statement are also submitted as evidence on this motion (NYSCEF Doc. Nos. 9-11). In addition, proof of additional mailing has been submitted (NYSCEF Doc. No. 14).

The motion only seeks a judgment for compensatory damages in respect of defendant’s guaranty of Dream Car’s obligations; waiving plaintiff’s rights under its remaining causes of action for an account stated and for attorneys’ fees (*see*, NYSCEF Doc. No. 6 ¶¶ 2-3).<sup>1</sup>

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<sup>1</sup> This action was commenced on the very last day of the six-year statute of limitations applicable to breach of contract or breach of guaranty (CPLR 213 [1]). The default by Dream Cars in ceasing to make the necessary bank deposits for plaintiff’s benefit under the Merchant Agreement was December 8, 2014 (*see*, NYSCEF Doc. No. 6 ¶ 28) (triggering defendant’s guaranty on that day of Dream Car’s obligations) – exactly six years prior to the December 8, 2020, filing of this lawsuit (*see*, NYSCEF Doc. No. 1). The action is timely – albeit barely – without resort to the executive tolls referenced in the complaint (¶ 20).

Thus, plaintiff is entitled to judgment on liability, on default. However, as to the precise amount of damages, less certainty is present at this stage, as follows.

As to Damages:

The principal judgment sought on this motion is \$113,473.18, as stated in the Wolfson Affidavit (NYSCEF Doc. No. 6). The essential gravamen of the action is that Dream Cars ceased making required bank deposits for plaintiff's benefit under the Merchant Agreements as of December 8, 2014. Mr. Wolfson avers that the amount of receivables purchased by plaintiff from Dream Car's – and guaranteed by defendant – was, and is, \$113,473.18. However, the relatively terse five-paragraph section dedicated in the Wolfson Affidavit as "Itemization of Claim Amount" (NYSCEF Doc. No. 6 at 4 [¶¶ 23-28]) simply does not divine for the court on these papers how that \$113,473.18 sum is arrived at. It certainly does not seem clearly apparent from a reading of the Merchant Agreements themselves, or even from the Merchant Statement, which is basically a ledger unilaterally prepared by the plaintiff.

Accordingly, while this motion for a default judgment is being granted, an inquest will go forward in order to receive evidence from the plaintiff regarding its theory of the damages amount.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment against defendant is granted as to the issue of liability; and it is further

ORDERED that the issue of the quantum of damages, if any, is reserved for further proceedings, in the nature of an inquest, to be heard and determined by a Judicial Hearing Officer ("JHO") or Special Referee; and, therefore, it is

ORDERED that the issue of such damages is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of Plaintiff's said damages, which is 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 the court.

ENTER:



<u>1/11/2022</u>			<u>LOUIS NOCK, J.S.C.</u>	
<b>DATE</b>				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input checked="" type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER