

**CFG Merchant Solutions, LLC v Eagle Eye Truck
Lines LLC**

2024 NY Slip Op 30510(U)

February 13, 2024

Supreme Court, Kings County

Docket Number: Index No. 521023/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

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CFG MERCHANT SOLUTIONS, LLC,

Plaintiff,

Decision and order

- against -

Index No. 521023/2023

EAGLE EYE TRUCK LINES LLC and MUZAFER DURIC,
MIRZA DURIC,

Defendants,

February 13, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 arguing there are no questions of fact the defendants owe the money sought. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On May 4, 2023, the plaintiff a merchant cash advance funding provider entered into a contract with defendants who reside in Michigan. Pursuant to the agreement the plaintiff purchased \$292,900 of defendant's future receivable for \$202,000.00. The defendants guaranteed the agreement. The plaintiff asserts the defendants changed banks in July 2023 and stopped remittances now owe \$165,793.85. This action was commenced and now the plaintiff seeks summary judgement arguing there can be no questions of fact the defendants owe the amount outstanding and judgement should be granted in their favor. The defendants oppose the motion arguing there are questions of fact

which preclude a summary determination at this time.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

The business record exception to the hearsay rule is codified in CPLR §4518. Essentially, there are three foundational requirements which must be satisfied before any part of a business record may be admitted. Thus, it must be demonstrated that the record was made in the regular course of business, that it was the regular course of business to make such a record and that the record was made close in time to the act or transaction or occurrence (CPLR 4518(a), People v. Kennedy, 68 NY2d 569, 510 NYS2d 853 [1986]). Thus, the proponent must establish the records contain routine and regularly conducted business activity that is necessary for the performance of the business's functions, there are procedures for the habitual and systematic making of such records and that the records are made

close in time to the event to insure accuracy (Kennedy, supra).

Moreover, in addition to the above foundational requirements "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, 14 NYS3d 420 [2d Dept., 2015]). Further, the actual business records substantiating the default must be submitted (U.S. Bank National Association v. Kahn Property Owner LLC, 206 AD3d 850, 168 NYS3d 349 [2d Dept., 2022]). Thus, where a party introduces evidence of the existence of outstanding balances, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept., 2012]). In this case, the plaintiff submitted the affidavit of James Elder a manager of collections of the plaintiff who stated that he reviewed the plaintiff's records in connection with the loan extended in this case. He further stated that all the documents he reviewed were maintained in the regular course of business and all such records were made near their occurrence. Mr. Elder stated that "the information reflected in the records was given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately" (see, Affidavit of James Elder, ¶2 [NYSCEF Doc. No. 12]). Thus, the plaintiff has established the

admissibility of the records relied upon since Mr. Elder had knowledge of the plaintiff's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017]). In Capybara Capital LLC v. Zilco NW LLC, 78 Misc3d 1238(A), 188 NYS3d 427 [Supreme Court Kings County 2023] the court held similar language insufficient to establish the admission of any records demonstrating non-payment. However, in American Funding Services v. T.N. Eldridge Developments LLC, 2023 WL 8357446 [Supreme Court New York County 2023] the court declined to adopt that conclusion and held that an affidavit from a manager of the plaintiff was sufficient. In that case, the court concluded the manager "reviewed the records of the Plaintiff, and he has knowledge about how the records are kept and maintained. He also indicated that the documents he is relying on were made in the ordinary course of business" (id). Those assertions were sufficient to consider the records properly admitted as business records.

Likewise, in this case Mr. Elder has submitted an affidavit which avers he is fully familiar with the records in this case, that the records are kept in the ordinary course of business and that the records were made near the time of the occurrence. Thus, the plaintiff has adequately presented sufficient evidence the defendant has failed to make the required payments. Thus, there are no other grounds upon which the defendants oppose the

motion seeking summary judgement.

Therefore, based on the foregoing, the motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: February 13, 2024

Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC