

**Avanza Capital Holdings, LLC v ARM Consulting Corp.**

2024 NY Slip Op 34929(U)

December 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 511195/2025

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 511195/2025

Motion Date: 10-27-25

Mot. Seq. No.: 001 + 002

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AVANZA CAPITAL HOLDINGS, LLC,

Plaintiff,

-against-

**DECISION/ORDER**

ARM CONSULTING CORP. D/B/A RV BUS NC LC  
and MORGAN RAMSEY MILLER,

-----X  
ARM CONSULTING CORP. D/B/A RV BUS NC LC  
and MORGAN RAMSEY MILLER,

Third-Party Plaintiffs,

-against-

DELANCEY STREET GROUP, d/b/a DELANCEY  
STREET,

Third-Party Defendant.

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The following papers, which are e-filed with NYCEF as items 12-20, 34-38, 43-65 , were read on these motions:

In Motion Seq. #1, Plaintiff/Counterclaim-Defendant AVANZA CAPITAL HOLDINGS, LLC (Avanza) requests an Order, pursuant to CPLR §3211(a)(1) and (a)(7), dismissing the Counterclaims in full and with prejudice asserted by Defendant/Counterclaim-Plaintiffs ARM CONSULTING CORP. D/B/A RV BUS NC LC and MORGAN RAMSEY MILLER (collectively, the Miller Defendants).

In Motion Seq. #2, Third-Party Defendant DELANCEY STREET GROUP, d/b/a DELANCEY STREET (DSG) requests an Order, pursuant to CPLR §3211(a)(1) and (a)(7),

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dismissing the Third-Party Complaint asserted by the Miller Defendants. The two motions are consolidated for disposition.

## BACKGROUND

This action arises from a Merchant Cash Advance (“MCA”) Agreement between Avanza and the Miller Defendants. Following an alleged default under the Agreement by the Miller Defendants, Avanza commenced this action. The Miller Defendants asserted counterclaims for breach of contract and usury. Separately, the Miller Defendants engaged DSG for debt restructuring services. In the Third-Party Complaint, the Miller Defendants allege that DSG failed to settle debts despite a \$50,000.00 payment. DSG disputes this and contends the payment was for agreed-upon fees and that the Miller Defendants failed to fund the required trust account, preventing DSG from paying creditors.

## DISCUSSION

### Motion Seq. #1 (Avanza’s Motion to Dismiss Counterclaims)

Avanza argues the counterclaims are barred by a contractual waiver and that usury is not a valid counterclaim for a corporate entity. The Court agrees. New York courts consistently hold that a waiver of the right to assert a counterclaim is enforceable and not against public policy, absent allegations of fraud or negligence in the disposition of collateral (*see Fleet Bank v. Petri Mech. Co.*, 244 A.D.2d 523, 524, 664 N.Y.S.2d 462 [1997]; *Marine Midland Bank v. CMR Indus.*, 159 A.D.2d 94, 559 N.Y.S.2d 892 [1990]). The Miller Defendants have not alleged fraud or negligence regarding the disposition of collateral. Accordingly, the waiver provision in the MCA Agreement mandates dismissal of the breach of contract counterclaim.

Regarding the usury counterclaim, while a corporate defendant may assert criminal usury as an affirmative defense (*see* General Obligations Law § 5-521[3]), it may not assert it as the basis for a counterclaim (*see LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 122 N.Y.S.3d 309 [2020]; *Intima–Eighteen, Inc. v. Schreiber Co.*, 172 A.D.2d 456, 457, 568 N.Y.S.2d 802).

Accordingly, the counterclaims are dismissed as a matter of law.

### **Motion Seq. #2 (DSG's Motion to Dismiss Third-Party Complaint)**

The Third-Party Complaint asserts causes of action for breach of contract, fraud, negligent misrepresentation, and unconscionability. The claim of unconscionability fails as a matter of law. Unconscionability is a defense to the enforcement of a contract, not a freestanding affirmative cause of action for money damages (*see Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604, 606 [2d Dept. 1987]).

The claims of Fraud/Misrepresentation are flatly contradicted by documentary evidence. DSG submitted email correspondence from Ms. Miller confirming that the \$50,000.00 payment was applied to DSG's fees for services rendered, not for creditor payments (*see* NYSCEF Doc. No. 57. Ex. M). Allegations consisting of factual claims flatly contradicted by documentary evidence are not entitled to favorable consideration (*see Wilson v. Hochberg*, 245 A.D.2d 116 [1st Dept. 1997]; *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

The documentary evidence also established DSG's entitlement to dismissal of the breach of contract claim. The documentary evidence demonstrated that the Miller Defendants failed to fund the trust account as required by the Agreement. This funding was a condition precedent for DSG to pay creditors. A party cannot claim breach of contract when they themselves have failed to perform .

Finally, the Third-Party Action is procedural improper. Although the impleader language of CPLR 1007 has been liberally construed and "should not be read as allowing recovery solely for claims sounding in strict indemnity" (*George Cohen Agency v. Donald S. Perlman Agency*, 51 N.Y.2d at 365, 434 N.Y.S.2d 189, 414 N.E.2d 689), the "third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff" (*Zurich Ins. Co. v. White*, 129 A.D.2d 388, 390, 518 N.Y.S.2d 469 [internal quotation marks omitted]; *see Rausch v. Garland*, 88 A.D.2d 1021, 1022, 451 N.Y.S.2d 913; *Long Is. Women's Health Care Assoc., M.D., P.C. v. Haselkorn-Lomasky*, 10 Misc.3d 1068 [A], 2005 N.Y. Slip Op. 52186[U], 2005 WL 3610336 [2005] ). In

other words, “[t]he liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR 1007 should ‘arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action’ ” (*Lucci v. Lucci*, 150 A.D.2d 649, 650, 541 N.Y.S.2d 992, quoting *BBIG Realty Corp. v. Ginsberg*, 111 A.D.2d 91, 93, 489 N.Y.S.2d 224; see *Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 883, 917 N.Y.S.2d 664).

Here, the third-party complaint is not permitted by CPLR 1007 since it failed to state any cause of action arising from or conditioned upon the liability asserted by the Plaintiff against the Defendants in the main action (see *Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d at 883, 917 N.Y.S.2d 664; *Sklar v. Garrett*, 195 A.D.2d 454, 454, 599 N.Y.S.2d 846; *Lucci v. Lucci*, 150 A.D.2d at 650, 541 N.Y.S.2d 992).

Accordingly, it is hereby

ORDERED that Motion Seq. #1 is GRANTED, and the Counterclaims asserted by ARM CONSULTING CORP. D/B/A RV BUS NC LC and MORGAN RAMSEY MILLER are dismissed in their entirety; and it is further

ORDERED that Motion Seq. #2 is GRANTED, and the Third-Party Complaint asserted against DELANCEY STREET GROUP, d/b/a DELANCEY STREET is dismissed in its entirety.

This constitutes the decision and order of the Court.

Dated: December 10, 2024



**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020