

**Spartan Bus. Solutions, LLC v Fish Chips & Grits Corp.**

2024 NY Slip Op 35178(U)

September 6, 2024

Supreme Court, Bronx County

Docket Number: Index No. 805647/2023E

Judge: Kim Adair Wilson

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, NEW YORK: Part IA-12

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SPARTAN BUSINESS SOLUTIONS, LLC  
D/B/A SPARTAN CAPITAL,  
Plaintiff,

**-against-**

FISH CHIPS & GRITS CORP. D/B/A  
FAT MAMAS FISH MARKET and  
ALBERT COOKS,

Defendants.

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**Kim Adair Wilson, J.:**

**DECISION AND ORDER**  
**Index No. 805647/2023E**  
**Motion Seq. #: 001**

**HON. KIM ADAIR WILSON**

“NOTICE OF MOTION” (NYSCEF Doc 7) dated and filed July 12 and 13, 2023, respectively, by Jason A. Gang, Esq. (The Law Office of Jason Gang PLLC), counsel for plaintiff, Spartan Business Solutions, LLC d/b/a Spartan Capital (“Spartan” or “movant”), “seeking an Order for summary judgment on the causes of action in its Verified Complaint and on the affirmative defenses in the Verified Answer of Defendants FISH CHIPS & GRITS CORP. D/B/A FAT MAMAS FISH MARKET and ALBERT COOKS” is decided as set forth below.

The instant matter was commenced on April 10, 2023, by the filing of plaintiff’s Verified Complaint seeking monetary damages for the alleged breach of a March 29, 2023, Agreement whereby plaintiff purchased 15% of defendant Fish Chips & Grits Corp. d/b/a Fat Mamas Fish Market’s (“Fish Chips”) future receivables up to a total value of \$10,360.00, and that such disbursements would be daily deducted from Fish Chip’s bank account until the entire purchased value was remitted, subject to mandatory reconciliation at the behest of the defendant. As consideration for its purchase, plaintiff states that it provided paid defendant Fish Chips a cash advance in the sum of \$6,615.00 (\$7,000.00, less applicable pre-disclosed fees). Under the terms of the agreement, defendant Fish Chips’ performance was personally guaranteed by co-defendant Albert Cooks. On April 3, 2023, after remitting a total of \$129.50, or the equivalent of a single payment, plaintiff alleges that defendant Fish Chips defaulted under the terms of the Agreement by failing to deposit its receipts into the designated account. Plaintiff’s Complaint asserts four causes of action, for breach of contract, personal guarantee, attorney’s fees and unjust enrichment. On May 9, 2023, both co-defendants filed a joint Answer (NYSCEF Doc 5), refuting all allegations and asserting eleven affirmative defenses. No Note of Issue has been filed in this matter.

Now, in the instant motion movant seeks summary judgment, pursuant to CPLR 3212, against both co-defendants in the amount of \$17,190.92, which comprises the outstanding balance owed, plus contractual fees and costs. In support of its motion, movant submits the

annexed "MEMORANDUM OF LAW" (NYSCEF Doc 8); plaintiff's counsel's Affirmation (NYSCEF Doc 9); and plaintiff's "AFFIDAVIT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 11), dated July 7, 2023; Three (3) Affirmations of Service (NYSCEF Doc 14); a copy of the "STANDARD MERCHANT CASH ADVANCE AGREEMENT" (NYSCEF Doc 15); a "PROOF OF FUNDING" (NYSCEF Doc 16); and a "REMITTANCE HISTORY" (NYSCEF Doc 17).

Defendant Fish Chips has filed no opposition papers to this motion.

At the threshold, this Court notes that movant has served its Notice of Motion upon the defendant via the New York State Unified Court System's Electronic Filing System ("E-File"), pursuant to 22 NYCRR § 202.5-bb. The record shows that all parties in this matter are fully participating in the E-Filing system, which automatically transmits a digital notification of new filings to the email address provided by the recipient upon registry. Therefore, service of the Notice of Motion is presumptively deemed effective. Defendant's receipt of this service is further corroborated by the filed Stipulation (NYSCEF Doc 19), dated August 18 and 21, 2023, respectively, and signed by counsels for both parties, consenting to the adjournment of the motion's return date from August 30, 2023, to September 20, 2023; and also by the written correspondence to the Court (NYSCEF Doc 20), dated and filed August 21, 2023, respectively, by plaintiff's former counsel, one William Y. Fowlkes, Esq. (M. Cabrera & Associates, PC), memorializing same.

Movant contends, in sum, that plaintiff has established each element of its breach of contract claim, in that there is manifestly a signed contract requiring performance by the defendant (NYSCEF Doc 15), and that on April 5, 2023, defendant Fish Chips breached the terms of that contract by failing to make the agreed upon payments, causing damages to the plaintiff. Moreover, co-defendant Albert Cooks breached his personal guaranty by failing to meet Fish Chips's daily payment obligations upon its default. In rebuttal to defendants' affirmative defense asserting that the Merchant's Agreement constitutes a usurious loan, and is thus illegal and unenforceable, movant posits that an agreement is not a loan unless it provides (1) a right of interest in principal, and (2) an absolute right to repayment. Movant further contends that the subject agreement contains a mandatory reconciliation provision, is of an indefinite term, and features a provision permitting bankruptcy as a non-default recourse to the merchant, factors recognized by New York courts as determining whether plaintiff enjoyed an absolute right to repayment, and thus distinguishing merchant agreements from business loans. Movant concludes that the defendants' remaining affirmative defenses are unsupported and conclusory, and therefore insufficient to preclude summary judgment to the plaintiff.

Plaintiff's motion is further supported by the Affidavit of Justin Yuen, Chief Financial Officer of plaintiff Spartan, who states that he is familiar with the facts and circumstances of the underlying agreement, and that the business records proffered in support of movant's

motion were made in the regular course of business at or around the time the transactions occurred by a person with personal knowledge and a duty to transmit the information accurately. The affiant asserts that the “Remittance History” (NYSCEF Doc 17) details plaintiff’s attempts to collect its due remittances from the designated account, showing payment of \$129.50 on April 4, 2023, but indicating no additional remittances on April 5, 2023, or on any date subsequent. The affidavit, however, contradicts the business record, in that the affiant states that defendant Fish Chips defaulted as of April 3, 2023, and made no payments after that date. However, plaintiff’s Complaint states that the Merchant Agreement was breached on April 3, 2024, when defendant Fish Chips allegedly “chang[ed] the designated bank account without [p]laintiff’s authorization, by placing a stop payment on [p]laintiff’s debits to the account to by otherwise taking measures to interfere with [p]laintiff’s ability to collect the Future Receivables” (see NYSCEF Doc 1 at ¶11).

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 (2003); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility. *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204, 205 (1990).

The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 182 (1st Dept. 2021). A breach of contract claim must be plead with sufficient particularity to give the defendant the requisite notice of the of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. See CPLR 3013; also see *Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 554 (1st Dept. 2017). The Complaint should be read liberally in plaintiff’s favor. *Id* at 554.

As to the defendants’ Seventh Affirmative Defense that the Merchant Agreement is tantamount to a usurious loan, a usury defense must be established by clear evidence as to all the elements essential thereto [quotes omitted]. *Giventer v. Arnow*, 37 N.Y.2d 305, 309 (1975). The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be. *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 665 (2d Dept. 2020). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. *Id* at 666. Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2)

whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy. *Id.*

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movant, defendant 1990 Ellis, has met its burden to demonstrate entitlement to summary judgment against the plaintiff. Plaintiff's Verified Complaint asserts that defendant Fish Chips defaulted under the agreement on March 3, 2023, and that no additional payments were made subsequent to that date. However, the documentary evidence submitted in support (NYSCEF Doc 17) indicates that Fish Chips remitted payment on April 4, 2024, but not thereafter. Despite this discrepancy, this Court determines that the facts constituting the claim are set forth in the Complaint with sufficient particularity to provide the defendants with notice of the transactions underlying plaintiff's causes of action. Furthermore, defendant Fish Chips would have direct knowledge as to the date such remittances were either made or prevented and is therefore not prejudiced by the inaccuracy of the date indicated in the Complaint. Similarly, although the dates provided in the movant's Affidavit conflict with those indicated in the documentary evidence proffered in support, we will henceforth rely upon the date of default of April 5, 2023, as indicated in the "Remittance History" (see NYSCEF Doc 17).

Movant has established each element of their breach of contract cause of action, having shown the existence of a signed agreement (NYSCEF Doc 15) between the plaintiff and defendant Fish Chips; that defendants failed to make a contracted payment of \$129.50 on April 5, 2023, or on any date thereafter; and that plaintiff has suffered damages pursuant to the terms of the agreement. Movant has also demonstrated that Fish Chips's performance was personally guaranteed by co-defendant Albert Cooks, as set forth in the Guarantee appended to the agreement (see NYSCEF Doc 15 at p.14). It is also evident that the terms of the contract, though onerous, do not constitute a usurious loan under New York State law. The agreement's terms provided defendant Fish Chips with a right to mandatory reconciliation, is of indefinite term by virtue of defendant's right of reconciliation, and permits defendant to pursue bankruptcy without defaulting on the terms. Therefore, because full repayment is contingent on defendant's continued solvency, the transaction cannot be defined as a loan, and the terms of the agreement, including that obligating the defendants to pay Spartan's attorney's fees as well as a contingency fee up to 40% of the amount claimed (see NYSCEF Doc 15 at p.11), are enforceable. In light of the above, and in the absence of any facts or argumentation in opposition, movant's motion for summary judgment is **GRANTED in the entirety**.

Accordingly, plaintiff Spartan Business Solutions LLC's motion for summary judgment against co-defendants Fish Chips & Grits Corp. d/b/a Fat Mamas Fish Market and Albert Cooks on plaintiff's First, Second, Third and Fourth Causes of Action for breach of contract, personal guarantee, attorney's fees and unjust enrichment in their Complaint is


GRANTED, and plaintiff is hereby awarded the sum of \$17,190.92, which is comprised of the outstanding balance owed on the purchased amount of receivables of \$10,230.50; a UCC filing fee in the amount of \$195.00; a default fee of \$2,500.00; and attorney's fees of \$4,265.42 (33% of the amount claimed per Section 46 of the Merchant Agreement). Further, it is hereby

ORDERED AND ADJUDGED that the Clerk of Court is directed to enter a judgment against co-defendants Fish Chips & Grits Corp. d/b/a Fat Mamas Fish Market and Albert Cooks in the amount of \$17,190.92; and it is further

ORDERED that movant Spartan Business Solutions LLC is directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Judgment of this Court.

Dated: September 6, 2024  
Bronx, New York

  
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Hon. Kim Adair Wilson, J.S.C.