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| <b>Unique Funding Solutions LLC v Hector Labastida<br/>Sole Prop</b>                                                                                                                                                                    |
| 2024 NY Slip Op 35628(U)                                                                                                                                                                                                                |
| April 11, 2024                                                                                                                                                                                                                          |
| Supreme Court, Nassau County                                                                                                                                                                                                            |
| Docket Number: Index No. 612345/2022                                                                                                                                                                                                    |
| Judge: Francis D. Ricigliano                                                                                                                                                                                                            |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - IAS PART 26

Present: HON. FRANCIS RICIGLIANO  
Justice of the Supreme Court

-----X  
UNIQUE FUNDING SOLUTIONS LLC,

Plaintiff,

-against-

HECTOR LABASTIDA SOLE PROP D/B/A  
PRISTINE BUILDERS AND HECTOR  
LABASTIDA,

Defendants.  
-----X

**DECISION & ORDER**

INDEX NO.: 612345/2022

Motion Seq. 3

The following e-filed documents were reviewed in consideration of this motion:

Notice of Motion, Affirmations, Exhibits, etc. .... 29 - 41;

Opposition to Motion ..... 42;

Reply..... 43.

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By Notice of Motion (Motion Sequence No. 3), plaintiff Unique Funding Solutions, LLC, seeks an Order granting summary judgment against the defendants, dismissing defendants' affirmative defenses, and awarding plaintiff costs, expenses, and disbursements.

**BACKGROUND**

This action concerns a "Standard Merchant Cash Advance Agreement" whereby defendant Hector Labastida, as sole proprietor of Pristine Builders, agreed to sell \$119,000.00 in future merchant receivables to plaintiff, payable from a percentage of defendant's daily revenue, for the up-front sum of \$85,000.00. Mr. Labastida executed the agreement as owner of Pristine Builders, as well as a personal guarantee. Plaintiff thereafter commenced this action seeking to recover damages for breach of contract and the personal guarantee after defendants allegedly defaulted on the agreement.

In support of the motion, plaintiff submits an Affidavit from Yaakov Winograd, as an authorized representative of Unique Funding, a Business Records Affidavit also executed by Mr. Winograd, a copy of the agreement and the personal guarantee of performance, and a copy of the related transaction history. Mr. Winograd attests to the fact the parties entered into the agreement on August 3, 2022, and that Unique Funding satisfied their obligation under the agreement by providing Mr. Labastida with \$85,000 less applicable fees on August 4, 2022. Mr. Winograd also attests plaintiff collected \$4,520.04 of the purchased sales proceeds before JABLYS stopped remittance on August 17, 2020, and thereby defaulted and deprived plaintiff of the balance due on the agreement. Plaintiff is thus seeking judgment on the balance of \$114,479.60, plus a default fee in the amount of \$2,500.00, for a total sum of \$116,979.60, plus cost, expenses and disbursements.

Defendants oppose the motion via the submission of a Memorandum of Law, and argue plaintiff's motion should be denied as premature as no discovery has been conducted, and because defendant's answer is sufficient to raise issues of fact that warrant a trial. Defendants further contend the reconciliation provision of the agreement is unfair to the defendants, and that the agreement is a loan.

In reply, plaintiff argues they have established prima entitlement to judgment as a matter of law, and that defendants have in turn failed to submit evidence sufficient to raise a question of fact that would warrant a trial. In addition, plaintiff's contend the agreement contained a mandatory reconciliation provision and is not a usurious loan under the prevailing case law.

#### DISCUSSION

It is well settled that a proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). If the movant does establish prima facie entitlement to judgment as a matter of law, the burden then shifts to the party opposing summary judgment to produce evidence sufficient to raise a question of fact sufficient to require a trial. *Alvarez*, 68 NY2d at 324.

Moreover, in moving for summary judgment in an action for breach of contract, a plaintiff must demonstrate the existence of an agreement, performance by the plaintiff, a breach by the defendant, and damages resulting from the breach. See e.g. *JP Morgan Chase v. JH Electric of New York, Inc.*, 69 AD3d 802, 803 (2d Dept 2010); *Key Bank of Maine v. Lisi*, 225 AD2d 669 (2d Dept 1996). In order to establish a claim for breach of guarantee, the moving party must submit proof of the underlying agreement and the signed guarantee. See e.g. *North Fork Bank Corp. v. Graphic Forms Assoc., Inc.*, 36 AD3d 676, 676 (2d Dept 2007).

In this case, the Court finds plaintiff has satisfied its burden of demonstrating prima facie entitlement to judgment as a matter of law as to defendant via its submissions in support of the motion. In his Affidavits, Mr. Winograd attests to the fact he personally reviewed plaintiff's records relating to the defendants, that he has is personally familiar with how plaintiff's records are kept and maintained, that those records are maintained by plaintiff in the course of its regularly conducted business, and that they are made at or near the time of the events recorded. As such, Mr. Winograd's Affidavits establish both the admissibility of the business records on which he relied, and plaintiff's breach. See e.g. *Bank of New York Mellon v. Lopes*, 158 AD3d 662 (2d Dept 2018); *Citibank, N.A. v. Castillo*, 52 Misc.3d 636 (Sup Ct, Westchester County 2016).

Plaintiff having demonstrated its prima facie entitlement to judgment as a matter of law, defendant has failed to submit evidence sufficient to raise a question of fact sufficient to require a trial. Defendant does not dispute entering into the agreement or the amounts advanced by plaintiff and remitted by defendant. Moreover, while defendant's Answer does indeed assert affirmative defenses based upon fraudulent, deceptive, and misleading conduct by plaintiff, the Complaint is not verified by someone with personal knowledge of the facts, and defendant did not submit an Affidavit of someone with personal knowledge in opposition to the motion. See e.g. *Smith v. Lefrak Organization, Inc.*, 60 NY2d 828, 830 (1983). To the extent defendants argue the Merchant Cash Agreement was a usurious loan, New York State courts have consistently ruled that merchant cash agreements such as in this case are not loans, and are thus not subject to usury laws. See e.g. *Principis Capital, L.L.C. v I Do, Inc.*, 201 AD3d 752 (2d Dept 202022); *LG Funding, L.L.C. v. United Senior Props. of Olathe, L.L.C.*, 181 AD3d 664 (2d Dept 2020); *Champion Auto Sales v. Pearl Beta Funding, L.L.C.*, 159 AD3d

507 (1<sup>st</sup> Dept 2018). Finally, to the extent defendant contends plaintiff's motion should be denied as premature on the grounds discovery is outstanding, defendant has failed to demonstrate discovery may lead to relevant evidence of that relevant facts are thus far in the sole possession of the movant. *MVB Collision, Inc., v. Progressive Ins. Co.*, 129 AD3d 1040, 1041 (2d Dept 2015).

In regard to that portion of plaintiff's motion which dismissal of defendant's affirmative defenses, plaintiff has already moved for that relief, defendants did not oppose that application, and the granted that motion, motion sequence, by a Decision and Order dated June 30, 2023, and entered July 5, 2023 (see NYSCEF Doc. 28).

Accordingly, it is hereby

ORDERED, that the portion of plaintiff's motion which seeks an Order dismissing defendants' affirmative defenses is DENIED as moot; and it is further

ORDERED, that the portions of plaintiff's motion which seek an Order granting summary judgment against the defendants, and awarding plaintiff costs, expenses, and disbursements is GRANTED; and it is further

ORDERED, that plaintiff shall submit to the Judgment Clerk a proposed judgment of \$116,979.60, plus costs, expenses and disbursements.

This constitutes the Decision and Order of this Court. Any and all relief not specifically addressed herein is denied.

Dated: April 11, 2024

ENTER:



HON. FRANCIS RICIGLIANO, J.S.C.

**ENTERED**

**Apr 15 2024**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE