

**Grossman v Starks**

2025 NY Slip Op 31415(U)

April 3, 2025

Supreme Court, Westchester County

Docket Number: Index No. 52044/2020

Judge: David S. Zuckerman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
GARY GROSSMAN,

Plaintiff,

**DECISION AFTER TRIAL**

**INDEX NO. :  
52044/2020**

-against-

JOSEPH STARKS and JHJW INC.,

Defendants.

-----X  
ZUCKERMAN, J.

On April 1 and 2, 2025, the court presided over a bench trial. Each side called both individual parties. Defendants also called Ernesto Martinez. In addition, both parties introduced numerous exhibits.

Each individual parties' testimony contradicted the other's regarding a number of significant facts. Consequently, the court's credibility determinations are critical to deciding this case. Having seen and heard the witnesses, the court is in a unique position to determine credibility as well as the weight to be given to accepted testimony (*Kincade v Kincade*, 178 AD2d 510, 511 [2d Dept 1991]).

The court finds Plaintiff credible in all respects and Defendant Joseph Starks significantly less so. One example of Starks' incredible testimony related to his personal guarantee on a note. The note obligated Defendant JHJW, Inc. ("JHJW") to pay Plaintiff in monthly installments. Starks first testified that he was not a guarantor of the note. When confronted by his signature on the guarantee, Starks then testified that he had assigned the guarantee to JHJW - who was obligated on the underlying note in the first place. Putting aside that a guarantee by the same entity that was obligor on a note begs credulity, the referenced assignment, admitted as evidence, clearly refutes Starks' testimony.

#### FINDINGS OF FACT

In 2015, Plaintiff owned non-party Gary Grossman, Inc. and Starks owned JHJW. On December 31, 2015, Plaintiff agreed to sell the assets of Gary Grossman, Inc. to Starks ("the Agreement"). The terms of sale included JHJW issuing Plaintiff a note for \$200,000.00 and Starks' personal guarantee of same. The note required Defendants, beginning February 7, 2016, to make sixty monthly payments of \$3,774.25 to Plaintiff. The Agreement provided that Defendants, would employ Plaintiff for five years and pay \$1,500.00 per week for same. The Agreement also contained a

provision precluding Plaintiff from competing with Defendants for five years, violation of which would excuse Defendants' obligation to pay on the note. The transaction closed on or about January 18, 2016.

In January, 2018, Defendants stopped making the monthly payments on the note. In January, 2020, Defendants effectively terminated Plaintiff's employment by shutting off the work computer and telephone that they had provided. They also terminated the \$1,500.00 weekly payments.

The Complaint contains causes of action for breach of contract (failure to pay salary) and failure to make payments due on the note. Defendants assert the following eleven counterclaims: breach of covenant not to compete, "breach of contract for failure to use best efforts to help JHJW retain existing customers of Gary Grossman, Inc." (Answer, p. 16), "breach of fiduciary duty and/or breach of loyalty" (*id.* at 17), "faithless servant doctrine" (*id.* at 18), temporary and permanent injunction, conversion, tortious interference with contract, tortious interference with prospective business relations, unjust enrichment, breach of duty of good faith and fair dealing, and declaratory judgment (that Defendants are not obligated to make payments on the note).

## DISCUSSION

### 1. Plaintiff's Claims

#### A. Breach of Contract

To establish a claim for breach of contract, Plaintiff must establish "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 208-09 [2d Dept 2013]). "It is well established that in actions for breach of contract the nonbreaching party may recover general damages which are the natural and probable consequence of the breach" (*Kenford Co., Inc. v County of Erie*, 73 NY2d 312, 319 [1989]). The basic principle of damages in a contract action is to leave the injured party in as good a position as he or she would have been if the contract had been fully performed (*Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, 91 NY2d 256, [1998]).

Here, there is no issue regarding the existence of the Agreement. Plaintiff established full performance of all obligations under the Agreement and, in January, 2020, Defendants' breach by failing to pay the \$1,500.00 weekly remuneration.

Notably, Starks confirmed that, in January, 2020, Defendants stopped making the weekly payments. The court rejects Starks' testimony that Plaintiff first breached the Agreement by luring customers from JHJW. Consequently, Plaintiff is entitled to a judgment for \$1,500.00 per week for the period beginning January 31, 2020 and ending January 31, 2021.

#### **B. Breach of Note**

To prevail on a cause of action for breach of a promissory note, "a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms" (*Lugli v Johnston*, 78 AD3d 1133, 1135 [2d Dept 2010]). Here, there is no issue regarding the existence of the note or that Defendant executed it. Plaintiff established that, by the end of January, 2018, Defendants breached the terms of the note by failing to make the required \$3,774.25 monthly payments. The court rejects Starks' testimony that Defendants were no longer obligated to make payments on the note due to Plaintiff's breach of the Agreement by trying to lure customers from JHJW or stealing revenue. The court similarly

rejects Starks' testimony that he is not a guarantor<sup>1</sup>. Consequently, Plaintiff is entitled to a judgment for \$3,774.25 per month for the period beginning February, 2018 and ending February, 2021.

## 2. Defendants' Counterclaims

Based, *inter alia*, on witness credibility determinations, the court finds for Plaintiff on all of Defendants' counterclaims. In any event, Defendants failed to establish damages for any of them. Consequently, Defendants are not entitled to an award of damages.

The remaining contentions, if any, do not compel a different result. Any additional relief requested by any party and not expressly considered herein is denied.

Accordingly, it is hereby

**ORDERED**, after trial by the court, the court finds for Plaintiff as set forth herein.

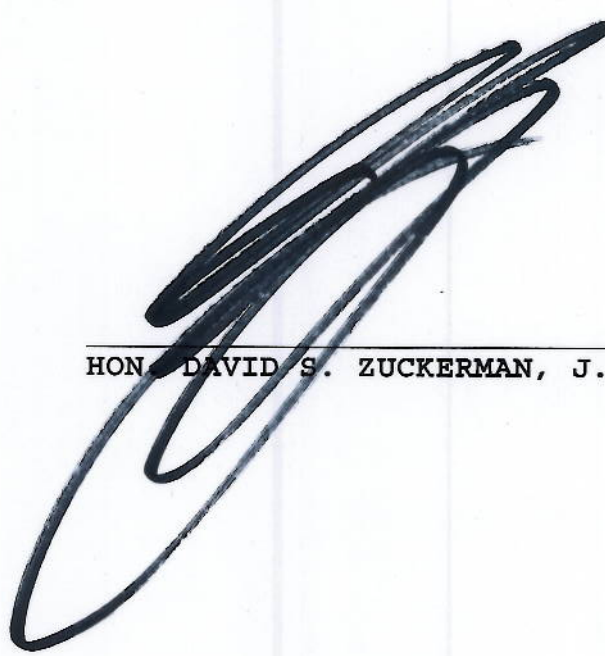
Settle Judgment.

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<sup>1</sup>Starks affirmatively testified that he did not make any payments as guarantor.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: Goshen, New York  
April 3, 2025



HON. DAVID S. ZUCKERMAN, J.S.C.

TO: All parties via NYSCEF