

**Tribe LLC v Blvd Bistro 116th St., LLC**

2025 NY Slip Op 33319(U)

September 5, 2025

Supreme Court, New York County

Docket Number: Index No. 652205/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. MARY V. ROSADO PART **33M**

*Justice*

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INDEX NO. 652205/2022

TRIBE LLC, as assignee of SENAPE CAPITAL, LLC,

MOTION DATE 01/09/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

BLVD BISTRO 116TH STREET, LLC, doing business as  
BLVD BISTRO, THE SWEPSON GROUP, INC., doing  
business as BLVD BISTRO, and MARKISHA C.  
ARMSTRONG SWEPSON

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and after a final submission date of June 9, 2025, Plaintiff Tribe LLC, as assignee of Senape Capital, LLC's ("Plaintiff") motion for summary judgment against Defendants Blvd Bistro 116<sup>th</sup> Street, LLC d/b/a Blvd Bistro ("Blvd Bistro LLC"), The Swepson Group, Inc. d/b/a Blvd Bistro ("Swepson Group"), and Markisha C. Armstrong Swepson ("Ms. Swepson") (collectively "Defendants") seeking a money judgment in the amount of \$91,459.65 is denied. Defendants' cross motion for summary judgment dismissing Plaintiff's Complaint and seeking sanctions is granted in part and denied in part.

**I. Background**

On May 22, 2019, Senape Capital, LLC entered a merchant agreement (the "Contract") with Blvd Bistro LLC and the Swepson Group, Inc. (NYSCEF Doc. 13). Ms. Swepson signed the merchant agreement as a guarantor. On August 1, 2019, Senape Capital, LLC assigned its rights under the Contract to Plaintiff (NYSCEF Doc. 14). Allegedly, Defendants failed to make required

payments under the Contract. Plaintiff commenced this action on May 10, 2022 alleging breach of contract, breach of guaranty, account stated, unjust enrichment, and seeking attorneys' fees (NYSCEF Doc. 1). Defendants Answered on May 16, 2022 (NYSCEF Doc. 4). There was no other activity listed on the docket until January 9, 2025, when Plaintiff filed this motion for summary judgment along with a request for judicial intervention. Defendants oppose Plaintiff's motion, cross move for summary judgment dismissing Plaintiff's Complaint, and are seeking sanctions.

## II. Discussion

### A. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### B. Plaintiff's Motion

Plaintiff's motion for summary judgment is denied. As a preliminary matter, Plaintiff failed to meet its *prima facie* burden by failing to include any ledger showing that Defendants failed to pay according to the Contract (*see, e.g. 46<sup>th</sup> Street Leaseholder LLC v Hercules Corp.*, 208 AD3d 1083 [1st Dept 2022] [plaintiff's statement that defendant accumulated arrears under contract, without a ledger or demand for amounts due in support, was insufficient for purposes of summary judgment]). The issues surrounding the amounts owed, if any, are compounded by Defendants' conflicting affirmation that tens of thousands of dollars were paid, as well as entries from what appear to be a ledger program showing payments were made at times that Plaintiff alleges

Defendants defaulted. As to Plaintiff's account stated cause of action, Plaintiff submits an affirmation from Rizwan Awwal, Plaintiff's managing member, claiming full and accurate accounts were delivered and accepted by Defendants without objection. Yet, copies of those invoices or accounts are not included, nor is there any information as to when or how they were sent to Defendants. On this record, Plaintiff failed to meet its burden on summary judgment. Therefore, Plaintiff's motion is denied.

### **C. Defendants' Cross Motion**

Defendants' cross motion for summary judgment is granted. Plaintiff's unjust enrichment claim is dismissed. A cause of action for unjust enrichment is unavailable when it is duplicative of a breach of contract claim (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]). Here, Plaintiff alleges there exists a valid and enforceable contract and has moved for summary judgment on that premise. Having elected to argue the Contract is valid and enforceable, and seeking to collect sums allegedly owed under that Contract, Plaintiff's unjust enrichment claim is dismissed.

The breach of contract and breach of guaranty claims are also dismissed. Defendants argue these claims must be dismissed because the Contract is an unenforceable usurious loan. When determining whether a transaction is a loan, the Court looks to the substance of the transaction, not the form or title given to it by the drafter (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 334 [2021]; *LG Funding, LLC v United Senior Properties of Olathe, LLC*, 181 AD3d 664 [2d Dept 2020]). Three factors courts consider when determining whether a transaction is a loan are "(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" (*LG Funding, supra* at 666; *see also Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

Here, there is no dispute that the Contract lists Defendants declaring bankruptcy as an event of default (NYSCEF Doc. 28 at §3.1[c]). This weighs in favor of finding the Contract is a usurious loan (*Crystal Springs Capital, Inc. v Big Thicket Coin, LLC*, 220 AD3d 745, 747 [2d Dept 2023]). Moreover, the “reconciliation” provision is a reconciliation provision in name only. It explicitly states that the amount of payment due can be adjusted in Plaintiff’s “sole discretion and as it deems appropriate” (NYSCEF Doc. 28 at p. 1). The Second Department found a nearly identical provision constituted an illusory reconciliation provision (*LG Funding, LLC v Untied Senior Props. Of Olathe, LLC*, 181 AD3d 664, 666 [2d Dept 2020]). Plaintiff’s argument that the sentence in the Contract, which states that upon receipt of Defendants’ monthly bank statements, Plaintiff will credit or debit “the difference from or back to the Merchant’s bank account so that amount debited per month equals the specified percentage” constitutes a valid reconciliation provision is without merit. That sentence is modified by the following sentence which provides that the amount of payment due may be adjusted in Plaintiff’s “sole discretion.” Further, where, as here, no reconciliation ever occurred, despite what Plaintiff claims is “mandatory” reconciliation, the reconciliation clause is considered a sham (*see, e.g. People v Richmond Capital Group LLC*, 80 Misc.3d 1213[A] [Sup. Ct., New York County 2023]).

There are several other hallmark characteristics showing the Contract is a loan. First, Plaintiff was offered collateral in property to secure the loan. Second, e-mail correspondence show Plaintiff’s employees or officers referred to the Contract as a “loan” (NYSCEF Doc. 24). Third, multiple Courts have found that provisions akin to the one here, where placing Defendants in default for missing three or four fixed daily payments, renders a transaction a loan (*People, supra; see also Lateral Recovery LLC v Capital Merchant Services, LLC*, 632 F.Supp.3d 402, 455 [SDNY 2022]).

Finally, the term of the contract is finite and calculable. Because the total repayment amount and daily remittance amount are known, and given reconciliation is in Plaintiff's "sole discretion" the term can be calculated by dividing the total repayment amount (\$86,400) by the daily payment amount (\$587.75) (*Haymount Urgent Care PC v GoFund Advance, LLC*, 609 F.Supp.3d 237, 248 n.5 [SDNY 2022]). While Plaintiff opposes and argues the term is indefinite because of the reconciliation provision, as discussed above, Plaintiff fails to show any reconciliation ever took place. Plaintiff also fails to negate the plain and unambiguous language of the agreement, which states any change or reconciliation for the merchant's payment structure was left to Plaintiff's sole discretion. Therefore, Defendants have established when the substance of the transaction is viewed in its totality, the Contract is a loan subject to New York's usury laws. Defendants have also established that loan's annual interest rate is far more than the 25% limit imposed by New York Penal Law § 190.40, rendering the loan unenforceable.

In opposition Plaintiff fail to raise a triable issue of fact, let alone submit any competent evidence, relying instead on an attorney affirmation and memorandum of law. This is insufficient, as on a motion for summary judgment, the party opposing must assemble and lay bare its proof (*see, e.g. Schiraldi v U.S. Mineral Products*, 194 AD2d 482, 482 [1st Dept 1993]). Therefore, Plaintiff's motion for summary judgment dismissing the breach of contract and breach of guaranty causes of action is granted.

Because the Contract is an unenforceable criminally usurious loan, Plaintiff has no avenue to recoup attorneys' fees, and Plaintiff's account stated claim must also fail as any invoice or accounting provided to Defendants was null and void.<sup>1</sup> Therefore, the causes of action seeking attorneys' fees and account stated are dismissed. Defendants' cross motion for sanctions against

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<sup>1</sup> Plaintiff also failed to produce any invoices or accountings sent to Defendants which Defendants allegedly did not object to.

Plaintiff is denied. In an exercise of its discretion, in the interest of finality, and based on a review of the record, the Court finds Plaintiff's actions during litigation do not rise to the extreme level of frivolity or bad faith required to impose sanctions.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendants' cross motion for summary judgment is granted, and Plaintiff's Complaint is hereby dismissed; and it is further

ORDERED that Defendants' cross motion for sanctions against Plaintiff is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

8/5/2025  
DATE

Mary V Rosado J.S.C.  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: