

**CFG Merchant Solutions, LLC v Essential Founds.  
Preschool & Learning Ctr. LLC**

2025 NY Slip Op 33547(U)

September 18, 2025

Supreme Court, Kings County

Docket Number: Index No. 518812/2025

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16<sup>th</sup> day of September, 2025.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

CFG MERCHANT SOLUTIONS, LLC,

Plaintiff,

- against -

Index No. 518812/2025

DECISION AND ORDER

ESSENTIAL FOUNDATIONS PRESCHOOL & LEARNING CENTER LLC DBA DESERT DREAMS DAYCARE AND JAIME HUNTER,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_

8-15, 17  
18

Upon the foregoing papers in this breach of contract action, plaintiff CFG Merchant Solutions, LLC (“CFG” or “Plaintiff”) moves (Seq. 01) for an order, pursuant to CPLR § 3212, granting it summary judgment against defendants Essential Foundations Preschool & Learning Center LLC (“Essential”) and Jamie Hunter (“Hunter”) ( NYSCEF Doc No. 8).

### BACKGROUND

The complaint alleges that on or about December 2, 2024, CFG and Defendants “entered into an agreement (“Agreement”) whereby Plaintiff agreed to purchase all rights to Essential’s future receivables having an agreed upon value of \$52,125” and Essential agreed to have one bank account approved by Plaintiff (“Bank Account”) from which [it] authorized Plaintiff to make daily ACH withdrawals until \$52,125 was fully paid to Plaintiff” (complaint at ¶¶ 4-5). Hunter guaranteed Essential’s obligation to CFG (*id.* at ¶ 6). CFG “remitted the purchase price for the future receivables to [Essential] as agreed” (*id.* at ¶ 7). The complaint alleges that “[Essential] stopped making its payments to [CFG] and otherwise breached the Agreement by intentionally impeding and preventing Plaintiff from making the agreed upon ACH withdrawals from the Bank Account while conducting regular business operations” (*id.* at ¶ 8). Essential allegedly “made payments totaling \$16,759, leaving a balance of \$35,366” (*id.* at ¶ 9).

The complaint asserts three causes of action: (1) against Essential for breach of the Agreement by failing to make the specified payment; (2) breach of the guaranty executed by Hunter; and (3) unjust enrichment based on the allegation that Defendants “have received the purchase price for the future receivables, yet have failed to pay the sum of \$35,366 pursuant to the Agreement” (*id.* at ¶ 24).

Defendants collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that “this agreement was illegal[,]” “[d]efendants had a lack of understanding as to the material risks, costs [and] conditions

. . . of the Agreement[.]” “[d]efendants here were lured into a loan situation packaged as a merchant cash advance . . .” and “[p]laintiff’s claims are barred by . . . *usury*, estoppel, unclean hands, and waiver” (NYSCEF Doc No. 3 [emphasis added]).

### PARTIES’ CONTENTIONS

#### *CFG’s Instant Summary Judgment Motion*

CFG now moves for summary judgment for the relief demanded in the complaint based on an affidavit from Laura Cinnella (Cinnella), CFG’s Collections Manager, “responsible for, among other duties, maintaining archived documents regarding accounts that are in active litigation” (NYSCEF Doc No. 9 at ¶ 7). Cinnella attests that CFG is a “merchant advance company that provides cash advances to businesses in return for a percentage of the business’ future receivables” (*id.* at ¶ 5).

Cinnella reiterates the allegations in the complaint regarding the Agreement, pursuant to which CFG agreed to buy Essential’s future receivables, and CFG funded the Agreement “having a face value of \$52,125” for a cash advance of \$37,500 (*id.* at ¶ 12). Cinnella attests that Hunter, the President of Essential, guaranteed the amounts owed to CFG (*id.* at ¶ 13). Cinnella further attests that:

“[p]ursuant to the Agreement, [Essential] agreed to have one bank account approved by CFG . . . into which [Essential] and its customers were to remit \$229 a day to CFG . . . until \$52,125 was fully paid to CFG . . .

“[Essential] initially met its obligation under the Agreement by making payments totaling \$16,759 to CFG . . . leaving a balance owed on the Agreement in the amount of \$35,366” (*id.* at ¶¶ 14-15).

Cinnella's affidavit annexes a copy of CFG's payment history as NYSCEF Doc No. 13. Cinnella asserts that "[p]ursuant to Section 9 (a) [of the Agreement], [Essential], by interfering with Plaintiff's rights to collect the Daily Amount, defaulted under the Agreement" (*id.* at ¶ 17). Specifically, Cinnella attests that:

"[o]n or about May 16, 2025, May 19, 2025, May 20, 2025, May 21, 2025, May 22, 2025, May 23, 2025, May 27, 2025 and May 28, 2025, [Essential], by authorizing a closure of the designated bank account (Bank Code R02) from processing the daily ACH payment, consequently breached the Agreement" (*id.* at ¶ 18).

Cinnella references Section 10 of the Agreement, which provides that "[i]n the event of Seller's Breach, the full uncollected Amount Sold plus all fees and charges (including legal fees) due under this Agreement will become due and payable in full . . ." (*id.* at ¶ 20). Cinnella, however, notes that CFG only seeks the "balance due and owing to CFG . . . on the Agreement the amount of \$35,366, plus additional interest, costs and disbursements" and "waives attorney's fees" (*id.* at ¶ 21).

### ***Defendants' Opposition***

Defendants, in opposition, submit only an attorney affirmation asserting that "Plaintiff has violated New York Law which prohibits usurious loans when cloaked as purchases of revenue" (NYSCEF Doc No. 18 at 2, 16 and 20). Defense counsel asserts, repeatedly, that "[t]he lengths of the transactions are fixed and do not vary based on a

specified percentage of revenue” (*id.* at 2-3 and 16-17). Defense counsel further argues, without any personal knowledge, that there were substantial barriers to reconciliation:

“Plaintiff virtually never issues reconciliation refunds and makes them expressly discretionary. Plaintiff uses fixed specified percentages that are grossly inflated to ensure that Defendants are still unable to adjust payments retroactively through reconciliation.

“There are additional barriers to reconciliation. Plaintiff used the effects of declining revenues to disqualify Defendants from reconciliation. Plaintiff manipulated how Defendants’ revenue was calculated when performing reconciliations. Plaintiff refused to provide relief to Defendants when they experienced a sudden drop in revenue. Plaintiff disincentivized reconciliation, and their funders disfavored it. Prospective payment modifications (which are discretionary and do not align payments with the specified percentage) are not a substitute for reconciliation. Plaintiff treats the specified percentage (purportedly the share of revenue that Plaintiff was purchasing) as irrelevant except as a barrier to reconciliation. Plaintiff did not negotiate the specified percentage with Defendants. Plaintiff purported to purchase shares of Defendants’ revenue that were improbably/impossibly large. Plaintiff left it up to individual funders to determine what counted as ‘revenue.’ The specified percentage was only relevant to reconciliation, where it serves chiefly as [a]n impediment” (*id.* at 16-17).

Defense counsel also asserts that “Plaintiff claims rights to repayment and extensive recourse in the event of bankruptcy or lack of revenue” (*id.* at 17).

In addition to arguing that the Agreement is a usurious loan, defense counsel challenges the Cinnella Affidavit, and the admissibility of CFG’s business records and payment history submitted therewith, asserting that:

“[i]n the affidavit, the witness does not testify as to the exact method used by plaintiff to maintain these records. In this case, the witness does not testify as to how the alleged agreement herein was transmitted to the defendant. the witness does not provide testimony concerning the execution ceremony procedure. The witness does not provide testimony regarding the operating system of plaintiff’s office. The witness does not testify that the contract is kept and filed electronically. In her affidavit, the witness does not provide any information regarding the location of the original contract” (*id.* at 14).

Essentially, counsel asserts that “[t]he Employee Affidavit is insufficient in providing a proper foundation and, thus, must be disregarded as hearsay evidence” (*id.* at 15).

### ***CFG’s Reply***

CFG, in reply, submits a memorandum of law asserting that Defendants failed to demonstrate that there is a genuine issue of material fact precluding summary judgment because they did not submit an affidavit from someone with personal knowledge. (NYSCEF Doc No. 20 at 1). CFG asserts that the “bare affirmation of nonmoving party’s attorney who demonstrated no personal knowledge of the manner or the facts and circumstances is without evidentiary value and thus unavailing” (*id.* at 3).

Regarding the merits, CFG asserts that while Defendants argue that the Agreement is a usurious loan rather than a purchase of future receivables, they “rely on case law none of which even concern merchant cash advance agreements . . .” (*id.* at 2). CFG asserts that “New York Courts have codified a three-factor test to determine whether a merchant cash advance agreement or a usurious loan” and “the explicit language of the Agreement heavily

conforms to the three-factor test to show that the Agreement is, in fact, a purchase of future receivables and not a loan” (*id.*).

### DISCUSSION

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

“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” (*Crystal Springs Cap., Inc. v Big Thicket Coin, LLC*, 220 AD3d 745, 746 [2d Dept 2023], quoting *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181

AD3d 664, 665 [2d Dept 2020]). “When determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it” (*Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009] [internal quotation marks omitted]). “To determine whether a transaction constitutes a usurious loan: the court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan” (*Principis Cap., LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022] [internal quotation marks omitted]). The Second Department recently reaffirmed a three-factor test for determining whether or not repayment is absolute or contingent:

“[c]ourts generally “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” (*True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d 787, \*2 [2d Dept 2025] [internal quotation marks omitted]).

Here, Section 7 of the Agreement has a reconciliation provision, which provides in relevant part:

**“Reconciliation and Adjusting the Daily Amount (IMPORTANT PROTECTION FOR SELLER):** The initial Daily Amount is intended to represent the specified Purchased Percentage of Seller's Future Receipts. At any time, Seller or Buyer may request that Buyer adjust the Daily Amount to more closely reflect the Seller’s actual Future Receipts times the specified Purchased Percentage.

a. **How Seller may Request a Reconciliation.** Seller may request a reconciliation by sending an email to [reconciliation@cfgms.com](mailto:reconciliation@cfgms.com).

b. **How Buyer may Request a Reconciliation.** Buyer may request a reconciliation in writing via regular mail or e-mail.

c. **Adjusting the Daily Amount.** Seller agrees to provide Buyer any information reasonably requested by Buyer to assist in this reconciliation, including but not limited to Seller's most recent full month's official Bank Account statement, along with a list of subsequent transactions from the end of that statement to-date in any format Buyer reasonably requests (the 'Reconciliation Information'). *Upon receipt of the Reconciliation Information, Buyer shall promptly* (but no later than three (3) calendar days following Buyer's reasonable verification of Reconciliation Information), *adjust* the Daily Amount on an going-forward basis *to more closely reflect the Seller's actual Future Receipts* times the specific Purchased Percentage. After each adjustment made the pursuant to this paragraph, the new dollar amount shall be deemed the Daily Amount until any subsequent adjustment. If an adjustment results in an increa[s]e to the Daily Amount, Buyer will give Seller notice prior to any such adjustment. . . ." (NYSCEF Doc No. 12 at § 7 [a]-[c] [emphasis added]).

This reconciliation provision weighs in favor of repayment under the Agreement being contingent, since reconciliation is not in CFG's sole discretion and Section 7 [C] of the Agreement explicitly states that, upon receipt of reconciliation information, the payment amount shall be adjusted "to more closely reflect the Seller's actual Future Receipts . . ."

Regarding the second prong of the test, the Agreement does not have a finite term. Section 1 of the Agreement entitled "Sale of Future Receipts" specifically provides that payment is intended to represent the Specified Percentage of Seller's Future Receipts:

“Seller agrees to sell to Buyer, in consideration of the Purchase Price as specified in the Schedule of Purchased Receipts, the Amount Sold, by delivering the Purchased Percentage of the proceeds of each future sale made by Seller (‘Future Receipts’), including amounts due from Seller’s payment card processor (hereafter ‘Processor’). “Future Receipts” includes all payments made by cash, check, ACH or other electronic transfer, credit card, debit card, bank card, charge card . . . or other form of monetary payment in the ordinary course of Seller’s business. As payment for the Amount Sold, Buyer will deliver to Seller the Purchase Price, shown above, minus any fees shown above. . . .” (*id.* at §1).

Absent a payment default, by its provisions, the Agreement’s term would have expired once the total amount of purchased Future Receipts is paid to CFG. Furthermore, the reconciliation provision rendered the term of the Agreement indefinite (*True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d at \*2).

Finally, Section 4 (g) of the Agreement, which contains Seller’s Representations, Warranties and Covenants, provides that:

“Each fact in any financial record, statement, books and records or other documents Seller has shown to Buyer, either before or after the execution of this Agreement, was true, accurate and complete at such dates. *As of the date of this Agreement*, Seller is in good standing with all financing agreements and *is not contemplating bankruptcy*” (*id.* at §4[g] [emphasis added]).

Other than the foregoing representation that Seller is not contemplating bankruptcy, Section 6 of the Agreement further provides, in relevant part, that Buyer assumes the risk that Seller goes bankrupt:

“Buyer assumes the risk that Future Receipts may be remitted more slowly than Buyer may have anticipated or projected

because Seller’s business has slowed down, *and the risk that the full Amount Sold may never be remitted because Seller’s business went bankrupt* or Seller otherwise ceased operations in the ordinary course of business” (*id.* at §6 [emphasis added]).

Since bankruptcy relieved the Corporate Defendant of the obligation of repayment, CFG’s entitlement to repayment was not absolute (*True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d at \*2).

Considering the three foregoing factors, CFG has satisfied its prima facie burden of demonstrating that the parties’ Agreement was for the purchase of Essential’s future receivables and not an illegal usurious loan. Defendants, in opposition, failed to raise an issue of fact. Indeed, Defendants merely opposed CFG’s summary judgment motion with an attorney affirmation, which lacks any evidentiary value (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

**CONCLUSION**

Accordingly, it is hereby

**ORDERED** that CFG’s summary judgment motion (Seq. 01) is granted and the clerk is directed to enter judgment against Defendants in the amount of \$35,366.00 plus interest from May 16, 2025, the date of the initial breach.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

**Hon. Wavny Toussaint  
J.S.C.**

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KINGS COUNTY CLERK  
FILED