

AKF Inc. v Steel City Dance & Gymnastics LLC

2025 NY Slip Op 33826(U)

October 7, 2025

Supreme Court, New York County

Docket Number: Index No. 652766/2024

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

Justice

-----X

AKF INC.,

Plaintiff,

- v -

STEEL CITY DANCE & GYMNASTICS LLC,AUTUMN
MCCOMBIE, STEEL CITY DANCE & GYMNASTICS LLC

Defendant.

-----X

INDEX NO. 652766/2024

MOTION DATE 05/29/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT .

Upon the foregoing documents, it is

Before the Court is the motion by Plaintiff, AKF Inc., D/B/A Fundkite ("Plaintiff"), for an order granting summary judgment in lieu of complaint pursuant to CPLR §3213. The plaintiff seeks to enforce a settlement agreement entered into between the parties and demands judgment for an outstanding balance of \$42,231.52. The plaintiff asserts that the Settlement Agreement is an instrument for the payment of money only and that the defendants have defaulted. In opposition, the defendants raise several defenses, including that the underlying transaction was a criminally usurious loan and that the plaintiff committed a prior material breach, thereby creating triable issues of fact that preclude summary judgment.

For the reasons that follow, Plaintiff's motion for summary judgment in lieu of complaint is denied.

The dispute originates from a Revenue Purchase Agreement ("RPA") executed by the parties on or about December 19, 2023. Under the terms of the RPA, the plaintiff advanced funds to the defendant Steel City Dance & Gymnastics LLC in exchange for the purchase of a specified amount of the defendant's future receivables. A subsequent dispute arose concerning performance under the RPA, which led the parties to execute a Settlement Agreement on March 13, 2024. The Settlement Agreement established a "Settlement Amount" of \$83,018.55 to be paid by the defendants. The plaintiff now alleges that the defendants have breached the Settlement Agreement by ceasing payments after remitting a total of \$41,037.72. Plaintiff therefore seeks an accelerated judgment for the allegedly outstanding amount of \$42,231.52.

The plaintiff, as the moving party, contends that the Settlement Agreement is an unequivocal instrument for the payment of money only, making it a suitable candidate for the

accelerated procedure of CPLR § 3213. The plaintiff asserts that it has established a prima facie case by submitting the executed Settlement Agreement and an affidavit attesting to the defendants' default. The plaintiff argues that the defendants' payment obligations were unconditional and that their failure to remit the full Settlement Amount, after having paid only \$41,037.72, constitutes a clear breach of the agreement, entitling the plaintiff to expedited summary judgment.

The defendants raise several defenses that they contend create triable issues of material fact precluding summary judgment. First, they assert that Settlement Agreement was procured by fraud and/or that the plaintiff committed a prior material breach of the parties' understanding. Specifically, the defendants allege that after the plaintiff received a \$35,000 payment from the defendants' restrained funds, it failed to honor its obligation to release liens it had placed on the defendants' accounts. The defendants argue this failure crippled their cash flow and directly prevented them from making further payments as required by the Settlement Agreement. Second, the defendants maintain that the underlying RPA was not a legitimate purchase of future receivables but a criminally usurious loan. They calculate that the transaction, which involved an advance of \$54,993.00 for a total repayment of \$84,528.00, carried an effective annual interest rate of approximately 54%. This rate far exceeds the 25% criminal usury threshold established by New York Penal Law § 190.40. Defendants argue that because the underlying RPA is void as a matter of law, the subsequent Settlement Agreement, which was executed to resolve a dispute over this void obligation, is also unenforceable. Flowing from the usury argument, the defendants also contend that the Settlement Agreement is void for lack of consideration. They argue that a settlement predicated on a criminally usurious and therefore void contract cannot be supported by valid consideration.

In order to qualify for CPLR 3213 treatment, plaintiff must be able to establish a prima facie case by proof of the agreement and a failure to make the payments called for thereunder. Once plaintiff has met its burden, it is incumbent upon defendant to establish, by admissible evidence, that a triable issue of fact exists (*see SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). A settlement agreement can form the basis for a summary judgment in lieu of complaint motion if it is an instrument for the payment of money only (*see Tongkook Am., Inc. v Bates*, 295 AD2d 202, 202 [1st Dept 2002]). While a settlement agreement can qualify for such treatment, the motion is nonetheless subject to the overarching standards of summary judgment. The standard for a CPLR 3212 motion for summary judgment “is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial.” (*Funding Group, Inc. v Water Chef, Inc.*, 19 Misc3d 483, 486 [Sup Ct, NY County 2008], *citing Andre v Pameroy*, 35 NY2d 361 [1974].) All of the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion. (*See Bramham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007].) The movant on a motion for summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law “by tender of evidentiary proof in admissible form” sufficient to eliminate any material issues of fact about the claim or claims at issue. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once the initial burden is established, the burden shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact.” (*Id.*)

Upon review of the papers submitted, the Court finds that the defendants have raised several triable issues of material fact that preclude the granting of summary judgment at this preliminary stage. The defendants have raised a material issue of fact regarding Plaintiff's performance of its own obligations related to the settlement. Defendants allege that Plaintiff's failure to release liens on their payment processing accounts after receiving a \$35,000 payment constituted a material breach that excused Defendants' subsequent non-payment. Plaintiff correctly notes that an explicit obligation to release liens is not contained within the four corners of the Settlement Agreement itself. However, the email correspondence submitted by Defendants is sufficient to raise a triable issue of fact as to the parties' full agreement. The email chain begins on April 23, 2024, with Defendants' counsel attaching the signed agreement and stating, "Please send the releases to ICP (iclass pro), quickbooks and venmo asap if you can so we can get your 35k out timely." Subsequent emails from Plaintiff's agent on April 26 and April 29 confirm an understanding that the release of liens was contingent upon receipt of the wired funds, which the defendants allege the plaintiff failed to fully effectuate even after receiving payment. This correspondence evidences an understanding that the release of liens may have been a condition precedent or a concurrent obligation essential to Defendants' ability to perform. Whether Plaintiff failed to perform this obligation and whether that failure excused Defendants' subsequent breach are triable issues of fact that cannot be resolved on this motion.

The parties also fundamentally disagree on the legal character of the December 19, 2023 Revenue Purchase Agreement. Plaintiff characterizes it as a non-recourse sale of future receivables, pointing to its indefinite term contingent on business revenue, a provision for reconciliation, and the absence of recourse in the event of bankruptcy. Indeed, the RPA itself states in capitalized letters, "THIS IS NOT A LOAN." Conversely, the defendants vehemently argue it is a disguised loan with a criminally usurious interest rate of approximately 54%, well above the 25% statutory maximum. The determination of whether a transaction is a true sale of receivables or a disguised usurious loan is a fact-intensive inquiry that requires the court to look beyond the form of the documents to their substance. The presence of factors like a reconciliation clause or an indefinite term are not, in themselves, dispositive. Where a colorable claim of criminal usury is raised, the court must scrutinize the transaction in its totality. There is simply not enough information on this bare record to determine whether the transaction was a legitimate purchase of receivables or a disguised usurious loan.

Based on the colorable and fact-dependent defenses raised—most notably the factual dispute over the lien releases, as well as the defense of usury, the Court finds that summary judgment is premature. Defendants have sufficiently demonstrated that "facts essential to justify opposition may exist but cannot then be stated" without an opportunity for discovery pursuant to CPLR 3212(f). Discovery is necessary to develop a record regarding the true nature of the RPA, the negotiations surrounding the Settlement Agreement, and the parties' performance concerning the release of liens and restrained funds.

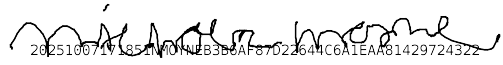
The Court finds that triable issues of material fact exist which preclude the granting of summary judgment to the Plaintiff at this time. Accordingly, it is hereby

ORDERED that the Plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 is DENIED in its entirety; and it is further

ORDERED that the Plaintiff's moving papers (the Summons and Notice of Motion, affirmation, affidavit, and exhibits) shall be deemed the complaint in this action, and the Defendants' answering papers shall be deemed the answer; and it is further

ORDERED that the parties shall proceed with discovery in the ordinary course of litigation.

This constitutes the Decision and Order of the Court.


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10/7/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE