

Byzfunder NY LLC v Second to None Exteriors, LLC
2025 NY Slip Op 35231(U)
June 9, 2025
Supreme Court, Rockland County
Docket Number: Index No. 032098/2024
Judge: Keith J. Cornell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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BYZFUNDER NY LLC D/B/A BYZFUNDER, :

Plaintiff, :

Index #: 032098/2024

-against-

: **DECISION AND ORDER**

: (Motion Seq. #2 & #3)

SECOND TO NONE EXTERIORS, LLC D/B/A
SECOND TO NONE EXTERIORS and
MICHAEL EDWARD ECKLER, :

Defendants. :

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PRESENT: HON. KEITH J. CORNELL, A.J.S.C.

Before the Court is the motion by Byzfunder NY LLC (“Byzfunder” or “Plaintiff”) made pursuant to CPLR § 3212 for summary judgment against each of the above captioned Defendants. Also before the Court is the cross-motion of Defendants seeking summary judgment against Plaintiff. The Court has read and considered NYSCEF documents #48-62 in deciding the motions.

Background

On January 11, 2024, Second to None Exteriors, LLC (“Merchant”) and Defendant Michael Edward Eckler (“Defendants”) entered into a Revenue Purchase Agreement (“RPA”) with Plaintiff. Eckler also personally signed the agreement as guarantor. Per the terms of the RPA, Merchant sold \$68,000.00 of its future receivables to Byzfunder for \$50,000.00. Merchant agreed to make weekly payments to Byzfunder in the amount of \$2,000.00 until the \$68,000.00 was paid. The weekly payment was set at 4.48% of Merchant’s weekly receivables. According to Plaintiff, on January 11, 2024, \$48,105.00 was transferred to Merchant’s bank account (Doc. 54).

This action was commenced by way of a Summons and Complaint filed on April 17, 2024. (Doc. 1). Plaintiff alleged that Defendants breached the RPA after remitting \$19,602.20 of the \$68,000.00 owed, leaving a balance of \$48,397.80. Plaintiff also alleged that as a result of the breach, Defendants owed NSF fees of \$100, default fees of \$2,500.00, and \$14,519.34 in attorneys' fees, for a total of \$65,517.14 plus interest, costs, and disbursements.

Defendants filed a Verified Answer with thirty-four affirmative defenses on April 24, 2024. (Doc. 4). On the same date, Defendant filed various discovery demands, a request to change venue, and request for a preliminary conference. (Docs. 5-13). The next day, April 25, 2024, Plaintiff filed a Notice to Admit, a demand for documents, and interrogatories (Doc. 14, 17-18). Plaintiff also filed a response to Defendants' document demands that primarily consisted of objections to the demands. (Doc. 20). Plaintiff produced four documents: a copy of the RPA, a document entitled "transaction history," proof of funding, and the authorization for direct payments from Merchant's bank account to Plaintiff (Doc. 23-26). Plaintiff also responded to the demand for a bill of particulars and demand for any UCC notices and liens. (Doc. 21-22). These responses were also primarily objections to the requests. No additional documents were produced.

On May 1, 2025, Defendants replied to the notice to admit, arguing that it was improper per CPLR § 3123 because it sought admissions as to the issue in controversy. On May 3, 2025, Defendant filed a verification for the answer previously filed.

On September 19, 2024, Plaintiff moved for summary judgment pursuant to CPLR § 3212 on the claims of breach of contract and the personal guarantee. On October 18, 2024, Defendants filed opposition to the motion. On October 23, 2024, Plaintiff filed a memorandum of law in reply. On November 22, 2024, Plaintiff voluntarily withdrew its motion without prejudice.

Plaintiff refiled the motion for summary judgment on February 13, 2025. In support, Plaintiff submitted the affirmation of Marshall Rosenblum, a Manager of Byzfunder (Doc. 49), the affirmation of Ariel Bouskila, Esq. (Doc. 50), and exhibits A-D, which included a copy of the RPA (Doc. 52), an exhibit entitled “transaction history” (Doc. 53), proof of funding (Doc. 54), and copies of three pages from Merchant’s bank statements (Doc. 54). Plaintiff also submitted a statement of material facts. (Doc. 51). Rosenblum affirmed that Plaintiff performed its part of the Agreement by “causing the deposit of the ‘Purchase Price,’ \$50,000.00, less applicable fees . . . to the Merchant’s business account.” (¶10). Rosenblum further affirmed that “The Merchant breached the Agreement on March 29, 2024, when Plaintiff was deprived of the Remittance due, and the Merchant's bank returned the code of ‘R02 Account Closed.’” (¶ 14). Rosenblum alleged that the return of that payment code breached the contract per the sections “No Diversion of Future Receipts” (Doc. 52 ¶ 2.5) and “Events of Default” (Id. ¶ 3.1).

On February 28, 2025, Defendants filed their cross-motion. Defendant argued that the complaint failed to make out a *prima facie* case of breach of contract because it failed to give any details of default. Defendants point out the complaint neither identifies a date of default nor an event of default. Defendants argue that the alleged return of an ACH code of R02 is not an identified default under the RPA. Defendants argue that Plaintiff’s election to accelerate the amount due for an alleged breach is unconscionable. Defendants argue that Plaintiff offers no evidence to establish a “diversion of funds.” Defendants argue the contract is actually a loan, not a merchant cash advance, and should be subject to the prohibition on usury. Defendants argue that the personal guarantee must be dismissed as a matter of law. Defendants argue that

Defendant Michael Eckler signed the guarantee in his representative capacity, not in his personal capacity.

Defendants argue in the alternative that summary judgment cannot be granted to Plaintiff because material facts remain at issue. Defendants argue that the Rosenblum Affirmation fails to lay a proper foundation for the admission of business records. Defendants argue that the RPA is truly a usurious loan that is void as a matter of law. Defendants argue that the default fee and the attorneys fees are unenforceable penalties.

In reply, Plaintiff argues that the personal guarantee is enforceable personally against Defendant Eckler. Plaintiff argues that the one outlier decision cited by Defendants only found that an issue of fact existed, not that the personal guarantee was unenforceable. Plaintiff argues that no material issues of fact exist. Plaintiff argues that it has demonstrated that Defendants breached the RPA by failing to remit the receivables to Plaintiff. Plaintiff argues that a proper foundation was laid for admission of business records. Plaintiff argues that Defendants failed to properly respond to the statement of material facts, thereby admitting those facts that were not specifically controverted.

Plaintiff argues that Merchant collected over \$360,000 in receivables in April 2024, requiring Merchant to make a payment of \$16,128 that month (4.48%). Plaintiff points to Doc. 55, which contains two pages from Merchant's April 2024 bank statement and one page from Merchant's July 2024 bank statement. Plaintiff points out that these statements show deposits of \$364,517.29 and \$406,455.00 respectively. Plaintiff argues that Merchant had the funds to make its payments, but did not do so, thereby establishing the breach.

Plaintiff argues that the RPA is not a loan. Plaintiff argues that Defendants failed to inform Plaintiff of any business decline or request a reconciliation. Instead, Defendants simply stopped paying, thereby breaching the contract. Plaintiff argues that the RPA satisfies the three prong test adopted by the Appellate Departments for determining if a transaction is a loan or a purchase of future receivables. Finally, Plaintiff argues that it is entitled to attorneys' fees based on the contract.

DISCUSSION

Plaintiff's Motion for Summary Judgment

The remedy of summary judgment is a drastic one, and it should only be granted when it is clear no triable issue of material facts exists. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Andre v. Pomeroy, 35 N.Y.2d 361 (1974). The proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985); see Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The evidence submitted must be in admissible form. See, e.g., JP Morgan Chase Bank, N.A. v RADS Group, Inc., 88 A.D.3d 766, 767 (2d Dept. 2011) (summary judgment denied because plaintiff failed to demonstrate admissibility of defendant's payment history). Once a *prima facie* showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. Alvarez, supra. As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. See Phillips

v. Kantok & Co., 31 N.Y.2d 307 (1982). On a motion for summary judgment, the Court's role is issue finding, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. See Gitlin v. Chirkin, 98 A.D.3d 561 (2d Dept. 2012); Dowsey v. Megerlan, 121 A.D.2d 497 (2d Dept. 1986). Even if the plaintiff's motion is unopposed, summary judgment should not be granted merely because the party against whom judgment is sought failed to submit opposition papers. See Liberty Taxi Mgt., Inc v. Gincherman, 32 A.D.3d 276, 277 fn. 1 (1st Dept. 2006) (citing Vermont Teddy Bear Co., v. 1-800 Beargram Co., 373 F.3d 241 (2d Cir. 2004) ("the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the...court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement as a matter of law")).

To establish a *prima facie* claim for breach of contract, a plaintiff must establish the existence of a contract, that plaintiff performed pursuant to the contract, that defendant breached its contractual obligations, and that plaintiff was damaged as a result of the breach. See Dee v. Rakower, 112 A.D.3d 204 (2d Dept. 2013).

Here, Plaintiff offered the Revenue Purchase Agreement (Doc. 52), which establishes existence of the agreement. Plaintiff offered proof of performance with a document from First Republic that purports to establish that Plaintiff transferred funds (Doc 54). Plaintiff also offered a document that it titled "Transaction/Remittance History." (Doc. 53). This document appears to be a download or screenshot of a spreadsheet entitled "Recent ACH Transactions" with entries

dated from January 30, 2024 through March 26, 2024. The processor is identified as “SPS-ByzFunder – Debits” and the amount debited is \$2,000. Two of the transactions have the status “returned” and the processor status of “R02 Account closed.” None of the Defendants are named on this document and it is not clear what entity generated this document.

A business entity may admit a business record to prove its case through a person without personal knowledge of the document if that person can lay a proper foundation per CPLR § 4518. In those cases, the business records exception to the hearsay rule requires someone with personal knowledge of the maker’s business practices and procedures to affirm that the document was created by the business, in the standard course of business, and at or around the time of the occurrence. See id.; Federal Natl. Mtge. Assn. v. Marlin, 168 AD3d 679, 681 (2d Dept. 2019). This foundation usually is provided by the testimony of the custodian, the author, or some other witness familiar with the practices and procedures of the particular business.” Bank of N.Y. Mellon v. Gordon, 171 A.D.3d 197, 205 (2d Dept. 2019).

If the record is received from some other entity, the mere filing or retention of the file(s) is insufficient to qualify the documents as business records. See People v. Cratsley, 86 N.Y.2d 81, 90 (1995). For records of another entity to be admissible, the party offering the document must establish “that the records provided by the maker were incorporated into the recipient’s own records or routinely relied upon by the recipient in its business.” State of New York v. 158th St. & Riverside Dr. Hous. Co., Inc., 100 A.D.3d 1293, 1296 (2d Dept. 2012), lv denied 20 N.Y.3d 858 (2013). Finally, “it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted.” Bank of N.Y. Mellon v. Gordon, 171 A.D.3d 197, 205 (2d Dept. 2019).

Here, Rosenblum laid a proper foundation to introduce the RPA and the proof of funding. However, the “Transaction/Remittance History” offered by Plaintiff is not admissible. This document is devoid of any indication that it refers to Defendants. Further, it lacks standard indicia of reliability, such as an indication of what entity prepared the record or the source of the information within it. Therefore, this document cannot be use as proof of the breach of the RPA.

Further, even if the document entitled “Transaction/Remittance History” were admissible, it is not clear how this would establish a breach of the RPA. First, as Plaintiff argues, and the RPA makes clear, and non-payment, in and of itself, is not an event of default. See Doc 52. at p 1. (“Merchant . . . is not borrowing money from PURCHASER, therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by PURCHASER.”).

Second, Plaintiff claims that “Transaction/Remittance History” establishes a breach of Paragraph 2.5 of the RPA, “No Diversion of Future Receipts.” Paragraph 2.5 states that the Merchant agrees not to revoke the Purchaser’s (Plaintiff) authorization to debit the account where all of Merchant’s receipts are deposited and from which Plaintiff makes it debits for repayment. Plaintiff tries to suggest that the return of the ACH code “R02” is proof that the Merchant had violated this provision of the RPA. However, the code itself does not establish that Merchant revoked Byzfunder’s authorization to debit its weekly payment from Merchant. Even if this code did establish that the future receipts were diverted, Plaintiff’s own records are not sufficient to prove that R02 was returned. Instead, Plaintiff would need to submit documentation from the bank. Finally, Plaintiff’s claim that Merchant had \$360,000 in receivables in April is not supported by any admissible evidence.

Plaintiff failed to establish that Defendant breached the contract. Thus, Plaintiff has not made out a *prima facie* showing in support of summary judgment, and the burden of proof did not shift to Defendants.

Defendants' Cross-motion for Summary Judgment

Defendants argue that they are entitled to dismissal of the second cause of action to enforce the personal guarantee. Defendants point out that the signature line for the Guarantor says "Michael Edward Eckler, Member." Defendant argues the inclusion of the word "Member" raises an issue of fact as to whether Eckler signed in his personal capacity or on behalf of the LLC.

Where there is evidence that a person signed a guaranty as an individual and not on behalf of a business, the inclusion of a title after their signature does not change the nature of the guarantee. See PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 (1st Dept. 2001); Chemical Bank v. Masters, 176 A.D.2d 591 (1st Dept. 1991) (the individual guarantor's writing "V. Chairman" next to his signature "is merely descriptive, and does "not evidence an intention to sign in a purely corporate capacity which would, in any event, be inconsistent with the nature of the guaranty").

Here, Mr. Eckler fails to claim in his affirmation that he signed the guarantee in his capacity of a member of the Merchant. (Doc. 57). And even he had made that claim, it would be sufficient only to raise a triable issue of fact, not to require dismissal.

Defendants also argue that the agreement is a usurious loan, not a genuine purchase of receivables, and therefore unenforceable. When determining whether a transaction constitutes a usurious loan, the transaction must be considered in its entirety and judged "by its real character, rather than by the name, color, or form which the parties have seen fit to give it." LG Funding,

LLC v. United Senior Props of Olathe, LLC, 181 A.D.3d 664, 665 (2d Dept. 2020) (internal citation and quotations omitted); see also Crystal Springs Cap., Inc. v. Big Thicket Coin, LLC, 220 A.D. 745, 748 (2d Dept. 2023); Royal Bus. Group, LLC v. Sky Airparts Intl. Inc., 2025 NY Slip Op 30508(U) (Sup. Ct. Monroe Co. 2025).

A loan is characterized by an absolute entitlement to repayment under all circumstances. See K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc.3d 807, 816 (Sup Ct. Westchester Co. 2017). In assessing whether the transaction is a loan, Courts generally weigh three factors: “(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, 181 A.D.3d at 666.

This agreement specifically states that there is no fixed term (Doc. 52 ¶ 1.2). As for bankruptcy, the agreement specifically states that bankruptcy of the Merchant is not a breach. (Id. p. 1). The agreement also contains a provision purporting to provide a right of reconciliation (Id. ¶ 1.3). However, while the presence of a purported reconciliation provision is “an indication of whether an agreement constitutes a loan,” the court must assess whether there was an obligation of Plaintiff to reconcile. See Royal Bus. Group, LLC, supra, citing Kapitus Servicing, Inc. v. Point Blank Constr., Inc., 221 A.D.3d 532, 534 (1st Dept. 2023). If there is no action obligation on Plaintiff to reconcile despite the inclusion of a purported reconciliation provision, the true nature of the agreement will be called into question.

Here, Defendants have raised a triable issue as to whether the agreement is usurious loan, but they have not established the status of the agreement such that they are entitled to summary judgment on the issue.

Finally, Defendants argue that the default fee and attorney's fees are unenforceable penalties. In breach of contract actions, "the nonbreaching party may recover general damages which are the natural and probable consequence of the breach." Kenford Co. v. County of Erie, 73 N.Y.2d 312, 319 (1989). "Where the breach of contract was a failure to pay money, plaintiff should be limited to a recovery of the contract amounts plus appropriate interest." Scavenger, Inc. v GT Interactive Software Corp., 289 A.D.2d 58, 58-59 (1st Dept 2001); see Cotheal v Talmage, 9 N.Y. 551, 554 (1854) ("Where there is a contract to pay money, the damages for its breach are fixed and liquidated by law, and require no liquidation by the parties. An agreement to pay greater damages is therefore regarded as a penalty.").

Liquidated damages are "an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement." Truck Rent-A-Ctr. v Puritan Farms 2nd, 41 NY2d 420, 424 (1977). A liquidated damage provision in a contract will be enforceable when it can be justified as compensation for loss. See id. (citing Restatement [First] of Contracts § 339 and Comment). However, liquidated damages that are simply an additional penalty are unenforceable as a violation of public policy. See Trustees of Columbia Univ. v. D'Agostino Supermarkets, Inc., 36 N.Y.3d 69, 74-75 (2020).

Plaintiff does not attempt to justify the \$2,500 default fee in opposition to Defendants' motion. Plaintiff offers no valid loss for which it would be entitled to compensation over and above the unremitted purchased amount and interest thereon. Therefore, the default fee is found to be an unenforceable penalty in violation of public policy.

Generally, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or

court rule.” Hooper Assoc., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 (1989). Parties are free to enter private agreements to require the unsuccessful litigant to pay the prevailing party’s attorney’s fees. However, such contractual agreements “must contain ‘unmistakably clear’ language of the parties’ intent to encompass” direct actions between the parties. Sage Sys., Inc. v. Liss, 39 N.Y.3d 27, 31 (2022) (quoting Hooper at 492). Here, the language in Paragraph 3.3 is unmistakably clear in granting Plaintiff entitlement to its attorney’s fees expended on collection efforts as a result of Merchant’s breach.

The contract sets the fees at 30% of the outstanding amount owed on the contract. Courts closely scrutinize contingent fee arrangements between attorneys and their clients. See Lawrence v. Miller, 11 N.Y.3d 588 (2008). Perhaps an even higher level of scrutiny is required when the attorney’s fees will be paid not by the client, but by the party opponent. Here, the attorney’s fees requested are \$14,519.34, based on the balance remaining on the contract. Plaintiff argues that a contingency fee of this type is proper. Defendants argue, at a minimum, a hearing should be held to determine the amount of attorney’s fees owed. Since neither side has prevailed, no determination of the amount of attorney’s fees is necessary and this issue is dismissed as moot.

And it is

ORDERED, that Plaintiff’s motion for summary judgment is DENIED; and it is further

ORDERED, that Defendants’ motion for summary judgment is GRANTED as to the claim that the default fee is an unenforceable penalty, and DENIED on all other points; and it is further

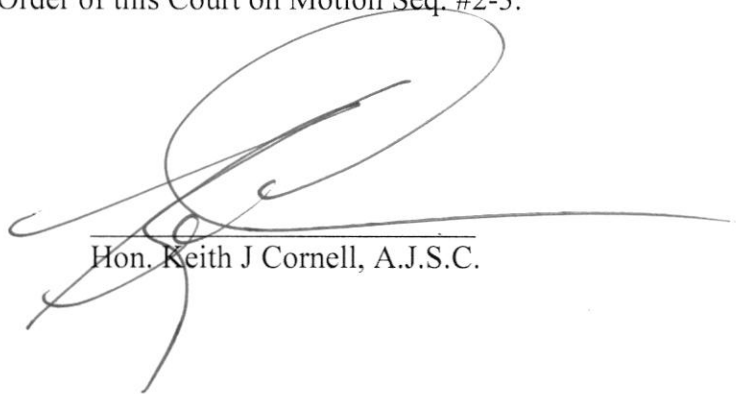
ORDERED, that all counsel shall appear for a preliminary conference on a date to be scheduled by the Clerk in a notice to follow, and it is further

ORDERED, that Defendant Eckler must attend said conference, but may attend virtually by Teams; and it is further

ORDERED, that the attached Preliminary Conference Order shall be completed and submitted to the Court at the preliminary conference.

This constitutes the Decision and Order of this Court on Motion Seq. #2-3.

Dated: June __, 2025
New City, New York



Hon. Keith J Cornell, A.J.S.C.

To: All counsel via NYSCEF