MCA Servicing Co. v Executive Premier Limousine, LLC
2025 NY Slip Op 35233(U)
September 12, 2025
Supreme Court, Monroe County
Docket Number: Index No. E2024013518
Judge: Daniel J. Doyle
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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MCA SERVICING COMPANY,
Plaintiff,

Decision and Order

-vs-

Index No. E2024013518

EXECUTIVE PREMIER LIMOUSINE, LLC D/B/A EXECUTIVE PREMIER LIMOUSINE; ELSAYAD, SHERIF; ELSAYAD SHERIFF; EXECUTIVE PREMIER LIMO; EXECUTIVE PREMIER LIMOUSINE LLC; GOLDEN STATE MOTORS, INC.; EXECUTIVE PREMIER LIMOUSINE, INC. AND SHERIF MOHAMED ELSAYAD,
Defendants.

Appearances:

Ariel Bouskila, Esq., Berkovitch & Bouskila, PLLC, for the Plaintiff
Dominick Dale Esq., for Defendants

Daniel J. Doyle, J.

MCA Servicing Company (hereinafter "plaintiff") initiated this action by the filing of a summons and complaint in August of 2024 against the corporate defendants and Sherif Mohamed Elsayaf, individual guarantor, (hereinafter "defendants") alleging that the defendants breached a sale of a receivables

agreement (hereinafter "agreement")[1] and seeking resultant damages against the corporate defendants and the personal guarantor. [2]

The defendants move to quash a non-party subpoena served by the plaintiff. Plaintiff moves for summary judgment on the causes of action in the complaint. The defendants cross-move for summary judgment. For the reasons that follow, the motion to quash is DENIED. The plaintiff's motion for summary judgment is DENIED. The defendants' motion for summary judgment is partially GRANTED and otherwise DENIED.

Motion to Quash is Denied

On September 4, 2024, the plaintiff e-filed a third party subpoena served upon JP Morgan Chase Bank seeking:

> (1) Copies of all statements of all deposit accounts held in full or in part, by any of the Defendants from June 6, 2024 through the date of your production of documents responsive to this subpoena.
>
> (2) If the subject accounts were closed at any time prior to service date of this subpoena, please provide all documents relating to said closure, including but not limited to, copies of closing statements, reasons for closing, and any cashed checks.

[1] Revenue Purchase Agreement, dated June 6, 2024 (NYSCEF Docket # 2).
[2] The Verified Complaint contains two causes of action: (1) breach of contract; and (2) a cause of action for enforcement on personal guarantees. (NYSCEF Docket # 1.)

JP Morgan Chase Bank complied with the subpoena and produced the requested records on October 12, 2024. The defendants moved to quash on October 21, 2024.

The motion is moot.

> A motion to quash or vacate, of course, is the proper and exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority (*e. g., Matter of Santangello v. People*, 38 N.Y.2d 536, 539, 381 N.Y.S.2d 472, 344 N.E.2d 404; see Carlisle v. Bennett, 268 N.Y. 212, 218, 197 N.E. 220). Such a motion must be made promptly, generally before the return date of the subpoena (*id.*; *see* CPLR 2304; *see, also*, Fed.Rules Civ.Pro., rule 45, subd. [b]). Once there has been compliance with the subpoena, however, a motion to quash or vacate no longer is available (*see Matter of Hynes v. Moskowitz*, 44 N.Y.2d 383, 394, 406 N.Y.S.2d 1, 377 N.E.2d 446, *supra; Matter of Gammarano v. Gold*, 51 A.D.2d 1012, 381 N.Y.S.2d 298, *supra*). Quite simply, having complied with the process the subpoenaed party no longer possesses the option of challenging its validity or the jurisdiction of its issuer. Any other rule would open the door to never-ending challenges to the validity of subpoenas, perhaps even years after initial issuance and compliance. At some point, litigation must terminate.

(*Brunswick Hosp. Ctr., Inc. v. Hynes*, 52 NY2d 333, 339 [1981].)

The Court denies the defendants' request for a protective order. The subpoenaed records- the defendants' bank statements for the relevant time period- are relevant records to the instant action. "We conclude that the "material and necessary" standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery. The words "material and necessary" as used in section 3101 must "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist

preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968])." (*Kapon v. Koch*, 23 NY3d 32, 38 [2014].)

The motion is denied.

The Motions for Summary Judgment

Relevant Law

A party seeking summary judgment pursuant to CPLR 3212 must make prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact. (*Iselin & Co. Inc v Landau*, 71 NY2d 420 [1988].) Summary judgment may only be granted when "it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function". (*Suffolk County Dep't of Soc. Servs. v James M.*, 83 NY2d 178, 182 [1994].) Only when the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 851 [1985].)

"'It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' (*Scott v. Long Is. Power Auth.*, 294 A.D.2d 348, 348, 741 N.Y.S.2d 708; *see Ruiz v. Griffin*, 71 A.D.3d 1112, 1115, 898 N.Y.S.2d

590)." (*Katz v. Beil*, 142 AD3d 957, 964 [2nd Dept. 2016].) ""When reviewing a motion for summary judgment the focus of the court's concern is issue finding, not issue determination, and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion". (*Goldstein v County of Monroe*, 77 AD2d 232, 236; *Renda v Frazer*, 75 AD2d 490.)" (*Robinson v. Strong Mem'l Hosp.*, 98 AD2d 976, 976 [4th Dept. 1983]; *see also Gitlin v. Chirinkin*, 98 AD3d 561 [2nd Dept. 2012].)

Plaintiff's Motion is Denied

Plaintiff submits the affidavit of Phillip Scaglione (hereinafter "Scaglione") to establish the necessary foundation to admit the agreement,[3] proof of funding, and the partial performance by defendants in their deliverance of $13,603 in receivables (see the remittance history attached as Exhibit B to the Scaglione affidavit) as business records. In the Scaglione affidavit he alleges:

> 12. On August 1, 2024, MCA discovered that there were uncollected funds held in the Merchant's account and, consequently, deprived 9% of the weekly sales proceeds due to MCA. All attempts to debit MCA's 9% of sales proceeds from the designated deposit account result in an ACH debit rejection notice coded R09.

However, the plaintiff's business records (the transaction history) do not establish any payment was rejected.:

[3] Notably, the agreement called for weekly payments in the amount of $2,194.

MCA Servicing Company
1 Whitehall Street
#200
New York, NY, 10004

SERVICING COMPANY

EXECUTIVE PREMIER LIMOUSINE, LLC
NC1811612

Beginning Balance:	$68,000.00
Funds Collected:	$13,603.00
Bounce Fees:	$245.00
Ending Balance:	$54,642.00
Amount Approved:	$50,000.00
Amount Purchased:	$68,000.00
Date Funded:	6/12/2024
Statement Date:	8/8/2024

Date		Amount Debited
7/25/2024	Cleared	$2,194.00
8/1/2024	Bounced($2,194.00)	$0.00
8/6/2024	Bounced($439.00)	$0.00
8/6/2024	Bounced($439.00)	$0.00
8/7/2024	Bounced($439.00)	$0.00
8/7/2024	Bounced($439.00)	$0.00
8/8/2024	Bounced($439.00)	$0.00
8/8/2024	Bounced($439.00)	$0.00
		Total Receipts
		$13,603.00

The plaintiff's business records do not establish a breach of the agreement. The business records submitted by plaintiff do not support the Scaglione affidavit's conclusory assertion that the defendants breached the agreement - as noted above the submitted records do not support that averment – by blocking access to the account. "Conclusory assertions will not defeat summary judgment (*Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176, 372 N.E.2d 12; *Indig v. Finkelstein*, 23 N.Y.2d 728, 296 N.Y.S.2d 370, 244 N.E.2d 61; *HNC Realty Co. v. Bayview Towers Apts.*, 64 A.D.2d 417, 409 N.Y.S.2d 774; *Kahn v. City of New York*, 37 A.D.2d 520, 321 N.Y.S.2d 791, *affd.* 30 N.Y.2d 690, 332 N.Y.S.2d 638, 283 N.E.2d 615; *Holdridge v. Town of Burlington*, 32 A.D.2d 581, 299 N.Y.S.2d 340, 6 Carmody-Wait 2d, NY Prac, s 39:29)." (*Chem. Bank v. Queen Wire & Nail Inc.*, 75 AD2d 999, 1000 [4th Dept. 1980].) Similarly, the plaintiff cannot rely upon conclusory assertions that the defendants

breached the agreement while presenting contrary evidence (the transaction history). (*See e.g. Kelly v. Herzog*, 224 AD3d 1189, 1190 [3rd Dept. 2024]: "Bare conclusory assertions with no factual relationship to the alleged injury are insufficient to establish that the cause of action has no merit so as to entitle defendant[s] to summary judgment" (*Pullman v. Silverman*, 28 N.Y.3d 1060, 1062, 43 N.Y.S.3d 793, 66 N.E.3d 663 [2016] [internal quotation marks, brackets, ellipsis and citation omitted]). To meet this burden, "defendants must present factual proof, generally consisting of affidavits, deposition testimony and medical records" (*Marshall v. Rosenberg*, 196 A.D.3d 817, 818, 151 N.Y.S.3d 240 [3d Dept. 2021] [internal quotation marks and citations omitted]).")

As noted by the Appellate Division, Second Department in *Bank of New York Mellon v. Gordon*:

> Finally, under the circumstances here, it bears noting that the business record exception to the hearsay rule applies to a "writing or record" (CPLR 4518 [a]). Although "[t]he foundation for admission of a business record 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" (Jerome Prince, Richardson on Evidence § 8-306 [Farrell 11th ed 1995]), it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted (*see generally Great Am. Ins. Co. v Auto Mkt. of Jamaica, N.Y.*, 133 AD3d 631, 632-633 [2015]; 35 Carmody-Wait 2d § 194:94 [2019]; *cf.* 9 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 4518.20). Accordingly, "[e]vidence of the contents of business records is admissible only where the records themselves are introduced" (35 Carmody-Wait 2d § 194:94 [2019]; *see People v Barnes*, 177 AD2d 989 [1991]; *see also People v Olivero*, 27 Misc 3d 1218[A], 2010 NY Slip Op 50794[U] [Crim Ct, NY

> County 2010]; *People v Ross*, 12 Misc 3d 755, 764 [Crim Ct, Kings County 2006]). "Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay" (35 Carmody-Wait 2d § 194:94 [2019]; *see U.S. Bank N.A. v 22 S. Madison, LLC*, 170 AD3d 772, 774 [2d Dept 2019]; *People v Barnes*, 177 AD2d 989 [1991]).

(171 AD3d 197, 205–06 [2nd Dept. 2019].)

The plaintiff did not submit the business records relating to the underlying agreement that establish an alleged breach by the defendants herein. (*Id.*) Had plaintiff "blocked" access to the account, there would be a business record establishing that fact. As the agreement contemplated ACH withdrawals, had the defendants blocked access to the account a business record would be available establishing that fact.[4]

Instead, the records indicate that the payments "bounced". The business records submitted by the plaintiff show that a payment was declined for insufficient funds ("bounced"), which is not a breach of the underlying agreement. "Bounced" in referring to a banking transaction is slang commonly employed to refer to a check (or other draw) being rejected for insufficient funds. (*See e.g. Torres v. D'Alesso*, 80 AD3d 46, 48, [1st Dept. 2010]: "'in the event any check being delivered herewith fails of collection,' and if the seller so notified the buyer, giving the buyer 48 hours to replace the bounced check with certified funds.". *See also* CHECK, Black's Law

[4] See Authorization Agreement for Direct Deposit (ACH Credit) and Direct Payments (ACH Debits)- page 8 of the agreement.

Dictionary [12th ed. 2024]: "[B]ad check (1856) A check that is not honored because the account either contains insufficient funds or does not exist. — Also termed hot check; worthless check; rubber check; bounced check; cold check; bogus check; false check; dry check; NSF check; nonsufficient-funds check.") The underlying agreement specifically excludes a payment being returned due to insufficient funds as an event of default (see 3.1 [l].)

The plaintiff did not meet its initial burden establishing entitlement to summary judgment. Assuming arguendo that the plaintiff met its initial burden, the defendants have established an issue of fact necessitating denial of the motion, i.e., whether plaintiff breached the parties' agreement

The plaintiff's motion for summary judgment is denied, without prejudice.

Defendants' Motion is Partially Granted and Otherwise Denied

Defendants move for summary judgment seeking dismissal of the causes of action in the complaint.

Defendants submit the affirmation of Sherif Mohammed Elsayad (hereinafter "Elsayad"). Elsayad avers – as relevant herein- that the plaintiff breached the agreement by attempting to make daily withdrawals of $439 on August 6, 7, and 8 of 2024 when the agreement required weekly withdrawals in the amount of $2,194. He further avers that he attempted to seek a reconciliation from the plaintiff but

was unreasonably denied. The defendants argue that this establishes that the agreement was actually a criminally usurious loan as the reconciliation provisions were illusory. (*See gen. Bridge Funding Cap LLC v. SimonExpress Pizza, LLC*, __ AD3d__, 2025 WL 2091793, at *4 [4th Dept. July 25, 2025].)

The defendants argue that the underlying agreement- pursuant to its terms- is a criminally usurious loan.

> 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. Usually, courts 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" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d at 665-666 [citations and internal quotation marks omitted]).

(*Principis Cap., LLC v. I Do, Inc.*, 201 AD3d 752, 754 [2nd Dept. 2022].)

The agreement between plaintiff and defendants contained a mandatory right of reconciliation. The agreement (Sections 1.3) required reconciliation to occur within five (5) days of the request, provided that the defendants provide the necessary documentation for the plaintiff to determine whether a debit or credit should be made to the defendants' account. The agreement also contained provisions to allow for the defendants to seek adjustments to the daily installment

payment debited from their account, provided the contractual procedures were followed (Section 1.4).

Additionally, the agreement did not have a finite term and was subject to a "downturn" in Defendants' business. If the defendants' businesses did not generate sufficient monthly income, the defendants could seek the reconciliations noted about to decrease the daily amount owed and receive a credit for amounts previously paid.

Finally, the agreement did not make as a condition of default the Defendants filing for bankruptcy (Sections 2.9 and 3.1). Thus, the agreement- on its face- was not a loan contract, and it is not subject to the usury laws. (*Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752 [2nd Dept. 2022].)

The defendants argue that the reconciliation provision was illusory as they sought reconciliation, and it was improperly denied. However, the defendants did not meet their initial burden in establishing that they followed the proper procedures under the parties' agreement for seeking reconciliation. Furthermore, whether the corporate defendants were entitled to a reconciliation based upon a reduction of revenues is necessarily a question of fact. The corporate defendants do not submit any records submitted to the plaintiff and Elsayad's conclusory allegations that there were not sufficient receivables in the account are not sufficient to meet the corporate defendants' initial burden on the summary judgment motion.

Assuming, *arguendo*, that the defendants met their initial burden, the plaintiff established an issue of fact as to whether the defendants sought a reconciliation pursuant to the agreement that was improperly denied and whether there were sufficient receivables in the account and the plaintiff was improperly denied payment.

However, the defendants also move for summary judgment seeking dismissal of the default fee. That portion of the motion is granted.

The agreement states that a default fee of $6,500 will be assessed should the defendants default under the agreement. The Court finds the default fee to be an unenforceable penalty. "Newco has not shown—or attempted to show—that these fees constitute a reasonable advance estimate of difficult-to-calculate damages, as required for the fees to be collectible liquidated damages, rather than impermissible penalties. (*See Forever Funding LLC v S.F. Meats, Inc.*, 2022 NY Slip Op 513056[U], at *2-3 [Sup Ct, NY County Dec. 22, 2022]; *Irwin Funding, LLC v Dexter Young Cattle Feeding*, 2022 NY Slip Op 51035[U], at *2 n 1 [Sup Ct, NY County Oct. 21, 2022].)" (*Newco Cap. Grp. VI LLC v. La Rubia Rest. Inc.*, 81 Misc. 3d 1203A [N.Y. Sup. Ct. 2023.])

With respect to the fees "[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." (*Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425

[1977].) "If, however, the amount of actual damages that would be suffered upon a breach is readily ascertainable when the contract is entered, or the amount fixed as liquidated damages is conspicuously disproportionate to the foreseeable losses, the liquidated damages provision is unenforceable as a penalty." (*Cent. Irr. Supply v. Putnam Country Club Assocs., LLC*, 57 AD3d 934, 935 [2nd Dept. 2008].) "Where, however, a liquidated damages provision is found to be an unenforceable penalty, the recovery is limited to actual damages proven." (*Id.*) Here, the amount of damages upon a breach is readily ascertainable: it is the sum remaining due on the factoring agreement.[5] The request for a default fee of $6,500 is an unconscionable penalty as the provision is only a penalty and bears absolutely no relation to measuring the actual loss suffered by the Plaintiff. It will not be enforced.

Additionally, the defendants move for summary judgment seeking dismissal of the requested attorneys' fees. The motion is partially granted. The parties' agreement specifically allowed the recovery of attorneys' fees. However, "An award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." (*Kamco Supply Corp. v. Annex Contracting Inc.*, 261 AD2d 363, 365 (2nd Dept. 1999].) "The fixed percentage fee, therefore, is viewed only as a maximum fee, limiting the amount of reasonable attorneys' fees which the creditor may charge

[5] Notably, the plaintiff also seeks pre-judgment interest from the date of default.

upon proving the extent of the necessary services actually rendered." (*Mead v. First Tr. & Deposit Co.*, 60 AD2d 71, 78 [4th Dept. 1977].) The Fourth Department continued:

> We note that it is not the intent of the law, nor of the petitioner in this proceeding, to deprive the creditor of full payment of its actual necessary legal expenses in collecting the defaulted debt, limited only by the reasonable value of such services and the percentage provision expressed in the contract. The aim is to prevent creditors and their attorneys from receiving more than such sums, which they may otherwise be able to accomplish because of the debtors' defaults.

(*Id.*)

Should plaintiff prevail on its causes of action, appropriate attorneys' fees will assessed by the Court upon evidentiary submissions or an evidentiary hearing.

Based upon the foregoing, and the papers submitted herein,[6] it is hereby

ORDERED that the defendants' motion to quash the subpoena is DENIED; and it is further

[6] Notice of Motion (NYSCEF Docket # 30); Affirmation in Support (NYSCEF Docket # 31); Affirmation in Opposition (NYSCEF Docket # 32); Memorandum of Law in Opposition (NYSCEF Docket # 33); Notice of Motion (NYSCEF Docket # 35); Affidavit (NYSCEF Docket # 36); Affirmation in Support (NYSCEF Docket # 37); Statement of Material Facts (NYSCEF Docket # 38); Exhibits (NYSCEF Docket #s 39-44); Notice of Cross-Motion (NYSCEF Docket # 52)l; Affirmation in Opposition to Motion and in Support of Cross-Motion (NYSCEF Docket # 53); Statement of Material Facts (NYSCEF Docket # 54); Memorandum of Law in Opposition to Motion and in Support of Cross-Motion with exhibits (NYSCEF Docket #s 55-57); Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion (NYSCEF Docket # 58).

ORDERED that the plaintiff's motion for summary judgment is DENIED, without prejudice; and it is further

ORDERED that the defendants' motion for summary judgment is partially GRANTED and the default fee is dismissed and the motion is otherwise DENIED, without prejudice.

Dated: ~~August~~ September 12, 2025

Hon. Daniel J. Doyle
Supreme Court Justice