

**Hudson Val. Credit Union v Mackay**

2025 NY Slip Op 35337(U)

February 27, 2025

Supreme Court, Dutchess County

Docket Number: Index No. 2024-50944

Judge: Edward T. McLoughlin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

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HUDSON VALLEY CREDIT UNION,

DECISION & ORDER

Plaintiff,

Index No.: 2024-50944

- against -

Motion Sequence No.: 1

NORM F. MACKAY, d/b/a LEGEND PROPERTY  
MANAGEMENT,Defendants.

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McLOUGHLIN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding the plaintiff's motion for summary judgment:

*NYSCEF Docket Numbers: 5 – 31*

In this action for breach of contract, account stated, and unjust enrichment, the plaintiff alleges that defendant Norm F. Mackay, d/b/a Legend Property Management (hereinafter "defendant") failed to repay \$48,556.52 in funds received from plaintiff pursuant to a business loan agreement. The plaintiff commenced this action with the filing of a summons and verified complaint on March 4, 2024 (*see* NYSCEF Docket No. 1). The defendant was properly served (*see* NYSCEF Docket Nos. 2-3) and interposed an answer, *pro se*, on April 10, 2024, containing a general denial (*see* NYSCEF Docket No. 4).

The plaintiff moves, by notice of motion dated May 15, 2024, for summary judgment on its complaint. The Court adjourned the motion over several months to provide the *pro se* defendant with an opportunity to negotiate a resolution with plaintiff's counsel and/or retain counsel. Ultimately, the defendant failed to appear for conferences scheduled on November 14, 2024, and December 3, 2024. The defendant failed to submit written opposition to the motion until December 5, 2024, two days

after the Court marked the motion submitted based upon the defendant's two successive non-appearances. On December 5, 2024, the defendant forwarded to the Court's clerk, by email, what purports to be an affidavit in opposition to the motion. In response, the Court's clerk advised defendant that the Court could not accept documents for filing via email and that the document would have to be uploaded to NYSCEF. Defendant's purported affidavit has not, to date, been filed on NYSCEF nor has defendant provided proof that it was served upon plaintiff's counsel pursuant to CPLR 2103.

#### DISCUSSION

Because summary judgment "deprives the litigant of its day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided" (*id.*). "The proponent of a summary judgment motion 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 issue of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.* at 324).

"An account stated is an agreement, express or implied, between parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them which is independent of the original transaction" (*First Class Concrete Corp. v. Rosenblum*, 167 AD3d 989, 990 [2d Dept. 2018]). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time or makes partial payment on the account" (*Stardom Brands, LLC v. SKI Wholesale Beer Corp.*, 172 AD3d 1266, 1266 [2d Dept. 2019] [citations omitted]).

The competent evidence presented by plaintiff demonstrates that it provided funds to the defendant pursuant to a business loan agreement, that defendant made several repayments, that plaintiff regularly sent monthly account statements to defendant, and that defendant did not timely object to the monthly account statements. Accordingly, plaintiff has adequately established its *prima facie* entitlement to judgment as a matter of law as to its account stated cause of action (*see D&N Lending, LLC v. Tachlis Corp.*, 221 AD3d 954, 955 [2d Dept. 2023]; *Callaghan v. Curtis*, 82 AD3d 816, 817 [2d Dept. 2011]).

Plaintiff has also adequately established his *prima facie* entitlement to judgment as a matter of law for breach of contract relating to the business loan agreement. Specifically, plaintiff has demonstrated that it provided funds to defendant pursuant to the business loan agreement and that defendant has defaulted under the terms of the business loan agreement by failing to pay the remaining balance of \$48,561.52 (*Soufer v. Baroukhian*, 182 AD3d 624, 625-626 [2d Dept. 2020]; *Maser Consulting, P.A. v. Viola Park Realty, LLC*, 91 AD3d 836, 837 [2d Dept. 2012]).

Even if the Court were to consider defendant's untimely affidavit in opposition, defendant does not raise a triable issue of material fact warranting denial of plaintiff's motion. Defendant's submission fails to raise an issue of fact as to whether he defaulted on the business loan agreement by failing to make a payment in April of 2023 and all successive months. Nor does defendant raise an issue of fact on the cause of action for account stated. Even if the Court were to credit defendant's unsubstantiated claim of forged signatures – which it does not – defendant does not dispute receipt of account statements from plaintiff, the accuracy of the balance listed in each statement, or the fact that he did not timely object to any of the statements.

Based upon the foregoing, plaintiff's motion for summary judgment is granted as to the causes of action in its complaint for breach of contract and account stated. However, the motion is denied insofar as it seeks summary judgment on its cause of action for unjust enrichment, as that cause of

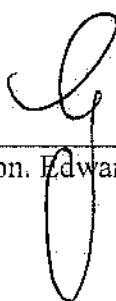
action is duplicative of its cause of action to recover damages for breach of contract (*see Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski*, 14 AD3d 644, 645 [2d Dept. 2005]). Therefore, plaintiff's motion for summary judgment on its cause of action for unjust enrichment is denied, without regard to the sufficiency of the defendant's opposition papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on its cause of action for unjust enrichment is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is in all other respects granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 27, 2025  
Poughkeepsie, New York

  
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Hon. Edward T. McLoughlin, AJSC

To: Counsel of record via NYSCEF

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