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| <b>Moneywell Group, LLC v Basic Constr. Servs. Inc</b>                                                                                                                                                                         |
| 2025 NY Slip Op 35420(U)                                                                                                                                                                                                       |
| March 19, 2025                                                                                                                                                                                                                 |
| Supreme Court, Rockland County                                                                                                                                                                                                 |
| Docket Number: Index No. 034073/2024                                                                                                                                                                                           |
| Judge: David Fried                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time period for appeals as of right (CPLR §5513 [a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
MONEYWELL GROUP, LLC,

Plaintiff,

-against-

BASIC CONSTRUCTION SERVICES INC D/B/A  
BASIC CONSTRUCTION SERVICES INC and  
WILLIAM ROY ROSA,

Defendants.  
-----X

HON. DAVID FRIED, A.J.S.C.

## DECISION & ORDER

Index No. 034073/2024  
Motion Sequence No. 2

The papers filed electronically via NYSCEF numbered 26 through and including 35 (“Motion”) were read and considered herein. Upon such reading and consideration, the Motion is disposed as follows:

### BACKGROUND

Plaintiff Moneywell Group, LLC (“Plaintiff”), an entity in the business of purchasing future receivables and sales proceeds, commenced this action by filing a Summons and Complaint with the Rockland County Clerk’s Office on July 12, 2024. Plaintiff seeks damages arising from an alleged breach of a Revenue Purchase Agreement (“Agreement”) entered into by the parties on or about February 28, 2024. Plaintiff alleges that pursuant to the Agreement, Defendant Basic Construction Services Inc d/b/a Basic Construction Services Inc (“Defendant Company”) agreed to sell to Plaintiff \$367,770.00 of its future receivables for a sum of \$230,000.00, minus applicable fees (including a payoff to satisfy Defendants’ other obligations in the amount of \$171,937.00), to be remitted to Plaintiff at a rate of 20% of the daily receivables of Defendant Company. Additionally, Defendant William Roy Rosa (“Guarantor”) agreed to personally guaranty Defendant Company’s performance pursuant to the Agreement. The Agreement purportedly further provides that in the event that Defendant Company sought a reconciliation, and was entitled to one pursuant to the Agreement, Plaintiff was required to perform such reconciliation.

On September 3, 2024, Defendants interposed an Answer with twenty-two affirmative defenses to the Complaint and a counterclaim for breach of the implied duty of good faith and fair dealing. By Decision & Order dated November 21, 2024 (NYSCEF Doc. No. 24), this Court denied Plaintiff's Motion Sequence No. 1 seeking an Order dismissing said counterclaim.

Plaintiff now moves (Motion Sequence No. 2) for summary judgment against all Defendants severally in the amount of \$174,283.00 (the unremitted amount of receivables) plus default fees, non-sufficient funds fees, attorneys' fees, interests, costs and disbursements. The Motion stands unopposed.

## DISCUSSION

The remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). On a motion for summary judgment, the proponent "must make 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 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once such a 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*, 68 NY2d at 320).

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 (*Dowsey v. Megerlan*, 121 AD2d 497, 503 [2d Dept. 1986]); *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept 2012]). 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 (*Phillips v. Kantok & Co.*, 31 NY2d 307 [1982]; *Andre*, 35 NY2d at 361). However, mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]).

Plaintiff, in support of its summary judgment motion, contends to having proven *prima facie* its entitlement to judgment as a matter of law by submitting a copy of the Agreement (NYSCEF Doc. No. 30), the transaction/remittance history (NYSCEF Document No. 31), proof of funding of Defendant Company's business account (NYSCEF Document No. 32), Defendant Company's bank statements purportedly showing revenue Defendant Company collected following its alleged breach (NYSCEF Document No. 3), and an Affirmation of Plaintiff's Manager, Akash Seth (NYSCEF Document No. 27), among other things.

The Affirmation of Akash Seth states the following: that said Affiant has access to relevant account records maintained in the ordinary course of regularly conducted business and made at or near the time of the event from information conveyed by a person with personal knowledge; that Plaintiff relies on the accuracy of business records created by third parties, if any, in conducting its business; that on



February 28, 2024, Defendant Company and Plaintiff entered into the Agreement, which provided that Defendant Company would sell future receivables and sale proceeds, with a face value of \$367,770.00, for the sum of \$230,000.00 minus applicable fees and a prior balance, to Plaintiff; that pursuant to the Agreement, Defendant Company would pay Plaintiff by ensuring that its sale proceeds and receivables were deposited into a designated bank account, permitting Plaintiff to electronically debit from said account 20% of its daily sales proceeds until Plaintiff collected the sum due and owing; and that Plaintiff timely deposited \$28,063.00, which represents the purchase price of \$230,000.00 less the origination fee of \$30,000.00, minus a payoff to satisfy Defendants' other obligations in the amount of \$171,937.00, into Defendant Company's account, as evidenced by the proof of funding attached by Plaintiff (NYSCEF Document No. 32).

Subsequent to entering into the Agreement and until June 20, 2024, Akash Seth states that Defendant Company purportedly performed pursuant to the terms of the Agreement, remitting a sum of its daily receivables to Plaintiff through automatic withdrawals from its bank account which totaled \$193,487.00 of the \$367,770.00, owed to Plaintiff. However, on June 20, 2024, Akash Seth claims that Defendants breached the terms of the Agreement by blocking withdrawals to Plaintiff, leaving a balance of \$174,283.00, due and owing. Additionally, Akash Seth contends that Defendants have incurred, as per the terms of their Agreement, a default fee of \$57,513.39, NSF fee of \$350.00, plus \$43,570.75 in attorney's fees, thus totaling \$275,717.14. The Agreement is signed by Defendants. Based upon the foregoing, Plaintiff contends that it has established its *prima facie* entitlement to summary judgment on its causes of action for breach of contract and breach of the personal guarantee.

The evidence establishes that Defendants breached the terms of the Agreement. The issue then becomes whether the Defendants have raised triable issues of fact in opposition to the motion. Since Defendants have failed to oppose all matters advanced on Plaintiff's motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (see *Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; see also *Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *Argent Mtge. Co. LLC v. Montesana*, 79 AD3d 1079 [2d Dept 2010]). Moreover, the Defendants' failure to raise and or assert all of the pleaded affirmative defenses in opposition to the Plaintiff's motion for summary judgment renders those defenses abandoned and thus without any efficacy (see, *New York Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v. City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]). Defendants have failed to oppose Plaintiff's motion. As such, Defendants have failed to demonstrate a triable issue of fact when the burden shifted to them to do so. Accordingly, Plaintiff has established its *prima facie* entitlement to summary judgment and is entitled to \$174,283.00 (the balance remaining on the contract) and the NSF fee of \$350.00, totaling \$174,633.00.

"The Default Fee, however, is an unenforceable penalty. Here, the amount of damages upon a breach is readily ascertainable: it is the sum remaining due on the factoring agreement.... Plaintiffs in this industry are unquestionably capable and able to calculate the amount due on a default, as continuously illustrated by the plethora of cases of this type filed in the [Ninth] Judicial District" (see *Byzfinder NY*

*LLC v. Holy City Collision LLC*, 80 Misc3d 1208[A] [Sup Ct, Ontario County 2023]).

It appears Plaintiff is requesting a fixed attorneys' fee award of 25% of the balance of the amount due. The Supreme Court is not bound by the fixed percentage set forth in the Agreement but, instead, has the inherent authority to determine reasonable attorneys' fees (see *Orix Credit Alliance Inc. v. Grace Industries, Inc.*, 261 AD2d 521, 521-522 [2d Dept 1999]; *Prince v. Schacher*, 125 AD3d 626, 628, [2d Dept 2015]). Thus, an award of attorneys' fees pursuant to 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, 689 [2d Dept 1999]; *Lupo v. Anna's Lullaby Caf  , LLC*, 189 AD3d 1205 [2d Dept 2020]; *Coffey v. Tretola*, 179 AD3d 889, 890 [2d Dept 2020]).

Accordingly, the fee requested here, is viewed only as a maximum fee, limiting the amount of reasonable attorney's fees which the plaintiff may charge upon proving the extent of the necessary services (see *Mead v. First Trust    Deposit Co.*, 60 AD2d 71, 78, [4th Dept 1977]). An award of reasonable attorneys' fees is within the sound discretion of the court, based upon such factors as the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel see *SO/Bluestar LLC v. Canarsie Hotel Corp.*, 33 AD3d 986 [2d Dept 2006]).

Plaintiff may be entitled to recover an attorney's fee of a fixed percentage if it can demonstrate that the quality and quantity of the legal services rendered were such as to warrant, on a *quantum meruit* basis, that full percentage (*Industrial Equipment Credit Corp. v. Green*, 92 AD2d 838 [1st Dept 1983]). If the Plaintiff does not make that demonstration, then a reasonable attorney's fee should be set by the court upon a *quantum meruit* basis (*id.*). Where the value of the legal services rendered by Plaintiff's counsel is not evident from the record, the matter may be remanded for an assessment of those damages (*id.*). Here, Plaintiff has offered absolutely no evidence, by way of billing statements or otherwise, that the amount of time expended by counsel related to its pursuit of this debt.

Since a *quantum meruit* award cannot be issued on this record, if Plaintiff does intend for the Court to contemplate an award of attorney's fees, Plaintiff is accorded fifteen (15) days from the date of this Decision & Order, to provide a proper affirmation, along with billing statements, and other proofs ("supporting documents"), to this Court in furtherance of a *quantum meruit* assessment. Submit the supporting documents, via NYSCEF, as correspondence to the Court. Ensure that the submission is filed in connection with this motion sequence, and in the description, enter: "Documents in Support of Attorney Fee Application." Do not initiate a new motion. Plaintiff shall not enter Judgment for the principal sum awarded herein until such time that the attorney's fees assessment is determined by the Court. Failure to strictly comply with the directives contained herein shall constitute a waiver of the application for attorney's fees.

If Plaintiff no longer wishes the Court to contemplate an award of attorney's fees, then, Plaintiff may enter Judgment against Defendants in the amount of \$174,633.00, plus pre-judgment interest at 9% from June 20, 2024, to the date of entry of judgment, post-judgment interest, and costs and



disbursements as taxed by the Rockland County Clerk.

In light of the foregoing, it is hereby

**ORDERED**, that Plaintiff's Motion for Summary Judgment against Defendants is GRANTED to the extent set forth herein; and it is further

**ORDERED**, that if Plaintiff does intend for the Court to contemplate an award of attorney's fees, Plaintiff is accorded fifteen (15) days from the date of this Decision & Order, to provide a proper affirmation, along with billing statements, and other proofs ("supporting documents"), to this Court in furtherance of a *quantum meruit* assessment. Submit the supporting documents via NYSCEF as correspondence to the Court. Ensure that the submission is filed in connection with this motion sequence, and in the description, enter: "Documents in Support of Attorney Fee Application." Do not initiate a new motion. Plaintiff shall not enter Judgment for the principal sum awarded herein until such time that the attorney's fees assessment is determined by the Court. Failure to strictly comply with the directives contained herein shall constitute a waiver of the application for attorney's fees; and it is further

**ORDERED**, that if Plaintiff no longer wishes the Court to contemplate an award of attorney's fees, then, Plaintiff may enter Judgment against Defendants, jointly and severally, in the amount of ONE HUNDRED SEVENTY FOUR THOUSAND SIX HUNDRED THIRTY-THREE DOLLARS (\$174,633.00) plus pre-judgment interest at 9% from June 20, 2024, to the date of entry of judgment, post-judgment interest, and costs and disbursements as taxed by the Rockland County Clerk, without further leave of Court; and it is further

**ORDERED**, that Plaintiff shall serve a copy of this Decision & Order, with Notice of Entry, upon Defendants via NYSCEF and certified mail within ten (10) days of the entry hereof, and by such date shall also upload to NYSCEF, an affirmation of such service. Annex to said affirmation of service, proof of said certified mailing and include the certified mailing tracking number.

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York  
March 19, 2025

ENTER:



HON. DAVID FRIED, A.J.S.C.  
STATE OF NEW YORK  
COUNTY OF ROCKLAND