Mantis Funding LLC v Dayton Car Care of Ohio LLC
2025 NY Slip Op 35629(U)
January 7, 2025
Supreme Court, Westchester County
Docket Number: Index No. 60441/2024
Judge: Gretchen Walsh
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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 NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
---X
MANTIS FUNDING LLC,

Plaintiff,

- against -

DAYTON CAR CARE OF OHIO LLC DBA
DAYTON CAR CARE OF OHIO AKA
DAYTON CAR AND BARRY JOHN JOHNSON,

Defendants.
---X

Index No. 60441/2024
Motion Seq. No. 1
Motion Date: 11/1/2024

WALSH, J.

The following e-filed documents, listed in NYSCEF under document numbers 10-31, were read on this motion by Mantis Funding LLC ("Mantis" or "Plaintiff") for an order pursuant to CPLR 3212 granting it summary judgment against Defendants Dayton Car Care of Ohio LLC d/b/a Dayton Care of Ohio a/k/a Dayton Car ("Dayton") and Barry John Johnson ("Johnson") (together "Defendants"). Defendants oppose the motion.

Upon the foregoing papers and for the reasons stated herein, Plaintiff's motion shall be granted in part and denied in part.

PROCEDURAL HISTORY

This action, which arises from a dispute concerning allegations of, inter alia, breach of contract in the context of a written agreement entered into on March 1, 2023 between Plaintiff and Dayton for the purchase of Dayton's future receivables (the "Agreement"), was commenced by Plaintiff's filing of the Summons and Complaint on April 15, 2024 (NYSCEF Doc. No. 1 [the "Complaint"]). In the Complaint, Plaintiff alleges that pursuant to the terms of the Agreement, Plaintiff agreed to purchase Dayton's future receivables with an agreed-upon value of $102,900 and that Dayton agreed to have one bank account approved by Plaintiff from which Dayton authorized Plaintiff to make daily ACH withdrawals until $102,900 was paid to Plaintiff (NYSCEF Doc. No. 1 at ¶¶ 4-5). Plaintiff alleges that Johnson agreed to provide a guaranty with respect to any and all amounts owed to Plaintiff by Dayton upon a breach of performance by Dayton (*id.* at ¶ 6). According to Plaintiff, Plaintiff remitted the purchase price for the future receivables to

Dayton and that while Dayton initially met its obligations, it eventually stopped making payments to Plaintiff and breached the Agreement by intentionally impeding and preventing Plaintiff from making the agreed upon withdrawals (*id.* at ¶¶ 7-8). Plaintiff contends that Dayton made payments totaling $43,907 leaving a balance of $58,993 and that Dayton also included a default fee in the amount of $5,000 (*id.* at ¶ 9). Plaintiff further alleges that Dayton had agreed pursuant to Appendix F of the Agreement to transfer the remaining balance owed to Plaintiff in the amount of $24,523 pursuant to a prior merchant receivables purchase agreement entered into between the parties on or about December 20, 2022 (*id.* at ¶ 10). Plaintiff alleges that despite demand, Dayton has failed to pay the amounts due and owing and Johnson, as guarantor has breached the guaranty by failing to make the payments owed by Dayton (*id.* at ¶ 12). Plaintiff asserts: (1) a First Cause of Action against Dayton for breach of the Agreement; (2) a Second Cause of Action against Johnson for breach of the guaranty; and (3) a Third Cause of Action against Defendants for unjust enrichment. As its relief, Plaintiff seeks an award of damages in the amount of $63,993, together with interest, costs, disbursements and attorneys' fees. On May 13, 2024, Defendants filed their answer in which they denied the material allegations of the Complaint and asserted 27 affirmative defenses (NYSCEF Doc. No. 3). On June 26, 2024, the Court signed a Preliminary Conference Order requiring that all discovery be completed by June 4, 2025 and scheduling a compliance conference for February 26, 2025. On July 29, 2025, Plaintiff filed this motion for summary judgment.

PLAINTIFF'S CONTENTIONS IN SUPPORT OF ITS MOTION

In support of its motion, Plaintiff submits: (1) an affidavit of merit of Kathleen Fink, sworn to July 24, 2024 (NYSCEF Doc. No 15 [the "Fink Aff."]) and its attached exhibits (NYSCEF Doc. Nos. 18-21); (2) an affirmation of Jeffrey Zachter, Esq. dated July 25, 2024 (NYSCEF Doc. No. 16 [the "Zachter Aff."]); and (3) a statement of material facts (NYSCEF Doc. No. 17 [the "SOF"]).

In her affidavit, Kathleen Fink avers that she is the Director of Plaintiff's Risk Management and is familiar with Plaintiff's record keeping practices (Fink Aff. at ¶¶ 2, 4). Fink attests to the necessary requirements for the admission of the documents attached to her affidavit as Plaintiff's business records, which are: (1) a copy of the Agreement (Ex. A); and (2) a copy of Dayton's payment history (Ex. B) (*id.* at ¶¶ 12, 15). She avers that pursuant to the Agreement, Plaintiff paid $70,000 for the purchase of Dayton's future receivables (*id.* at ¶ 12). She avers that pursuant to the Agreement, Dayton agreed to have one bank account into which it and its customers were to remit $1,029 a day to Mantis until $102,900 was paid in full (*id.* at ¶ 14). Relying on the payment history, Fink asserts that Dayton complied with the Agreement by making payments totaling $43,907, but has since defaulted, leaving a balance of $58,993 (*id.* at ¶ 15). Fink quotes section 14 of the Agreement, which provides, inter alia, that Dayton is in default if it interferes with Dayton's right to collect the daily amount (*id.* at ¶ 16). She asserts that Dayton violated this provision by stopping the payments for the daily ACH payment starting on May 12, 2023, May 15, 2023 and May 16, 2023 (*id.* at ¶ 18). Fink also quotes from section 15 of the Agreement, which delineates the remedies available to Plaintiff in the event of Defendant's default, which includes Plaintiff right to its attorneys' fees incurred in this lawsuit (*id.* at ¶ 20), although Fink states that Plaintiff is waiving its right to attorneys' fees (*id.* at ¶ 22). Finally, Fink avers that pursuant to paragraph 3 of Appendix A, Daytona incurred a default fee of $5,000 (*id.* at ¶ 21).

In his affirmation, Zachter repeats the facts set forth in Fink's affidavit (Zachter Aff. at ¶¶ 1-12). He further sets forth the standard to be applied on a motion for summary judgment based on a breach of contract and argues that Plaintiff has submitted evidence establishing its prima facie entitlement to summary judgment on its First and Second Causes of Action (*id.* at ¶¶ 13-17). He also argues that Plaintiff has established its prima facie entitlement to its unjust enrichment claim, but because there is no dispute that the Agreement and guaranty govern Plaintiff's entitlement to summary judgment, the Court shall not address Plaintiff's alternative claim for unjust enrichment, which is only applicable if there is a dispute over the existence of a contract governing the parties' rights and remedies.

DEFENDANTS' CONTENTIONS IN OPPOSITION

In opposition, Defendants submit: (1) an affirmation of Joseph Obermeister, Esq. dated October 23, 2024 (NYSCEF Doc. No. 28 ["Obermeister Opp. Aff."]); (2) an affirmation of Barry John Johnson dated October 23, 2024 (NYSCEF Doc. No. 29 ["Johnson Opp. Aff."]), together with attached exhibits (NYSCEF Doc. No. 30).

In his affidavit, Johnson affirms, on information and belief, that "Plaintiff is part of an industry comprised of predatory business-to-business lenders. Similar to other companies in this industry, Plaintiff purports to offer financing arrangements, which are disguised as the 'sale' of future receipts, but which are in reality, loans with criminally usurious interest rates" (Johnson Opp. Aff. at ¶ 1). Johnson contends that he believes the Agreement is criminally usurious (*id.* at ¶ 2). Johnson further asserts that "Plaintiff fails to articulate to the Court that a major component of its supposed claim for damages, is a Blocked Fee of $2,500.00 and a Default Fee of $5,000," but "[n]owhere in Plaintiff's filed papers and its many frivolous claims does the allegation of 'blocking' even arise. Plaintiff seems to have felt that it could conjure up any claim for any amount of damages to add to its predatory behavior . . . Defendant did not 'block' or violate that provision of the agreement" (*id.* at ¶¶ 4-6). According to Johnson, Plaintiff did not provide for a possible reconciliation and this Court should deny Plaintiff's motion. However, Johnson provides no evidentiary support for his conclusory statement that Plaintiff did not provide for a possible reconciliation.

In counsel's affirmation, Obermeister argues that Plaintiff's motion should be denied as premature as Defendants are in need of discovery. He asserts that Defendants served both a deposition notice and a notice for discovery and inspection on Plaintiff but they have not received any responses and that these documents and deposition testimony are relevant to Defendant's defenses (Obermeister Opp. Aff. at ¶¶ 3-7).

He further repeats Johnson's contentions concerning the criminally usurious nature of the Agreement (*id.* at ¶¶ 8-11). Obermeister contends that Plaintiff has admitted various facts set forth in Defendants' notice to admit based on Plaintiff's failure to timely respond to same and that these facts substantiate Defendants' argument concerning the usurious nature of the Agreement (i.e., the courts have "established that in order for this type of transaction not to be considered a loan, the repayment must not be absolutely payable and instead must be based on known and projected receivables; any payments must be a good-faith estimate of known and projected receivables") (*id.*

at ¶¶ 8-11). Counsel argues that based on the admissions made by Plaintiff in defaulting to respond to the Notice to Admit (i.e., "Plaintiff has admitted that when entering into this agreement and subsequent to the agreement's effective date, they never had a record, basis, or knowledge of Defendant's receivables, receipts, or invoices"), "it is axiomatic that Plaintiff loaned the Defendants the funds and did not base the monies due to it by Defendants on potential receivables," and it is therefore usurious based on the three-prong test adopted by the courts (*id.* at ¶¶ 21-23).

Finally, counsel argues that Plaintiff's request to be awarded the $2,500 blocked fee and the $7,500 default fee should be denied as they are an unenforceable penalty (i.e., a liquidated damage amount that is grossly disproportionate) and, further, there is no evidence submitted to support the $2,500 blocked fee (*id.* at ¶¶ 31-39).

PLAINTIFF'S CONTENTIONS IN FURTHER SUPPORT OF ITS MOTION

In further support of its motion, Plaintiff submits a reply memorandum of law (NYSCEF Doc. No. 31 ["Plf's Reply Mem."]). In it, Plaintiff contends that this Court should reject Defendants' argument concerning their need for discovery as they "have failed to provide any evidentiary basis that suggest[s] that discovery may lead to relevant evidence . . . [given that this action] is predicated on the explicit language of the Agreement" (Plf's Reply Mem. at 1).

In response to Defendants' argument that the Agreement is a usurious loan, Plaintiff asserts that "[a]s a matter of law, unless advanced monies are repayable 'absolutely,' the transaction is not a loan" (*id.* at 3). Plaintiff argues that courts look at three factors to determine "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" (*id.* at 4). In support, Plaintiff relies on, inter alia, the language in Section 4.1 of the Agreement which explicitly states that it is a "Nonrecourse Sale of Future Receipts (THIS IS NOT A LOAN) . . . Seller is selling a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer, There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Buyer" (*id.*). The Section further states that Plaintiff assumes the risk that "the full Purchased Amount may never be remitted because [Dayton's] business . . . went bankrupt" (*id.*).

Regarding the first factor weighing in favor of the repayment being contingent rather than absolute, Plaintiff relies on the fact that the Agreement has a reconciliation provision (Section 2) which allows Dayton to request, as long as it is not in default, to adjust the remittance amount based on its revenue stream (*id.* at 5).

Regarding the second factor (i.e., whether the Agreement has a finite term), Plaintiff asserts that the reconciliation provision, which allows the parties to agree to adjust the daily amount to be remitted to more closely reflect Dayton's actual future receipts and which could have the potential of reducing the daily remittances and prolong the length of time for Plaintiff to be paid in full, means that there is no finite term to the Agreement (*id.* at 6).

And in support of the final factor weighing in favor of a finding that the repayment was contingent and not absolute (i.e., whether there is any recourse should the merchant declare bankruptcy), Plaintiff argues that under the plain language of Section 4.1,

> Seller is selling a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Buyer. If Future Receipts are remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down, or if the full Purchased Amount is never remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business, and Seller has not breached this Agreement or otherwise violated its lawful obligations to Buyer, Seller would not owe anything to Buyer and would not be in breach of or default under this Agreement (*id.* at 6-7).

Plaintiff argues that Dayton is in breach of Section 1 of the Agreement by interfering with Plaintiff's right or ability to collect the Daily Amount as reflected in the payment history showing that Dayton's last weekly ACH Payment was made on or about May 11, 2023 (*id.* at 7). Plaintiff argues that Defendants have provided no evidence that they "attempted to inform Plaintiff that the remittance of the weekly ACH payments would not be successful and/or informed Defendants that Plaintiff would be unable to withdraw the weekly ACH payments from the account. If Defendants simply informed Plaintiff of such, pursuant to the explicit language of the Agreement, Defendants would not be in default" (*id.*). Plaintiff contends that the recourse it has if Dayton files for bankruptcy is only if an event of default occurs, not if Dayton has no revenue and, therefore, "Plaintiff's recourse also weighs in favor that repayment is contingent rather than absolute" (*id.*).

In response to Defendants' argument that the $2,500 Blocked Account Fee and $5,000 Default Fee are unenforceable penalties, Plaintiff argues that under the caselaw, it is Defendants' burden to submit proof that the Blocked Fee is an unenforceable penalty, which they have failed to do. Plaintiff further argues that in any event, the Blocked Fee and Default Fee are enforceable liquidated damages and not a penalty given that they are a reasonable estimate of the damage Plaintiff would likely incur (i.e., it "'bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation'"). Plaintiff asserts that whether a contractual provision represents a liquidated damages provision is a question of law for the court. According to Plaintiff, the probable loss must be viewed at the time of the parties' entry into the Agreement and not when the breach occurs and that by entering into this Agreement, "Plaintiff was deprived from the ability to use those funds given to Defendants towards other clients, who would not have defaulted on the agreement" (*id.* at 9-10). It is Plaintiff's position that "the Blocked Fee for $2,500 and Default Fee of $5,000 is not grossly disproportionate to the amount of actual damages as the amount of actual damages is $63,993, the fees associated with the breach (i.e. bank fees), the costs of collection efforts, the statutory interest after said breach, and most importantly the detrimental effect to Plaintiff's portfolio. Aside from the amount that Defendant currently owes to Plaintiff, the remainder of the damages suffered by Plaintiff was unascertainable at the execution of the Agreement. Accordingly, the Blocked Fee and Default Fee is reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*id.* at 12).

Finally, in response to Defendants' arguments concerning Plaintiff's failure to respond to the Notice to Admit, Plaintiff argues that the default "does not mean Defendants are absolved from defaulting on the Agreement," and it is undisputed that "[o]n or about May 12, 2023, May 15, 2023 and May 16, 2023, [Dayton] stopped payment (Bank Code R08) for the daily ACH payment and consequently breached the Agreement" (*id.* at 13).

DISCUSSION

The legal standards to be applied in evaluating a motion for summary judgment pursuant to CPLR 3212 are well-settled. "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' . . . and then only if, upon the moving party's meeting of this [prima facie] burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega*, 18 NY3d at 503, *quoting Ortiz v Varsity Holdings, LLC,* 18 NY3d 335, 339 [2011]). "It is the defendants' burden, as the party moving for summary judgment, to demonstrate their prima facie entitlement to judgment as a matter of law by submitting evidence conclusively establishing their defense to the action . . . ." (*Fricano v Law Offs. of Tisha Adams, LLC*, 194 AD3d 1016, 1017 [2d Dept 2021]). Accordingly, "summary judgment is appropriate 'where only one conclusion may be drawn from the established facts'" (*Jones v Saint Rita's R.C. Church*, 187 AD3d 727, 729 [2d Dept 2020], *quoting Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]), or where a cause of action and/or the type of damages sought "fails as a matter of law" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008]; *see also M.V.B. Collision, Inc. v Allstate Ins. Co.*, 187 AD3d 881 [2d Dept 2020]).

Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]). Even where there is no opposition, however, "[a] summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion" (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 277 [1st Dept 2006], *citing Vermont Teddy Bear Co. v 1-800 Beargram Co.,* 373 F3d 241 [2d Cir. 2004]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega,* 18 NY3d at 504). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]; *Collado,* 126 AD3d 927). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

As an initial matter, the Court does not credit Defendants' argument that the motion is premature pursuant to CPLR 3212(f) because they have not received the outstanding discovery from Plaintiff as they have not demonstrated that there is discovery solely within the control of Plaintiff is needed to oppose Plaintiff's motion. Defendants offer nothing more than mere speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered and to succeed in the denial of a summary judgment motion pursuant to CPLR 3212(f), Defendants were required to show that evidence necessary for their opposition was exclusively within Plaintiff's control, which Defendants have failed to do (*see Vikram Constr., Inc. v Everest Natl. Ins. Co.*, 139 AD3d 720 [2d Dept 2016]; *Williams v Spencer-Hall*, 113 AD3d 759 [2d Dept 2014]; *Brewster v Five Towns Health Care Realty Corp.*, 59 AD3d 483 [2d Dept 2009]; *Berkeley Fed. Bank & Trust FSB v 229 E. 53rd St. Assoc.*, 242 AD2d 489 [1st Dept 1997]).

Turning to Plaintiff's motion for summary judgment on its First and Second Causes of Action, "[t]he essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259, 1260 [2d Dept 2016]). With regard to Plaintiff's claim on the guaranty, to establish *prima facie* entitlement to summary judgment, a plaintiff must show, (1) the underlying obligation, (2) the guaranty executed by defendant, and (3) failure to make payments according to the terms of the underlying obligation and guaranty (*Provident Bank v Giannasca,* 55 AD3d 812 [2d Dept 2008]; *Verela v Citrus Lake Dev., Inc.,* 53 AD3d 574 [2d Dept 2008]; *see also Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541 [1st Dept 1992]; *see Gateway State Bank v Shangri-La Private Club for Women, Inc.,* 113 AD2d 791 [2d Dept 1985], *affd* 67 NY2d 627 [1986]). If this showing is made, the burden shifts to defendant to come forward with evidentiary facts demonstrating the existence of a material issue of fact which would defeat summary judgment (*see, e.g., Fleet Bank v M & Z Headwear, Inc.*, 308 AD2d 507 [2d Dept 2003]; *Moezinia v Baroukhian,* 247 AD2d 452 [2d Dept 1998]; *Alicanto, S.A. v Woolverton*, 142 AD2d 703 [2d Dept 1988], *lv denied* 73 NY2d 702 [1988]; *accord Banco Popular North Am. v Victory Taxi Mgt., Inc.,* 1 NY3d 387 [2004]; *Mastro v Carroll*, 296 AD2d 802 [3d Dept 2002]; *DeVito v Benjamin*, 243 AD2d 600 [2d Dept 1997]). To defeat the motion, the guarantor must come forward with proof showing the existence of a triable issue of fact with respect to a bona fide defense (*id.*).

Here, Plaintiff has presented evidence establishing prima facie, the parties' entry into the Agreement to purchase Dayton's future receivables and Johnson's agreement to guaranty Dayton's performance. Plaintiff has also submitted evidence establishing its performance under the Agreement based on its providing Dayton with the $70,000 purchase price for Dayton's future receivables. Plaintiff has also established Defendants' default based on Dayton's breach in failing to tender the receivables as required under the Agreement and Johnson's failure to pay for Dayton's breach in accordance with the guaranty. Because Plaintiff has demonstrated its prima facie entitlement to summary judgment on its First and Second Causes of Action, the burden shifted to Defendants to submit evidence sufficient to raise a triable issue of fact precluding summary judgment (*Vega*, 18 NY3d 499).

First, Defendants cannot use Plaintiff's failure to respond to their palpably improper Notice to Admit as evidence to oppose Plaintiff's motion. Defendants' Notice to Admit requests that Plaintiff admit that: (1) "At the time of the making of the parties' agreement, and after plaintiff transferred its funding or purchase price to the business defendants, plaintiff had no record of any invoice issued by the business defendants"; (2) "At the time of the making of the parties' agreement, and after plaintiff transferred its funding or purchase price to the business defendants, plaintiff had no record of any customer of the business defendants that owed any money to the business defendants"; and (3) "At the time of the making of the parties' agreement, and after plaintiff transferred its funding or purchase price to the business defendants, plaintiff had no record of any receipts ledger of the business defendant" (NYSCEF Doc. No. 5). Defendants then attempt to use Plaintiff's failure to respond to show that it is a usurious loan because to qualify as a purchase of future receivables, "the repayment must not be absolutely payable and instead must be based on known and projected receivables; any payment must be a good-faith estimate of known and projected receivables" (NYSCEF Doc. No. 28 at ¶ 17), and since "Plaintiff has admitted that when entering into this agreement and subsequent to the agreement's effective date, they never had a record, basis, or knowledge of Defendant's receivables, receipts, or invoices, it is then axiomatic that Plaintiff loaned the Defendants the funds and did not base the monies due to it by Defendants on potential receivables" (*id.* at ¶ 21). Defendants' argument fails based on its palpably improper Notice to Admit. And even if the Court were to deem them as admissions by Plaintiff, these admissions would not provide a triable issue of fact for purposes of this motion.

CPLR 3123 provides "a party may serve upon any other party a written request for admission by the latter. . . of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123[a]). It is well settled that "the purpose of a notice to admit is only to eliminate from the litigation factual matters which will not be in dispute at trial . . . [I]t may not be employed to request admission of material issues or ultimate or conclusory facts" (*Lewis v Hertz Corp.*, 193 AD2d 470, 479 [1st Dept 1993]; *see also Tonkiwa Ltd. v Truesdell*, 155 AD3d 1479 [3d Dept 2017]; *Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770 [2d Dept 2011]; *Hawthorne Group, LLC v RRE Ventures,* 7 AD3d 320 [1st Dept 2004]; *DeSilva by DeSilva v Rosenberg*, 236 AD2d 508 [2d Dept 1997]; *Lotrean v 3M Co.*, 2022 NY Slip Op 32679[U] [Sup Ct, NY County 2022]). A notice to admit is designed to secure a stipulation regarding certain specific matters about which there is general agreement (*Lewis*, 193 AD2d 470; *Hodes v New York*, 165 AD2d 168 [1st Dept 1991]). A notice to admit is improper where it seeks admission of obviously disputed matters that go to the heart of the controversy between the parties (*see Village of Malone v Stone Mtn. Prime, LLC*, 204 AD3d 1148 [3d Dept 2022]; *Lewis v DiMaggio*, 151 AD3d 1296 [3d Dept 2017]; *Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664 [2d Dept 2013]), or requests admission of material or ultimate issues of fact (*see Eddyville Corp. v Relyea*, 35 AD3d 1063 [3d Dept 2006]; *see also Altman v Kelly*, 128 AD3d 741 [2d Dept 2015]; *32nd Ave. LLC v Angelo Holding Corp.*, 134 AD3d 696 [2d Dept 2015]; *Taylor v Blair*, 116 AD2d 204 [1st Dept 1986]; *Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514 [1st Dept 2018] [notice to admit may not be used to seek admission of facts central to the parties' dispute]). As such, given the palpably improper requests to admit found in Defendants' Notice to Admit, the Court shall not deem Plaintiff's failure to respond to these palpably improper requests as admissions for purposes of determining Plaintiff's motion (*Nahar v Gulati*, 33 Misc 3d 1233[A] [Sup Ct, NY County 2011]).

Other than their reliance on Plaintiff's failure to respond to Defendants' improper Notice to Admit, Defendants have offered no evidence to support the denial of Plaintiff's motion. Their argument that the Agreement was a usurious loan rather than a purchase of future receivables is not based on any evidence and, in any event, is utterly refuted by the controlling provisions found in the Agreement.

"To determine whether a transaction constitutes a usurious loan, it must be considered in its totality 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 Properties of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020]). The Court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" (*K9 Bytes, Inc. v Arch Capital Funding, LLC,* 56 Misc 3d 807, 816 [Sup Ct, Westchester County 2017]). The factors to be reviewed in determining whether repayment is absolute or contingent include "(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*, 181 AD3d at 666). A review of the Agreement's provisions make clear that repayment was not absolute. The agreement contained a reconciliation provision, was of indefinite term, and does not provide that a bankruptcy filing is an event of default. As such, Defendants have failed to produce any evidence raising a triable issue of fact which would preclude summary judgment on Plaintiff's First and Second Causes of Action, at least to the extent of Defendants' liability (*Byzfunder NY LLC v Holy City Collision LLC*, 80 Misc 3d 1208[A] [Sup Ct, Ontario County 2023], *Mr. Advance, LLC v The Pore Co., LLC*, 2023 WL 2858973 [Sup Ct, Kings County 2023]; *Kalamata Capital Group, LLC v A Plus Remodeling & Restoration, LLC,* 79 Misc 3d 1223[A] [Sup Ct, Sullivan County 2023]; *West Coast Bus. Capital, LLC v ISO Intl., LLC*, 2023 WL 3271821 [Sup Ct, Kings County 2021]).

As to Defendants' Affirmative Defenses, the Affirmative Defenses are legally insufficient as they fail to allege any facts to support them (*see Coppa v Fabozzi*, 5 AD3d 718, 718 [2d Dept 2004] ["[t]he affirmative defenses raised by the mortgagor [were] unfounded and, thus, were properly stricken by the Supreme Court"]; *Petracca v Petracca,* 305 AD2d 566, 567 [2d Dept 2003] ["Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken"]; *Bentivegna v Meenan Oil Co., Inc.,* 126 AD2d 506, 510 [2d Dept 1987] ["affirmative defenses (which) are 'totally bereft of factual data . . . are fatally deficient'"]; *see also Falk v Gallo*, 18 Misc 3d 1146[A], 859 NYS 2d 894 [Sup Ct, Nassau County 2008]).

Turning to the issue of the damages to which Plaintiff is entitled, the Court agrees with Defendants that the Blocked Fee and Default Fee are unenforceable penalties. Courts enforce liquidated damages clauses to the extent they reasonably estimate the damages and are not viewed a penalty (*X.L.O Concrete Corp. v John T. Brady and Co.,* 104 AD2d 181 [1st Dept 1984], *affd* 66 NY2d 970 [1985]; *Gregory v Simon & Schuster, Inc.,* 1994 WL 381481 [SD NY 1994], *affd* 60 F3d 812 [2d Cir 1995]; *Hulko v Connell,* 1988 WL 75012 [SD NY 1988]). "'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" and where it is found to be an unenforceable penalty, "'the recovery is limited to actual damages proven'" (*Byzfunder NY LLC*, 80 Misc 3d 1208[A] at *2, *quoting Central Irrigation Supply v Putnam Country Club Assoc., LLC*, 57 AD3d 934, 935 [2d Dept 2008]). Here, the Court agrees with decisions issued by other Supreme Court Justices in which these types of default fees and blocked fees were found to be unenforceable penalties because the damages to be suffered upon a breach were readily ascertainable at the time of the parties' entry into the Agreement (*Byzfunder NY LLC* , 80 Misc 3d 1208[A]; *Mr. Advance, LLC*, 2023 WL 2858973; *Kalamata Capital Group, LLC,* 79 Misc 3d 1223[A]; *West Coast Bus. Capital, LLC*, 2023 WL 3271821). Accordingly, the branches of Plaintiff's motion seeking to recover from Defendants the $2,500 Blocked Fee and $5,000 Default fee shall be denied.

Finally, since there is no dispute that the parties entered into the Agreement and guaranty, there is no cause of action to recover for unjust enrichment (*Cortazar v Tomasino*, 150 AD3d 668 [2d Dept 2017]). "A cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter underlying the action" (*Scott v Fields*, 92 AD3d 666, 669 [2d Dept 2012]).

CONCLUSION

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that motion by Mantis Funding LLC seeking a summary judgment against Defendants Dayton Car Care of Ohio LLC d/b/a Dayton Care of Ohio a/k/a Dayton Car and Barry John Johnson is granted in part and denied in part; and it is further

ORDERED that the branches of Plaintiff's motion seeking summary judgment on its First and Second Causes of Action is granted to the extent Defendants are liable to Plaintiff for the outstanding sum due under the Agreement and guaranty in the amount of $58,993.00, together with interest (9% per annum) from May 16, 2023 and Plaintiff's costs and disbursements as reflected in a bill of costs to be presented along with its proposed judgment to the Clerk of the Court; and it is further

ORDERED that the branches of Plaintiff's motion seeking summary judgment on its Third Cause of Action for unjust enrichment is denied and this claim is dismissed; and it is further

ORDERED that the branches of Plaintiff's motion seeking recovery from Defendants for the Blocked Fee and the Default Fee are denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 7, 2025

ENTER:

Gretchen Walsh
HON. GRETCHEN WALSH, J.S.C.

APPEARANCES

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