

**Radiance Funding v Harvest Bakery Servs. & Equip.,  
Inc.**

2026 NY Slip Op 30542(U)

February 6, 2026

Supreme Court, Kings County

Docket Number: Index No. 527436-2025

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 527436-2025  
Motion Date: 11-10-25  
In Mot. Seq. #1

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RADIANCE FUNDING,

Plaintiff,

-against-

**DECISION/ORDER**

HARVEST BAKERY SERVICES AND  
EQUIPMENT, INC. and TIMOTHY ALLEN KEMP,

Defendants.  
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The following papers, which are e-filed with NYCEF as items 5-8, 20-23, were read on this motion.

This is an action for breach of contract and breach of a personal guaranty of performance arising from a Merchant Cash Advance Agreement. In Mot. Seq. #1, , Defendants Harvest Bakery Services and Equipment, Inc. and Timothy Allen Kemp move for an order dismissing the Plaintiff's Verified Complaint in its entirety pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Defendants further request an order dismissing Plaintiff's claims for default fees and attorney's fees as unenforceable penalties.

**BACKGROUND**

On or about March 12, 2025, Plaintiff Radiance Funding and the Business Defendant, Harvest Bakery Services and Equipment, Inc., entered into a Merchant Cash Advance Agreement wherein the Business Defendant sold \$108,800.00 of its future business receivables to Plaintiff for an upfront purchase price of \$80,000.00. On the same date, Defendant Timothy Allen Kemp executed a personal guarantee of the Business Defendant's performance under the Agreement. Plaintiff performed its obligations by wiring the purchase price, less an agreed-upon origination fee, totaling \$76,800.00 to the Business Defendant on March 12, 2025.

Defendants partially performed their obligations under the agreement by delivering \$51,809.60 of the purchased receivables to the Plaintiff. Plaintiff alleges that on August 11, 2025, Defendants breached the Agreement by intentionally stopping ACH withdrawals to which Plaintiff claims it was entitled, resulting in an unremitted balance of \$59,590.40.

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Plaintiff subsequently commenced this action seeking the outstanding balance plus interest, a \$2,500.00 default fee, and attorney's fees.

## DISCUSSION

In support of their motion to dismiss, Defendants contend that the complaint fails to satisfy the requirements of CPLR 3013 because it does not allege specific facts or identify the provisions of the contract that were breached. Defendants argue that the allegation of failing to remit a specified percentage of revenue is not a specific event of default as a matter of law. Furthermore, Defendants assert that the requested default fees and attorney's fees are punitive and constitute unenforceable penalties.

In opposition, Plaintiff argues that the Verified Complaint sufficiently states a cause of action pursuant to the pleading standards of CPLR 3013 by stating the material elements of the causes of action supported by authenticated documents, including the Agreement, proof of funding, and transaction history. Plaintiff also submits an affirmation from its CEO, Simon Wein, clarifying that the breach occurred when Defendants placed a stop payment order (ACH Return Code R08) on authorized withdrawals, which he claims is an express event of default under the Agreement. Plaintiff also contends that the default fee is a reasonable estimate of non-legal costs incurred due to the compliance burden and collection efforts necessitated by a breach.

That branch of Mot. Seq. #1 in which Defendants move to dismiss the complaint for failure to state a cause of action for breach of contract and breach of guaranty is **DENIED**. “In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Langley v. Melville Fire Dist.*, 213 A.D.3d 748, 750, 183 N.Y.S.3d 516; see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). “On a motion to dismiss pursuant to CPLR 3211(a)(7), ‘the standard is whether the pleading states a cause of action’ ” (*Houtenbos v. Fordune Assn., Inc.*, 200 A.D.3d 662, 663, 160 N.Y.S.3d 57, quoting *Sokol v. Leader*, 74 A.D.3d 1180, 1180–1181, 904 N.Y.S.2d 153). “Whether a complaint will later survive a motion for

summary judgment, or whether the plaintiff will ultimately be able to prove its claims, plays no part in the determination of a pre-discovery motion to dismiss pursuant to CPLR 3211(a)(7)” (*Bailey v. City of New York*, 228 A.D.3d 713, 715, 214 N.Y.S.3d 58; see *Maursky v. Latham*, 219 A.D.3d 473, 475, 193 N.Y.S.3d 300). “Moreover, the court may consider affidavits submitted by the pleading party to remedy any defects in the pleading, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true” (*Island Ordnance Sys., LLC v. Amerimex, Inc.*, 224 A.D.3d at 822, 205 N.Y.S.3d 456; see *Mera v. New York City Health & Hosps. Corp.*, 220 A.D.3d 668, 669, 197 N.Y.S.3d 278).

While Defendants cite *Atkinson v. Mobil Oil Corp.*, 205 A.D.2d 719 (2d Dept. 1994) and *Woodhill Elec. v. Jeffrey Beamish, Inc.*, 73 A.D.3d 1421 (3rd Dept. 2010) for the proposition that a complaint is insufficient if it does not allege the specific provisions breached, the Plaintiff here has satisfied this requirement by attaching the Agreement itself, which defines blocking ACH debits as an Event of Default, as well as providing the Wein Affirmation which explains the alleged breach. These materials sufficiently provide notice of the transactions and occurrences intended to be proved. Plaintiff has identified the specific act of breach—the placement of a stop payment order (Return Code R08) on August 11, 2025—which constitutes an express Event of Default under the Agreement. Consequently, the complaint as well as the above submissions satisfies the requirements of CPLR 3013 and are sufficient to demonstrate that the plaintiff’s claims fit within a cognizable legal theory.

That branch of Motion Sequence Number 1 in which Defendants move to dismiss the claims for a default fee and attorney's fees as unenforceable penalties is also **DENIED**. While a contractual provision fixing damages will not be sustained if it constitutes an unenforceable penalty rather than a reasonable proportion of probable loss, such a determination often requires a factual showing. Plaintiff has provided an explanation for the default fee as a best estimate of non-legal costs, including compliance burdens and fees for collection contractors. At this pleading stage, Plaintiff has sufficiently alleged a factual basis for these fees as part of its contract-based damages. The motion to dismiss these claims is more properly a subject for a summary judgment motion.

Based on the foregoing, it is hereby

**ORDERED** that the motion is **DENIED** in its entirety.

This constitutes the decision and order of the Court.

Dated: February 6, 2026.



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HON. PETER P. SWEENEY, J.S.C.

2025-11-10-RADIANCE-1-527436-2025

**FILED**

FEB 11 2026

**KINGS COUNTY CLERK'S OFFICE**