Cherokee Funding II, LLC v Express Funding of Am., LLC
2026 NY Slip Op 31195(U)
March 24, 2026
Supreme Court, New York County
Docket Number: Index No. 653433/2024
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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CHEROKEE FUNDING II, LLC,	INDEX NO.	653433/2024
Plaintiff,	MOTION DATE	09/16/2025, 09/16/2025
- v -		
EXPRESS FUNDING OF AMERICA, LLC, NEAL ZEER, KENNETH BUNN, ALEXANDER FELIX	MOTION SEQ. NO.	014 015
Defendants.	**DECISION + ORDER ON MOTION**	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 363, 364, 365, 366, 367, 368, 369, 370, 391, 392, 400, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 430, 433, 457, 462, 464, 468, 471
were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 401, 404, 405, 406, 407, 408, 434, 458, 463, 465, 469, 470, 472
were read on this motion for SUMMARY JUDGMENT.

Defendants and Counterclaim-Plaintiffs Express Funding of America, Neal Zeer, Kenneth Bunn, and Alexander Felix (collectively, "EFA") move for Partial Summary Judgment on their counterclaims against Cherokee (Mot. Seq. 014). Plaintiff and Counterclaim-Defendant Cherokee Funding II, LLC ("Cherokee") moves for Partial Summary Judgment on its breach of contract claim relating to the recovery of costs and expenses paid and incurred in enforcing and administering the RPAs (Mot. Seq. 015).

This action involves Receivable Purchase Agreements ("RPAs") pursuant to which Cherokee purchased receivables on hundreds of personal injury claims and lawsuits that EFA funded (the "Sold Receivables") (NYSCEF 69 and 70 [the "RPAs"]). Under the RPAs, EFA

conveyed its "rights, title, and interest in, to, and under" the Sold Receivables to Cherokee, and EFA reserved a right to split a percentage of "Revenue in Excess of Hurdle Share" from the receivables pursuant to schedule depending on "Months to Settlement from Sold Receivable Closing Date by Purchaser" (the "waterfall") (*see* RPAs, §§ 2[a];5[f]).

Cherokee now seeks to recover costs and expenses from EFA under the RPAs (*see* RPAs, § 12). Cherokee submits that it has paid or incurred $1,294,808.13[1] for expenses, including: $908,072.98 for attorneys' fees, paralegal fees', litigation costs and disbursements in connection with enforcing the RPAs through this lawsuit; $219,500.00 for paying Rhett A. Frimet, P.C., Jordan Cohen, Esq. and Lawrence Yablon, Esq. to assist Cherokee in administering the RPAs and obtaining payments on Sold Receivables; and $6,285 in legal fees to prepare an amendment to the RPAs in 2024 (NYSCEF 374 ["Zeising Affirm"] ¶¶ 8-15).

In EFA's motion, EFA seeks partial summary judgment in the form of: (1) an Order declaring that EFA has the exclusive right to provide "servicing assistance" under Paragraph 4(a) of the RPAs; (2) an Order finding that Cherokee breached the RPA by unilaterally as a matter of law by having removed EFA completely from its servicing obligations under the RPA; (3) a Declaration that EFA is not responsible for any servicing fees or attorney's fees relating to servicing of the RPA, whether incurred by counsel and/or third parties; (4) a Declaration that the RPA does not provide a basis to assess any attorney's fees against EFA; (5) an Order finding that Cherokee breached the RPA Paragraph 2(c) by failing to pay EFA in full for 63 sold receivables,

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[1] Cherokee submits another figure in its motion papers (*see* NYSCEF 372 at 5 [stating the costs and expenses are "$1,603,682.22 and counting"]), but neither $1,294,808.13 nor $1,603,682.22 appear to comprise the $908,072.98 for attorneys' fees, $219,500.00 for administrative fees, and the $6,285 in legal fees claimed (which add up to $1,133,857.98). It is unclear how Cherokee is arriving at these numbers.

warranting a damage hearing for the unpaid balance and lost profits; (6) an Order declaring that Cherokee is only permitted to assess write-offs or ineligible receivables against the waterfall after written notice and no objection from EFA; and (7) an Order, pursuant to Paragraph 5(f) of the RPA, that Cherokee must remit to EFA within five business days any funds it receives from sold receivables, together with documentation of such payments.

For the following reasons, both motions are denied.

DISCUSSION

Under CPLR 3212, summary judgment is appropriate when a party establishes with evidence "that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law" matter of law." (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A. Cherokee's Motion for Partial Summary Judgment

Cherokee moves for partial summary judgment on the branch of its First Cause of Action for Breach of Contract alleging that EFA breached the RPAs by "refusing to pay costs and expenses owed pursuant to Section 12 of the Receivable Purchase Agreements" (NYSCEF 68 ¶ 119[g]). Section 12—entitled "Costs and Expenses"—of the RPAs provides in relevant part that: "Seller agrees to promptly pay Purchaser for all costs and expenses paid or incurred [sic] Purchaser in connection with the administration, and enforcement of this Purchase Agreement, including, without limitation: (i) attorneys' and paralegals' fees and disbursements of your counsel; (ii) costs and expenses (including attorneys' and paralegals' fees and disbursements for both in-house and outside counsel) for any amendment, supplement, restatement, waiver, consent, or other agreement in connection with this Purchase Agreement and the transactions

contemplated herein (iii) costs and expenses (including attorneys' and paralegals' fees and disbursements) paid or incurred to obtain payment of the Sold Receivables . . . (RPAs, § 12).

1. Attorney's Fees Incurred in This Litigation

First, Cherokee seeks reimbursement for all attorney's fees, paralegals' fees, and disbursements it has incurred thus far in this ongoing litigation. This claim is both premature (as the matter is not complete) and of questionable merit at least to the extent it seeks to recover fees incurred even if Cherokee does not prevail in this litigation. There is no indication that Section 12's reference to "enforcement of this Purchase Agreement" means that the parties intended to shift the cost any of litigation between the parties pursuant to the RFAs to EFA even if EFA is the prevailing party.

Under Georgia law, which governs the RPAs, "[p]arties may establish contract terms on any subject matter in which they have an interest so long as their agreement is not prohibited by statute or public policy. There is no public policy against contracting for the recovery of attorney fees" (*Sylar v Hodges*, 250 Ga App 42, 43 [Ga Ct App 2001]). However, Cherokee fails to cite to any case under Georgia law that upheld an attorney's fees provision that permitted the losing party in a litigation to recover its fees from the prevailing party.[2] Georgia, like New York, recognizes that "[u]nder our legal system, the American rule by which each party is responsible

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[2] Most of the cases Cherokee cites to address the application of OCGA § 13–1–11, which deals with attorney's fees in notes and appears to place strict limitations on such provisions (*see e.g.*, OCGA § 13-1-11[a][1] ["If such note or other evidence of indebtedness provides for attorney's fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to ***but not in excess of 15 percent of the principal and interest owing*** on said note or other evidence of indebtedness"] [emphasis added]).[2] As recognized by Cherokee itself (NYSCEF 434 at 8 n 7), this case would not fall under OCGA § 13-1-11, and thus that statute does not apply here (*see Eagle Jets, LLC v Atlanta Jet, Inc.*, 347 Ga App 567, 572 [Ga Ct App 2018] ["this litigation was not an attempt to collect on a defaulted debt after maturity, and OCGA § 13-1-11 has no application here"]).

for its own attorneys' fees and litigation expenses generally applies unless there is some statutory or contractual exception" (*City Hgts. Condominium Assn., Inc. v Bombara*, 337 Ga App 679, 682 n 3 [Ga Ct App 2016]; *see also Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

The Court leaves open the possibility that this provision was intended to be a prevailing party provision or that it was intended to only apply to third-party claims. In this regard, extrinsic evidence may be useful to determine what the parties intended.[3] However, the Court dismisses Cherokee's expansive reading to the extent it suggests entitlement to recover costs of litigation even with respect to claims on which *EFA* prevails.

2. Administrative Costs and Expenses

Next, Cherokee submits that it incurred fees in connection with "administration" of the RPAs, including funds paid to three attorneys to assist Cherokee in administering the RPAs (*see* NYSCEF 372 at 6). Cherokee asserts that these costs and expenses clearly fall under Section 12 of the RPAs, as they were paid or incurred in connection with the "administration" of the RPAs "to obtain payment of the Sold Receivables. . . or otherwise realize upon the Sold Receivables" (RPAs, §12). When looking at the RFAs as a whole, and reading the provisions together, Cherokee has not established its entitlement to summary judgment on such fees and costs.

[3] Evidence relating to the drafting of the RPAs may also be helpful in interpreting the RPAs (*see Hertz Equip. Rental Corp. v Evans*, 260 Ga 532, 532 [1990], citing OCGA § 13–2–2(5) ["[u]nder the statutory rules of contract construction, if a contract is capable of being construed two ways, it will be construed against the preparer and in favor of the non-preparer"]). For example, the first subsection (i) of Section 12 is unclear, as it refers to fees and disbursements of "your counsel," although there is no definition of whose counsel that might be. At oral argument, EFA asserted that Cherokee drafted the RPAs, and therefore "your" was referring to EFA. Cherokee objected to this assertion, although no facts have been placed in the record on this motion about the drafting of the RPAs.

There is no provision in the RPAs which defines what "administrative" costs are, and whether or not they include the "servicing" costs that Cherokee has included in its administrative costs. Servicing is governed by paragraph 4 of the RPA. That section provides that "Seller shall be obligated to assist Purchaser with the onboarding and servicing of the Sold Receivables. Servicing assistance shall include, but not be limited to, obtaining case updates from counsel on each Sold Receivable no less often than every 90 days, taking appropriate action to secure Purchaser's right to payment in the event of change of Counsel or dropping of Counsel, providing Counsel with payoff quotes, negotiating reductions and settlements to the amounts owed on the Sold Receivables, and routing payments to Purchaser's designated bank account. ***Notwithstanding the foregoing Purchaser may directly contact Counsel in the event that Seller does not obtain a case update in the required time frame or to obtain any other information necessary*** for the Advance(s) to qualify as Eligible Receivables. and (ii) must approve any reduction, settlement, or other request for a payment less than the full amount due on any Sold Receivable" (RPAs § 4[a] [emphasis added]).

It has been EFA's contention throughout this litigation that Section 4 confers a right or obligation on EFA to continue servicing the receivables under the RPAs, and that Cherokee cannot reach out to law firms unless EFA fails to do so (RPAs, § 4[a] ["Purchaser may directly contact Counsel in the event that Seller does not obtain a case update in the required time frame or to obtain any other information necessary"]).[4] While Cherokee argues that Section 4(a)

[4] EFA also points to Section 7 of the RPAs which provides: "Duty to Cooperate. The Seller, its agents, employees, members, shareholders, unrepresentative and/or doctors agree to use their best efforts to maximize the recovery of the Sold Receivables, including but not limited to, complying with any reasonable request for information or documentation by Purchaser, complying in a timely manner with all subpoenas served on Seller relating to the Claimant, and to cooperate in any reasonable manner with counsel for Claimant and/or Purchaser" (RPAs, § 7).

imposes an obligation on EFA—not a *right*— the Court is not able to determine conclusively on this summary judgment record whether the "administrative costs" Cherokee seeks in this motion are recoverable under Cherokee's theory of servicing.[5]

Moreover, the Court is not persuaded on this summary judgment record that Section 4(a) means that EFA had the *exclusive* right to service the receivables. On this issue extrinsic evidence may be useful to determine what the parties intended by Section 4. Therefore, summary judgment on this issue is denied. For the same reasons, Cherokee's request for payment by EFA for fees and expenses incurred in preparing amendments to the Receivable Purchase Agreements totaling $6,285.00 is deferred pending a more complete record and final Court determination with respect to the parties' intent.

B. EFA's Motion for Partial Summary Judgment

EFA's motion for partial summary judgment is denied. EFA's motion improperly seeks rulings in the form of "declaratory" relief that EFA did not assert as Counterclaims. The only counterclaims remaining after the motion to dismiss are two breach of contract claims (first and second counterclaims) that seek damages (*see* NYSCEF 212).[6]

Pursuant to CPLR 3017, in a declaratory-judgment action, "the demand for relief *in the complaint* shall specify the rights and other legal relations on which a declaration is requested"

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[5] The Court recognizes that during the May 29, 2025 hearing, it observed that EFA's servicing under section 4(a) of the RPAs is "not a right, it's an obligation -- to assist purchaser [Cherokee] with the onboarding and servicing of the receivables." (NYSCEF 245 [5.29.25 Hearing Tr. 54:15-17]). However, that was *not* a decision or an order by the Court, and this issue remained (and remains) open for resolution on an appropriate record.

[6] Cherokee's argument that EFA's motion is premature because issue has not been joined on EFA's counterclaims is now moot, since the motion to dismiss the counterclaims has been heard and decided (NYSCEF 438). In any event, the Court expressly granted the parties' request to move for partial summary judgment. Thus, this argument is unavailing.

(emphasis added). Applying this statute, the court in *Eisenberg v Rem* (67 Misc 3d 1208(A) [Sup Ct 2020]) held that "Rem is not entitled to summary judgment in the form of a declaration because he never asserted a claim for declaratory relief to begin with. A cause of action seeking a declaratory judgment is one like any other--a plaintiff (or counterclaim defendant) cannot obtain relief that he has never sought." (*affd sub nom. Eisenberg v Weisbecker*, 190 AD3d 549 [1st Dept 2021]; *see also Green v Dolphy Const. Co., Inc.*, 187 AD2d 635, 636 [2d Dept 1992] ["Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief"]).

To be clear, most of the issues upon which EFA seeks relief—including whether EFA has the exclusive right to provide "servicing assistance" and whether EFA is responsible for costs and fees—are issues that, as addressed above, remain open for resolution at trial. As to EFA's request for an Order finding that Cherokee breached the RPA Paragraph 2(c) by failing to pay EFA in full for 63 sold receivables, EFA has not explained why Cherokee should be found responsible for the brokers' fees at issue under the RPAs. Section 2(c) of the RPAs provide "[i]n the event the broker fee is greater than 15%, [Cherokee] shall be solely responsible for paying any such amount." (RPAs § 2[c]). The RPAs are silent as to which party pays brokers' fees under 15 percent. Once again, extrinsic evidence may be helpful in determining which party is responsible for paying brokers' fees under 15 percent.

The Court has considered the parties' remaining arguments and finds them unavailing.

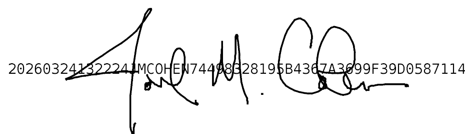
Accordingly, it is

ORDERED that EFA's Motion for Partial Summary Judgment is **DENIED**; it is further

ORDERED that Cherokee's Motion for Partial Summary Judgment is **DENIED**; and it is further

ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.



3/24/2026						
DATE				JOEL M. COHEN, J.S.C.		
CHECK ONE:	☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☒ DENIED		☐ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER			☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN			☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	