

**Fora Fin. Asset Securitization 2024, LLC v Hot Tub
Factory Outlet LLC**

2026 NY Slip Op 31325(U)

April 1, 2026

Supreme Court, New York County

Docket Number: Index No. 154691/2025

Judge: Nicholas W. Moyne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41M

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FORA FINANCIAL ASSET SECURITIZATION 2024, LLC,

INDEX NO. 154691/2025

Plaintiff,

MOTION DATE 05/07/2025

- v -

HOT TUB FACTORY OUTLET LLC, RAYMOND MORROW

MOTION SEQ. NO. 001

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

The defendant has moved to dismiss and the plaintiff has cross-moved for summary judgment. This action arises out of a Purchase and Sale Agreement, whereby the plaintiff agreed to purchase all rights to the future receivables of Hit Tub Factory Outlet LLC (“Hot Tub”).

The parties entered into a Purchase and Sale Agreement (“PSA”) on November 13, 2024, whereby the plaintiff agreed to purchase all rights to Hot Tub’s future receivables having an agreed upon value of \$95,676.000 (the “Purchased Amount”) for a purchase price of \$70,350.00 (the “Purchase Price”). Pursuant to the PSA, Hot Tub agreed to have automatic withdrawals from its business bank account to an account designated by the plaintiff. The defendant Raymon Morrow agreed to guaranty any and all amounts owed to the plaintiff by Hot Tub upon a breach in performance by Hot Tub.

The plaintiff remitted the purchase price to Hot Tub and while Hot Tub initially met its payment obligations, thereafter the payments stopped. The plaintiff alleges that Hot Tub intentionally impeded and prevented the plaintiff from accessing the required withdrawal amounts from the designated bank accounts. Hot Tub remitted the sum of \$7,654.08, leaving an unremitted balance of

\$88,021.92. The plaintiff has brought this suit, asserting causes of action for breach of contract against Hot Tub, breach of the guaranty against Morrow and conversion against Hot Tub.

On a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), the Court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]). At the same time, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery (*see Connaughton*, 29 NY3d at 142).

In moving to dismiss, the defendants first allege that the conversion claim is improperly duplicative of the breach of contract claim and should be dismissed. The Court agrees. It is well-settled that a cause of action for conversion cannot be predicated on a mere breach of contract (*see Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]). Here, the conversion claim does not allege the breach of nay duty separate from the PSA or guaranty that would warrant allowing a tort claim to proceed. The conversion claims is entirely duplicative of the breach of contract cause of action. Accordingly, the motion to dismiss the conversion claim is granted.

The defendants also maintain that the complaint should be dismissed pursuant to CPLR §3211(a)(8) and General Obligations Law §5-1402. In this case, the plaintiff is a Delaware company and the defendants are residents of Pennsylvania. The defendants maintain that the action should be dismissed or moved to a more convenient forum such as Pennsylvania. The PSA contains a forum selection clause wherein the parties explicitly consented to jurisdiction in New York. It is well-settled that a contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, invalid due to fraud or overreaching or in contravention of public policy (*see Bernstein v Wysoki*, 77 AD3d 241, 248-249 [2d Dept 2010]). Absent a strong showing that it should be set aside, a forum selection agreement will control” (*Horton v Concerns of Police Survivors*, 62 AD3d 836, 836 [2d Dept 2009]). Here, the defendants failed to make the requisite showing that the forum selection clause in the parties' merchant cash advance agreement, which requires


disputes to be litigated in the courts of the State of New York, should be set aside (*see Fundfi Merchant Funding, LLC v BKT High Quality Healthcare Agency LLC*, _____ Misc 3d _____, 203 NYS3d 858, 2024 NY Slip Op 24006, *3 [2024] [” The court finds that the foregoing facts constitute an exception under GOL § 5-1402(1) as *National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 230, 690 N.Y.S.2d 57 (1st Dept 1999) gives discretion to the court when the amount is less than \$1 million dollars and the court further finds the forum is appropriate as neither party addresses the convenience of the forum”]; *Bizfund LLC v Holland & Sliger Steel, LLC*, 71 Misc 3d 1226[A], 2021 NY Slip Op 50504[U], *4 [Sup Ct, Kings County 2021] [“The defendants, as the challenging party, proffered no proof that the forum selection clause was unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court”]).

The parties to this action agreed on a New York forum and waived objections thereto. The defendants’ motion fails to establish that the hardship alleged is sufficient to not enforce the agreed upon forum selection clause. No have they established that the forum selection clause was the product of fraud or overreaching. The contention that Pennsylvania would be a more convenient forum to the defendants does not carry the day here given the valid forum selection clause wherein objections based upon forum non conveniens were expressly waived.

The court now turns to the cross-motion for summary judgment. A motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to (*see Brooklyn Bound Realty Corp. v Charles*, 238 AD3d 1104, 1106 [2d Dept 2025]; *Drezin v New Yankee Stadium Community Benefits Fund, Inc.*, 94 AD3d 542, 543 [1st Dept 2012]). Here, since the plaintiff’s cross-motion was made before issue was joined, the plaintiff was barred from seeking summary judgment. Accordingly, the cross-motion for summary judgment is denied.

The motion to dismiss is granted to the extent that the conversion claims is dismissed. The motion is otherwise denied. The cross-motion for summary judgment is denied. The defendants shall answer the complaint within 20 days unless otherwise stipulated to between the parties.

The foregoing constitutes the decision and order of this court.



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4/1/2026

DATE

NICHOLAS W. MOYNE, 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