

Parkview Advance LLC v Comstock Energy LLC

2026 NY Slip Op 31627(U)

April 9, 2026

Supreme Court, Kings County

Docket Number: Index No. 514970/2025

Judge: Reginald A. Boddie

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At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 9th day of April 2026.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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PARKVIEW ADVANCE LLC,

Index No. 514970/2025

Plaintiff,

Cal. No. 19-20 MS 1-2

-against-

COMSTOCK ENERGY LLC and JERRY NICKELL
A/K/A JERRY DON NICKELL SR,

Decision and Order

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 1

17-39; 57

MS 2

42-54

Plaintiff’s motion seeking summary judgment pursuant to CPLR 3212 and defendants’ cross-motion seeking dismissal of plaintiff’s complaint against the individual defendant pursuant to CPLR 3211[a][1] and [a][7] are decided as follows:

This action arises out of defendants’ alleged breach of four merchant cash advance agreements dated November 22, 2023, February 20, 2024, March 21, 2024, and May 8, 2024 (collectively, the “Agreements”). In connection with the Agreements, defendant Jerry Nickell (“Nickell”) executed a Personal Guaranty of Performance (the “Guaranty”). Plaintiff alleges that defendants breached the Agreements on March 25, 2025, by performing an Event of Default under

section 30(16) of the Agreements which states, “[a]n “Event of Default” may be considered to have taken place if...[a]ny Merchant causes any ACH debit to the Account to be stopped or otherwise returned that would result in an ACH Return Code of R08, R10, or R29 and that Merchant does not within two business days thereafter provide PARKVIEW with written notice thereof explaining why that Merchant caused the ACH debit to be stopped or otherwise returned, which notice may be given by e-mail to accounting@parkviewadvance.com.” Plaintiff avers that this resulted in a Bank Return Code R08. As a result of defendant merchant’s breach of the Agreements and Nickell’s failure to satisfy merchant’s outstanding balances, plaintiff submits that defendants are liable to plaintiff in the total amount of \$453,210.51, plus statutory interest at a rate of 9% from March 25, 2025, plus costs and disbursements.

Plaintiff moves for summary judgment for the foregoing amount against defendants under the Agreements and Guaranty and also seeks dismissal of defendants’ affirmative defenses. Regarding defendants’ affirmative defense that the Agreements are usurious loans, plaintiff argues that the Agreements explicitly state that they are a purchase and sale of future receipts and not a loan, that repayment is contingent on future receipts, that the Agreements include a mandatory reconciliation provision, have no fixed term, and specifically provide that plaintiff has limited recourse in bankruptcy and that bankruptcy in of itself does not constitute an event of default. As for defendants’ other affirmative defenses, plaintiff argues they should be dismissed as (1) vague or conclusory; (2) directly contradicted by the parties’ documentary evidence; and/or (3) unsupported by the law.

In opposition, defendants maintain that several issues of material fact remain regarding the usurious nature of the Agreements, thereby precluding summary judgment. In support, defendants argue that the Agreements contain excessive fees, sham reconciliation provisions, waiver of rights, and personal guaranties, which other courts have consistently held as being traits

indicating that the agreements are usurious loans disguised as merchant cash advances. In addition, defendants contend that plaintiff's calculated action in repeated refinances, escalation of balances without new funding, fixed withdrawals untethered to receivables, and an expectation of full repayment within a defined timeframe further support a finding that the Agreements are in fact a predatory lending scheme. In support of the argument that the Agreements expect full repayment, defendants point to the presence of an acceleration clause, plaintiff's ability to debit the seller's accounts, the existence of the personal guaranty, and the inclusion of the security agreement and plaintiff having perfected its security interest by filing a UCC-1 form in Texas, as undermining any claim that plaintiff assumed a genuine risk of nonpayment.

In addition, defendants contend the Agreements' reconciliation provision is illusory because plaintiff has full discretion over the reconciliation process and the Agreements provide no consequences for plaintiff's failure to conduct a reconciliation. According to defendants, when they informed plaintiff that they were struggling financially, plaintiff responded by immediately offering a 50% reduction in payments. Defendants argue that plaintiff's proposal to arbitrarily reduce the payments in half, without reviewing any financial documentation, demonstrates that the payment amounts were not calculated as a percentage of receivables, but were instead fixed repayment obligations.

Further, defendants contend the Agreements reflect an implied finite term since plaintiff never purported to withdraw the specified percentage of company defendant's receivables, always withdrew fixed payments, and reserved the right and ability to debit the defendants' bank account until the full purchase price is received.

In addition to defendants' arguments that the Agreements weigh in favor of being a loan, defendants argue that plaintiff has failed to establish that defendants breached the Agreements since insufficient funds are explicitly identified in the Agreements as not constituting an event of

default. Moreover, that the risk of decreased funds or delayed payments is expressly assumed by the plaintiff under the Agreement.

Nickell also avers, in his affidavit, that he signed the second agreement with plaintiff with the understanding that, rather than receive the full balance of the stated purchase price of \$701,860.63, he would receive a reduced disbursement, with the majority of the funds being applied toward the balance on his first agreement with Parkview. Consistent with this understanding, Nickell further states he believed the weekly withdrawals of \$11,900.00 would cease and be replaced with daily withdrawals of \$5,737.82, but that contrary to those expectations, plaintiff continued to charge daily withdrawals of \$5,737.82, in addition to the weekly withdrawals of \$11,900.00 under the first agreement. Due to the duplicative withdrawals, Nickell states that the company required additional financing which only imposed further repayment obligations.

Lastly, defendants seek dismissal of the complaint as against Nickell on the ground that, under the subject Guaranty, Nickell did not guarantee payment or the delivery of receivables, but rather, guaranteed prompt and complete performance. Defendants posit that, under New York law, Nickell cannot be held liable for plaintiff's alleged damages because Nickell is only bound to the obligations that were expressly guaranteed in the Agreements and nowhere in the Guaranty is there a guarantee of payment from Nickell. Because there is no clear language putting Nickell on notice, defendants argue that it would be inappropriate to read into the Guaranty that Nickell guaranteed payment.

In reply, plaintiff argues that the reconciliation is not illusory and that defendants cannot claim same where they failed to produce their bank statements to substantiate any alleged financial hardship. Further, that defendants' contention that the Agreements have an implied finite term is directly contradicted by the language in the Agreements. Plaintiff contends that courts interpreting substantially similar merchant cash advance agreements have consistently held that the inclusion

of a reconciliation provision defeats any claim that the contract imposes a finite repayment term or disguises a loan. Regarding bankruptcy, plaintiff maintains that if a merchant files for bankruptcy before any default is declared, the funder has no recourse. Since it is only after a merchant defaults that the remedies provisions apply, plaintiff submits that the arguments by defendants, who never filed for bankruptcy, have no evidentiary value.

As for Nickell's liability under the Guaranty, plaintiff argues that the guaranty provision leaves no room for ambiguity as it expressly provides that Nickell guarantees the performance of the Agreement and assumes the responsibility for the Seller's obligations, including but not limited to, the payment of damages in the event of nonperformance.

Discussion

It is well established that summary judgment is warranted when "the proponent makes a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] [citation omitted]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that "[t]he rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022] [citation omitted]). "To determine whether a transaction constitutes a usurious loan: [t]he court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances"

(*id.* [internal quotation marks omitted]). “Unless a principal sum advanced is repayable absolutely, the transaction is not a loan” (*id.*). “Usually, courts weigh three factors when determining 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.*).

Here, plaintiff established as a matter of law its performance under the Agreements by funding defendants. Plaintiff also established defendants’ default under the Agreements by performing an Event of Default under section 30(16) of the Agreements and breach of the Guaranty. Although defendants assert they did not breach the Agreements because the Agreements contemplated the possibility of insufficient funds, defendants do not dispute their failure to comply with section 30(16) of the Agreements. Defendants also fail to raise an issue of fact regarding Nickell’s liability under the Guaranty insofar as they fail to demonstrate why the Guaranty’s language is insufficient to guarantee payment. In this regard, the court notes that the Guaranty provides:

“The Guarantor hereby irrevocably, absolutely and unconditionally guarantees to the Purchaser prompt, full, faithful and complete performance and observance of all of Seller’s Obligations under the Agreement. The Guarantor unconditionally covenants to the Purchaser in the event of a default or breach at any time by the Seller, the Guarantor shall be responsible for the Obligations and **pay all damages and other amounts stipulated in the Agreement** with respect to non-performance of the Obligations” (emphasis added).

Regarding whether the Agreements were in fact loans rather than a purchase of future receivables, the language of the Agreements indicate the purchase and sale of future receivables since (i) repayment was contingent on defendants’ generation of future receivables, (ii) the Agreements contain a mandatory reconciliation provision, (iii) the Agreements lacks a finite term and (iv) the Agreements expressly provide that bankruptcy does not constitute a default event.

Unlike *Crystal Springs Capital, Inc. v Big Thicket Coin, LLC*, 220 AD3d 745 [2d Dept 2023], a case cited by defendants where (1) the plaintiff was “under no obligation” to reconcile payments and (2) a bankruptcy declaration constituted a default under the relevant agreement, here, the Agreements require plaintiff to perform a reconciliation within five business days following seller’s written request and explicitly provides that bankruptcy does not constitute an event of default. Moreover, there is no indication that defendants submitted a reconciliation request that plaintiff failed to perform or that plaintiff had recourse in bankruptcy since defendant merchant never filed for bankruptcy. As such, defendants’ contentions that the Agreement’s reconciliation provisions were illusory and that plaintiff had recourse in the event of bankruptcy are speculative.

Based on the foregoing, plaintiff established that the state’s usury laws do not apply to the Agreements. As such, defendants’ third affirmative defense that the Agreements constitute usurious loans is dismissed. As for defendants’ other affirmative defenses, with the exception of the fifth affirmative defense,¹ the remaining defenses are dismissed as being conclusory, inapplicable, or without merit.

Regarding the judgment amount, although Nickell contends that he believed the second agreement would pay off the balance due under the first agreement, the terms of the second agreement fail to support Nickell’ contention. However, as raised in defendants’ fifth affirmative defense, plaintiff’s requested judgment in the amount of \$453,210.51 includes default fees separately assessed pursuant to the four agreements. Plaintiff fails to demonstrate that such default fees are a reasonable estimation of its loss or injury flowing from defendants’ breach of the Agreements (*see Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424-425 [1977]), especially considering that plaintiff is recouping the full purchased amount of future

¹ Defendants’ fifth affirmative defense concerns the recovery of fees by plaintiff that amount to unenforceable penalties, which the court credits by modifying the requested judgment amount.

receivables that it is entitled to by way of the instant action. As such, the default fees shall be removed from the judgment amount. Plaintiff's motion seeking summary judgment is otherwise granted.

Based on the foregoing, plaintiff's motion seeking summary judgment is granted to the extent indicated. Defendants' cross-motion seeking dismissal is denied. It is hereby ORDERED that plaintiff shall, within 30 days of entry of this decision, serve and file a proposed judgment with an affirmation regarding the proposed judgment amount reflecting an itemization of the unpaid balance for each of the four agreements, the amount of attorneys' fees sought, if any, supported by an attorney affirmation and contemporaneous billing records, and accrued interest.

Any argument not explicitly addressed herein was considered and deemed to be without merit or unnecessary to address given the court's determination.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.