

Avion Funding v Access Prods. Inc
2026 NY Slip Op 32048(U)
May 14, 2026
Supreme Court, Kings County
Docket Number: Index No. 501343/2026
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 14th day of May 2026.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
AVION FUNDING,

Plaintiff,

Index No. 501343/2026

-against-

Cal. No. 1 MS 2

ACCESS PRODUCTS INC d/b/a IMAGING SYSTEMS,
et al.,

Decision and Order

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 2

61-68, 69-81

Plaintiff’s motion to dismiss defendant’s affirmative defenses is decided as follows:

Background

This action arises out of the alleged breaches of Sale of Future Receipts Agreement (the “Agreement”) and related guaranties.

On or about May 14, 2025, plaintiff Avion Funding (“Avion”) purchased \$1,234,210.60 of future receivables from defendant Access Products Inc (“Access”) for a \$881,579 purchase price, to be delivered through weekly remittances of 11.36% of Access’s estimated average sales revenue. The Agreement provided for a net funded amount of \$500,000.05 after deductions for a \$44,078.95 origination fee and a \$337,500 payment of a prior balance owed to plaintiff. Defendant

Robert Michael Roth (“Roth”) and the remaining business defendants executed guaranties of Access’s obligations under the Agreement.

Plaintiff alleges that on or about December 5, 2025, Access defaulted by refusing to continue the weekly remittances, withholding the purchased future receivables, and refusing to continue performance under the Agreement. Plaintiff commenced this action on or about January 13, 2026. Roth thereafter served a verified answer asserting various affirmative defenses, including that the Agreement constitutes an unenforceable and usurious loan, that plaintiff breached the Agreement by withdrawing fixed amounts unrelated to the agreed specified percentage of receivables, and that Roth cannot be held personally liable for the obligations of the Business Defendants.

By Decision and Order dated May 7, 2026, the Court granted plaintiff a default judgment pursuant to CPLR 3215, jointly and severally, against defendants Access Products Inc d/b/a Imaging Systems, Access Products, Inc, Access Products, Inc., Access Business Solutions, Inc., Access Business Systems Inc, Access Products Inc, and BLN Properties LLC (collectively, the “Business Defendants”). The Court directed that submission of a proposed judgment await disposition of the claims against Roth, given the appearance by him.

Plaintiff now moves pursuant to CPLR 3211(b) to dismiss all of Roth’s affirmative defenses, arguing that the defenses fail to sufficiently plead facts and are meritless. Plaintiff contends that the Agreement is not a loan, but rather a lawful purchase of future receivables containing a reconciliation provision, no finite repayment term, and no absolute right to repayment. Plaintiff further argues that the remaining defenses are either legally inapplicable, contradicted by documentary evidence, waived, or constitute mere surplusage.

In opposition, defendant asserts that the defenses were sufficiently pled and that plaintiff failed to establish that the defenses are without merit as a matter of law. Defendant further argues that the motion is premature because material issues of fact exist as to whether plaintiff initially breached the Agreement by withdrawing an amount in excess of the agreed percentage. Although defense counsel further asserts that Roth sold the Business Defendants pursuant to a purchase agreement under which the purchasers assumed all assets and liabilities of the Business Defendants, no affirmation or affidavit from Roth was filed in support of those assertions.

In reply, plaintiff reasserts that the Agreement is not a loan under controlling authority and that defendant failed to submit admissible evidence sufficient to preserve the affirmative defenses. Plaintiff argues that defendant does not allege that defendants ever invoked the reconciliation provision or that Roth's guaranty was ever released or assigned.

Discussion

"CPLR 3211(b) provides that a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law because they either do not apply under the factual circumstances of the case, or fail to state a defense. Where affirmative defenses merely plead conclusions of law without any supporting facts, the affirmative defenses should be dismissed pursuant to CPLR 3211(b)" (*Ramirez v Issa*, 245 AD3d 848, 849 [2d Dept 2026] [citations and internal quotation marks omitted]).

"The 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. 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. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. 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” (*Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022] [citations and internal quotation marks omitted]).

Here, the Agreement demonstrates that the transaction was structured as a purchase and sale of future receivables rather than a loan subject to the usury statutes. The Agreement provides for adjustments to the weekly remittances by calculating the “average revenue for the 30-day period preceding the Reconciliation request” based on bank statements and other records of actual revenue received provided by defendant. Accordingly, because the amount of remittances could change based on Access’s actual revenue, the Agreement does not provide for a finite repayment term. Moreover, the Agreement expressly provides that plaintiff assumes the risk that defendant’s business may fail or declare bankruptcy before the full purchased amount is remitted.

Defendant’s allegations that plaintiff withdrew fixed amounts unrelated to the specified percentage are insufficient to establish that repayment was absolute under all circumstances, particularly where the Agreement expressly contemplated the periodic amount and the specified percentage subject to reconciliation, and defendant does not allege that defendant requested reconciliation or that plaintiff refused a requested reconciliation. The authorities relied on by defendant are either distinguishable on their facts or do not constitute binding authority. Accordingly, the branches of plaintiff’s motion seeking dismissal of defendant’s usury-based affirmative defenses are granted.

Although defendant argues that the guaranty is limited in scope, the Agreement expressly provides for enforcement of guaranty obligations in connection with specified breaches and defaults under the Agreement. Defendant's additional assertions regarding a purported sale of the Business Defendants are unsupported, as defendant failed to file the referenced affirmation from Roth.

However, the branch of plaintiff's motion seeking dismissal of defendant's first affirmative defense is denied. "No motion by the plaintiff lies under CPLR 3211(b) to strike the defense of failure to state a cause of action, as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (*Mazzei v Kyriacou*, 98 AD3d 1088, 1089 [2d Dept 2012] [citations and internal quotation marks omitted]).

As to the remaining affirmative defenses, the asserted defenses are conclusory and boilerplate, unsupported by particularized factual allegations, and therefore subject to dismissal.

Conclusion

Based on the foregoing, plaintiff's motion is granted to the extent that defendant's second through eighteenth affirmative defenses are dismissed. The motion is denied as to the first affirmative defense. Any arguments not expressly addressed herein were 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.