

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

PRESENT: HON. SARIKA KAPOOR  
Acting Justice of the Supreme Court

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VOX FUNDING LLC,

Plaintiff,

-against-

CHAMPION FAMILY AUTO SALES LLC d/b/a  
CHAMPION FAMILY AUTO SALES AND GRADY  
DARNELL CHAMPION,

Defendants.  
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TRIAL/IAS PART 33

Index No. 615887/2022

**DECISION AND ORDER**

Motion Seq. No. 001

Motion Submission Date:  
04/10/2023

NYSCEF Entries #6 through #11 and #14 through #16 were read and considered in deciding this motion.

Defendants, Champion Family Auto Sales LLC a/b/a Champion Family Auto Sales and Grady Darnell Champion (hereinafter "Defendants") move, for an Order, although not specified within their motion, pursuant to CPLR 3211(a)(5) seeking a pre-answer dismissal of Plaintiff, Vox Funding LLC's, Complaint. The motion is **GRANTED** in its entirety.

This action stems from a breach of an agreement entered into by the Plaintiff and Champion Family Auto Sales LLC ("Company Defendant") on January 5, 2022, wherein Plaintiff agreed to purchase \$190,233.67 of future receivables of Company Defendant's for the sum of \$161,206.50. Grady Darnell Champion ("Grady") agreed to guarantee any performance under the agreement.

In or about September of 2022, Company Defendant allegedly stopped remitting the purchased receivables to Plaintiff by closing its bank account from which the money was being withdrawn. The Company Defendant did not provide either any proper notice, proper financial disclosures, or a written request reconciliation. Thus, Plaintiff's claimed that the agreement was breached.

Pursuant to the "Remedies" provision of the parties' contract:

Remedies. Upon an Event of Default, the Specified Percentage shall equal 100% of all Future Receipts and Purchaser shall be entitled to all remedies available under law, subject to arbitration as provided in Section 31 of this Agreement. In any action for damages, Purchaser shall be entitled to damages equal to the undelivered portion of the Amount Sold. Merchant

and the individuals signing this Agreement hereby agree that upon an Event of Default, Purchaser may electronically debit from any of Merchant's bank accounts via ACH or otherwise all or any portion of the Amount Sold or may instruct Merchant's processor to forward to Purchaser all or any portion of the Amount Sold outstanding.

As a result of the purported default, on September 29, 2022, the Plaintiff and Company Defendant entered into Authorization Agreement for Automated Clearing House Transactions whereby Company Defendant authorized nonparty Ivy Receivables, LLC on behalf of Plaintiff to debit \$1,000.00 weekly from Company Defendant starting on October 7, 2022 with possible increase until the balance was paid in full.

Plaintiff commenced this action on November 14, 2022 asserting three causes of actions, to wit: breach of contract, breach of personal guarantee and unjust enrichment.

In support of their instant application, Defendants submit the Summons and Complaint, an affidavit by Grady, the parties' contract and Grady's bank statements. Defendants argue that, pursuant to CPLR 3211(a)(5), the Complaint should be dismissed as Grady's bank statements show regular ACH-debiting to Plaintiff after the lawsuit was commenced. Specifically, Defendants argue that, beginning on November 22, 2022 and continuing weekly for four weeks, until the filing of the instant motion, \$1,000.00 was debited from Defendant Grady's account in favor of Plaintiff. Defendants' argue that "[a] Plaintiff cannot bring a lawsuit for a breach of contract while simultaneously availing itself of a benefit and privilege bestowed upon it." Furthermore, Defendants' argue nothing in the original agreement allowed for ACH-debits after a lawsuit was filed.

In opposition, Plaintiff submits the Authorization Agreement for Clearing House Transaction form and argues that the acceptance of payment of the accelerated debt is not an affirmative act of revoking the underlying claims for a breach of contract. Additionally Plaintiff argues, as the original agreement allowed for the debiting of Defendants' account in the event of a default, the acceptance of a payment is not a waiver of the terms of the agreement and Defendant is still in breach of its obligations.

CPLR 3211(a)(5) states, in pertinent part:

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that \* \* \* (5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.

Moreover, "a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint on the ground of payment may be granted where the documentary evidence establishes the defense of payment as a matter of law" (*Parkoff v. Stavsky*, 109 AD3d 646, 647 [2<sup>nd</sup> Dept. 2013]). In order for evidence submitted to qualify as "documentary evidence," it must be "unambiguous, authentic, and

undeniable” (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 996–997 [2<sup>nd</sup> Dept. 2010]).

Based upon the papers submitted herewith, this Court finds that Defendants have met their burden of entitlement to dismissal by the submission of Grady’s affidavit which authenticates the submitted bank records. Additionally, a review of the bank records demonstrates that four payments from Grady’s account to Plaintiff were in fact “cleared” post the commencement of the action.

Additionally, this Court also finds that Plaintiff failed to establish through the submitted Authorization Agreement for Clearing House Transaction form the Defendants’ continuous default. While this Court cannot speculate as to the merits of the case, it is clear that Defendants was adhering to the terms of the Authorization Agreement for Clearing House Transaction form as evidence by the four \$1,000.00 payments that were required.

Under these circumstances, dismissal of the Complaint is warranted, and Plaintiff’s application is **GRANTED** in its entirety.

The parties’ remaining contentions have been considered and do not warrant discussion.

All other relief not specifically addressed by this Court is **DENIED**.

This shall constitute the Decision and Order of the Court.

Dated: June 6, 2023  
Mineola, New York

ENTER:



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HON. SARIKA KAPOOR, A.J.S.C.