

At an I.A.S. Trial Term, Part 2, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 320 Jay Street, Borough of Brooklyn, City and State of New York, on the 1st day of September, 2023.

P R E S E N T:

Hon. AARON D. MASLOW  
Justice

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AJ EQUITY GROUP LLC,

Plaintiff,

-against-

URBAN BAY HOUSING FUND LLC / JOHNRUTH CAPITAL  
INC. / FAST TIME PLUMBING / FLORIDA 4 SALE / PARKS  
MANAGEMENT LLC AND CALEB JOHN WALSH,  
Defendants.

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DECISION AND ORDER

Index No. 508662/2022

Calendar Date: 7/21/2023

Calendar No. 1 (Motion Sequence No. 1)

*Wells Law, P.C.*, Lancaster, NY (*Blane Fellows* of counsel), for Plaintiff.  
*Amos Weinberg*, Great Neck, NY (*Ilya Murafa* of counsel), for Defendants.

The following numbered papers were read on these motions<sup>1</sup>:

Submitted by Plaintiff in Support of Motion

NYSCEF Doc No. 14: Notice of Motion  
NYSCEF Doc No. 15: Statement of Material Facts  
NYSCEF Doc No. 16: Affidavit of Asher Sussman  
NYSCEF Doc No. 17: Affirmation of Yana Chechelnitsky, Esq.  
NYSCEF Doc No. 18: Exhibit A – Contract  
NYSCEF Doc No. 19: Exhibit B – Wire Receipt  
NYSCEF Doc No. 20: Exhibit C – Payment History  
NYSCEF Doc No. 21: Exhibit D – Summons and Complaint  
NYSCEF Doc No. 22: Exhibit E – Answer  
NYSCEF Doc No. 23: Exhibit F – Reply to Counterclaim  
NYSCEF Doc No. 24: Memorandum of Law  
NYSCEF Doc No. 25: Affirmation of Service  
NYSCEF Doc No. 26: Request for Judicial Intervention  
NYSCEF Doc No. 27: Addendum to Request for Judicial Intervention

Submitted by Defendants in Opposition to Motion

NYSCEF Doc No. 28: Affirmation of Amos Weinberg, Esq.  
NYSCEF Doc No. 29: Memorandum of Law

<sup>1</sup> A memorandum in reply submitted by Plaintiff on August 23, 2023 (NYSCEF Doc No. 35), more than a month after this Court heard oral argument and reserved decision, has not been considered (*see Matter of Bronx Envtl. Health & Justice Inc. v New York City Dept. of Envtl. Protection*, 8 Misc 3d 1002[A], 2005 NY Slip Op 50891[U] \*5 [Sup Ct, Queens County 2005].)

NYSCEF Doc No. 30: Response to Statement of Material Facts  
 NYSCEF Doc No. 31: Notice of Appearance

Submitted by Plaintiff

NYSCEF Doc No. 32: Stipulation – Adjournment of Motion  
 NYSCEF Doc No. 34: Stipulation – Adjournment of Motion<sup>2</sup>

Submitted by Court

NYSCEF Doc No. 36: Transcript of Oral Argument

Upon the foregoing papers and having heard oral argument on the record, the within motion is determined as follows.

Background

Plaintiff AJ Equity Group LLC (“Plaintiff”) commenced an action against Urban Bay Housing Fund LLC / Johnruth Capital Inc / Fast Time Publishing / Florida 4 Sale / Parks Management LLC (“Business Defendant”) and Caleb Walsh (“Individual Defendant”) (collectively “Defendants”) in the amount of \$62,854.94 for breach of contract and breach of personal guarantee.

Per the complaint herein, on or about May 4, 2021, Plaintiff and Business Defendant entered into a Purchase and Sale of Future Receivables Agreement (the “Agreement,” NYSCEF Doc No. 18) for all rights to Business Defendant’s future account receivables having the face value of \$299,800.00, for the agreed upon price of \$200,000.00. Business Defendant agreed to have one bank account (the “Bank Account”) that was approved by Plaintiff, pursuant to the Agreement. Plaintiff purchased two installments totaling \$149,000.00 of the receivables from the Business Defendant, for a payment amount of \$100,000.00. (*See* NYSCEF Doc No. 21 ¶¶5-8.)

Plaintiff alleged that Business Defendant stopped making payments on or about June 9, 2021, thereby breaching the Agreement. Business Defendant made payments totaling \$89,940.06, leaving a balance of \$59,959.94. The combined sum of the balance due to Plaintiff and fees total \$62,854.94. Furthermore, Plaintiff argued that Individual Defendant personally guaranteed that Business Defendant would perform its obligations under the Agreement and be personally liable for any breach by Business Defendant. (*See id.* ¶¶ 13-21.)

Plaintiff now moves for summary judgment in its favor against Defendants in the principal sum of \$62,854.04 plus interest, costs, and disbursements (*see* NYSCEF Doc No. 14 at 1).

Discussion

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<sup>2</sup> The stipulation to adjourn this motion, scheduled for argument on July 21, 2023, was denied as not being compliant with the Part Rules requiring three-days’ notice and because there was a prior adjournment, there were no exigent circumstances, and appearing counsel was familiar with the case (*see* NYSCEF Doc No. 36, Transcript at 2-3, 7-8; Hon. Aaron D. Maslow: Part 2 Rules, Part I [Motions & Special Proceedings], Subpart D [Adjournments], <https://ww2.nycourts.gov/courts/2jd/kings/civil/MaslowRules.shtml> [last accessed August 31, 2023]; *Mohammed v St. Barnabas Hosp.*, 177 AD3d 509 [1st Dept 2019]; *Puzzo v Ayoub*, 137 AD3d 770 [2d Dept 2016]).

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must present a prima facie case of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see CPLR 3212 [b]*; *Smalls v AJI Industries, Inc.*, 10 NY3d 733 [2008]; *Alvarez*, 68 NY2d at 324). Once a prima facie showing has been made, however, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution or tender an acceptable excuse for the failure to do so; mere expressions of hope are insufficient to raise a genuine issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff argued that pursuant to CPLR 3212, summary judgment should be granted because there were no substantial issues of material fact. Additionally, Plaintiff argued that “Business Defendant breached the Agreement by defaulting on its representations and warranties to Plaintiff under the Agreement and by failing to direct its receivables/payments to Plaintiff, by blocking access to a designated bank account from which Business Defendant agreed to permit Plaintiff to withdraw receivables, by failing to deposit receivables into the Bank Account, and/or by depositing receivables into an account other than the agreed upon Bank Account” (*see* NYSCEF Doc No. 16 ¶ 19).

Pertinent parts of the Agreement are as follows:

**23. No Bankruptcy.** Merchant represents, warrants, and covenants that as of the date of this Agreement, Merchant does not contemplate and has not filed any petition for bankruptcy protection under Title 11 of the United States Code and there has been no involuntary petition brought or pending against Merchant. Merchant further warrants that it does not anticipate filing any such bankruptcy petition and it does not anticipate that an involuntary petition will be filed against it. Merchant further warrants that there will be no statutory presumption that it would have been insolvent on the date of this Agreement.

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**29. Events of Default.** An “Event of Default” will be considered to have taken place if any of the following occur:

- (1) Merchant violates any term or covenant in this Agreement;
- (2) Any representation or warranty by Merchant in this Agreement proves to have been incorrect, false, or misleading in any material respect when made;

- (3) the sending of notice of termination by Merchant or Guarantor;
- (4) Merchant transports, moves, interrupts, suspends, dissolves, or terminates its business without the prior written consent of AJ;
- (5) Merchant transfers or sells all or substantially all of its assets without the prior written consent of AJ;
- (6) Merchant makes or sends notice of any intended bulk sale or transfer by Merchant without the prior written consent of AJ;
- (7) Merchant uses multiple depository accounts without the prior written consent of AJ;
- (8) Merchant changes the Account without the prior written consent of AJ;
- (9) Merchant performs any act that reduces the value of any Collateral grant under this Agreement
- (10) Merchant defaults under any of the terms, covenants, and conditions of any other agreement with AJ; or
- (11) Merchant fails to deposit its Receivables into the Account

If Merchant goes out of business in the ordinary course of its business, is not otherwise in default of this Agreement, and provides AJ with written notice of this closure within 2 business days thereafter, then such closure will not be deemed an Event of Default, and Merchant will be permitted to liquidate its assets, provided that the proceeds of any such liquidation will be deemed Receivables, of which Merchant will be obligated to AJ for the Specified Percentage.

(NYSCEF Doc No. 18.)

Although Plaintiff alleged that Business Defendant defaulted on its representations on or about June 9, 2021, Plaintiff's own "Payment History" (NYSCEF Doc No. 20) demonstrates that Plaintiff still had access to the Bank Account after that date and in fact collected \$50 payments on June 9 (twice), 10 (twice), 11, 14, and 15, 2021. The code "NSF" appears, which indicates insufficient funds. There was not enough money in the Bank Account to cover attempted withdrawals of \$4,996.67, but the account was not blocked. Thus, the allegation that Business Defendant blocked access to the Bank Account conflicts with the payment record submitted by Plaintiff itself. This latter point was set forth in defense counsel's affirmation (*see* NYSCEF Doc No. 28 ¶¶ 2-5). Moreover, as defense counsel pointed out at oral argument, Plaintiff failed to establish a prima facie case that there was a default as defined in paragraph 29 of the Agreement (*see* NYSCEF Doc No. 37 at 7). And there was no bankruptcy either, according to the papers submitted.

The Second Department has discussed this issue, stating "the inconsistencies which appear on the face of plaintiff's own papers prohibit the granting of summary judgment, despite the inadequacy of the opposing papers" (*Bank of N.Y. v McLean*, 116 AD2d 546, 547 [2d Dept 1986], citing to *Winegrad*, 64 NY2d 851, 853).

In an action for personal injuries or for coverage of medical expenses arising from a motor vehicle accident, where a party's papers submitted in support of a motion for summary judgment conflict, there is a failure to meet the prima facie burden (*see Black v County of Dutchess*, 87

AD3d 1097 [2d Dept 2011] [defendants submitted contradictory proof as to whether plaintiff's right knee condition was caused by subject accident, degenerative disease, or previous accident]; *Cracciolo v Omerza*, 87 AD3d 674 [2d Dept 2011] [inconsistent norms by defense's examining doctor]; *Dettori v Molzon*, 306 AD2d 308 [2d Dept 2003] [defendants submitted contradictory proof as to whether plaintiff's lumbar spine condition was caused by subject accident or previous accident]; *Shur v Unitrin Advantage Ins. Co.*, 56 Misc 3d 136[A], 2017 NY Slip Op 51011[U] [App Term, 9th & 10th Dists 2017] [IME doctor's report contained contradictory statements as to whether assignor's right knee injury was "partially causally related" to subject accident or caused by "preexisting degenerative changes"]; *Hillcrest Radiology Assoc. v State Farm Mut. Auto Ins. Co.*, 28 Misc 3d 138[A], 2010 NY Slip Op 51467[U] [App Term, 2d, 11th & 13th Dists 2010] [other reports in insurer's papers contradict conclusion of its peer reviewer that service was not medically necessary].

In other personal injury contexts, inconsistencies denude a party of a prima facie case on its motion for summary judgment (*e.g. Saaverda v East Fordham Rd. Real Estate Corp.*, 233 AD2d 125 [1st Dept 1996] [plaintiff's deposition testimony concerning the manner in which the accident occurred inconsistent with his own account provided in support of motion]. The same applies to summary judgment motions in commercial contexts (*see Neuman v Otto*, 114 AD2d 791 [1st Dept 1985] [circumstances surrounding delivery of check and the reasons for its payment]).

Likewise, in an action by a purchaser of accounts receivables where the plaintiff claims a breach of contract by a defendant but submits conflicting evidence on its motion for summary judgment, the motion must be denied. Further, where the moving party's papers suffer from a deficiency of inconsistencies, it is not necessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (*e.g. Black*, 87 AD3d 1097, citing *Alvarez*, 68 NY2d 320; *Winegrad*, 64 NY2d 851).

When determining a motion for summary judgment, the court must view the evidence in light most favorable to the non-moving party (*see Bank of NY Mellon v Gordon*, 171 AD3d 197 [2019]; *Stukas v Streiter*, 83 AD3d 18, 22 [2011]; *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2009]). Viewing Plaintiff's evidence, it is clear that it was contradictory and, therefore, it failed to make out a prima facie case against Defendants (*see Nationstar Mort. LLC v Goeke*, 151 AD3d 1237 [3d Dept 2017]).

### Conclusion

Accordingly, it is hereby ORDERED that Plaintiff's motion for summary judgment is DENIED.

**For Clerk's use only**

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MD \_\_\_\_\_

Motion Sequence #

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HON. AARON D. MASLOW  
Justice of the Supreme Court of the  
State of New York