

Cavalry LLC v EBF Holdings, LLC

2022 NY Slip Op 34548(U)

December 13, 2022

Supreme Court, Orange County

Docket Number: Index No. EF003081-2021

Judge: James L. Hyer

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This opinion is uncorrected and not selected for official publication.

To commence the 30 days statutory time period for appeals as of right (CPLR 5512 [2]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

-----X
CALVARY LLC d/b/a CALVARY ASSOCIATES
a/k/a CALVARY a/k/a CNC, and YOEL BOCHNER,

Plaintiffs,
-against-

DECISION & ORDER

Index No.: EF003081-2021
Motion Seq. No. 2
Motion Date: 10/7/2022

EBF HOLDINGS, LLC d/b/a EVEREST BUSINESS
FUNDING d/b/a EBF and BANKS 1-5,

Defendants.
-----X

HYER, J.S.C.

The following papers, numbered 1 to 27, were considered in connection with Defendant's Notice of Motion, dated August 7, 2022, seeking an Order, pursuant to CPLR § 3212, granting summary judgment on its First and Second Counterclaims in the amount of \$259,000.00 for breach of contract and breach of performance guaranty, with statutory interest thereon at 9% per annum, together with such other and further relief in Everest's favor as this Court may deem just and proper.

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Memorandum in Support/Statement of Material Facts/Affirmation in Support (Picon)/Exhibits 1-14/Affidavit in Support (Jackson)/Exhibits A-B	1-21
Memorandum of Law in Opposition/Statement of Material Facts in Response/Affirmation in Opposition (Levenson)/Exhibits 1-2	22-26
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Plaintiffs Calvary LLC d/b/a Calvary Associates a/k/a Calvary a/k/a CNC (hereinafter referred to as “Calvary” or “Seller”), and Yoel Bochner (“Bochner” or “Guarantor”) (hereinafter collectively referred to as “Plaintiffs”), and Defendant EBF Holdings, LLC d/b/a Everest Business Funding d/b/a EBF (hereinafter referred to as “Everest,” “Purchaser” or “Defendant”), entered into a Payment Rights Purchase and Sale Agreement on April 15, 2021 (hereinafter referred to as the “Agreement”). Bochner personally guaranteed the Agreement.

The Agreement notes in Seller’s Information that Seller’s monthly Average Sales are \$1,206,257.12 and Seller’s Annual Sales are \$14,475,085.38. The Agreement further lists the Purchase Price as \$200,000.00, the Purchased Amount as \$280,000.00, the Daily Payment as \$2,000.00, and the Specified Percentage as 15%.

The Agreement includes the following provisions under “Offer to Sell and Purchase Payment Rights” (Agreement at 1-2):

Seller hereby sells, assigns and transfers to Purchaser, without recourse, upon payment of the Purchase Price, the Purchased Amount of Future Receipts by delivering to Purchaser the Specified Percentage of the proceeds of each future sale by Seller. “Future Receipts” includes all payments made by cash, check, ACH or other electronic transfer, credit card, debit card, bank card, charge card (each such card shall be referred to herein as a “Credit Card”) or other form of monetary payment in the ordinary course of Seller’s business. BASED UPON SELLER’S CALCULATIONS AND EXPERIENCE IN OPERATING ITS BUSINESS, SELLER IS CONFIDENT THAT THE PURCHASE PRICE PAID BY PURCHASER IN EXCHANGE FOR THE PURCHASED AMOUNT OF FUTURE RECEIPTS WILL BE USED IN A MANNER THAT WILL BENEFIT SELLER’S CURRENT AND FUTURE BUSINESS OPERATIONS.

* * *

Seller shall (1) deposit all Future Receipts into only one bank account, which must be acceptable to and pre-approved by Purchaser (the “Account”) and (2) instruct Seller’s Credit Card processor, which processor must be acceptable to and pre-approved by Purchaser (the “Processor”) who shall serve as Seller’s sole Credit Card processor, to deposit all Credit Card receipts of Seller into the Account. Purchaser will debit the Daily Payment from the Account each Weekday (Monday-Friday). Seller authorizes Purchaser to initiate electronic checks or ACH debits from the Account equal to the Daily Payment

each business day and will provide Purchaser with all required account information. Seller will be responsible for any fees incurred by Purchaser resulting from a rejected electronic check or ACH debit attempt. Purchaser is not responsible for any overdrafts or rejected transactions that may result from Purchaser's debiting any amount authorized under the terms of this Agreement.

The Agreement notes that "THE 'PAYMENT RIGHTS PURCHASE AND SALE AGREEMENT TERMS AND CONDITIONS' AND THE 'PERFORMANCE GUARANTY' ARE ALL HEREBY INCORPORATED IN AND MADE A PART OF THIS PAYMENT RIGHTS PURCHASE AND SALE AGREEMENT'" (Agreement at 2).

The "Payment Rights Purchase and Sale Agreement Terms and Conditions" (hereinafter referred to as the "Terms and Conditions"), include, in part, the following provision (Agreement at 3, 5-7, 9):

"1.1. (a) ACH Authorization. Seller shall execute an agreement (the "ACH Authorization") acceptable to Purchaser to authorize the use of the Automated Clearinghouse System (ACH) to retrieve the Daily Payment from the Account. Seller shall provide Purchaser and/or its authorized agent(s) with all of the information, authorizations and passwords necessary for verifying Seller's receivables, receipts, deposits and withdrawals into and from the Account. Seller hereby authorizes Purchaser and/or its agent(s) to deduct from the Account the Purchased Amount and any other amounts owed by Seller to Purchaser as specified herein and to pay such amounts to Purchaser. If an ACH transaction is rejected by Seller's financial institution for any reason other than a stop payment order placed by Seller with its financial institution, including without limitation insufficient funds, Seller agrees that Purchaser may resubmit any ACH transaction that is dishonored as permitted under the NACHA rules. In the event Purchaser makes an error in processing any payment or credit, Seller authorizes Purchaser to initiate ACH entries to or from the Account to correct the error. These authorizations apply not only to the approved Account but also to any subsequent or alternate account used by the Seller for these deposits whether preapproved by Purchaser or not. This additional authorization is not a waiver of Purchaser's right to declare Seller in default if Seller uses an account that Purchaser did not first preapprove in writing. This additional authorization shall be irrevocable without the prior written consent of Purchaser.

* * *

2.1 Good Faith, Best Efforts and Due Diligence. * * * Seller will communicate with Purchaser including providing timely notice to Purchaser if the Account

will have insufficient funds for any Daily Payment amount so that Purchaser can reschedule any pending ACH debit from the Account.

* * *

2.7. Processor and Bank Account. Seller will not change its Credit Card processor, add terminals, change its financial institution or bank account(s), use multiple bank accounts, or take any similar action that could interfere with Purchaser's ability to collect the Specified Percentage of the Future Receipts purchased under this Agreement, without Purchaser's prior written consent. Any such changes shall be a material breach of this Agreement.

* * *

2.16 Account. Seller represents and warrants that (i) the Account is Seller's bank account; (ii) the person executing this Authorization on behalf of Seller is an authorized signer on the Account and has the power and authority to authorize Purchaser to initiate ACH transactions to and from the Account; (iii) the Account is a legitimate, open, and active bank account used solely for business purposes and not for personal, family or household purposes.

* * *

3.1 Events of Default. The occurrence of any of the following events shall constitute an "Event of Default": (a) Seller intentionally interferes with Purchaser's right to collect the Daily Payment in violation of this Agreement; (b) Seller violates any term or covenant in this Agreement; (c) Any representation or warranty by Seller in this Agreement proves to have been incorrect, false or misleading in any material respect when made; (d) Seller defaults under any of the terms, covenants and conditions of any other agreement with Purchaser, or (e) Seller fails to provide timely notice to Purchaser such that in any given calendar month there are five consecutive ACH transactions attempted by Purchaser that are rejected by Seller's bank and Seller fails to communicate and/or provide documentary evidence satisfactory to Seller for the failed transactions or failed remittance.

* * *

5.1 Personal Guaranty of Performance. Guarantor (i) will derive direct or indirect economic benefit from this Agreement and (ii) is directly or indirectly involved in the business operations of Seller. As an inducement to Purchaser to purchase the Future Receipts, Guarantor agrees to irrevocably, absolutely and unconditionally guarantee to Purchaser prompt and complete performance of the following obligations of Seller (the "Guaranteed Obligations"):

5.1.1 Seller's obligation to provide bank statements and other financial information that fairly represent the financial condition of Seller at such dates, within 5 business days after request from Purchaser;

5.1.2 Seller's obligation to not change its Credit Card processor, add terminals, change its financial institution or bank account(s), use multiple bank accounts, or take any similar action that could have an

adverse effect upon Seller's obligations under this Agreement, without Purchaser's prior written consent;

5.1.3 Seller's obligation to not conduct Seller's businesses under any name other than as disclosed to Processor and Purchaser;

5.1.4 Seller's obligation to not change any of its places of business or the type of business without prior written consent by Purchaser; and

5.1.5 Seller's obligation to not voluntarily sell, dispose, transfer or otherwise convey its business or substantially all business assets without (i) the express prior written consent of Purchaser, and (ii) the written agreement of any purchaser or transferee assuming all of Seller's obligations under this Agreement pursuant to documentation satisfactory to Purchaser.

In the event that Seller fails to perform any of the Guaranteed Obligations, Purchaser may recover from Guarantor for all of Purchaser's losses and damages and all remedies specified in Section 3.2 of this Agreement by enforcement of Purchaser's rights under this Performance Guaranty without first seeking to obtain payment from Seller or any other guarantor, or any other guaranty.

* * *

5.3 Guarantor Acknowledgement. Guarantor acknowledges that Guarantor understands the seriousness of the provisions of the Agreement, including the jury Trial Waiver and Arbitration sections and has had a full opportunity to consult with counsel their choice; and have consulted with counsel. or have decided not to avail himself/ herself /themselves of that opportunity. (emphasis added).

As part of the Agreement, and Terms and Conditions, Bochner executed an "Agreement for Direct Deposits (ACH Credits) and Direct Collections (ACH Debits)" (hereinafter referred to as the "Authorization"), pertaining to the Investors Bank Account with Account Number ending in "1209" (hereinafter referred to as the "Seller's Account"), which includes, in part, the following provisions (Authorization at 1, 2):

"Purchase and Sale Agreement: Payment Rights Purchase and Sale Agreement between Seller and Purchaser, dated as of 4/15/2021.

* * *

This Agreement for Direct Deposits (ACH Credits) and Direct Collections (ACH Debits) is part of (and incorporated by reference into) the Payment

Rights Purchase and Sale Agreement. Seller should keep a copy of this important legal document for Seller's records.

* * *

DISBURSMENT OF PURCHASE PRICE. By signing below, Seller authorizes Purchaser, after electing to purchase the Purchased Amount, to disburse the Purchase Price (less any applicable fees) set forth in the Payment Rights Purchase and Sale Agreement, or to disburse other amounts due to Seller under the Payment Rights Purchase and Sale Agreement, by initiating an ACH credit to the Designated Bank Account.

* * *

COLLECTION OF FUNDS ARISING FROM FUTURE RECEIPTS. By signing below, Seller authorizes Purchaser to collect amounts Purchaser is entitled to receive under the Payment Rights Purchase and Sale Agreement by initiating ACH debits to the Designated Bank Account, as follows:

For the amount of \$2,000.00 (or) Percentage of each banking deposit: 15%

On the following Days: Each business day. On the business day immediately following any business day(s) on which Seller's bank was not open or was not able to process ACH transactions, the Purchaser will debit the Designated Bank Account for an amount equal to the sum of (i) the Daily Payment amount due on that business day, plus (ii) the Daily Payment amount(s) due on the preceding business day(s) when the Bank was not open or could not process ACH transactions.

* * *

Seller understands and agrees that any revocation or attempted revocation of this Authorization will constitute an event of default under the Payment Rights Purchase and Sale Agreement (emphasis added).

* * *

The individual signing below on behalf of Seller certifies that he/she is an authorized signer on the Designated Bank Account and the Alternate Bank Account(s). Seller will not dispute any ACH transaction initiated pursuant to this Authorization Agreement, provided the transaction corresponds to the terms of this Authorization Agreement Seller requests the financial institution(s) that hold(s) the Designated Bank Account and the Alternate Bank Account(s) to honor all ACH entries initiated in accordance with this Authorization Agreement."

As part of the Agreement, Terms and Conditions, and Authorization, Bochner also signed a Bank Login Information document permitting the Purchaser with the password to obtain information about Seller's Account.

Following execution of the Agreement, Terms and Conditions, and Authorization, the Purchase Price of \$200,000.00 was paid by the Purchaser to Seller. Purchaser provided Seller with payments pursuant to the Agreement totaling \$21,000.00, consisting of ten consecutive payments of \$2,000.00 from April 16, 2021, through April 29, 2021, all being paid from the Account.

On May 3, 2021, Bochner submitted an "Unauthorized/Improper ACH Debit Form" to Investors Bank signed by him referencing debits in the amount of \$2,000.00 each, dated April 30, 2021 and May 3, 2021, on which Seller "revoked payment authorizations." Bochner signed and submitted two additional "Unauthorized/Improper ACH Debit Forms" that blocked payments of \$2,000.00 each from Seller to Purchaser dated May 4, 2021 and May 5, 2021. The Seller made one final payment to Purchaser of \$1,000.00 on May 6, 2021. The multiple "Unauthorized/Improper ACH Debit Form" submissions made to Investors Bank by Bochner on behalf of the Seller pertaining to the Account are hereinafter collectively referred to as the "Unauthorized/Improper ACH Debit Forms". Notably, the Seller's Account Statement from Investors Bank for May 2021 indicated that it had over \$1 million dollars of deposits into the account and a \$134,000.00 balance at the end of the month.

On May 11, 2021, not even one month following the execution of the Agreement and ancillary documents, Plaintiffs filed the instant Complaint, asserting eleven causes of action against Everest, being the following:

- (1) Civil usury, in violation of GOL § 5-501(1);
- (2) Criminal usury, in violation of Penal Law § 190.40;
- (3) Engaging in unlicensed lending, in violation of Banking Law §§ 340 and 356;
- (4) Violation of GBL § 349, based on alleged usurious lending;
- (5) Declaratory judgment that the Agreement is usurious and unenforceable;
- (6) Unjust enrichment, based on receipt of proceeds of an illegal loan;
- (7) Fraudulent inducement of criminally usurious Agreement;
- (8) Engaging in deceptive usurious practices, in violation of GOL § 5-515;

- (9) Collecting unlawful usurious debt, in violation of Penal Law §§ 190.42, 109.45;
- (10) Permanent injunctive relief against unlawful usurious practices; and
- (11) Intentional infliction of emotional distress.

On June 1, 2021, Everest filed an Answer with Counterclaims, including: (1) Merchant's Breach of the Agreement, requesting a judgment against Calvary and its d/b/a's for \$295,000.00 with interest thereon from May 7, 2021 at 9% per annum; (2) Bochner's Breach of Performance Guarantee, requesting a judgment against Bochner, individually, for \$295,000.00 with interest thereon from May 7, 2021 at 9% per annum; (3) Attorneys' Fees Under the Contract against Calvary and Bochner, jointly and severally, awarding Everest attorneys' fees in an amount to be determined at trial; (4) Conversion against Calvary and Bochner, jointly and severally, for \$179,000.00, with interest thereon from May 7, 2021 at 9% per annum; and (5) Unjust Enrichment Conversion against Calvary and Bochner, jointly and severally, for \$179,000.00, with interest thereon from May 7, 2021 at 9% per annum.

On August 3, 2021, Everest moved for summary judgment dismissing Plaintiffs' Complaint and granting Everest judgment on its First and Second Counterclaims in the amount of \$259,000.00 for breach of contract and breach of the performance guaranty, with statutory interest thereon at 9% per annum, together with such other and further relief in Everest's favor as the Court may deem just and proper (hereinafter referred to as "Motion #1").

In opposition to Motion #1, Plaintiffs' counsel, Scott C. Levenson, Esq. (hereinafter referred to as "Levenson"), filed an Affirmation on August 30, 2021, as NYSCEF Doc. No. 37 (hereinafter referred to as "Levenson Affirmation"), wherein he made the following representations to this Court:

"SCOTT C. LEVENSON, ESQ., an attorney duly licensed to practice law before the Courts of the State of New York, affirms the truth of the following under penalty of perjury:

* * *

1. I am the attorney for Plaintiffs, CAVALRY LLC d/b/a CAVALRY ASSOCIATES a/k/a CAVALRY a/k/a CNC (“CAVALRY”) and YOEL BOCHNER in the above-captioned action. I am fully familiar with the facts and circumstances of this action and all prior pleadings and proceedings heretofore had herein by virtue of my role as attorney for the Plaintiffs, review of the case file maintained by this office, and my conversations with Plaintiffs.

2. I submit this affirmation in support of Plaintiffs’ Opposition to Defendant’s motion for summary judgement.

* * *

13. Plaintiffs made daily payments from April 16 until April 29 when its bank blocked Defendant’s ACH because Bochner, while out of the country, couldn’t access his treasury system to approve the ACH. NYSCEF Doc. No. 30, pg. 9-10.

14. Bochner tried to remedy the situation, but the business didn’t have sufficient cash flow to repay the missed payments....”

On October 5, 2021, this Court entered a Decision and Order pertaining to Motion #1 (Bartlett, AJSC), wherein the Court: (1) granted Defendant’s motion for summary judgment and dismissed Plaintiffs’ Complaint; (2) denied Defendant’s motion for summary judgment against Plaintiff Cavalry LLC on its First Counterclaim; and (3) denied Defendant’s motion for summary judgment against Plaintiff Yoel Bochner on its Second Counterclaim (hereinafter referred to as the “October Decision”).

The October Decision includes this Court’s determination that the Agreement constitutes a Purchase of Future Receivables, not a loan. The Court further rejected Plaintiffs’ assertion that they had been subjected to Defendant’s misconduct (NYSCEF Doc. No. 48 at 15-16):

“It appears from the face of the record that Cavalry-breezily assuming victim status with no concrete factual allegations or supporting evidence of any kind- has fraudulently induced the defendant funding companies to part with considerable sums of money in return for promises it had no intention of keeping. Cavalry’s scheme to defraud is evidenced by the pattern of its obtaining large sums of money from a number of different parties in return for a promise of future payment of a portion of its receivables, and then promptly filing frivolous lawsuits to forestall collection of the promised payments. See, e.g., *People v. Fenner*, 155 AD2d 946 (4th Dept.), appeal denied 75 NY2d 770 (1989); *People v. DeMuirier*, 106 AD2d 266, 267 (1st Dept. 1984);

People v. Coloney, 98 AD2d 969, 970 (4th Dept. 1983). Thus, Cavalry and its principal are potentially liable to criminal prosecution for larceny by false promise under Penal Law § 155.05(2)(d), which provides: “A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct. *Id. See, People v. Kramer*, 92 AD2d 529, 542 (1998); *People v. Norman*, 85 NY2d 609, 619 (1995).

While this Court dismissed Plaintiffs’ Complaint, it denied Defendant’s motion for summary judgment as to its First and Second Counterclaims. As to the denial of summary judgment on Defendant’s First Counterclaim, the Court concluded that Defendant had failed to eliminate all material issues of fact with regard to the occurrence of an “Event of Default” under the Agreement. The Court’s reasoning included the following (NYSCEF Doc. No. 48 at 20-21):

“The determinative issue is whether Defendant has established Calvary’s default under the Agreement as a matter of law. Defendant appears to argue that Calvary “intentionally interfere[d] with Purchaser’s right to collect the Daily Payment in violation of [the] Agreement (Event of Default “a”) and “violate[d] any term or covenant in [the] Agreement” (Event of Default “b”) because (1) it allegedly “blocked its bank account from autodebiting”, and (2) remitted no further payments to Everest thereafter. (See, Defendant’s Memo. p. 20) However, Defendants’ showing is deficient in two respects.

First, there is no admissible evidence that Cavalry blocked its bank account from auto-debiting. Indeed the only evidence of record is the statement of Mr. Bochner, recorded in Defendant’s records that “*the bank* placed a block on the transactions.” (Jackson Aff., Ex. B)

Second, mere non-payment of the Daily Payment is not an event of default under the Agreement. If it were, a court might possibly infer therefrom that the Purchased Amount of Future Receivables (\$280,000) was payable in a finite term at a fixed (and usurious) interest rate. *See, e.g., Davis v. Richmond Capital Group, LLC, supra*, 194 AD3d 516 (rejection of two or three automated debits without prior notice constituted an event of default). Under the Agreement a default occurs only upon an “intentional” interference with Everest’s rights (Events of Default, subd. “a”). Given the inherent difficulty of proving intent, the Agreement establishes what is, in effect, an objective measure of intent: a default occurs where five (5) consecutive ACH debits are attempted by Everest and rejected by Cavalry’s bank during a calendar

month, where Cavalry has neglected to “communicate and/or provide documentary evidence satisfactory to Seller for the failed transactions or failed remittance.” (Events of Default, subd. “e”) However, the proof on this score also fails to demonstrate Defendant’s entitlement to judgment as a matter of law. Defendant’s documentary evidence shows that there were indeed five consecutive rejected ACH transactions in May 2021 – on May 3, 4, 5, 11 and 12 – but also reflects communications from Mr. Bochner on May 6, 2021 purporting to explain the problem:

Merchant called in...said he was out for a couple of days he was in Europe and the time change was off. Said he has a treasury system that requires his approval for all checks and ACHs and he didn’t have time to approve them so bank placed a block on the transactions but he got it resolved yesterday evening so everything should be find now. Merchant said he will take care of the missed payments today when he gets in the office later on(11:51 AM)

Yoel called in...with Isaac from accounting on the phone who handles the payments. Said because of this hiccup it’s caused them some issues with their available cash and since mostly everyone wants their payments they are a little strapped and can’t catch up on everything today. I agreed to accept a good faith payment of \$1,000 today and have the unblock form signed to reinstate payments on Tuesday 5/11 and they will send in a lump sum payment of amount \$14,000 on 5/11 to catch up.... (2:37 PM)”

With respect to Defendant’s Second Counterclaim, in denying Defendant’s motion for summary judgment, this Court reasoned (NYSCEF Doc. No. 48 at 23):

“Defendant argues: “In the Personal Guaranty of Performance, Bochner guaranteed Cavalry’s obligation to provide financial information upon Everest’s request, the obligation to deposit its receipts into the designated account and refrain from interfering with Everest’s right to debit that account ([Agreement] ¶5.1). Thus, when Cavalry blocked the account and failed to remit the required payments to Everest, Bochner became jointly liable for Cavalry’s breach.” (Defendant’s Memo. p. 20) As set forth in Point “F” above, Defendant’s evidence fails to demonstrate as a matter of law Cavalry’s breach of the Agreements on the grounds alleged. Perforce, its motion for summary judgment on Mr. Bochner’s limited performance Guaranty fails.”

Following the entry of the October Decision, the parties engaged in further discovery, which uncovered the Unauthorized/Improper ACH Debit Forms referenced hereinabove, in

addition to deposition testimony of Bochner, which provided further clarity that was not available previously to the Court. In his deposition, Bochner admitted: (1) to not preparing for the deposition; (2) to signing the Unauthorized/Improper ACH Debit Forms; (3) he did not recall if he was out of the country on the dates when the Unauthorized/Improper ACH Debit Forms were signed; (4) he did not recall any measures taken to address Seller's default of the Agreement; and (5) he did not know why the Seller stopped payments under the Agreement.

Shockingly, Chany Rosen, the President of Seller, also appeared for a deposition and she testified that she also did not prepare for her deposition; she did not remember Seller obtaining funds from the Purchaser; and she was unaware of this litigation.

Defendant's First Counterclaim

The elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *see also Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Each of those elements is beyond dispute here. Courts have readily concluded that blocking a revenue-based funding company's access to the merchant's bank account is a breach of such agreements (*see e.g. Power Up Lending Grp., Ltd. v Cardinal Energy Group, Inc.*, 2019 WL 1473090, *4 [SD NY 2019] [granting revenue based funder summary judgment due to merchant's blockage of account]).

As noted above, all of the elements required for this Counterclaim have been met by Defendant through the undisputed evidence that is before the Court. Based upon the foregoing, the Court grants Defendant summary judgment on its First Counterclaim against Plaintiff Calvary

in the amount of \$259,000.00 for breach of contract, with statutory interest thereon at 9% per annum from the date of commencement of this action.

Defendant's Second Counterclaim

A party claiming breach of a guaranty “must establish (1) the existence of the guaranty, (2) the underlying debt, and (3) the guarantor’s failure to perform” (*Merchant Cash & Capital LLC v Edgewood Group, LLC*, 2015 WL 4430643, *8 [SD NY 2015), citing *Davimos v. Halle*, 35 AD3d 270 [1st Dept 2006]).

As noted above, all of the elements required for this Counterclaim have been met by Defendant through the undisputed evidence that is before the Court. Based upon the foregoing, the Court grants Defendant summary judgment on its Second Counterclaim against Bochner in the amount of \$259,000.00 for breach of guaranty, with statutory interest thereon at 9% per annum from the date of commencement of this action.

Attorneys' Fees Request

The Court grants Defendant reasonable legal fees to be determined at a hearing to be scheduled by this Court as noted below.

Attorney Admonition

As noted above, the Decision entered by this Court previously denied Defendant’s Motion for Summary Judgment on Defendant’s First and Second Counterclaims, due in large part, to the representations made by Levenson in the Levenson Affirmation which included statements that (NYSCEF Doc. No. 37 at 3):

“13. Plaintiffs made daily payments from April 16 until April 29 when its bank blocked Defendant’s ACH because Bochner, while out of the country, couldn’t access his treasury system to approve the ACH, NYSCEF Doc. No. 30, pg. 9-10.

14. Bochner tried to remedy the situation, but the business didn’t have sufficient cash flow to repay the missed payments....”

Now, after discovery has completed, it is clear that these representations are untrue. Investors Bank did not block Defendant’s ACH because Bochner was out of the country and could not access his treasury system to approve the ACH. On the contrary, the evidence before this Court is the Unauthorized/Improper ACH Debit Forms, which Bochner admitted to signing. Moreover, Bochner did not even recall if he was out of the country during this period when these documents were signed. Further, with respect to the claim that Bochner tried to remedy the Seller’s default but could not do so due to a lack of Seller’s funds is also untrue as the Account Statement from that default period confirms that hundreds of thousands of dollars passed through that account in the month when the default occurred.

The Rules of the Chief Administrative Judge of the Courts § 130-1.1 notes (22 NYCRR § 130-1.1):

- (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.**
- (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm,**

corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case."

It is unquestionable that the statements of material fact included in the Levenson Affirmation, which were relied upon by this Court in entering the October Decision, were false and could possibly be considered frivolous pursuant to Section 130-1.1. This is troubling by itself, but even more so considering that this Court previously dismissed Plaintiff's underlying Complaint as frivolous itself. While this Court will not issue sanctions at this time, Plaintiff's counsel is admonished and shall comply with the ethical requirements of attorneys practicing law before the courts of the State of New York. Counsel is strenuously cautioned that any further actions that

constitute frivolity or a departure from the Court’s ethical requirements may result in future sanctions, taking into consideration this case’s history.

Based upon the Court’s review of the submissions and oral argument, it is hereby

ORDERED that Defendant EBT Holdings, LLC d/b/a Everest Business Funding d/b/a EBF is granted summary judgment on the First Counterclaim against Plaintiff Cavalry LLC d/b/a Cavalry Associates a/k/a Cavalry a/k/a CNC in the amount of \$259,000.00 for breach of contract, with statutory interest thereon at 9% per annum from the date of commencement of this action; and it is further

ORDERED that Defendant EBT Holdings, LLC d/b/a Everest Business Funding d/b/a EBF is granted summary judgment on the Second Counterclaim against Plaintiff Yoel Bochner in the amount of \$259,000.00 for breach of guaranty, with statutory interest thereon at 9% per annum from the date of commencement of this action; and it is further

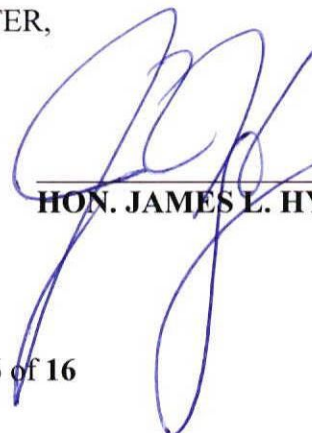
ORDERED that any issue not directly addressed herein is denied; and it is further

ORDERED that Defendant EBT Holdings, LLC d/b/a Everest Business Funding d/b/a EBF’s motion is granted to the extent that it is awarded attorneys’ fees from Plaintiffs in an amount to be determined at a hearing to be held before this Court on February 1, 2023, at 10:00 a.m., at which the parties and counsel shall appear IN PERSON.

The foregoing constitutes the Decision and Order of the Court.

Dated: Goshen, New York
December 13, 2022

ENTER,



HON. JAMES L. HYER, J.S.C.

TO: COUNSEL OF RECORD VIA NYSCEF