Slate Advance v Dr Gregory S Cartmell Sole Prop
2023 NY Slip Op 33192(U)
September 13, 2023
Supreme Court, New York County
Docket Number: Index No. 160554/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 160554/2021

SLATE ADVANCE,
Plaintiff,

MOTION SEQ. NO. 001

- v -

DR GREGORY S CARTMELL SOLE PROP and GREGORY SCOTT CARTMELL,
Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for **SUMMARY JUDGMENT**.

In this action, plaintiff Slate Advance ("Slate" or "plaintiff") seeks damages against defendants for breach of contract. On June 29, 2021, the parties entered a "Standard Merchant Cash Advance Agreement" ("agreement") whereby the corporate defendant Dr. Gregory S Cartmell Sole Prop ("Cartmell Sole Prop") sold its future receivables having a value of $224,850.00 for the purchase price of $150,000.00, to be collected at a specified percentage of twenty-five (25%) percent until the purchase amount was paid in full. At the same time, individual defendant Gregory Scott Cartmell ("Cartmell") executed a personal guaranty of the performance of Cartmell Sole Prop.

Plaintiff now moves for an order (1) pursuant to CPLR 3212, granting summary judgment against defendants in the sum of $165,450.00, plus interest at sixteen (16%) percent from the date of breach to the date of entry of judgment, plus attorney's fees, costs, and disbursements; and (2) pursuant to CPLR 3211(b), dismissing defendants' affirmative defenses (NYSCEF Doc. No. 7, *notice of motion*). Plaintiff alleges that defendants breached the agreement by failing to deposit receivables into the designated bank account (NYSCEF Doc. No. 14, *memorandum of law*).

In support of its motion, plaintiff submits the affirmation of Phil Klein ("Klein"), a manager at Slate, who states that on June 29, 2021, defendant entered into the agreement, whereby plaintiff agreed to and did remit the purchase price of $150,000.00 less contractual fees to Cartmell Sole Prop (NYSCEF Doc. No. 9 at ¶¶ 2, 7, 8-9, *Klein Affirmation*). Klein further indicates that payments were initially made by defendants pursuant to the agreement, but defendants subsequently failed to remit payment on or about November 17, 2021, amounting to a breach of the agreement (*id.* ¶ 15). He affirms that Cartmell Sole Prop made payments totaling $64,000.00, leaving a balance of $160,850.00 of the purchase amount, together with the default fee provided for in the agreement (*id.* ¶ 16). Klein also submits the agreement, as well as an "accounting of the balance due and owing to [p]laintiff less fees associated with [d]efendants' breach" (*id.* ¶¶ 7, 21). Plaintiff contends that according to the agreement, Cartmell Sole Prop agreed to use only one bank account, to be approved by Slate, into which Cartmell Sole Prop

agreed to deposit all their receipts, and from which Slate was to conduct its ACH withdrawals until the contracted purchase amount was fully paid to plaintiff (NYSCEF Doc. No. 22 at ¶ 6, *agreement*). Plaintiff further contends that defendants deposited the receivables into another account and submitted copies of the purported bank statements (NYSCEF Doc. No. 30 at ¶¶ 29-36, *Klein reply affirmation*). Plaintiff also contends that defendants' have admitted breaching their obligations under the agreement based on defendants' failure to respond to its notice to admit served on January 3, 2022 (NYSCEF Doc. No. 14 at 14-15).

Defendants oppose the motion arguing that plaintiff has failed to present sufficient evidence to make a *prima facie* showing of its entitlement to summary judgment. Defendants also cross-move for an order (1) pursuant to CPLR 3211(a)(1) and/or CPLR 3212 dismissing the complaint on the grounds that the documentary evidence establishes the defendants have not breached the parties' agreement; (2) pursuant to CPLR 3211(a)(1) and/or CPLR 3212 that the agreement between the parties is legally unenforceable and based upon a criminally usurious loan; and (3) pursuant to CPLR 2004, 2005 and/or 3123(a) extending defendants' time to respond to plaintiff's notice to admit, or in the alternative, compel plaintiff to accept defendants' late responses (NYSCEF Doc. No. 20).

In opposition and supporting their cross-motion, defendants submit an affidavit from Cartmell (NYSCEF Doc. No. 21, *Cartmell affidavit*) and an attorney affirmation from Kenneth H. Dramer (NYSCEF Doc. No. 25, *Dramer affirmation*).[1] In sum and substance, defendants argue that a review of the agreement clearly establishes that it is not a valid agreement to purchase future receivables but rather is a loan from which a finding of usury could be made. Defendants argue that plaintiff breached the agreement and was taking more than twenty-five percent of the daily receivables.

Cartmell avers that he was "induced to execute the Agreement" on behalf of Cartmell Sole Prop as well as to "unconditionally guarantee Cartmell Sole Prop's performance of certain representations, warranties and covenants in the Agreement." (Cartmell affidavit at ¶ 16.) Cartmell further affirms that Slate used false pretenses and misrepresented the "true nature" of the agreement, disguising it to "circumvent the criminal usury laws of the States of New York and California" (*id.* at ¶¶ 18-19, 27). Cartmell denies breaching the agreement and contends that he did nothing to prevent Slate from collecting the purchase amount and "never maintained 'multiple accounts' for the deposit of its receivables" (*id.* at ¶ 34). Defendants argue that their failure to timely respond to plaintiff's notice to admit is excusable because the notice to admit requests admissions to the ultimate issues in the case and, in any event, an extension of time should be granted based on law office failure and there being no prejudice to plaintiff (NYSCEF Doc. No. 27 at 7). Defendants further challenge the venue of this case, despite the agreement containing a forum selection clause (*id.* at 8).

On a motion pursuant to CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "A paper will qualify as documentary evidence only if it satisfies the following criteria: (1) it is

[1]Dramer's affirmation, which is not based upon personal knowledge, is of no probative or evidentiary significance (See *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted]).

Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" ([CPLR 3211[b]). Where, as here, dismissal of affirmative defenses is sought based on documentary evidence, (CPLR 3211 [a][1]), such relief is warranted, only where such evidence shows the defense to be "without merit as a matter of law" (*Granite State Ins. Co. v Transatlantic Reins. Co.,* 132 AD3d 479, 481 [1st Dept 2015]; *see also* CPLR 3211[b]).

A movant seeking summary judgment pursuant to CPLR 3212 in its favor "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [citation omitted]), "and every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d at 562). Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; 'issue-finding, rather than issue-determination, is the key to the procedure'" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [citation omitted]).

As an initial matter, defendants contend that New York is not a proper forum for this action and that the forum selection clause in the parties' agreement was violative of public policy since New York is not the site of the subject matter of the action, or the residence of either party (NYSCEF Doc. No. 27 at 1-2; agreement at ¶ 40). However, a contractual forum selection clause is *prima facie* valid and enforceable, absent a showing that it is "unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or . . . that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Grant v United Odd Fellow*, 187 AD3d 440, 441 [1st Dept 2020] [internal quotation marks and citations omitted]).

Here, the forum selection clause in the agreement provides that "[a]ny litigation relating to this Agreement or involving SA [Slate Advance] on one side and any Merchant or any Guarantor on the other must be commenced and maintained in any court located in the Counties of Nassau, New York, or Sullivan in the State of New York (the "Acceptable Forums") (*agreement* at ¶ 40). Under the agreement, "[t]he parties agree that the Acceptable Forums are convenient, submit to the jurisdiction of the Acceptable Forums, and waive any and all

objections to the jurisdiction or venue of the Acceptable Forums" (*id.*). The agreement further provides that "[t]he parties agree that this Agreement encompasses the transaction of business within the City of New York" *(id.)*.

Plaintiff does not demonstrate any real inconvenience to litigating in New York. Defendant simply argues that the agreement is invalid because neither party resides in New York. However, the mere fact that neither party reside in New York does not make New York an unreasonable and unjust forum (*Matter of Fidelity & Deposit Co. of Md. v Altman*, 209 AD2d 195, 195 [1st Dept 1994] [affirming denial of motion to dismiss on personal jurisdiction and forum *non conveniens* grounds for defendants' failure to show fraud or misrepresentation rendered the forum selection agreement unenforceable]). Defendants proffer no proof that the forum selection clause in the agreement is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching. Accordingly, defendants are bound by the agreement they signed consenting to the jurisdiction of New York courts (see *IRM Ventures Capital LLC v East Wind Consulting LLC*, 2023 NY Slip Op 32864[U], **1-2 [Sup Ct, Kings County 2023, Sweeney, J.] [denying defendants' request to set aside forum selection clause in contract for the sale of future receivables]).

Pursuant to CPLR 3211(b), "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." If the moving party "properly challenges the factual basis" of the defense, the party asserting the defense must come forward with evidence sufficient to "raise an issue as to the facts pleaded" (*Leonard v Leonard*, 31 AD2d 620, 620 [1st Dept 1968]). Affirmative defenses that merely plead conclusions of law without supporting facts are properly dismissed as insufficient (*Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569, 569-570 [1st Dept 2019]; *Commissioners of State Ins. Fund v Ramos*, 63 AD3d 453, 453 [1st Dept 2009]; *170 W. Vil. Assoc. v G & E Realty. Inc.*, 56 AD3d 372, 372-373 [1st Dept 2008]).

Defendants assert approximately fifteen affirmative defenses such as lack of standing, lack of subject matter jurisdiction, failure to state a claim, unclean hands, unconscionability, bad faith, fraud, criminal usury, deceptive business practices, false advertising, breach of contract, breach of the implied covenant of good faith and fair dealing, laches, waiver, ratification, and failure to mitigate (NYSCEF Doc. No. 24). Plaintiff moves to dismiss defendants' affirmative defenses as meritless and "simply boilerplate" (NYSCEF Doc. No. 14 at 2). Defendants oppose arguing that dismissal is not warranted because the transaction is criminally usurious since the interest charged is more than twenty-five percent (NYSCEF Doc. No. 27 at 10-23). Defendants contend that plaintiff's motion is deficient as most of plaintiff's moving paper is spent arguing for the dismissal of defendants' sixth affirmative defense of criminal usury, ignoring the other defenses (*id.* at 25-29).

Defendants fail to demonstrate that the agreement to purchase Cartmell Sole Prop's future receivables was a loan subject to usury laws. "To determine whether a transaction constitutes a usurious loan, it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] [internal quotation marks omitted]). The court must examine whether the plaintiff "is absolutely entitled

to repayment under all circumstances" (*K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 816 [Sup Ct, Westchester County 2017]). The factors to be reviewed in determining whether repayment is absolute or contingent include "(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" (*LG Funding, LLC*, 181 AD3d at 666).

Defendants rely on *Davis v Richmond Capital Group, LLC*, 194 AD3d 516 (1st Dept 2021), where the court held that the borrowers had sufficiently alleged, on a pre-answer motion to dismiss, that the merchant cash advance agreements were loans subject to usury laws based on "the discretionary nature of the reconciliation provisions, the allegations that defendants refused to permit reconciliation, the selection of daily payment rates that did not appear to represent a good faith estimate of receivables, provisions making rejection of an automated debit on two or three occasions without prior notice an event of default entitling defendants to immediate repayment of the full uncollected purchased amount, and provisions authorizing defendants to collect on the personal guaranty in the event of plaintiff business's inability to pay or bankruptcy" (*Davis*, 194 AD3d at 517). Here, however, after a review of the agreement, this court finds that the agreement agreed to by the parties is not a loan as it satisfies all three factors set forth in *LG Funding, LLC.*

The first factor of the test, whether there is a reconciliation provision, is determined by the merchant's ability to seek adjustments of the amount remitted to the purchaser (*see K9 Bytes, Inc.*, 56 Misc 3d at 817). If there is no reconciliation provision, the agreement may be considered a loan (*id.*). In this case, the agreement contains a reconciliation provision providing for mandatory adjustments in payments the defendant merchant is obligated to make under the agreement based on changes in its receivables (*agreement* at ¶ 4). Defendants' argument that the reconciliation provision is illusory (NYSCEF Doc. No. 27 at 15-18) is contradicted by the undisputed fact that defendants took advantage of the reconciliation provision and was granted a downward adjustment of the daily remittance amount from $3,212.14 to $1,000.00 (*Klein affirmation* at ¶ 14; *Cartmell affidavit* at ¶ 13).

The second factor of the test is whether the agreement has a finite or non-finite term for payment of receivables to plaintiff. (*LG Funding, LLC*, 181 AD3d at 666). Here, the agreement's payment terms are non-finite as the amount of the daily payments could possibly change based on the amount of receivables (*agreement* at ¶¶ 1, 4, 7). The agreement provides that "[e]ach Merchant and SA agree that the Purchase Price under this Agreement is in exchange for the Receivables Purchased Amount and that such Purchase Price is not intended to be, nor shall it be construed as a loan from SA to any Merchant. SA is entering into this Agreement knowing the risks that each Merchant's business may decline or fail, resulting in SA not receiving the Receivables Purchased Amount" (*id.* at ¶ 15). Thus, the Agreement had no end date or sunset provision as to when defendants were to finish making payments and relies solely on defendants' receivables. A decrease in defendants' receivables would take longer for defendants to finish making payments to plaintiff.

The third factor is whether there is any recourse in the agreement should the merchant declare bankruptcy. (*LG Funding, LLC*, 181 AD3d at 666.) Contrary to defendants' contention (NYSCEF Doc. No. 17 at 19), there were no provisions in the agreement to the effect that a

declaration of bankruptcy would constitute a default under the agreement, it states that seller assumes the risk if merchant's business fails by conditions outside the control of merchant (*agreement* ¶¶ 17, 34). Defendants further argue that Slate had not assumed a risk of nonpayment because it had a recourse against the guarantor if the sole proprietorship filed for bankruptcy (NYSCEF Doc. No. 27 at 19-20). However, "[t]he fact that the guarantor's obligations under the agreement would continue if the merchant was declared bankrupt is not a basis to find that the agreement is a loan" (*IRM Ventures Capital LLC*, 2023 NY Slip Op 32864 [U], **3). Therefore, because declaring bankruptcy would not be a breach of or a default under the agreement, plaintiff would have no recourse in that event. Accordingly, plaintiff has demonstrated the lack of merit as to the sixth affirmative defense of criminal usury.

Defendants argue that there was fraud and misrepresentation concerning the characterization of the agreement. Here, other than an affidavit from Cartmell averring he was misled about the characterization of the agreement, defendants present no evidence of fraud or misrepresentation. The terms of the agreement were fully disclosed within the document, expressly stating that it was not for a loan and stated in complete, clear, and unambiguous language what the provisions were. "Even if someone were confused by the contracts, or did not understand the obligation or the process, by reading the documents, one would grasp immediately that they certainly were not straightforward loans" (*World Global Capital, LLC v Mesko*, 2023 NY Slip Op 30490[U], ** 5, [Sup Ct, NY County 2023, Saunders, J.] [dismissing contention that defendant misunderstood the type of agreement he entered], quoting *K9 Bytes, Inc*, 56 Misc 3d at 812-813]). As defendants have failed to demonstrate any steps taken to remedy their alleged confusion about the terms of the agreement, they are precluded from now complaining of any misrepresentations (*id.*) "Where a party has the means available to him of knowing by the exercise of ordinary intelligence the truth or real quality of the subject of the representation, he must make use of those means or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations", quoting *K9 Bytes, Inc.*, 56 Misc 3d at 813).

The balance of defendants' affirmative defenses are without merit. A party's affirmative defense may be dismissed "where such evidence shows that the defense is 'without merit as a matter of law'" (*Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016] [citations omitted]). In this instance, plaintiff has demonstrated the lack of merit to the affirmative defenses. Plaintiff correctly argues that defendants' other fourteen (14) affirmative defenses lack merit as they are premised on the viability of the defense of criminal usury (NYSCEF Doc. No. 27 at 25-29; NYSCEF Doc. No. 37 at 10), which, as discussed *supra*, is not viable. Thus, plaintiff is entitled to dismissal of defendants' affirmative defenses.

To establish a *prima facie* case on a breach of contract claim, plaintiff must show proof of a contract, plaintiff's performance under the contract, defendant's breach thereof, and damages as a result (*see Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (*see Bartfield v RMTS Assoc.*, 283 AD2d 240, 241 [1st Dept 2001]).

Plaintiff contends that by failing to respond to its notice to admit served on January 3, 2022, "[d]efendants have admitted to all the relevant allegations and failed to provide any evidence that disputes the facts as stated by [p]laintiff," warranting summary judgment for plaintiff, including that defendants breached the agreement. (NYSCEF Doc. No. 14 at 14-15.) Plaintiff argues that defendants admitted, among other things, that they defaulted on the agreement beginning November 17, 2021, that there is a balance due of $165,450.00, plus attorney's fees, prejudgment interest, and costs and disbursements, and that defendants breached the agreement (NYSCEF Doc. No. 14 at 14-15; NYSCEF Doc. No. 37 at 17). Defendants contend that while their response was untimely due to law office failure, it is excusable as plaintiff seeks admission of the ultimate issues in the case, and defendants request an extension of time to answer the notice to admit, or in the alternative, seek an order compelling plaintiff to accept service of defendants' previously served responses (NYSCEF Doc. No. 27 at 1, 7).

A notice to admit may request the truth of any factual matters on which the requesting party reasonably believes there can be "no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." (CPLR 3123[a]). A notice to admit can also seek admissions pertaining to the "genuineness of any papers or documents." (*Id.*) "A notice to admit . . . is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]; *see also Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6-7 [1st Dept 2000].) Notices to admit may not be used to "request admission of material issues or ultimate or conclusory facts" (*Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018] [internal quotation marks and citations omitted]).

Plaintiff's reliance on defendants' failure to timely respond to its notice to admit in support of its summary judgment motion is misplaced. Plaintiff may not use the notice to admit for the improper purpose of resolving the ultimate issues in this case (*e.g.*, the existence of an enforceable agreement, the alleged breach of that agreement, and the purported damages resulting from that breach) (*CFG Merchant Solutions, LLC v Valentis Sec. Servs., Inc.*, 76 Misc 3d 1212(A), *2 [Sup Ct, NY County 2022, Lebovits, J.] ["[a] motion court on summary judgment may properly decline to treat as admitted the facts set forth in an improper notice to admit of this sort — even where the nonmovant failed to respond timely to the notice"][citations omitted]).

As plaintiff's notice to admit improperly seeks admissions to the material issues in the case, defendants' failure to timely respond is excused (*Meadowbrook-Richman, Inc.*, 273 AD2d at 6 [response not required where request sought admission of material issues that were in dispute]). Further, plaintiff is directed to accept defendants' late response. Under CPLR 2004 and 2005, an attorney's mistake or inadvertence amounts to the "good cause" required to excuse lateness (CPLR 2004; *N450JE LLC v Priority 1 Aviation, Inc.*, 102 AD3d 631, 633 [1st Dept 2013] [compelling acceptance of late response to notice to admit as law office failure constituted "'good cause shown'"] [citation omitted]).

Plaintiff also contends that defendants breached the agreement by diverting their receivables and depositing them into another account, attaching copies of bank statements from the purported accounts (*Klein reply affirmation* at ¶¶ 29-36). Defendants dispute this contention, arguing that Cartmell had no receivables at the time of alleged default. Cartmell avers that at no time did he or Cartmell Sole Prop do anything to prevent Slate from collecting its money, that they did not maintain multiple deposit accounts for its receivables and did not impede or prevent plaintiff from receiving the funds, but rather Cartmell was not generating sufficient receivables to meet the attempted ACH withdrawals and Bank of America closed the account (Cartmell affidavit at ¶¶ 3, 32, 34, 36).

Here, summary judgment is not warranted as the parties have submitted conflicting affidavits that raise issues of credibility as to whether defendants breached the agreement, thus genuine issues of material fact exist (see *Boston Concessions Group. v Criterion Ctr. Corp.*, 200 AD2d 543, 544 [1st Dept 1994] [affirming denial of pre-discovery motion for summary judgment as the conflicting affidavits of the parties and their representatives on whether defendant breached the contract raised triable material issues of fact]; *Meged Funding Group, Corp. v Italiano*, 2023 WL 3477496, *1 [Sup Ct, Kings County 2023, Rothenberg, J.] ["considering the contradictions between the affidavits and submissions in evidentiary form, there are triable issues of fact as to whether defendants breached the contract that preclude a grant of summary judgment to either party"] [citations omitted]). Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking dismissal of defendants' affirmative defenses pursuant to CPLR 3211(b) is granted and defendants' affirmative defenses are dismissed; and it is further

ORDERED that the branch of defendants' motions seeking summary judgment pursuant to CPLR 3211(a)(1) and/or CPLR 3212 is denied; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR 2004, 2005 and/or 3123(a) compelling plaintiff to accept defendants' late response to plaintiff's notice to admit is granted; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on November 8, 2023, details which shall be provided by the court no later than November 6, 2023.

September 13, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	☐	**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐	**DENIED**	X	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**			☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**			☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**