

**Pentagon Fed. Credit Union v Sparkle Cab Corp.**

2024 NY Slip Op 32287(U)

July 1, 2024

Supreme Court, New York County

Docket Number: Index No. 651738/2023

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

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PENTAGON FEDERAL CREDIT UNION, AS SUCCESSOR  
BY MERGER TO PROGRESSIVE CREDIT UNION,

Plaintiff,

**INDEX NO.** 651738/2023

**MOTION DATE** 03/07/2024

**MOTION SEQ. NO.** 002

- v -

SPARKLE CAB CORP., WILSON CARTAGENA, ROSA  
CARTAGENA

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

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

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff’s motion, which is, in effect, to renew its prior motion for summary judgment, is granted, without opposition, for the reasons set forth in the moving papers (NYSCEF Doc. Nos. 53, 55, 65, 67) and the exhibits attached thereto, in which the court concurs, as summarized herein.

As stated in the court’s prior decision denying the motion, plaintiff seeks to recover for failure to pay sums owed pursuant to promissory notes executed by defendants Wilson and Rosa Cartagena, and also to replevin taxicab medallions used as collateral for the notes. Defendant Sparkle Cab Corp. (“Sparkle”) serves as guarantor for the promissory notes. The court denied plaintiff’s first motion after defendant Rosa Cartagena filed for protection under Chapter 7 of the Bankruptcy Code before the United States Bankruptcy Court for the Eastern District of New York (notice of bankruptcy, NYSCEF Doc. No. 61). Plaintiff asked to sever the claims against Rosa Cartagena and proceed against Sparkle and Wilson Cartagena. The court, however, decided

that the claims against the three defendants were too interrelated to fairly decide them in the absence of Rosa Cartagena, but gave plaintiff permission to renew the motion following her discharge from bankruptcy (decision and order, NYSCEF Doc. No. 49 at 2).

Rosa Cartagena received an order of discharge and final decree on December 13, 2023 (order of discharge, NYSCEF Doc. No. 64). Accordingly, plaintiff states that it is no longer seeking a judgment against her (memorandum of law, NYSCEF Doc. No. 53 at 1 n 1). Further, during the pendency of this action, plaintiff learned that the taxicab medallions securing the notes had been surrendered to the New York City Taxi and Limousine Commission (Cohen affirmation, NYSCEF Doc. No. 55, ¶ 15). Accordingly, plaintiff waives its fifth cause of action for replevin (*id.*). As against Sparkle and defendant Wilson Cartagena (collectively, “defendants”), plaintiff’s first and second causes of action for breach of the first loan and guaranty, and third and fourth causes of action for breach of the second note and guaranty, remain.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court

should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff has established prima facie entitlement to summary judgment on the first and third causes of action for breaches of the notes against Wilson Cartagena by submission of the promissory notes (NYSCEF Doc. Nos. 68, 73), the demand letters to defendants apprising them of the failure to pay (NYSCEF Doc. Nos. 71, 77), and the affidavit of Cathyann Frank, plaintiff's Director of Commercial Credit Operations, who further details defendants' prior payment history and current indebtedness (NYSCEF Doc. No. 67) (*Alard, L.L.C. v Weiss*, 1 AD3d 131, 131 [1st Dept 2003] ["Having established defendant's execution of the note and default in payment, plaintiff made out a prima facie case"]). In addition, plaintiff has established prima facie entitlement to summary judgment against Sparkle on the second and fourth causes of action for breaches of the note guarantees by submission of Frank's affidavit and the guaranty documents (First Note, NYSCEF Doc. No. 68 at 1, § H; Second Note Guaranty, NYSCEF Doc. No. 75) (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015] ["To meet its prima facie burden on its summary judgment motion, Rabobank must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty"]) [internal quotation marks and citations omitted]. By failing to oppose the motion, defendants have failed to satisfy their burden to raise a triable issue of fact (*Kershaw*, 114 AD3d at 82). In addition, by failing to raise any of them in opposition to the motion, defendants have waived their affirmative defenses (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017]).

Plaintiff also seeks an award of attorneys' fees. The contract documents provide that upon a default thereunder, plaintiff may recover its reasonable attorneys' fees (First Note, NYSCEF Doc. No. 68 at 1, § D; Second Note, NYSCEF Doc. No. 73, § 1 [d]). Plaintiff supports its claims for attorneys' fees with an affirmation of counsel (NYSCEF Doc. No. 65) and copies of its billing records (NYSCEF Doc. No. 66), and assert a claim for \$13,324.50 in fees. The court determines that based on the applicable standards (*see In re Freeman's Estate*, 34 NY2d 1 [1974]), the amount of \$13,324.50 constitutes reasonably incurred legal fees in this matter.

Accordingly, it is hereby

ORDERED that plaintiff's renewed motion is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Sparkle Cab Corp. and Wilson Cartagena, jointly and severally, as follows:

1. On the First and Second Causes of Action in the Complaint, in the principal sum of \$603,397.62, plus accrued interest in the amount of \$31,885.82 as of February 10, 2023, plus accruing interest from and after February 10, 2023, in the amount of \$24.80/per day through the date of entry of judgment, as calculated by the Clerk;
2. On the Third and Fourth Causes of Action in the Complaint, in the principal sum of \$18,827.33, plus accrued interest in the amount of \$1,068.12 as of February 10, 2023, plus accruing interest from and after February 10, 2023, in the amount of \$2.06/per day through the date of entry of judgment, as calculated by the Clerk;
3. Together with attorneys' fees in the amount of \$13,324.50, plus costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

<u>7/1/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
<b>DATE</b>			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE