

**Newco Capital Group VI LLC v Devry Constr. L.L.C.**

2024 NY Slip Op 34181(U)

July 8, 2024

Supreme Court, Rockland County

Docket Number: Index No. 035146/2023

Judge: Christie L. D'Alessio

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

NEWCO CAPITAL GROUP VI LLC,

Plaintiff,

-against-

DEVRY CONSTRUCTION L.L.C. D/B/A DEVRY  
CONSTRUCTION; BRIAN DEVRIES  
CONSTRUCTION, INC.; DEVRY CONSTRUCTION  
L.L.C.; DEVRIES CONSTRUCTION, INC.;  
DEVRIES CONSTRUCTION LLC; DEVRIES  
CONSTRUCTION AND SIDING, LLC; J DEVRIES  
CONSTRUCTION LLC; JAMES DEVRIES  
CONSTRUCTION LLC; DEVRY ENTERPRISE INC;  
DEVRY INDUSTRIAL SERVICE LLC; LES  
DEVRIES CONSTRUCTION INC.; PRIME  
CRAFTERS LLC; LAKESIDE BUILDING AND  
DEVELOPMENT CORPORATION; SOUTHERN  
CASCADE CONSTRUCTION INC; R J DEVRIES  
CONSTRUCTION, INC.; S. DEVRIES  
CONSTRUCTION L.L.C.; W. DEVRIES  
CONSTRUCTION, INC. and  
TRAVIS JAMES DEVRY,

Defendants.

**DECISION & ORDER**

No. 035146/2023

Mot. Seq. No. 001

D'ALESSIO, J.S.C.

Newco Capital Group VI LLC (“Plaintiff”) filed this contract action against Devry Construction L.L.C. d/b/a Devry Construction, Brian Devries Construction, Inc., Devry Construction L.L.C., Devries Construction, Inc., Devries Construction LLC; Devries Construction and Siding, LLC; J Devries Construction LLC; James Devries Construction LLC; Devry Enterprise Inc; Devry Industrial Service LLC; Les Devries Construction Inc., Prime Crafters LLC, Lakeside Building and Development Corporation, Southern Cascade Construction Inc, R J Devries Construction, Inc., S. Devries Construction L.L.C., W. Devries Construction, Inc. (collectively, “Company”) and Travis James Devry (“Devry,” and with Company, “Defendants”) on October

16, 2023. (See Doc. 1; see also Docs. 2-3). Plaintiff proceeds on two causes of action: (1) breach of contract against Company; and (2) breach of personal guarantee against Devry. (See Doc. 1 ¶ 15-23). Plaintiff seeks summary judgment on both causes of action under CPLR 3212(b); Defendants oppose that relief. (See Docs. 10-18, 38-45).

For the reasons set forth below, Plaintiff's motion is DENIED.

### **BACKGROUND**

On or about January 31, 2023, Plaintiff entered into an agreement ("Contract") with Defendants. (See Doc. 13 ¶ 1; see also Doc. 14). The Contract, labeled "Revenue Purchase Agreement," provides, in sum, that: (1) Plaintiff would give Company \$350,000.00 to "purchase" future receivables; and (2) Company, in exchange, would make weekly payments of \$11,167.00 until it returned \$469,000.00 to Plaintiff. (See Doc. 14 at 1). Devry, in connection therewith, guaranteed remittance and agreed that, in event of default, he would "be jointly and severally liable" for, *inter alia*, repayment. (*Id.* at 5).

Plaintiff transferred \$180,770.00 to Company on February 1, 2023 (what its agent describes as "\$350,000.00 less applicable fees in accordance with the" Contract). (Doc. 12 ¶ 9; see also Doc. 18). Company complied with its obligations under the Contract but stopped making weekly payments on September 28, 2023. (Doc. 12 ¶¶ 10-12; see also Doc. 15). As of September 28, 2023, Company paid Plaintiff \$366,278.00 (i.e., \$102,722.00 less than the \$469,000.00 agreed upon). (Doc. 12 ¶ 15; see also Doc. 15). Notwithstanding Devry's commitment to make good on the obligation, he also failed to make any payments on the debt. (See Doc. 12 ¶ 15; Doc. 15).

This litigation follows.

### **STANDARD OF REVIEW**

CPLR 3212(b) instructs, *inter alia*, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established



sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” This standard requires that a movant “make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Failure to carry this burden “requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993) (internal quotation marks omitted). Should the movant make this initial showing, “the burden shifts to the party opposing the motion to demonstrate the existence of a triable issue of fact.” *Metz v. Peconic Bay Med. Ctr.*, 203 A.D.3d 1040, 1041 (2d Dep’t 2022). Both the movant and opponent must, to meet their respective burdens, submit evidence in admissible form. *Moscatiello v. Wyde True Value Lumber & Supply Corp.*, 168 A.D.3d 833, 834 (2d Dep’t 2019); *Midfirst Bank v. Agho*, 121 A.D.3d 343, 347 (2d Dep’t 2014).

On “a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor” thereof. *Derise v. Jaak 773, Inc.*, 127 A.D.3d 1011, 1011 (2d Dep’t 2015). This view does not, however, relieve the motion’s opponent of their burden. “Material proffered in opposition . . . is insufficient if it constitutes mere surmise, suspicion, speculation, or conjecture.” *Agulnick v. Agulnick*, 191 A.D.3d 12, 16 (2d Dep’t 2020). Simply raising the specter of metaphysical doubt will not refute a *prima facie* showing. The Court’s role on summary judgment is issue-spotting, not issue-determining. *See Suffolk Cty. Dep’t of Soc. Servs. v. James M.*, 83 N.Y.2d 178, 182 (1994); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957).

#### ANALYSIS

The essential facts of this case are clear: the parties entered into the Contract, Plaintiff paid Company, Company repaid Plaintiff less than the amount agreed upon, and Devry did not make good on his personal guarantee. (See Doc. 12 ¶ 9-12, 15; Doc. 14; Doc. 15; Doc. 18).

The Court cannot, however, grant Plaintiff's motion because it failed to establish the absence of any material fact regarding its performance under the Contract.

Under New York law, “[t]he essential elements . . . to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach.” *R. Vig Props., LLC v. Rahimzada*, 213 A.D.3d 871, 873 (2d Dep't 2023) (internal quotation marks omitted). As for breach of a personal guarantee, a plaintiff “need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform . . . .” *Kensington House Co. v. Oram*, 293 A.D.2d 304, 305 (1st Dep't 2002).

The Contract provides that Plaintiff shall pay Company \$350,000.00 to “purchase” future receivables and that Company would return \$469,000.00. (Doc. 14 at 1). Plaintiff provides evidence that it transferred \$180,770.00 (i.e., \$169,230.00 *less* than the agreed upon amount) to Company on February 1, 2023. (Doc. 18). Plaintiff avers that this amount represents the \$350,000.00 transferred to Plaintiff “less applicable fees in accordance with the” Contract, but makes no effort to identify the fee structure therein. (Doc. 12 ¶ 9). The Court, upon review of the Contract, is unable to discern the fees, their sources, their amounts, and how they decreased the amount paid to Company in such a drastic way. (*See generally* Doc. 14). Given the lack of explanation as to this discrepancy, the Court cannot conclude that Plaintiff made its *prima facie* showing under either cause of action.

As Plaintiff failed to make the showing required and is, therefore, not entitled to summary judgment, the Court need not and does not address those arguments against such relief raised in opposition by Defendants.

**CONCLUSION**

In light of the foregoing, Plaintiff's motion for summary judgment is DENIED. The parties are directed to appear for a joint status/pretrial conference at 10:45 a.m. on August 21, 2024.

The Clerk of the Court is respectfully directed to terminate Motion Sequence No. 001 (DENIED).

Dated: July 8, 2024  
New City, New York

**SO ORDERED.**

  
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HON. CHRISTIE L. D'ALESSIO, J.S.C.