

<b>Samson MCA LLC v DI Constr. LLC</b>
2026 NY Slip Op 50732(U)
May 5, 2026
Supreme Court, Monroe County
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**Digest-Index Classification:** Contracts—Unconscionable Contracts—Stipulation of Settlement for Breach of Merchant Advance Agreement--Attorneys' Fees

Samson MCA LLC, Plaintiff,

v

DI Construction LLC D/B/A DI CONSTRUCTION, LLC and TIMOTHY L MILLER and BRENT  
E MYERS, Defendants.

Supreme Court, Monroe County

Decided on May 5, 2026

Index No. E2024019427

Ariel Bouskila, Esq., Berkovitch & Bouskila PLLC- for Plaintiff

Barry I. Siegel, Esq.- for Defendants

DANIEL J. DOYLE, J.

**[\*1]**

This is a merchant advance agreement case. Pending before the Court is Plaintiff's motion on a settlement judgment pursuant to CPLR §3215(i).

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

**LAWSUIT FACTS**

On May 8, 2024, Plaintiff and Defendants entered into an Agreement whereby Plaintiff agreed to purchase all rights to Company Defendant's future receivables, having an agreed upon value of \$798,000.00. Pursuant to the Agreement, Company Defendant agreed to remit to Plaintiff 6.0% of their receivables until the full purchased amount was remitted. Company Defendant further agreed to have one bank account approved by Plaintiff from which Company Defendant authorized Plaintiff to make ACH withdrawals of the specified percentage of receivables until \$798,000.00 was fully paid to Plaintiff. Guarantors agreed to guarantee any and all amounts owed to Plaintiff from Company Defendant upon a breach in performance by Company Defendant.

Plaintiff alleged it remitted the Purchase Price for the future receivables to Company Defendant as agreed. While Company Defendant initially met its obligations under the Agreement, Plaintiff's Complaint alleged that Company Defendant ceased remitting to Plaintiff the Plaintiff's [\*2] share of Purchased Receivables and otherwise breached the Agreement by intentionally impeding and preventing Plaintiff from receiving the Specified Percentage of Company Defendants' receivables, while conducting regular business operations and collecting revenue. The balance left due was alleged to be \$351,879.00. Plaintiff also sued seeking attorneys' fees in the amount of \$105,563.70, interest, costs, and disbursements. With respect to attorneys' fees, the Agreement provides:

**13. Remedies for Seller's Breach of this Agreement.** If Seller violates any term or covenant in this Agreement, Buyer may proceed to protect and enforce its rights including, but not limited to, the following . . .

c. Seller shall pay to Buyer all reasonable costs associated with Seller's breach including but not limited to court fees and *attorney 's fees calculated at 30% of the unremitted Purchased Amount at the time of Seller's breach . . . .*

Agreement, ¶13 (emphasis added) (NYSCEF Doc. #2).

This action was commenced on November 15, 2024 in Rochester, New York. Defendants, all residents of Dawsonville, Georgia, were served by Certified Mail return receipt requested on November 18, 2024. *See* Affidavit of Service (NYSCEF Doc. #3).<sup>FN1</sup> A Stipulation of Settlement was alleged entered into by the parties <sup>FN2</sup> on December 5, 2024, wherein Defendants agreed they were indebted to Plaintiff in the amount of \$457,442.70, and Plaintiff agreed to accept \$437,442.70 by making installment payments in accordance with the Stipulation of Settlement. The Stipulation of Settlement *also* provides for additional attorneys' fees:

*Judgment.* In the event that the Plaintiff that declares a default under this Stipulation, Plaintiff may at its option, apply for entry of a default judgment without notice against the Defendants and Guarantor, pursuant to CPLR 3215(i) Such application for entry of default judgment will include an affidavit or affirmation specifying the default and the amount of the unpaid balance of the entire abovementioned obligation.

a. In the event of a default hereunder, plaintiff may nevertheless elect to accept any late payment without giving up any future right to apply for entry of a default judgment of any future or past

defaults.

*b. Any Default Judgment entered hereunder will be for the sum of the unpaid Indebtedness plus any accrued interest, costs disbursements and attorneys fees calculated at 25% of the unpaid Indebtedness at the time the Judgment is filed.*

Stipulation of Settlement, ¶9 (emphases added) (NYSCEF Doc. #8).

Plaintiff alleges that Defendants made payments under the Stipulation of Settlement in the [\*3] amount of \$3,627.00, leaving a balance of \$453,815.70. Plaintiff seeks a judgment in the amount of \$453,815.70 plus attorney's fees in the amount of 25% of the balance due calculated at \$113,453.92 plus costs taxed at \$455 for a total of \$567,724.62. The Stipulation of Settlement provides the following:

"9. *Judgment.* In the event that the Plaintiff that declares a default under this Stipulation, Plaintiff may at its option, apply for entry of a default judgment without notice against the Defendants and Guarantor, pursuant to CPLR 3215(i) Such application for entry of default judgment will include an affidavit or affirmation specifying the default and the amount of the unpaid balance of the entire abovementioned obligation.

"a. In the event of a default hereunder, plaintiff may nevertheless elect to accept any late payment without giving up any future right to apply for entry of a default judgment of any future or past defaults.

"b. Any Default Judgment entered hereunder will be for the sum of the unpaid Indebtedness plus any accrued interest, costs disbursements and attorneys fees calculated at 25% of the unpaid Indebtedness at the time the Judgment if filed."

As a result, the Stipulation of Settlement provides an additional 25% of the unpaid indebtedness in alleged attorneys' fees, on top of attorneys' fees already included in the amount due in the Stipulation of Settlement.

In opposing this motion, Defendants take issue with the imposition of an additional legal fee of \$113,453.92 added to the settlement amount. Defendants note that with the addition of this second legal fee, the total legal fees on the unpaid principal balance of \$348,252.00 is \$219,017.62. Defendants acknowledge that they entered into the Agreement and also acknowledge their default. Defendants admit that the unpaid principal balance due at the time of default was \$351,879.00 and confirm that they entered into the Stipulation of Settlement, upon which they made one payment of \$3,627.00. Defendant object to the imposition of an additional legal fee of \$113,453.92 (on top of the legal fees of \$105,563.70 already factored into the Stipulation of Settlement amount).

## LEGAL ANALYSIS

Plaintiff seeks a default judgment pursuant to CPLR §3215(i). CPLR 3215(i) provides:

**(i) Default judgment for failure to comply with stipulation of settlement.** 1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based . . .

CPLR 3215(i) provides a procedure for a clerk to enter a judgment on the stipulation of settlement without notice to the other side. Again, the Court notes that Defendants take issue only with the percentage-based legal fees levied.

"An unconscionable contract has been defined as one which 'is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible according to its literal terms . . .'" *Gillman v. Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 (1988) (citation omitted). *See also Nalezenc v Blue Cross of Western New York*, 172 AD2d 1004, 1005 (4th Dept. 1991). "The doctrine, which is rooted in equitable principles, is a flexible one [\*4] and the concept of unconscionability is 'intended to be sensitive to the realities and nuances of the bargaining process.'" *Gillman*, 73 NY2d at 10. (citation omitted). "[A]t common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other." *King v. Fox*, [7 NY3d 181](#), 191 (2006). "Such contracts are usually voidable since a party to a contract has the power to validate or ratify the contract, as well as the power to avoid it." *Id.*

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made--i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Gillman*, 73 NY2d at 10. (internal quotation marks and citations omitted). "To support their claim of unconscionability, [a party] must make some showing of an absence of meaningful choice on their part, together with terms that are unreasonably favorable to the other party." *Nalezenc*, 172 AD2d at 1005.

"Procedural unconscionability requires [the court] to examine the formation of the contract for a lack of meaningful choice. . . "The most important factor [in determining procedural unconscionability] is whether the client was fully informed upon entering the agreement." *Divito v Fiandach*, [160 AD3d 1356](#), 1357 (4th Dept. 2018) (citation omitted). "Examples of procedural unconscionability include 'inequality of bargaining power \* \* \* and an imbalance in the understanding and acumen of the parties.'" *Lister Elec., Inc. v Incorporated Village of Cedarhurst*, 108 AD2d 731, 734 (2nd Dept. 1985) (citation omitted).

Here, Defendants establish procedural unconscionability. Defendants submit the Affirmation of Defendant Brent E. Myers, who states that Defendants sought money to keep the Corporate Defendant operational. *See* Affirmation of Brent E. Myers, ¶7 (NYSCEF Doc. #14). Myers states that "[i]t was made clear to use that if we wanted the money, we would have to sign the Agreement as it was presented to us without the ability to make any changed. It was basically sign 'as is' if you want the money." *Id.* With the exception of Defendants' demographic information and financial terms, the Agreement was pre-printed. *Id.* After Defendants (all residents of Georgia) defaulted on the Agreement, they received notice of the

lawsuit commenced against them in Rochester, New York. The Defendants acknowledge their default on the merchant cash advance agreement and sought to resolve the claims brought against them without hiring counsel to defend the New York action by entering into the Stipulation of Settlement with Plaintiff. *Id.* at ¶9. Defendants admit that they did not read the Stipulation of Settlement and contend that the Stipulation was presented to them as "if you want to settle" sign this or a judgment will be entered against you. *Id.* Defendants did not appreciate the second levy of percentage-based attorneys' fees that came with the Stipulation of Settlement.

Defendants establish procedural unconscionability associated with the parties' entry into the Stipulation of Settlement. The high pressure tactics of the merchant advance industry, coupled with being faced with a lawsuit brought against Defendants in a different jurisdiction and Defendants' acknowledgement of the debt and desire to recognize their debt created an atmosphere inconsistent with the formation of a valid contract between parties enjoying equal bargaining power. Whereas Defendants are engaged in the construction industry and there is no indication or proof presented that they are sophisticated business people, the Plaintiff and Plaintiff's counsel are "sophisticated businesspeople and all had prior experience with" merchant cash agreements. *People v. Richmond Cap. Grp. LLC*, [246 AD3d 585](#), 587 (1st Dept. 2026). The overreaching and unfair circumstances support a finding of procedural unconscionability in the Stipulation of Settlement that prevents the [\*5] Court from granting a default judgment.

Substantive unconscionability has also been established. "Substantively, courts consider whether one or more key terms are unreasonably favorable to one party." *Sablosky v. Edward S. Gordon Co.*, 73 NY2d 133, 138 (1989). "There is no general test for measuring the reasonableness of a transaction but we have recently provided this guidance: [a]n unconscionable contract [is] one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." *Id.* (internal quotation marks and citation omitted). "[S]ubstantive unconscionability appears per se. . . whether a contract provision is unconscionable as a matter of law is an issue for a court to determine." *Day Op of North Nassau, Inc. v Viola*, 16 Misc 3d 1122(A), \*6 (Sup. Ct. Nassau Co. 2007). "Upon a finding of unconscionability a court 'may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid an unconscionable result.'" *Id.* (citation omitted).

The terms of the agreements<sup>FN3</sup> between these parties (at least insofar as it relates to attorneys' fees) are grossly unreasonable and favorable to Plaintiff at the expense of Defendants. When Defendants (admittedly) defaulted on the initial Agreement, the balance due was \$351,879.00. In seeking out a Stipulation of Settlement with Defendants, Plaintiff included in that balance \$105,563.70 in attorneys' fees.<sup>FN4</sup> That brought the amount set forth in the Stipulation of Settlement to \$457,442.70. Upon the default on the Stipulation of Settlement, Plaintiff came to this Court seeking a default judgment which would add in another 25% in attorneys' fees on the balance due (\$113,453.92). In all, Plaintiff throughout this transaction seeks to charge Defendants with \$219,017.62 in attorneys' fees on the original balance of \$351,879.00. This is an agreement that "no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other." *King*, 7 NY3d at 191.

In New York, "[a]n award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 AD2d 363, 365 (2nd Dept. 1999). "The fixed

percentage fee, therefore, is viewed only as a maximum fee, limiting the amount of reasonable attorneys' fees which the creditor may charge upon proving the extent of the necessary services actually rendered." *Mead v. First Tr. & Deposit Co.*, 60 AD2d 71, 78 (4th Dept. 1977). The Fourth Department continued:

We note that it is not the intent of the law, nor of the petitioner in this proceeding, to deprive the creditor of full payment of its actual necessary legal expenses in collecting the defaulted debt, limited only by the reasonable value of such services and the percentage provision expressed in the contract. The aim is to prevent creditors and their attorneys from receiving more than such sums, which they may otherwise be able to accomplish because of the debtors' defaults.

[\*6]*Id.* Both the Agreement and the Stipulation of Settlement run afoul of this law.

Accordingly, the Court refuses to enforce the Stipulation of Settlement, and the motion for a default judgment is **DENIED**.

## ORDER

Based upon the foregoing, and the papers submitted at NYSCEF Docs. #5-8, 14-21, it is hereby ORDERED that Plaintiff's motion for a default judgment pursuant to CPLR 3215(i) is **DENIED**.

Signed at Rochester, New York on May 5, 2026

**HONORABLE DANIEL J. DOYLE**

**Supreme Court Justice**

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## FOOTNOTES

**Footnote 1** The Agreement allows for venue in New York and for service via certified or register mail. *See* Agreement, ¶20.

**Footnote 2** There is no indication that Defendants were represented at the time the Stipulation of Settlement was entered into, and their current counsel appeared for them in this action when he served an Answer on January 3, 2025. Indeed, the Stipulation of Settlement provides, "*Attorney Review*. Defendants acknowledge they had ample time to consult with an attorney of its choosing with respect to the terms of this Agreement, and has been advised to do so." *Id.* at ¶17.

**Footnote 3** Arguably, both the initial Agreement and the Stipulation of Settlement.

**Footnote 4** Attorneys' fees which Plaintiff and their counsel knew would not have been granted by the Court pursuant to well settled law. The Court *routinely* denies granting

plaintiff's in merchant advance agreements percentage-based attorneys' fees for the reasons set forth *infra*.

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