SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Diesel Funding, LLC v. Build Retail, Inc.

2026 NY Slip Op 02629 · No. 2024-09041 · Decided April 29, 2026

SUMMARY

The Appellate Division, Second Department affirmed an order denying defendants' motion to vacate a judgment and stipulation of settlement arising from a receivables-purchase agreement. The court held that defendants failed to establish that the transaction was a usurious loan, emphasizing the agreement's reconciliation provision, variable payment amounts tied to receivables, nonfinite term, and lack of a bankruptcy-default provision. The court also enforced the settlement stipulation and its default-judgment provision.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Lara J. Genovesi, J.P.; Linda Christopher, J.; Lillian Wan, J.; Lourdes M. Ventura, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	April 29, 2026
DOCKET	2024-09041
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion to vacate a judgment entered in favor of Diesel Funding, LLC and a stipulation of settlement.
STANDARD OF REVIEW	The Appellate Division reviewed the order denying defendants' motion to vacate the judgment and stipulation of settlement for legal error and affirmed where the defendants' contentions lacked merit or were unpreserved.
PRECEDENTIAL VALUE	published
PARTIES	Build Retail, Inc., James Wesley Cashwell, et al. v. Diesel Funding, LLC

TOPICS

breach of contract · contracts · commercial litigation · appellate procedure · civil procedure

PRACTICE AREAS

contract law · commercial litigation · appellate procedure

QUESTIONS PRESENTED

1. Whether the defendants were entitled to vacatur of the judgment and settlement stipulation because the receivables-purchase agreement was an unenforceable usurious loan.
2. Whether the settlement stipulation was enforceable according to its terms and authorized entry of judgment following defendants' default.
3. Whether defendants' remaining appellate contentions warranted reversal.

HOLDINGS

1. The stipulation of settlement was an enforceable contract, and because defendants undisputedly failed to comply with its terms, Diesel Funding was entitled under the stipulation to enter judgment for the specified settlement amount plus fees, interest, costs, and disbursements without further notice or application to the court.
2. Defendants failed to establish that the transaction was a usurious loan because repayment was contingent on future receivables rather than absolutely due under all circumstances.

KEY QUOTATIONS

> *"A stipulation of settlement is a contract, enforceable according to its terms"* (*1)

> *"The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be"* (*2)

> *"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"* (*2)

> *"Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (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"* (*2)

FACTUAL BACKGROUND

Diesel Funding purchased an interest in Build Retail's future receivables for $850,000, with repayment through a percentage of daily sales revenue until Diesel Funding received $1,274,150. Build Retail and James Wesley Cashwell later entered into a settlement stipulation for $1,150,740.12, providing that Diesel Funding could enter judgment upon default without further notice or court application. Defendants made none of the required settlement payments, and a judgment totaling $1,476,330.68 was entered against them.

PROCEDURAL HISTORY

Diesel Funding commenced an action for breach of contract after defendants allegedly defaulted on a receivables-purchase agreement. The parties entered into a stipulation of settlement, but defendants failed to make the required payments; a judgment for $1,476,330.68 was then entered against them. The Supreme Court, Kings County, denied defendants' motion to vacate the judgment and stipulation, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Tagliaferri v. Weiler, 1 N.Y.3d 605
- Corona Fuel Corp. v. Nayci, 140 A.D.3d 1004, 1005
- Principis Capital, LLC v. I Do, Inc., 201 A.D.3d 752, 754
- Davis v. Richmond Capital Group, LLC, 194 A.D.3d 516, 517
- LG Funding, LLC v. United Senior Props. of Olathe, LLC, 181 A.D.3d 664, 665-666
- Apollo Funding Co. v. Dave Reilly Constr., LLC, 241 A.D.3d 1508, 1509

OPINION

Diesel Funding, LLC v. Build Retail, Inc. 2026 NY Slip Op 02629
PER CURIAM.
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& ORDER</p> <p>In an action, inter alia, to recover damages for breach of contract, the defendants appeal from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated April 18, 2024. The order, insofar as appealed from, denied those branches of the defendants' motion which were to vacate a judgment dated May 25, 2023, in favor of the plaintiff and against the defendants in the total sum of $1,476,330.68, and a stipulation of settlement.</p> <p>ORDERED that on the Court's own motion, the notice of appeal is deemed to be a notice of appeal by the defendants (<i>see</i> CPLR 2001; <i>Matter of Tagliaferri v Weiler</i>, 1 NY3d 605); and it is further,</p> <p>ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.</p> <p>On or about June 21, 2022, the plaintiff, Diesel Funding, LLC, and the defendant Build Retail, Inc. (hereinafter Build Retail), entered into a written agreement (hereinafter the agreement) pursuant to which Build Retail sold, and the plaintiff purchased, an interest in Build Retail's future receivables for the sum of $850,000 (hereinafter the purchase price). In exchange for the purchase price, Build Retail authorized the plaintiff to debit from Build Retail's bank account a percentage of Build Retail's daily sales revenue until the plaintiff received the sum of $1,274,150 (hereinafter the purchased amount). Build Retail also agreed that in the event of its default under the agreement, the uncollected purchased amount "may become due and payable in full immediately" to the plaintiff. The defendant James Wesley Cashwell executed a personal guaranty of performance of all the representations, warranties, and covenants made by Build Retail in the agreement.</p> <p>In August 2022, upon the defendants' alleged default on the agreement, the plaintiff commenced this action, inter alia, to recover damages for breach of contract. Shortly thereafter, the parties entered into a stipulation of settlement dated August 22, 2022, which provided that "this action is settled for the sum of $1,150,740.12." It also provided that "[i]n the event of a default" under the terms of the stipulation of settlement, the "[p]laintiff shall have the right, without any notice to the Defendants and without further application to the court, to enter judgment for $1,150,740.12 plus fees equating to twenty percent of the then remaining settlement balance, together with costs, interest and disbursements less any amounts paid hereunder." The defendants failed to make any of the payments provided for in the stipulation of settlement. In May 2023, the plaintiff applied to the clerk for a judgment, and a judgment dated May 25, 2023, was entered against [*2]the defendants and in favor of the plaintiff in the total sum of $1,476,330.68.</p> <p>In March 2024, the defendants moved, among other things, to vacate the judgment and the stipulation of settlement. The plaintiff opposed the motion. In an order dated April 18, 2024, the Supreme Court, inter alia, denied those branches of the motion. The defendants appeal.</p> <p>"A stipulation of settlement is a contract, enforceable according to its terms" (<i>Corona Fuel Corp. v Nayci</i>, 140 AD3d 1004, 1005 [internal quotation marks omitted]). Here, it is undisputed that the defendants did not comply with the terms of the stipulation of settlement and, under the terms of the stipulation of settlement, the defendants agreed that, in the event of their default, the plaintiff had the right, without any notice to the defendants and without further application to the court, to enter a judgment for a specified amount, plus fees and interest (<i>see</i> CPLR 3215[i][1]).</p> <p>The defendants argue that the agreement was a usurious loan, and therefore, the judgment should be vacated as neither the agreement nor the stipulation of settlement was enforceable. If the agreement was found to be a loan, "criminal usury would be a defense to its enforcement, rendering it void" (<i>Principis Capital, LLC v I Do, Inc.</i>, 201 AD3d 752, 754; <i>see</i> <i>Davis v Richmond Capital Group, LLC</i>, 194 AD3d 516, 517). "The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (<i>LG Funding, LLC v United Senior Props. of Olathe, LLC</i>, 181 AD3d 664, 665). "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" (<i>id.</i> [internal quotation marks omitted]). "The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances" (<i>id.</i> [internal quotation marks omitted]). "Unless a principal sum advanced is repayable absolutely, the transaction is not a loan" (<i>id.</i> at 666). "Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (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" (<i>id.</i>).</p> <p>Here, the defendants failed to establish that the transaction set forth in the agreement was a usurious loan. The terms of the agreement specifically provided that the payments would be capped at a specified percentage of daily receivables, allowed for adjustments to the daily payments made by Build Retail to the plaintiff based on changes in Build Retail's sales, and provided for reconciliation in order to ensure that the amounts collected equaled the specified percentage of receivables. Concomitantly, as the amount of the daily payments could change, the term of the agreement was not finite. Additionally, we note that the defendants did not seek to engage in the agreement's reconciliation procedure, which precludes our review of the claim that the process was illusory (<i>see</i> <i>Apollo Funding Co. v Dave Reilly Constr., LLC</i>, 241 AD3d 1508, 1509). Moreover, no contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default (<i>see</i> <i>id.</i>; <i>cf.</i> <i>Davis v Richmond Capital Group, LLC</i>, 194 AD3d at 517; <i>LG Funding, LLC v United Senior Props. of Olathe, LLC</i>, 181 AD3d at 666).</p> <p>The defendants' remaining contentions are either improperly raised for the first time on appeal or without merit.</p> <p>Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were to vacate the judgment and the stipulation of settlement.</p> <p>GENOVESI, J.P., CHRISTOPHER, WAN and VENTURA, JJ., concur.</p> <p>ENTER:</p> <p>Darrell M. Joseph</p> <p>Clerk of the Court</p> </div>

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PER CURIAM.
Diesel Funding, LLC v Build Retail, Inc. - 2026 NY Slip Op 02629 skip to main content It appears you are using Adblock. Please disable Adblock to best experience our website. Law Reporting Bureau Thomas J.K. Smith, State Reporter Court Decisions Resources About Home All Court Decisions Decisions Diesel Funding, LLC v Build Retail, Inc. 2026 NY Slip Op 02629 April 29, 2026 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This decision is uncorrected and subject to revision before publication in the Official Reports. Diesel Funding, LLC, respondent, v Build Retail, Inc., et al., appellants. Supreme Court of the State of New York, Appellate Division, Second Judicial Department Decided on April 29, 2026 2024-09041, (Index No. 523957/22) Lara J. Genovesi, J.P. Linda Christopher Lillian Wan Lourdes M. Ventura, JJ. Grant Phillips Law, PLLC, Long Beach, NY, for appellants. [*1] DECISION & ORDER In an action, inter alia, to recover damages for breach of contract, the defendants appeal from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated April 18, 2024. The order, insofar as appealed from, denied those branches of the defendants' motion which were to vacate a judgment dated May 25, 2023, in favor of the plaintiff and against the defendants in the total sum of $1,476,330.68, and a stipulation of settlement. ORDERED that on the Court's own motion, the notice of appeal is deemed to be a notice of appeal by the defendants (see CPLR 2001; Matter of Tagliaferri v Weiler , 1 NY3d 605); and it is further, ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements. On or about June 21, 2022, the plaintiff, Diesel Funding, LLC, and the defendant Build Retail, Inc. (hereinafter Build Retail), entered into a written agreement (hereinafter the agreement) pursuant to which Build Retail sold, and the plaintiff purchased, an interest in Build Retail's future receivables for the sum of $850,000 (hereinafter the purchase price). In exchange for the purchase price, Build Retail authorized the plaintiff to debit from Build Retail's bank account a percentage of Build Retail's daily sales revenue until the plaintiff received the sum of $1,274,150 (hereinafter the purchased amount). Build Retail also agreed that in the event of its default under the agreement, the uncollected purchased amount "may become due and payable in full immediately" to the plaintiff. The defendant James Wesley Cashwell executed a personal guaranty of performance of all the representations, warranties, and covenants made by Build Retail in the agreement. In August 2022, upon the defendants' alleged default on the agreement, the plaintiff commenced this action, inter alia, to recover damages for breach of contract. Shortly thereafter, the parties entered into a stipulation of settlement dated August 22, 2022, which provided that "this action is settled for the sum of $1,150,740.12." It also provided that "[i]n the event of a default" under the terms of the stipulation of settlement, the "[p]laintiff shall have the

right, without any notice to the Defendants and without further application to the court, to enter judgment for $1,150,740.12 plus fees equating to twenty percent of the then remaining settlement balance, together with costs, interest and disbursements less any amounts paid hereunder." The defendants failed to make any of the payments provided for in the stipulation of settlement. In May 2023, the plaintiff applied to the clerk for a judgment, and a judgment dated May 25, 2023, was entered against [*2] the defendants and in favor of the plaintiff in the total sum of $1,476,330.68. In March 2024, the defendants moved, among other things, to vacate the judgment and the stipulation of settlement. The plaintiff opposed the motion. In an order dated April 18, 2024, the Supreme Court, inter alia, denied those branches of the motion. The defendants appeal. "A stipulation of settlement is a contract, enforceable according to its terms" (Corona Fuel Corp. v Nayci , 140 AD3d 1004, 1005 [internal quotation marks omitted]). Here, it is undisputed that the defendants did not comply with the terms of the stipulation of settlement and, under the terms of the stipulation of settlement, the defendants agreed that, in the event of their default, the plaintiff had the right, without any notice to the defendants and without further application to the court, to enter a judgment for a specified amount, plus fees and interest (see CPLR 3215[i][1]). The defendants argue that the agreement was a usurious loan, and therefore, the judgment should be vacated as neither the agreement nor the stipulation of settlement was enforceable. If the agreement was found to be a loan, "criminal usury would be a defense to its enforcement, rendering it void" (Principis Capital, LLC v I Do, Inc. , 201 AD3d 752, 754; see Davis v Richmond Capital Group, LLC , 194 AD3d 516, 517). "The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (LG Funding, LLC v United Senior Props. of Olathe, LLC , 181 AD3d 664, 665). "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" (id. [internal quotation marks omitted]). "The court must examine whether the plaintiff is absolutely entitled to repayment under all circumstances" (id. [internal quotation marks omitted]). "Unless a principal sum advanced is repayable absolutely, the transaction is not a loan" (id. at 666). "Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (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" (id.). Here, the defendants failed to establish that the transaction set forth in the agreement was a usurious loan. The terms of the agreement specifically provided that the payments would be capped at a specified percentage of daily receivables, allowed for adjustments to the daily payments made by Build Retail to the plaintiff based on changes in Build Retail's sales, and provided for reconciliation in order to ensure that the amounts collected equaled the specified percentage of receivables. Concomitantly, as the amount of the daily payments could change, the term of the agreement was not finite. Additionally, we note that the defendants did not seek to engage in the agreement's reconciliation procedure, which precludes our review of the claim that the process was illusory (see Apollo Funding Co. v Dave Reilly Constr., LLC , 241 AD3d 1508, 1509). Moreover, no contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default (see id. ; cf. Davis v Richmond Capital Group, LLC , 194 AD3d at 517; LG Funding, LLC v United Senior Props. of Olathe, LLC , 181 AD3d at 666). The defendants' remaining contentions are either improperly raised for the first time on appeal or without merit. Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were to vacate the judgment and the stipulation of settlement. GENOVESI, J.P., CHRISTOPHER, WAN and VENTURA, JJ., concur. ENTER: Darrell M. Joseph Clerk of the Court
