

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable Thomas Rademaker, J.S.C

_____x

VOX FUNDING LLC.,

Plaintiff,

-against-

**PRO SEALED ASPHALT INC. AND
MATTHEW C COX**

Defendant(s).

_____x

**TRIAL/IAS, PART 11
NASSAU COUNTY**

**Index No 605070/2023
Motion Seq. No.: 003
Motion Submitted: 2/20/2025**

DECISION AND ORDER

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including e-filed documents/exhibits numbered 17 - 36, and 68 - 70; this motion is decided as follows

The Plaintiff, VOX FUNDING LLC (“Plaintiff”)) moves the Court by Notice of Motion (I) Pursuant to CPLR § 3212 granting to Plaintiff summary judgment on the causes set forth in its Verified Complaint, NYSCEF Doc. No. 1; (ii) Dismissing Defendant’s affirmative defenses; and (iii) Awarding Plaintiff costs, expenses and disbursements.

It is alleged in the Complaint that, on or about November 8, 2022, the parties entered into an agreement in which Plaintiff agreed to purchase 26 percent of Defendant Pro Sealed Asphalt’s future receivables. The Complaint provides that Defendant Pro Asphalt made payments totaling \$24,204.55, but failed to pay the remaining balance, and accordingly, the Plaintiff is seeking recovery of the remaining balance of \$208,674.99, along with interest, costs, disbursements, and attorney’s fees.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

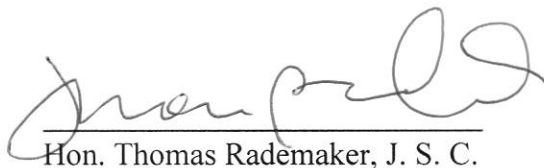
In opposition to the Plaintiff's motion, the Defendants contend that agreement between the parties was an "usurious loan," and based upon this characterization of the agreement, seek dismissal of the law suit. "To determine whether a transaction constitutes a usurious loan, it 'must be considered in 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' (*Crystal Spring Capital, Inc. v Big Thicket Coin, LLC*. 220 AD3d 745 [2nd Dept 2023]) "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. A loan that is criminally usurious is void.” (Id.. citations omitted) In contrast, the Plaintiff argue that the agreement was not a loan but was a purchase and sale agreement and that the agreement is not subject to usury analysis.

Upon a careful review of the papers submitted in support and in opposition to the Plaintiff’s motions, along with their respective annexed exhibits, and given the factual differences between the accounts of the parties, the Plaintiff’s motion for summary judgment is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: Mineola, N.Y.
April 8, 2025



Hon. Thomas Rademaker, J. S. C.