

**Merchant Cash & Capital, LLC v Fire Suppression
Servs., Inc.**

2016 NY Slip Op 32590(U)

December 16, 2016

Supreme Court, Nassau County

Docket Number: 603413/16

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 10

_____ X
MERCHANT CASH AND CAPITAL, LLC,

Plaintiff,

Index No. 603413/16
Motion Sequence...01
Motion Date...10/04/16

-against-

FIRE SUPPRESSION SERVICES, INC., and
CAREY PICKETT,

Defendants.

- _____ X
- Papers Submitted:
- Notice of Motion.....X
 - Affirmation in Opposition.....X
 - Affidavit.....X
 - Memorandum of Law.....X
 - Reply Affirmation.....X

Upon the foregoing papers, the motion by the attorneys for the Plaintiff, MERCHANT CASH AND CAPITAL, LLC, (hereafter "MCC") seeking an order dismissing the affirmative defenses¹ asserted by the Defendants, FIRE SUPPRESSION SERVICES, INC., and CAREY PICKETT, (hereafter "Fire" and "Pickett") pursuant to CPLR § 3211 (b), is determined as hereinafter provided.

On September 1, 2015, the parties executed an Agreement which provided that

¹It appears that all of the defenses listing in the Defendants' Answer comprise of only one (1) claim, that the interest rate is usurious.

the Plaintiff, MCC, as buyer, purchased from the seller, the Defendant, Fire, twelve (12%) percent of the proceeds of future sales of Fire in the amount of \$67,500.00 for a purchase price of \$50,000.00. The Plaintiff contends that the Agreement provides that Fire's payments of the purchased receivables and future sale proceeds were contingent upon Fire actually generating the purchased receivables and future sale proceeds. The Agreement does not provide for a fixed payment term as the Plaintiff was only entitled to a percentage of Fire's future sale proceeds and receivables. Counsel for the Plaintiff contends that the Agreement in no way contemplates a loan of any money and that MCC has no recourse in the event the sale proceeds are not generated.

The Defendants have interposed several affirmative defenses alleging that the Agreement is unenforceable on the grounds that it is an illegal agreement for the lending of money in exchange of a secured interest in the receivables of the Defendant at a usurious rate of interest. (See Answer attached to the Notice of Motion as Exhibit "B")

The Plaintiff's counsel argues that the affirmative defenses are meritless. He argues that the Agreement between the parties was not a loan or forbearance of money. As such, the usury claim must fail.

"CPLR § 3211 (b) authorizes a plaintiff to move, at any time, to dismiss a defendant's affirmative defense on the ground that it 'has no merit' " (*Greco v. Christoffersen*, 70 A.D.3d 769 [2d Dept. 2010]). In moving to dismiss an affirmative defense, "the plaintiff bears the burden of demonstrating that the affirmative defense is

‘without merit as a matter of law’ ”. (*Id.*, quoting *Vita v. New York Waste Servs., LLC*, 34 A.D.3d 559 [2d Dept. 2006]; see *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 A.D.3d 746 [2d Dept. 2010])

The Defendants’ contention that the Agreement is usurious is without merit. A corporation is prohibited from asserting a defense of civil usury. Additionally, an individual guarantor of a corporate obligation is also precluded from raising such a defense. (*See Arbutova v. Skalet*, 92 A.D.3d 816 [2d Dept. 2012]) The terms of the Agreement do not constitute a loan within the meaning of the usury laws. (*See Kaufman v. Horowitz*, 178 A.D.2d 632 [2d Dept. 1991])

Accordingly, it is hereby

ORDERED, that the Plaintiff’s motion to dismiss the affirmative defenses, interposed by the Defendants, is **GRANTED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
December 16, 2016



Hon. Randy Sue Marber, J.S.C.

HON. RANDY SUE MARBER

ENTERED

DEC 21 2016

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COUNTY CLERK'S OFFICE