

**Merchant Cash & Capital, LLC v Ethnicity Inc.**

2016 NY Slip Op 32593(U)

December 8, 2016

Supreme Court, Nassau County

Docket Number: 603262/16

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

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MERCHANT CASH and CAPITAL, LLC,  
  
Plaintiff,

TRIAL / IAS PART 35  
NASSAU COUNTY

Index No. 603262/16

- against -

Motion Sequence No. 001

ETHNICITY INC., and LASHA WNNNA  
STANLEY,

Defendants.

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The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1</u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Briefs: Plaintiff's / Petitioner's . . . . .	<u>4</u>
Defendant's / Respondent's . . . . .	<u>5</u>

The plaintiff moves pursuant to CPLR 3211 for an order to dismiss all of the defendants' affirmative defenses for failure to state a cause of action, and upon documentary evidence because the defenses are without merit. The plaintiff also moves pursuant to CPLR 3024(b) to strike scandalous and irrelevant content from the defendants' answer.

The plaintiff asserts the affirmative defense of usury should be dismissed because the subject agreement was not a loan, and the plaintiff's right to collect payment was

contingent on factors outside its control. The plaintiff avers it could not have knowingly taken or charged interest at a rate above 25% on a loan or forbearance of money because it was and remains mathematically impossible to calculate a rate of interest about 25% on the subject transaction, and because the parties expressly did not intend to enter into a loan transaction. The plaintiff maintains the Court should strike paragraphs one through and including eight of the defendants' "separate defenses" as scandalous, irrelevant and prejudicial claims.

In opposition, the defendants contend the parties' transaction was not one for the purchase of receivables, but was a loan. The defense asserts the provisions in the agreement under which the fixed daily payment was due regardless of whether any revenue was received that day. The defense maintains the provisions in the agreement purportedly allowing an adjustment to the daily payment are unenforceable.

In reply, the plaintiff reiterates the usury defense fails for threshold reasons and should be dismissed. The plaintiff asserts the defense arguments are unsupported and conclusory.

"In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." "A motion to dismiss a cause of action pursuant to CPLR 3211 (a) (1) may be granted only if 'documentary

evidence utterly refutes [the] plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law' ” [citations omitted]

*Bivona v Danna & Assoc., P.C.*, 123 A.D.3d 956, 957 [2d Dept. 2014].

The Court accepts the facts as alleged in the answer as true, accords the defendants the benefit of every possible favorable inference, and determines only that the facts as alleged by the defendants fit within cognizable legal theories, and not whether the defendants have affirmative defenses (CPLR 3211[a][7]; see *Bokhour v GTI Retail Holdings, Inc.*, 94 A.D.3d 682 [2d Dept. 2012]). However, the Court determines the plaintiff satisfies the burden to dismiss all of the defendants' affirmative defenses upon documentary evidence (CPLR 3211[a][1]). The plaintiff provides the agreement dated November 30, 2015, executed by the corporate defendant, through its chief executive officer and the natural defendant, as guarantor of payment; the advance agreement dated November 24, 2015, between the same corporate parties as seller and buyer with the natural defendant, as guarantor of payment. The documentary evidence supplied by the plaintiff utterly refutes the defense affirmative defenses as a matter of law. The written agreement among the parties is complete, clear and unambiguous on its face, and must be enforced according to the plain meaning of the contract's terms (*Obstfeld v Thermo Niton Analyzers, LLC*, 112 A.D.3d 895 [2d Dept. 2013]).

In opposition, the defendant contends the written agreement concerns a loan among the parties. However, there is no promissory note upon which the defendant

contentions depend (*see generally Hort v Devine*, 1 A.D.3d 266 [2d Dept. 2003]).

Contrary to the defense assertions, the evidence proffered by the plaintiffs utterly refutes the affirmative defense of a loan. As a matter of law, there is no usury in the absence of a loan or forbearance of money (*see generally Fareri v Rain's Intl.*, 187 A.D.2d 481[2d Dept. 1992]).

CPLR 3024(b) provides that “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” This rule is applicable to bills of particulars as well (*see Aronis v. TLC Vision Ctrs., Inc.*, 49 A.D.3d 576, 578, 853 N.Y.S.2d 621). In reviewing a motion pursuant to CPLR 3024(b), “the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action” (*Irving v Four Seasons Nursing & Rehabilitation Ctr.*, 121 A.D.3d 1046, 1047-1048 [2d Dept. 2014]).

The Court determines the paragraphs numbered one through and including eight in the answer entitled “separate defenses should be stricken pursuant to CPLR 3024(b). The plaintiff shows the defense allegations of criminal usury are scandalous and relevant. In opposition, the defendants fail to show the paragraphs numbered one through and including eight are necessary to the viability of the answer and would cause undue prejudice to the defendants should those items be stricken from the answer.

ORDERED that the branch of the plaintiff’s motion is GRANTED to dismiss all of the defendants’ affirmative defenses upon documentary evidence, and it is also,

ORDERED that the branch of the plaintiff's motion is DENIED to dismiss all of the defendants' affirmative defenses for failure to state a cause of action, and it is further,

ORDERED that the branch of the plaintiff's motion is GRANTED to strike scandalous and irrelevant content from the defendants' answer.

This will constitute the decision and order of the Court.

So ordered.

Dated: **December 8, 2016**

ENTER:



J. S. C.

NON FINAL DISPOSITION

**ENTERED**

DEC 14 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE