Merchant Cash & Capital, LLC v Frederick & Cole, LLC
2016 NY Slip Op 32730(U)
December 21, 2016
Supreme Court, Nassau County
Docket Number: 603517/16
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

MERCHANT CASH AND CAPITAL, LLC,

Interlocutory Order

Plaintiff,

MOTION SEQUENCE: 01, 02
-against- **INDEX NO.:603517/16**

FREDERICK & COLE, LLC d/b/a BRICK CITY PIZZA, ASHLEY D. FREDERICK, and DAVID COLE,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
Notice of Cross Motion	3
Affirmation in Opposition to Cross Motion and in Further Support of Motion	4
Reply Memorandum of Law	5

In an action, *inter alia*, to recover damages for breach of contract, the Plaintiff moves for an order pursuant to CPLR 3211(b) dismissing Defendants' affirmative defense of usury (Motion Sequence Number 1). The Defendants cross-move, *inter alia*, for an order pursuant to CPLR 3212(a) granting them summary judgment dismissing the complaint on the ground that the transaction at bar constituted a usurious loan (Motion Sequence Number 2).

Background

The Plaintiff, Merchant Cash and Capital, LLC ("Merchant") is engaged in the purchase and sale of future receivables and sale proceeds between commercial entities, often referred to as a "merchant cash advance." Defendant Frederick & Cole, LLC d/b/a Brick City Pizza ("Company") is a limited liability company which is owned and operated by individual Defendants Ashley D. Frederick and David Cole (collectively referred to as "Defendants").

According to Merchant, on October 27, 2015, it Merchant and the Company entered into an agreement whereby Merchant purchased $34,720 of the Company's future sales proceeds for a purchase price of $28,000 (Affidavit in Opposition to Cross Motion at ¶ 7).[1]

On February 5, 2016, a letter agreement was executed by the Defendants which set forth the following terms:

> We refer to the merchant advance agreement dated February 5, 2016 (the"Existing Merchant Agreement") between you and Merchant Cash and Capital, LLC d/b/a Bizfi Funding ("Bizfi Funding").
>
> This will confirm our telephone conversation of today's date wherein we agreed that Bizfi Funding would make an additional purchase of a percentage of each future credit card, debit card, bank card and/or other charge card (collectively, "Credit Card") receivables due to you from you[r] Credit Card processor.
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> In connection with such additional purchases, we will enter into a new merchant advance agreement between you and Bizfi Funding (the "New Merchant Agreement"). Pursuant to the New Merchant Agreement, Bizfi Funding (the "New Merchant Agreement"). Pursuant to the New Merchant Agreement, Bizfi Funding will purchase from you a percentage, as specified below (the "Purchase Percentage"), of each future Credit Card receivable due to you from your Credit Card processor until Bizfi Funding has received a total amount of $58,080.00 (the "Purchased Amount") for a total purchase price of $44,000.00 ("Purchase Price").

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[1] The court notes that the October 27, 2015 agreement is not in the record before the court.

A portion of the Purchase Price under the New Merchant Agreement, in the amount of $17,635.28, will be withheld from today's cash advance and applied to the "Purchased Amount" under the Existing Merchant Agreement following which Bizfi Funding will be deemed to have received the entire "Purchased Amount" under the Existing Merchant Agreement and the Existing Merchant Agreement will be terminated except for those provisions which expressly survive termination thereof.

You acknowledge that following application of such amount from today's cash advance and funding of the Purchase Price under the New Merchant Agreement, the aggregate total of the Purchase Price paid is equal to $72,000.00 and the aggregate total of the Purchased Amount is equal to $92,800.00.

A $500.00 processing fee will be deducted from the Purchase Price leaving a net funded amount of $25,864.72 that will be deposited to your account.

Lastly, this will confirm that the "Purchase Percentage" under the New Merchant Agreement will be 10%.

That same day, February 5, 2016, Merchant, as Buyer, and Company, as Seller, entered into another merchant agreement pursuant to which the Company sold additional future receivables and sales proceeds with a value of $58,080 to Merchant for a lump-sum payment of $44,000 ("Merchant Agreement").[2] The Merchant Agreement states:

Merchant Cash and Capital, LLC, d/b/a Bizfi Funding (together with its successors and/or assigns, the "Buyer") hereby purchases from the merchant set forth above (the "Seller"), a percentage, as specified below (the "Purchased Percentage"), of the proceeds of each future sale by Seller whether the proceeds are paid by cash, check, ACH, credit card, debit card, bank card, charge card and/or and other means (collectively "Future Sale Proceeds") until the Buyer has received the amount specified below (the "Purchased Amount") for the purchase price ("Purchase Price") set forth below.

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[2] Thereby bringing the total purchased amount of future receivables and sales proceeds to $92,800 for an upfront sum of $72,000 (Complaint at ¶ 9; Affidavit in Opposition to Cross Motion at ¶ 8).

Purchase Price	Purchased Percentage	Purchased Amount
$44,000.00	10% Purchase	$58,080.00

Pursuant to the Merchant Agreement, the Company agreed to pay Merchant $58,080 by ensuring that all of its sales proceeds and receivables were deposited into one designated deposit account and permitting Merchant to electronically debit from that account 10% percent of the Company's daily sales proceeds until such time as Merchant collected the contracted for amount of $58,080. The Merchant Agreement contained personal guaranties by both of the individual Defendants.

Other provisions in the Agreement provide, in relevant part:

> Section 4.1 *Sale of Future Sale Proceeds*. *The Seller [Company] and the Buyer [Merchant] acknowledge and agree that the Purchase Price paid by the Buyer in exchange for the Purchased Amount of Future Sale Proceeds is a sale of the Purchased Amount and is not intended to be, nor shall it be construed as, a loan from the Buyer to the Seller*. The Buyer is the owner of the Future Sale Proceeds purchased by the Buyer hereunder, and the Future Sale Proceeds purchased by the Buyer hereunder represents a bona fide sale by the Seller to a customer . . . .
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> Section 4.3 *Collection of Receivables*. As provided herein, the Purchased Percentage of each Future Sale Proceeds due to the Seller shall be paid to Buyer by the credit card processor approved by Buyer, or shall be collected by Buyer from electronic check or ACH payments initiated by Buyer or its agents from the Bank Account . . . .
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> Section 4.4 *Remedies*. In the event of (a) any breach or default in the performance by Seller of any covenant or agreement contained in this Agreement . . . , or (b) any breach or inaccuracy of any representation or warranty made by Seller in this Agreement . . . , the Buyer shall be entitled to all remedies available hereunder, under Article 9 of the Uniform Commercial Code or other applicable law. In the event that Buyer cannot access the Bank Account because of a Breach, then, without limiting Buyer's other rights and remedies, Buyer will be entitled to collect from Seller an estimated daily payment that represents the "Purchased Percentage" of Seller's Future Sales Proceeds for each business day Buyer does not have access to the Bank Account . . . . *Buyer, Seller and Guarantor(s) acknowledge and agree that if Seller*

has not violated the terms of this Agreement, the fact that it goes bankrupt or out of business shall not (a) be considered a Breach, or (b) obligate Guarantor(s) to pay the Purchased Amount to Seller (emphasis added).

A letter addendum ("Addendum"), which was also executed the same day as the Merchant Agreement, allowed each party to recalculate the daily payments every two weeks. Specifically, the Addendum provided:

> Pursuant to the Merchant Agreement, Buyer has agreed to make a cash advance to Seller in the amount of the "Purchase Price" in order to purchase the "Purchased Amount" of either (a) the Seller's future credit card, debit card, bank card and/or other charge card (collectively, "credit card") receivables due to Seller from its credit card processor, or (b) the proceeds of future sales by Seller whether the proceeds are paid by cash, check, credit card and/or and other means. The Merchant Agreement specifies whether Buyer has purchased a specified percentage of future credit card receipts (the "Credit Card Program") or a specified percentage of future revenues of Seller (the "Total Revenue Program").
>
> Seller desires to participate in Buyer's "Adjustable ACH Program" pursuant to which, in lieu of Seller's credit card processor making payments directly to Buyer of a portion of all future credit card receivables, Buyer or its agents will initiate daily electronic check or automated clearinghouse (ACH) payments from Seller's bank account on each business day until the Buyer has received an amount equal to the Purchased Amount.
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> B. Buyer shall initiate, on a daily basis on each business day, electronic check or ACH payments from the bank account identified in the ACH Authorization . . . maintained with the bank holding the Bank Account (the "Bank"), in an amount determined by Buyer in accordance with the provisions of this letter which represents the "Purchased Percentage" of Seller's daily average credit card receipts (in the case of the Credit Card Program) or daily average revenues (in the case of the Total Revenue Program), as specified in the Merchant Agreement (the "Daily Payment Amount").
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> C. The initial Daily Payment Amount shall be $230.48 per day. The Daily Payment Amount is subject to adjustment as set forth in Paragraphs D and E below.

D. Every two (2) weeks after the funding of the Purchase Price to Seller (each such time period, a "Calculation Period"), either Buyer or Seller (the "notifying party") may give written notice to the other (the "receiving party") requesting an increase or decrease in the Daily Payment Amount based upon . . . . daily average revenues . . . during the preceding Calculation Period. The Daily Payment Amount may be (1) increased if the amounts collected by Buyer from Seller during the most recently ended Calculation Period were less than the Purchased Percentage of all Credit card receipts or all revenues . . . of Seller during such Calculation Period, or (2) decreased if the amounts collected by Buyer from Seller during the most recently ended Calculation Period were more than the Purchased Percentage of all Credit Card receipts or all revenues . . . of Seller during such Calculation Period. The new Daily Payment Amount shall be equal to the product of (a) the Purchased Percentage times (b) . . . daily average revenues . . . of Seller during the most recent Calculation. *The intent of the foregoing adjustments shall be for Buyer to receive the Purchased Percentage of all Credit Card receipts or all revenues, as applicable, of Seller until Buyer has received an amount equal to the Purchased Amount* (emphasis added).

* * *

H. In the event that Buyer cannot access the Bank Account or in the event that an electronic check or ACH payment initiated by Buyer from the Bank Account is not paid in full based upon insufficient funds in the Bank Account or otherwise, then to the extent not prohibited by applicable law and without duplication, Buyer will be entitled to collect a $35 fee (or, if less, the maximum amount allowed to be charged under applicable law) for each business day Buyer does not have access to the Bank Account and for each electronic check or ACH payment that is not paid in full, which shall be in addition to the Daily Payment Amounts that otherwise became due. In addition, in the event that Buyer does not have access to the Bank Account because of a Breach, then, without limiting Buyer's other rights and remedies, Buyer will be entitled to collect from Seller the greater of the then-current Daily Payment Amount or the initial Daily Payment amount for each business day Buyer does not have access to the Bank Account.

On February 10, 2016, Merchant deposited the purchase price into the Company's bank account. Merchant collected $45,277.60 of the purchased future sales proceeds until April 7, 2016, after which Merchant tried, but was unable to collect, any more of the future sales. The balance of future proceeds owing to Merchant is $47,277.60 (Complaint at ¶¶ 14, 15; Affidavit in Opposition at ¶¶ 20-24). According to Merchant, on April 20, 2016, Defendant Cole "made a

blanket refusal to cooperate in any capacity and demanded that [Merchant] file suit against him" (Affidavit in Opposition at 24).

On May 17, 2016, Merchant commenced the instant action alleging causes of action for, *inter alia*, breach of contract and breach of a guaranty.

Defendants' answer, which contains general admissions and denials, also asserts, *inter alia*, usury as an affirmative defense.[3]

Thereafter, Merchant moved for an order pursuant to CPLR 3211(b) dismissing the affirmative defense of usury.

In support of its motion, Merchant submits an attorney affirmation, the pleadings, a copy of the Merchant Agreement, and a decision and order dated June 8, 2016 (Murphy, J.).[4]

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[3] Defendant's usury affirmative defense alleges that: the transaction at bar is a "usurious loan"; that Merchant may not recover either interest or principal; and that pursuant to the Agreement, Defendant's "had been paying a fixed daily amount per day towards a total repayment amount after having received certain proceeds and therefore were charged annual interest for exceeding 25% per annum" (Answer at ¶¶ 38, 40, 43).

[4] In *Platinum Rapid Funding Group Ltd. v VIP Limousine Services, Inc. and Joseph Cotton* (Index No. 604163-15), Judge Murphy dismissed defendants' affirmative defense that the agreement therein, which was similar to the agreement at issue herein, was civilly and criminally usurious. According to Justice Murphy:

> [e]ssentially, usury laws are applicable only to loans or forbearances, and if the transaction is not a loan, there can be no usury. As onerous as a repayment requirement may be, it is not usurious if it does not constitute a loan or forbearance. The Agreement was for the purchase of future receivables in return for an up-front payment. The repayment was based upon a percentage of daily receipts, and the period over which such payment would take place was indeterminate. Plaintiff took the risk that there could be no daily receipts, and defendants took the risk that, if receipts were substantially greater than anticipated, repayment of the obligation could occur over an abbreviated period, with the sum over and above the amount advanced being more than 25%. The request for the Court to convert the Agreement to a loan, with interest in excess of 25% would require unwarranted speculation, and would contradict the explicit terms of the sale of future receivables in accordance with the Merchant Agreement.

According to Merchant, there were multiple contingencies under which the Defendants would not be obligated to deliver anything to Merchant. One such contingency is Merchant's right to collect sales proceeds which was wholly contingent upon the Company's successful generation of future sales proceeds. Moreover, if the Company could not generate sufficient revenue to continue operating and had to cease operating or file bankruptcy, then Merchant would never collect the full purchased amount and there would be no liability to the Company or the individual guarantors. These contingencies, Merchant argues, run counter to the "distinguishing hallmark of a loan" which is the "lender's absolute right to repayment of the principal" (Memorandum of Law in Support at pp 5-8).

Defendants opposed Merchant's motion and cross-moved for an order granting them summary judgment dismissing the complaint on the ground that the transaction at bar constituted a usurious loan.[5]

For the reasons that follow, the motion is granted and the cross motion is denied.

The Court's Determination

A defendant raising the defense of criminal usury must allege and prove that the lender: 1) knowingly charged, took or received; 2) annual interest exceeding 25%; 3) on a loan or forbearance (Penal Law § 190.40).[6]

The fundamental element of usury is the existence of a loan or forbearance of money. Where there is no loan there can be no usury (*Seidel v 18 E. 17th St. Owners, Inc.*, 79 NY2d 735,

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[5] Defendant's cross motion also seeks to "deem [ ] defendants' answer amended to include the allegations in defendants' affidavit".

[6] The first element requires proof of the general intent to charge a rate in excess of the legal rate rather than the specific intent to violate the usury statute (*Angelo v Brenner*, 90 AD2d 131 [3d Dept 1982]).

744 [1992]; *Feinberg v Old Vestal Rd. Assoc., Inc.*, 157 AD2d 1002 [3rd Dept 1990]). In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character (*see Min Capital Corp. Retirement Trust v Pavlin*, 88 AD3d 666 [2d Dept 2011]; *O'Donovan v Galinski*, 62 AD3d 769 [2d Dept 2009]).

"There is a strong presumption against the finding of usury" (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]) and a "heavy burden rests upon the party seeking to impeach a transaction based upon usury. Thus, usury must be proved by clear and convincing evidence as to all its elements and usury will not be presumed" (*Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]; *Freitas v Geddes Sav. & Loan Ass'n*, 63 NY2d 254 [1984]; *Lehman v Roseanne Investors Corp.*, 106 A.D.2d 617 [2d Dept 1984]).

Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*Rubenstein v Small*, 273 AD 102 [1st Dept 1947]). Where payment or enforcement rests on a contingency, the contract is valid even though it provides for a return in excess of the legal rate of interest (*Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.*, 35 Misc 3d 1025[A] [Sup Ct Suffolk County 2012]; *Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 2012 WL 12284924, at *5 [Sup Ct, Suffolk County 2012]; *see also Lehman v Roseanne Investors Corp.*, 106 AD2d at 617, *supra* ["loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest"]).

Here, Merchant has demonstrated that the Merchant Agreement was not a loan and, thus, the law with respect to usury does not apply and the affirmative defense alleging that the transaction was based upon a usurious loan is without merit (CPLR 3211[b]). In this regard, the court notes the following: the Merchant Agreement allowed for the debit from the Company's designated bank account of 10% of the Company's daily receivables up until Merchant, as buyer, received the purchased amount of $58,080; each party had the mutual right to adjust the daily

payment amount in accordance with the daily revenues generated by the Company[7]; Merchant and the Company expressly agreed that the transaction entered into was not intended to be construed as a loan (*see Greenfield v Phillies Records*, 98 NY2d 562 [2002] [best evidence of what parties to a written agreement intend is what they say in their writing]); and that any bankruptcy or cessation of business by the Company would not be considered a breach by the Company or obligate either of the guarantors to pay the purchased amount.

Defendants' cross motion is denied inasmuch as the court has granted Merchant's motion dismissing the affirmative defense of usury.

Conclusion

Based on the foregoing, it is hereby

Ordered that the motion of the Plaintiff is granted and the affirmative defense interposed in the Defendants' answer alleging that the transaction at bar is based upon a usurious loan is dismissed; and it is further

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[7] In this regard, section "D" of the addendum provides that the intent of such adjustment, which maybe recalculated every two weeks, is for Merchant to receive the purchased percentage of 10% of the Company's revenues until Merchant has received an amount equal to the purchased amount. If the Company's revenues dropped, the Company could request a decrease in the daily payment amount which would, in turn, extend the time in which Merchant would recover the amount equal to the purchased amount.

Ordered that the motion of the Defendants is denied in its entirety.

This constitutes the decision and order of the court.

Dated: December 21, 2016

Hon. Vito M. DeStefano, J.S.C.