| **IBIS Capital Group, LLC v Four Paws Orlando LLC** |
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| 2017 NY Slip Op 30477(U) |
| March 10, 2017 |
| Supreme Court, Nassau County |
| Docket Number: 608586/16 |
| Judge: Robert A. Bruno |
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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**PRESENT: HON. ROBERT A. BRUNO, J.S.C.**

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IBIS CAPITAL GROUP, LLC,

Plaintiff,

-against-

FOUR PAWS ORLANDO LLC d/b/a 4PAWSORLANDO.COM, and JAMES F. PELLEY,

Defendants.

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TRIAL/IAS PART 14
Index No.: 608586/16
Submission Date: 02/06/17
Motion Sequence: 001

**DECISION & ORDER**

**Papers Numbered**

*Sequence #001*

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Motion by the attorney for the plaintiff for an order pursuant to CPLR 3211(a)(1) dismissing the defendants' affirmative defenses of usury for failure to state a cause of action based upon documentary evidence, dismissing the counterclaim alleging the subject agreement is void for usury, and striking scandalous and irrelevant content from defendants' answer pursuant to CPLR §3024(b) is granted.

This is an action for breach of a purchase and sales agreement, dated March 18, 2016. Plaintiff, IBIS Capital Group, LLC (IBIS) purchased future sales proceeds and receivables from defendant Four Paws Orlando LLC d/b/a 4pawsorlando.com (Four Paws) pursuant to a contract dated March 18, 2016 (Agreement or Contract). Plaintiff alleges Four Paws breached the Agreement by unlawfully withholding the purchased future sales proceeds despite the fact that

sales proceeds were actually generated and collected by Four Paws. IBIS also seeks damages from defendant James F. Pelley (Pelley) for breaching certain representations and warranties made in connection with the Agreement.

To succeed on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must refute the defendant's factual allegations as a matter of law (*Gould v Decolator*, 121 AD3d 845; *Goshen v Mutual Life Insurance Co. of N.Y.*, 84 NY2d 83, 88).

Section 190.40 of New York's Penal Law prohibits persons from knowingly charging interest on a note or loan at a rate which exceeds 25% per annum. The defense afforded by this statute imposes a heavy burden on the party raising the defense to establish that the lender knowingly charged, took or received annual interest exceeding 25% on a loan or forbearance (*see Ujueta v Euro-Quest Corp.*, 29 AD3d 895). 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 (*Feinberg v Old Vestal Rd. Assoc., Inc.*, 157 AD2d 1002). In determining whether a transaction is usurious, the law looks not to its form, but to its substance, or real character (*see Min Capital Corp. Retirement Trust v Pavlin*, 88 AD3d 666; *O'Donovan v Galinski*, 62 AD3d at 769).

Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v Small*, 273 AD102). 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 (*see Obermayer Rebmann Maxwell & Hippel LLP v West,* 2015 U.S. Dist. LEXIS 172922 (W.D. Pa. Dec. 30, 2015) 2015 U.S. Dist. LEXIS 172922 citing *Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.*, 35 Misc 3d 1025[A], 950 NYS2d 723, 2012 NY Slip Op 50560[U] [Sup. Ct. Suffolk Cty. 2012]).

The Agreement provided for the Purchase and Sale of Future Receivables:

> [IBIS], (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.

In the contract the parties expressly stated their mutual intent to enter into a purchase and sale of future sales proceeds agreement governed by the Uniform Commercial Code. The parties set forth their intent in the Agreement:

> Section 4.1 Sale of Future Sale Proceeds. The Seller and the Buyer acknowledge and agree that the Purchase Price paid by the Buyer in exchange for the Purchased Amount of Future Sale Proceeds in a sale of the Purchased Amount 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 5.5(a) Seller acknowledges that the sale of the Purchased Amount of Seller's Future Sale Proceeds is governed by the Article 9 of the Uniform Commercial Code, which provides, among other things, that a purchaser is authorized to file a financing statement against a seller of receivables in order [sic] give notice to third parties. Accordingly, Seller hereby authorizes Buyer to File one or more financing statements evidencing the sale of the Purchased Amount of Future Sale Proceeds hereunder. . . .

New York Courts have held that a contract such as the within Agreement are not loans and are not subject to usury laws. In *Merchants Advance, LLC*, the court found an agreement for the purchase of future receivables and sales proceeds lacked "the necessary elements of a loan transaction" and was not subject to usury laws (*Merchants Advance, LLC v Tera K. LLC, T/A Tribeca Frank Carabetta*, 2008 NY Misc LEXIS 10889, [Sup. Ct. N.Y. Cty. 2008]). "A primary indicia of usury is repayment of the principal sum advanced absolutely. Yet in the underlying agreement in this lawsuit the advance will only assuredly by [sic] repaid if the defendant defaults. Moreover, plaintiff surrendered control of repayment." (*Id.* at *4)). In determining that the agreement was a true purchase and sale, as opposed to a usurious loan, the court considered the structure of the transaction and the language used by the parties in the agreement. (*Id.* at *5). The agreement in *Merchants Advance, LLC* was substantively the same as the subject

Agreement. *In Transmedia Rest. Co. v 33 E. 61st St. Rest. Corp.*, the court dismissed counterclaims and affirmative defenses of criminal usury where the agreement was a purchase of future sales proceeds for an upfront discounted price (*Transmedia Rest. Co. v 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706, 712 [Sup. Ct. N.Y. Cty. 2000]). An agreement for the sale of future sales proceeds that are due and payable to the buyer contingent upon the seller's sales proceeds cannot constitute a loan because "[e]xcept in the case of a default or breach of the April Agreement, Transmedia bears the risk of not being repaid the advanced funds." (*Id.* at 711).

In *Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, the court reviewed a transaction that was also similar to the within Agreement (*Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 2012 NY Slip Op 33785(U) (*12-13 [Sup. Ct. Suffolk Cty. 2012]). The court analyzed the form of the transaction in addition to the language of the parties' agreement. (*Id.* at 13). The agreement provided that the buyer had purchased a fixed amount of the seller's future sales proceeds which were deliverable to the buyer from 45% of seller's daily sales proceeds. (*Id.* at 4). The court held that the defendants' usury defense was "unavailing" because the subject agreement was "an agreement to purchase future receivables for a lump sum discounted purchase price payable in advance by the plaintiff in exchange for a contingent return." (*Id.* at 14).

In *Merchant Cash & Capital, LLC v Yehowa Med. Servs., Inc.*, 2016 N.Y. Misc LEXIS 3065 [(Sup. Ct. Nassau Cty. 2016[), the court reviewed usury arguments that are identical to defendants' arguments in this action, and held that defendants' contention that the agreements are civilly and criminally usurious is without merit. The court held that "[u]nder the terms of the subject Agreement, if Seller/Defendant produces no daily revenue, no payments are required, and there is no absolute obligation of repayment. While the terms of payment provided for in the Agreement may be onerous, they do not involve a loan or forbearance of money, and are unaffected by civil or criminal usury status" (*Merchant Cash, supra*).

Purchases and sales of future receivables and sales proceeds are common commercial transactions expressly contemplated by the Uniform Commercial Code (*Merchants Capital Access, LLC v Shore Motorsports, LLC*, 2011 NY Slip Op 32300[U] [Sup. Ct. Nassau Cty. 2011]; *Merch. Cash & Capital v Jang Hwan Ko*, 2015 US Dist. LEXIS 80151 [SDNY 2015]; *Profl Merch. Advance Capital v McEachern*, 2015 US Dist. LEXIS 166429 [EDNY 2015]). Defendants argue that there is a set and finite fixed daily payment provided for in the Agreement

and that due to the purported fixed daily payment, they are able to calculate interest. The defendants are unable to cite to any section of the Agreement or addendum that indicates there is a fixed daily payment. Rather, there are more than four pages of the Agreement dedicated to providing the mechanisms for the parties to ensure the percentage of sales proceeds collected by IBIS remains true to Four Paws' actual sales proceeds over the course of the Agreement. Even if the Agreement were interpreted as having a fixed daily payment, with no adjustments or reconciliations, defendants' usury defense would still fail because the Agreement provided no liability in the event that the seller's business failed because it could not generate sufficient revenue to continue operating.

Defendants argue that there were no contingencies upon which delivery of IBIS' portion of the purchased sales proceeds would not be due. Defendants' argument does not rely upon the language of the contract but on unsubstantiated and conclusory assertions. The Agreement expressly sets forth contingencies under which none of the defendants would be obligated to delivery anything to IBIS. The Agreement expressly contemplates that, if Four Paws cannot generate sufficient revenue to continue operating and must cease operating or file bankruptcy, neither defendant will be liable for anything to IBIS. "[IBIS], [Business Defendant], and Guarantor(s) acknowledge and agree that if Seller has not violated the terms of this Agreement, the fact that [Four Paws] goes bankrupt or out of business shall not (a) be considered a Breach, or (b) obligate Guarantor(s) to pay. . . ." The Agreement includes express provisions to ensure that IBIS will not receive any money other than IBIS' share of the purchased future sales proceeds that have actually come to fruition (Section 1.1). "In exchange for the purchase of the Purchased Percentage of the Seller's Future Sale Proceeds, the Seller hereby agrees (i) to deposit all Future Sales Proceeds into the Bank Account . . . and (iii) not to deposit any funds into the Bank Account other than Future Sale Proceeds, or if any such deposits are made to notify Seller as soon as practicable." In order to ensure that IBIS will not inadvertently receive any money other than the purchased future sales proceeds, the Agreement provides a reconciliation mechanism by which IBIS will return to Four Paws anything that does not represent future sales proceeds. Moreover, the Agreement's lack of a specific ending date is consistent with the contingent nature of each and every collection of future sales proceeds under the contract. Because IBIS' collection of sales proceeds is contingent upon Four Paws actually generating sales and those sales actually resulting in the collection of revenue, neither party could have known when the Agreement might end because IBIS' collection of sales proceeds was wholly contingent upon the outside factor of customers actually shopping at Four Paws and paying for

products and services. The existence of this uncertainty in the length of the Agreement is an express recognition by the parties of the wholly contingent nature of this Agreement. The distinguishing hallmark of a loan is the lender's absolute right to repayment of the principal (*see MoneyForLawsuits V LP v Rowe,* 2012 U.S. Dist. LEXIS 43558, 2012 WL 1068171 [E.D. MICH. 2012]). This is a strict inflexible requirement (*see Zoo Holdings, LLC v Clinton*, 11 Misc 3d 1051[A], at *4 [Sup. Ct. N.Y. Cty. 20006]). "For a true loan it is essential to provide for repayment absolutely and at all events. . . ." (*Id.* at *5, quoting *Rubenstein v Small*, 273 AD 102, 104 [1st Dept 1947]; *see also Transmedia*, *supra* at 711] [the court held there can be no usury unless the principal sum advanced is repayable absolutely]). "Where payment or enforcement rests upon a contingency, the agreement is valid even though it provides for a return in excess of the legal rate of interest" (*Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 2012 NY Slip Op 33785[U], 2012 N.Y. Misc LEXIS 6757 [Sup. Ct. Suffolk Cty. 2012]).

Even if the court disregarded the existence of the other contingencies, IBIS could never have possessed usurious intent because it was impossible for the parties to know when, if ever, IBIS might collect the full purchased amount, or whether IBIS would even be entitled to collect the full purchased amount. Defendants' calculation asks the court to divide the estimated amount for the first two-week period by the total purchased amount and ignore the rest of the contract. Such an approach ignores the fact that both Four Paws and IBIS each had a right to have the estimated amount adjusted every two weeks to reflect the Business Defendant's changing collection of sales proceeds. It asks the court to treat variables that were subject to change many times over the course of the agreement as constants. Since IBIS' right to collect its portion of sales proceeds was variable, it is impossible for a party to have calculated the equivalent rate of interest without the result being expressed in terms of a variable. Defendants' argued interest rate calculations are nothing more than mere speculation based upon assumptions and hypotheses regarding what might have occurred under a very specific set of circumstances. The parties will never know if those circumstances would occur because the defendants allegedly breached the contract after having performed for only a short period of time. It was fundamentally impossible for the parties to have usurious intent because it was mathematically impossible for the parties to calculate the equivalent to an interest rate at the time they entered into the Agreement. The only time the parties could have possessed sufficient data to calculate the comparable equivalent to an interest rate, would have been too late for IBIS to have possessed usurious intent.

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Defendants' usury defense and counterclaims are dismissed as a matter of law. Plaintiff did not possess the requisite intent to enter to a usurious loan agreement. The parties entered a Purchase and Sale transaction, rather than a loan (*see* Section 4.1 and Section 5.5[a] of the Agreement [*supra*]). (*See Freitas v Geddes S&L Assn.*, 63 NY2d 254, 262; *Feinberg v Old Vestal Rd. Assoc, Inc.*, 157 AD2d 1002).

Defendants' opposition papers only address the motion to dismiss the usury defense. There is no opposition to the application by plaintiff to dismiss paragraphs 32-44 of the "Separate Defenses" section of the Answer. The defenses contained in paragraphs 32-44 of Defendants' Answer are dismissed as being scandalous, irrelevant, and nothing more than meritless and prejudicial claims that IBIS is a criminal and/or engaged in fraudulent conduct.

A Preliminary Conference (*see* 22 NYCRR 202.12) shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on the 23rd day of March, 2017 at 9:30 AM. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendant.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: March 10, 2017
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE