To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

QFC, LLC d/b/a QUICK FIX CAPITAL

Plaintiff,

-against-

IRON CENTURIAN, LLC and MOHAMED SADIQUI,

Defendants.

----------X

Index No. 51302/17
Motion Sequence No. 001
Decision and Order

EVERETT, J.

The following papers were read on the motion:

Notice of Motion/Affidavit in Supp/Exhibits A-F/Memorandum of Law
Memorandum of Law in Opp/Certificate of Merit/Memorandum of Law/Exhibit A
Reply Memorandum of Law

Defendants Iron Centurion, LLC (Iron) and Mohamed Sadiqui (Sadiqui) move for an order, pursuant to CPLR 5015, vacating the confession of judgment, voiding the written merchant agreement dated November 14, 2016 (Merchant Agreement), and cancelling and enjoining prosecution on the Merchant Agreement on the ground that it contemplates an illegal transaction. The motion is opposed.

Upon the forgoing papers, the motion is granted.

The following facts are taken from the parties' motion papers, opposition papers, annexed exhibits and the record, and are undisputed unless otherwise indicated.

On or about January 31, 2017, plaintiff Funding Metrics, LLC d/b/a Quick Fix Capital (QFC) filed an affidavit of nonpayment in support of a confession of judgment in the Office of

the Westchester County Clerk. Along with the affidavit of nonpayment, QFC submitted a copy of the affidavit of confession of judgment (Confession of Judgment) dated November 14, 2016, and signed by Sadiqui on behalf of himself and Iron. In the affidavit, Sadiqui confessed judgment individually, jointly and severally, in favor of QFC and against himself and Iron, and authorized the entry of judgment in favor of QFC and against himself and Iron in the sum of $21,900.00, less any payments timely made under the terms of the Merchant Agreement. Both the Merchant Agreement and the Confession of Judgment were dated and executed on November 14, 2016.

The affidavit of nonpayment submitted in support of entry of the Confession of Judgment states, in relevant part, that on November 14, 2016, Iron entered into a secured merchant agreement pursuant to which "QFC agreed to buy all rights of the Defendant [Iron's] future accounts receivable, having a face value of $21,900.00. The purchase price for these receivables was $15,000.00" (aff of nonpayment, ¶ 3). The affidavit of nonpayment further states: "[p]ursuant to the Agreement, Defendant [Iron] authorized QFC to debit from its bank account, by means of an online ACH [Automated Clearing House] debit, a percentage of Defendant [Iron's] accounts receivable (the 'Specified Percentage'), until the purchased amount of receivables – $21,900.00 – was paid in full" (*id.* ¶ 4). The Specified Percentage set forth in the Merchant Agreement is 11.02%.

The Confession of Judgment adjudged QFC entitled, with execution thereof, to recover from defendants, jointly and severally, the sum of $15,595.42, plus interest at 16% in the amount of $328.14, plus costs and disbursements in the amount of $225.00, plus attorneys' fees at 25% in the amount of $3,898.86, for a total sum of $20,047.42.

Prior to rendering a decision on the pending motion, the Court must address a collateral issue that has come to its attention. The copy of the agreement document that QFC attached to the Confession of Judgment entered in the Office of the Westchester County on January 31, 2017, was not the Merchant Agreement at issue. The agreement document pertained to a different financial arrangement between the parties, contemplating Iron's receipt of $25,030.00 from QFC, in exchange for repayment in the amount $36,543.80, by way of daily payments in the amount of $553.69, which was also dated November 14, 2016. In their affidavit in support of the motion, defendants point to the fact that, prior to filing the Confession of Judgment, QFC received and accepted daily payments from Iron in the amount of $331.82, which is consistent with the payment schedule under the Merchant Agreement, not the other agreement document of the same date. The defect was not cured, and nowhere in QFC's response to defendants' motion to vacate did it deny submitting the wrong document to the County Clerk, nor did it explain or even address the issue. Therefore, inasmuch as QFC fails to refute defendants' claim that the agreement document submitted with the Confession of Judgment was not the document needed to support the Confession of Judgment, this Court finds that the Confession of Judgment was not properly supported and must be vacated.

The balance of defendants' motion asserts that the Confession of Judgment must be vacated, because the financial arrangement contemplated under the Merchant Agreement was a usurious loan, cloaked as a purchase of defendants' receivables, based on: the lack of forgiveness of the loan if defendants are unable to collect the receivables; the annual percentage rate of 177% for the $21,900.00 loan resulting from fixed payments of $331.82 each business day over a period of approximately 93 days; and the Merchant Agreement's elimination of all risk and

contingency from QFC's ability to collect. This, defendants assert, render enforcement of a judgment based on a usurious transaction to be improper and against public policy.

In his affidavit in support of the motion to vacate, Sadiqui avers that QFC never asked for the identity of any of Iron's receivables or customers. Sadiqui denies any the existence of any connection or relationship between QFC and Iron's receivables, stating: "nothing in the parties' agreement had any mechanism or intent for the *delivery* to QFC of any receivable or invoice of Iron or the identity of any customer" (Sadiqui aff, ¶ 5). Sadiqui asserts that the Merchant Agreement was drafted so as to remove all risk and contingency from plaintiff, with himself as guarantor, responsible for full payment, without contingency, should there be an event of default under the Merchant Agreement, and he points to numerous provisions in the Agreement which support his position.

QFC opposes the motion as procedurally defective for not proceeding by way of a plenary action, and on the ground that the Merchant Agreement is not usurious, because it memorialized a purchase and sale of future accounts receivable, rather than a loan. It is QFC's position that the Merchant Agreement constitutes evidence confirming that QFC provided $15,000.00 to Iron in exchange for the return of $21,900.00, denominated therein as the "Purchased Amount." According to the affidavit of nonpayment submitted in support of the Confession of Judgment by John Eckstein, an underwriter for QFC, Iron defaulted after making payments totaling $6,304.58, leaving a balance due and owing in the amount of $15,595.42 (aff of nonpayment, ¶ 11). Plaintiff further states that, under the terms of the confession of judgment affidavits, QFC is also entitled to legal fees in an amount equal to 25% of the default amount, which totals $3,898.86, for the sum of $19,494.28, plus costs (*id.* ¶ 15).

CPLR 5015 (a) (3) provides that the Court may vacate a judgment on grounds of "fraud, misrepresentation, or other misconduct of an adverse party." Here, defendants contend that the Merchant Agreement is criminally usurious and void ab initio as a matter of law, because it contemplates payment by the corporate defendant of interest at the annual rate of 177%, a rate that exceeds the legal rate of interest of 25% for a corporation (*see* Penal Law § 190.40).

To this end, defendants maintain that the Specified Percentage of 11.02%, as set forth in the Merchant Agreement, is unrelated to the actual interest rate being charged, explaining, in relevant part, that:

> "[t]he specified percentage was written out of the agreement and replaced with the fixed daily payment. The specified percentage was meaningless because QFC never asked for any information and Iron's expenses, such as salaries of the work crews. For all QFC knew when making the agreement, Iron needed 100% of its revenue just to pay its pre-existing expenses. The specified percentage was expressly replaced by the fixed daily payment of $331.82. Apparently, the chief purpose of the specified percentage was to fool me into believing that this was the interest rate"

(Sadiqui aff, ¶ 13).

It is well settled that, while the defense of civil usury is unavailable to corporate entities in New York, the defense of criminal usury may lie in situations where the lender knowingly charges a corporate entity annual interest in excess of 25% on a loan. Penal Law § 190.40 states that:

> "[a] person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period."

A finding of criminal usury requires:

> "proof that the lender (1) knowingly charged, took or received (2) annual interest exceeding 25% (3) on a loan or forbearance. 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. Accordingly, the borrower satisfies his prima facie burden of proving usury by showing that the note given to the lender evidences a loan and reserves an illegal rate of interest. If usury is proved, the loan is deemed void, and the lender sacrifices his principal and interest"

(*In re David Schick, Venture Mtge. Corp., and A&D Trading Group, LLC, Debtors*, 245 BR 460, 473-474 [Bankr. SD NY] [2000] [internal citations omitted]; General Obligations Law § 5-522 [2]).

> "In order for a transaction to constitute a loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender"
>
> (*Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991] [internal citations omitted]).

"Further, there can be no usury unless the principal sum is repayable absolutely" (*Transmedia Rest. Co. v 33 E. 61st Rest. Corp.*, 184 Misc 2d 706, 711 [Sup Ct, NY County 2000]). The question here is whether the particular transaction under scrutiny "was made in good faith and not as a cover for a loan" (72 Am Jur 2d, Interest and Usury, § 85), and what effect to give to Sadiqui's guaranty, since the giving of a guaranty is one of the factors " to be considered in determining whether the transaction is in fact a loan or purchase and sale" (*id.*).

> "There can be no usury unless the principal sum advanced is repayable absolutely. If it is payable upon some contingency that may not happen, and that really exposes the lender to a hazard of losing the sum advanced, then the reservation of more than legal interest will not render the transaction usurious, in the absence of a showing that the risk assumed was so unsubstantial as to bear no reasonable relation to the amount charged.
>
> This risk of loss is to be distinguished from the risk of nonpayment that is inherent in every loan and that may only be compensated for by statutory interest; the risk

> of loss by the death or insolvency of the borrower is the ordinary risk that every person runs who lends money on personal security only"

(72 NY Jur 2d Interest and Usury, § 87).

QFC asserts in its affidavit of nonpayment that it agreed to buy all rights to Iron's future accounts receivable, having a face value of $21,900.00, for a purchase price of $15,000.00, and that repayment of the $21,900.00, was to be accomplished by debiting Iron's bank account by the Specified Percentage of 11.02%, until that amount was paid in full. The documents submitted before this court belie this claim. By doing basic mathematical calculations, the Court finds that controlling payment schedule set forth in the Merchant Agreement, with its Addendum, contemplates an interest rate of approximately 177%, as claimed by Iron.

In addition, there is absolutely no evidence that the parties' financial arrangement contemplated plaintiff to be an investor or partner in defendants' business. QFC fails to point to a non-recourse provision in the Merchant Agreement by which it assumed the risk that it might not be able to collect payments from Iron's account receivables. Merely telling the Court that risk is contemplated under the terms of the parties' agreement is inadequate. The requirement of a guarantor, along with the other facts and circumstances set forth, demonstrate that the principal sum advanced was absolutely repayable with calculated interest that exceeds the legal rate (72 Am Jur 2d, Interest and Usury, § 85; Penal Law § 190.40), and supports a finding that the evidence outweighs the presumption against a finding of usury (*Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 261 [1984]).

Upon review of the documents and consideration of the parties' respective arguments, the Court comes to the inevitable conclusion that the real purpose of the Merchant Agreement was

for QFC to lend money to defendants at the usurious interest rate set forth therein, and that defendants agreed to borrow the money based on the same usurious terms dictated by plaintiff. In its opposition, QFC offers no competent evidence that it purchased certain of Iron's receivables, that such receivables were dedicated to the repayment of the monies loaned, and that the risk inherent in the payment by way of these receivables was borne by QFC. Denominating a loan document by another name, as in this case, by calling it a Merchant Agreement, and including in it verbiage of QFC's purported purchase of accounts receivable that is unsupported by actual Iron receivables dedicated to repayment, does not shield it from the judicial determination that it contemplates a criminally usurious transaction, which is void ab initio as a matter of law.

Finally, the Court disagrees with QFC's contention it must deny Iron's motion due to its failure to proceed by way of a plenary action. Where, as here, the Merchant Agreement, on its face, contemplates a criminally usurious transaction, there is no question of fact for a trier of fact to resolve, and a motion under CPLR 5015 is adequate.

In further clarification of the Court's position, it should be noted that when the Appellate Division, Second Department addressed this issue, it stated: "[g]enerally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a plenary action for that relief" (*Regency Club at Wallkill, LLC v. Bienish,* 95 AD3d 879, 879 [2d Dept 2012] [internal citations omitted]). The specific use of the word "generally" would seem to indicate that there is no ironclad requirement for a plenary action in all such cases. While cases dating back at least 65 years have held that a motion by "a judgment debtor who seeks to set aside a judgment entered by confession, on grounds of fraud or misconduct, must

proceed by plenary action, not by motion," those cases "have so held, on grounds that sharply contested issues of fact should not be resolved upon affidavits, but rather by trial in a plenary action" (*Scheckter v Ryan*, 161 AD2d 344, 345 [1st Dept 1990]).

In the instant case, however, the submitted affidavits and exhibits clearly and unequivocally demonstrate that the Merchant Agreement is criminally usurious on its face, obviating the need for a superfluous plenary action. The court in *Scheckter,* refers to Siegel, NY Prac § 302, and notes that, "under CPLR 5015 (a) (3) a mere motion would seem adequate to the task today" (*id.*). The Court agrees with that observation. In particular, by recognizing the lack of necessity for a plenary action in cases where criminal usury is clear from the documents submitted in support of a motion under CPLR 5015 (a) (3), the victims of predatory lending through such illegal loan agreements are spared the needless cost in time and money of pursing a plenary action, the outcome of which would be the same.

Accordingly, it is

ORDERED that defendants' motion is granted; and it is further

ORDERED that the Confession of Judgment, under index number 51302/2017, entered in the Office of the Westchester County on January 31, 2017, is vacated; and it is further

ORDERED that the Judgment Clerk mark the judgment records accordingly.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 5, 2017

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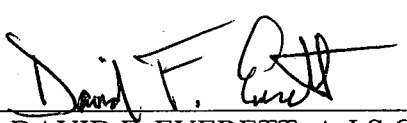

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