

**Merchant Cash & Capital, LLC v Liberation Land
Co., LLC**

2016 NY Slip Op 32589(U)

December 12, 2016

Supreme Court, Nassau County

Docket Number: 603342/16

Judge: Roy S. Mahon

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

MERCHANT CASH and CAPITAL, LLC,

Plaintiff(s),

- against -

**LIBERATION LAND COMPANY, LLC d/b/a
WHISPERING WINDS APARTMENTS and
THOMAS FISH,**

Defendant(s).

TRIAL/IAS PART 3

INDEX NO. 603342/16

**MOTION SEQUENCE
NO. 1**

**MOTION SUBMISSION
DATE: October 17, 2016**

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X
Memorandum of Law	X

Upon the foregoing papers, the motion by plaintiff for an Order to dismiss all of defendants' affirmative defenses for failure to state a cause of action, upon documentary evidence, and because defendants' defenses are meritless and strike scandalous and irrelevant content from defendants' Answer pursuant to CPLR 3024(b) and 3, is determined as hereinafter provided:

The Court initially observes that the plaintiff cites to the holding of the Court in Merchant Cash and Capital, LLC v Yehowa Medical Services, d/b/a Florence Medical Clinic and Thomas N. Tweh, Jr., Index No. 602039/16 (Sup Ct., Nassau County). In its entirety, Justice Murphy stated:

"PRELIMINARY STATEMENT

In Sequence No. 001, plaintiff brings this application for an order dismissing defendants' affirmative defense of usury for failure to state a cause of action, upon documentary evidence, and because defendants' usury defense is meritless. Opposition to this application has been submitted by defendants.

In Sequence No. 002, defendants bring this application for an order for summary judgment

dismissing the action under CPLR § 3212(a) and, in the alternative, defendants seek to replead the answer to include the proof of a criminally usurious loan as established by this motion. Opposition to this application has been submitted by plaintiff.

BACKGROUND

This action seeks to recover monetary damages sustained by plaintiff as a result of an alleged breach of a Merchant's Agreement (Revenue Program) by defendants. The Agreement, dated May 2, 2015, Exh. "C" to Motion, called for plaintiff to deposit with Yehowa Medical Services, Inc., d/b/a Florence Medical Clinic ("Yehowa") \$56,806.00, and to receive in return \$81,232.58, in payments of 10% of the daily receipts of Yehowa on five business days per week, until the sum of \$81,232.58 was paid.

The Agreement specifically provided that the arrangement was not intended to be a loan, but a sale of future sale proceeds. The Buyer, Merchant Cash and Capital, LLC, was stated to be the owner of future sale proceeds purchased by them, and that this represents a bona fide sale by Seller to a customer. The payment of a percentage of receivables was contingent upon the generation of sales proceeds, and the term over which payments would be made were indeterminable, since the daily payment depended upon the receipt of revenue by defendant.

Plaintiff commenced this action by filing a Summons and Complaint on March 25, 2016 (Exh. "A"). The Complaint alleges the parties entered into the Agreement, and that defendant Thomas N. Tweh, Jr., personally guaranteed payment. The parties have consented to the jurisdiction of the Courts of New York in accordance with the terms of the Agreement.

Plaintiff alleges that it paid the purchase price of \$56,806.00 to defendant, but that defendant has breached its obligations to forward receivables to plaintiff. While defendant made some payments totaling \$44,331.88, there remains an unpaid balance of \$36,900.70 from February 8, 2016. Plaintiff alleges two Cause of Action against the business defendant, one Cause of Action against the personal guarantor, and one Cause of Action jointly against the business defendant and the individual guarantor.

Defendants interposed an Answer dated May 9, 2016. It contains admissions and denials of specific allegations of the Complaint, and, while denominated as an Affirmative Defense, asserts at ¶¶ J 38 —40 that the transaction upon which the action purports to be based is a usurious

loan as to defendants; that the transaction was for an amount less than \$2,500,000.00 and provides for an interest rate which violates Penal Law § 190.40, in that it calls for daily payments of \$322.36, resulting in an interest rate of 43%, with no contingency under which principal would not be paid back.

Plaintiff moves to dismiss the claim of usury, on the ground that the Agreement under which payment is sought is not a loan or forbearance, and is not subject to the laws of usury.

Defendants controvert this position, asserting that the Agreement did not constitute a bona fide business investment; rather, it was a loan of \$56,806.00, to be repaid in the amount of \$81,233.00 with daily payments five days per week of \$322.26. Defendants claim that there was no provision in the Agreement which would permit Yehowa to pay less than \$322.36 per day.

In Reply, plaintiff points to the Agreement, which specifies the daily payment to be 10% of the daily receipts. As the daily receipts were an unknown quantity at the time of contracting, by letter dated May 28, 2015, plaintiff advised defendant of the provisions for modification of the daily payment amount based upon

a two-week Calculation Period for determining the average daily receipts required to be paid.

DISCUSSION

Motion Sequence No. 1

Defendants' contention that the Agreements violate General Obligation Law § 5-501[1] and Banking Law § 14-a[1], and are civilly and criminally usurious is without merit. A corporation is prohibited from asserting a defense of civil usury (*Arbozova v. Skalet*, 92 A.D.3d 816 [2d Dept. 2012]). An individual guarantor of a corporate obligation is also precluded from raising such a defense (*Id.*). Defendants have failed to adequately allege a defense of criminal usury in violation of Penal Law § 190.40, in that they failed to allege that the lender knowingly charged, took or received annual interest exceeding 25% on a loan or forbearance of money.

Defendant hypothesizes that the terms of the Agreement could result in payment of criminally excessive interest, but this is clearly insufficient under the pleading requirements.

Essentially, usury laws are applicable only to loans or forbearances, and if the transaction is not a loan, there can be no usury (*Kaufman v. Horowitz*, 178 A.D.2d 632 [2d Dept. 1991]). 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.

In *Merchant Cash & Capital v. Edgewood Group, LLC*, 2015 WL 4451057 (U.S.D.C., S.D.N.Y., Koeltl, J.), the Court adopted the Report and Recommendation of Magistrate Judge Freeman, 2015 WL 4430643. Magistrate Freeman undertook an extensive examination of the enforceability of an Agreement of June 21, 2013, whereby Edgewood Group sold \$163,726.00 of its business receivables/revenue to plaintiff, for an upfront payment of \$115,300.00. Edgewood Group agreed that the "business receivables/revenue" would be paid from a percentage of its daily revenue, but no percentage was set forth in the agreement.

After defendant failed to appear, plaintiff moved for default judgment. The Agreement contained terms consistent with the Agreement presently before this Court. It provided that defendant would pay Edgewood \$930.26 per day on each business day until such time as Edgewood had paid plaintiff \$163,726.00. Edgewood agreed not to change the designated bank account from which automated deductions would be made, and not to permit necessary licenses or permits to lapse, and the proprietor of Edgewood agreed to be personally liable for the obligations of Edgewood.

At fn. 5, Magistrate Judge Freeman stated that "(i)t is not entirely clear to this Court what differentiates this arrangement from a loan, to which lending laws (such as usury caps) would apply. She further noted that the absence of a percentage of daily receipts to be deducted on a daily basis resulted

in an obligation on the part of Edgewood to make payments over an eight month period, including 42% more than it received. As she stated "(t)his arrangement looks substantially like a loan (as opposed to Plaintiff's acquisition of a portion of Edgewood's farther receivables), but with an effective interest rate of over 50% per year."

She nevertheless concluded that the Court cannot conclude, as a matter of law, that the transaction at issue was a loan, citing Express Working Capital, LLC v. Starving Students, Inc. 28 F. Supp.3d 660, 669 (N.D. Tex. 2014). In analyzing the contractual language, and noting that usury was an affirmative defense which can be waived, based upon defendant's default, the Court accepted plaintiffs characterization of the agreement as a sale of receivables, rather than a loan.

This case does not involve a default, and defendants have actively opposed the motion to strike their claims of usury. Aside from the fact that the clear language of the Agreement is that it involves a purchase of receivables, and is not intended to constitute a loan, and is unaffected by laws regarding usury. The essence of a loan or forbearance is a lender's absolute right to repayment, and at all events, or that the principal in some way be secured as distinguished from being put in hazard (Rubenstein v. Small, 273 A.D.102 [1' Dept. 1947]). Under 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 statutes.

The motion by plaintiff to strike the affirmative defense of usury, to the extent that it is pleaded in the Answer, is granted.

Motion Sequence No. 2

Defendant moves for summary judgment dismissing the Complaint, or, alternatively, for leave to serve an Amended Answer setting forth the defense of Criminal Usury in violation of Penal Law §190.40. For the reasons set forth with respect to Motion Sequence No. 1, that the Agreement between the parties did not constitute a loan, and is unaffected by usury statutes, this motion by defendants is denied.

To the extent requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court."

The Court upon review of the foregoing finds the rationale set forth therein applicable to the plaintiff's instant application, as such, the plaintiff's motion for an Order to dismiss all of defendants' affirmative defenses for failure to state a cause of action, upon documentary evidence, and because defendants' defenses are meritless and strike scandalous and irrelevant content from defendants' Answer pursuant to CPLR 3024(b) and 3, is **granted**

SO ORDERED.

DATED:

12/12/2016

Roy S. Matar

J.S.C.

ENTERED

DEC 21 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE