

Merchant Cash & Capital, LLC v South Jersey Speed LLC
2016 NY Slip Op 32591(U)
December 13, 2016
Supreme Court, Nassau County
Docket Number: 604673/16
Judge: Anna Anzalone
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SUPREME COURT - STATE OF NEW YORK

PRESENT: *Honorable Anna R. Anzalone*
Justice of the Supreme Court

_____x
MERCHANT CASH AND CAPITAL, LLC,

Plaintiff,

- against -

SOUTH JERSEY SPEED LLC d/b/a CAR AND AUDIO
OF SOUTH JERSEY and RONALD MAKINO,

Defendants.
_____x

TRIAL/IAS, PART 26
NASSAU COUNTY

Index No. 604673/16

Motion Seq. No.: 001

The following papers read on this motion:

Notice of Motion	1
Plaintiff's Memorandum of Law	2
Affirmation in Opposition to Plaintiff's Motion	3
Defendant's Memorandum of Law	4
Affidavit	5
Reply Affirmation	6

Motion by the plaintiff for an order, pursuant to CPLR 3211, dismissing all of the defendants' affirmative defenses, is granted.

This action was commenced by the electronic filing of a summons and complaint on June 23, 2016. The complaint alleges that on or about September 3, 2015 and November 11, 2015, the plaintiff entered into two agreements ("the Agreements") with defendant, South Jersey Speed LLC d/b/a Car and Audio of South Jersey ("the Corporate Defendant"), by which the Corporate Defendant sold

\$25,344.00 of its business receivables/revenue to the plaintiff, to be paid to the plaintiff from a percentage of the Corporate Defendant's daily revenue, for an upfront sum of \$19,800.00 paid to the Corporate Defendant by the plaintiff. The defendant, Ronald Makino, signed the Agreements as guarantor for the Corporate Defendant. The Complaint further alleges that the Corporate Defendant made payments totaling \$17,458.44, but that the defendants have breached the Agreements by failing to pay the balance of \$7,885.56 due to the plaintiff under the Agreements.

The defendants filed an answer on July 25, 2016. The answer includes the affirmative defense of usury. The plaintiff moves to strike all of the defendants' affirmative defenses for failure to state a cause of action, upon documentary evidence and because the defendants' defenses are meritless.

CPLR 3211(b) provides that a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. A plaintiff moving to dismiss an affirmative defense bears the burden of proving that the affirmative defense is without merit as a matter of law. On such a motion to dismiss, the Court must liberally construe the pleadings in favor of the defendant asserting the affirmative defenses and give that defendant the benefit of every favorable inference (*Gonzalez v Wingate at Beacon*, 137 AD3d 747 [2d Dept 2016]).

Defendants' answer alleges that the transaction upon which this action purports

to be based is a usurious loan which violates Penal Law §190.40. Section 190.40 of the Penal Law provides, in relevant part, that a person is guilty of criminal usury if he knowingly charges interest in excess of 25% on a loan.

Essentially, usury laws are applicable only to loans or forbearances, and if the transaction is not a loan, there can be no usury (*Donatelli v Siskind*, 170 AD2d 433 [2d Dept 1991]; *Kaufman v Horowitz*, 178 AD2d 632 [2d Dept 1991]). Unless the principal sum advanced is repayable absolutely, there can be no usury (*Transmedia Rest. Co. v 33 E. 61st St. Rest. Corp.*, 184 Misc 2d 706 [Sup Ct, New York County 2000]; *Pearl Capital Rivis Ventures, LLC v RDN Constr., Inc.*, __Misc 3d__, __NYS3d__, 2016 NY Slip Op 26344, 2016 WL 6245103 [Sup Ct, Westchester County 2016]).

The terms of the Agreements specifically provide that the purchase price paid by the plaintiff “is not intended to be, nor shall it be construed as, a loan” from the plaintiff to the Corporate Defendant (Agreements, §4.1). While this language is not determinative in and of itself, the Agreements further provide that the plaintiff’s right to repayment is not absolute because the Agreements specify that if the Corporate Defendant has not violated the terms of the Agreements, the fact that it goes bankrupt or goes out of business shall not be considered a breach or obligate the guarantor to pay (Agreements, §4.4). Since payment is conditional, not absolute, the Agreements

do not constitute a loan and therefore cannot be usurious.

Moreover, while the defendants hypothesize that the terms of the Agreements could result in payment of criminally excessive interest, this is based upon mere speculation. The plaintiff set an initial daily payment amount, but that amount may be increased or decreased based upon the daily average revenues, and therefore the duration of the repayment period may also increase or decrease. Since the Agreements cannot be said to constitute a loan and since there is no proof that the plaintiff intended to charge impermissible interest, the defendants' affirmative defense of usury must fail.

Accordingly, the motion by the plaintiff to dismiss the affirmative defenses in the defendants' answer is granted.

This constitutes the decision and order of this Court.

DATED: December 13, 2016
Mineola, New York

ENTER:

ENTERED

DEC 21 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Anna R. Anzalone
Hon. Anna R. Anzalone, JSC

cc: Giuliano McDonnell & Perrone, LLP
Attorneys for Plaintiff

Merchant Cash and Capital, LLC
Christopher R. Murray, Esq.
170 Old Country Road, Suite 608
Mineola, New York 11501
(646) 328-0120

Amos Weinberg
Attorney for Defendant
49 Somerset Drive South
Great Neck, NY 11020-1821
(516) 829-3900