

STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

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THE MBE GROUP, INC.,

Plaintiff,

v.

J. PAUL DHILLON,  
D/B/A TIME FUNDING,

Defendant.

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DECISION AND ORDER

Ind # 2004/12746

Defendant, J. Paul Dhillon, d/b/a Time Funding, has moved pursuant to CPLR 3211(a)(7) for an Order dismissing the Complaint on the grounds that it fails to state a cause of action. On or about April 18, 2003, the parties entered into an Agreement requiring Defendant to "perform various 'purchase order financing and factoring between the parties.'" Plaintiff's Complaint, ¶3. Plaintiff alleges that the arrangement between the parties resulted in the charge of usurious interest in excess of 25%. Plaintiff commenced this action seeking the return of all interest paid to defendant. Plaintiff's Complaint, ¶11.

New York's General Obligations Law Section 5-521(1) states, "[n]o corporation shall hereafter interpose the defense of usury in any action." N.Y. Gen. Obl. Law §5-521(1). Section 5-521(3) further provides:

The provisions of sub-division (1) of this section shall not apply to any action in which a corporation interposes a defense of Criminal Usury as described in §190.40 of the Penal Law.

Id. at (3). Thus, a corporation may raise the usury defense "when the interest rate is criminally usurious . . . , i.e., greater than 25% per annum. . . ." Seidel et al. v. 18 East 17<sup>th</sup> Street Owners, Inc. et al., 79 N.Y.2d 735, 741 n.2 (1992) (citations omitted). But this is authorization only to cast criminal usury up as a defense.

Defendant contends that, even if a corporate borrower can raise criminal usury as a defense under these statutes, it cannot raise criminal usury for the purpose of obtaining affirmative relief, i.e., as in this case to avoid its obligations under the loan agreement challenged.

[I]t is well established that the statute generally proscribes a corporation from using the usury laws either as a defense to payment of an obligation or, affirmatively, to set aside an agreement and recover the usurious premium. . . . The statutory exception for interest exceeding 25 percent per annum is strictly an affirmative defense to an action seeking repayment of a loan [citations omitted] and may not, as attempted here, be employed as a means to effect recovery by the corporate borrower.

Initima-Eighteen, Inc. v. A.H. Schreiber Co., Inc., 172 A.D.2d 456, 457-58 (1<sup>st</sup> Dept. 1991) (emphasis supplied); cf., Pacer/Cats/CCS v. MovieFone, Inc., 226 A.D.2d 127, 128 (1<sup>st</sup> Dept. 1996). Despite Plaintiff's view of the Initima-Eighteen holding as "bad law," it is the law of this state, appears to be the law elsewhere, 45 Am. Jur. 2d Interest and Usury §268, and continues a trend in our law which increasingly facilitates commercial loans with interest costs

commensurate with the perceived risks involved, E. Cafritz & O. Tene, Securities Regulation v. Consumer Protection: French Financial Market Legislation, 37 Int'l Lawyer 173, 178-80 (2003) (tracing the development of N.Y. law in this area), when it is a truly commercial transaction that is involved and not one involving "an impoverished debtor." Schneider v. Phelps, 41 N.Y.2d 238, 243 (1977). Plaintiff does not protest that it is an impoverished or consumer debtor, nor does it contend that this was not a truly commercial transaction. Indeed, plaintiff appears to have enjoyed the financing it received for over a year before deciding to invoke the criminal usury statute in avoidance of its bargain. Plaintiff is, therefore, precluded from using the usury statutes in the fashion attempted here.

CONCLUSION

Defendant's motion to dismiss is granted.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: January 24, 2005  
Rochester, New York