

<b>Merchant Cash &amp; Capital v Royal Tate, LLC</b>
2016 NY Slip Op 32394(U)
November 7, 2016
Supreme Court, Nassau County
Docket Number: 602162/2016
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

*Honorable Karen V. Murphy*  
Justice of the Supreme Court

x

MERCHANT CASH AND CAPITAL,

Index No. 602162/2016

Plaintiff,

Motion Submitted: 09/08/16

Motion Sequence: 002

-against-

ROYAL TATE, LLC D/B/A GRAZING HERE and  
EUGENE TATE,

Defendants.

x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X
- Answering Papers..... X
- Reply..... X
- Briefs: Plaintiff’s/Petitioner’s.....
- Defendant’s/Respondent’s.....

Plaintiff moves this Court for an Order granting summary judgment against both defendants in the sum of \$66,000.78, together with pre-judgment interest at 9% from March 28, 2016 to the date of entry of judgment, and post-judgment interest at the statutory rate, plus costs, disbursements, and attorneys’ fees. Plaintiff also seeks dismissal of all counterclaims. Defendant Eugene Tate opposes the requested relief.

At the outset, the Court is compelled to reiterate its determination made in its Decision and Order dated August 3, 2016 that Eugene Tate, appearing *pro se*, may not represent the corporate co-defendant in this action, that the corporation must appear by counsel, and that the corporation’s failure to properly appear by counsel can result in the corporate defendant being held in default. In its prior Decision and Order, this Court concluded that, “the *pro se* answer interposed by Eugene Tate serves as his answer only, and is determined not to have been served on behalf of the corporate co-defendant.”

Plaintiff has not made any application to this Court for a default judgment against the corporate defendant in this matter.

Having determined that the *pro se* answer is not interposed on behalf of the corporate defendant in this matter, summary judgment against the corporation may not issue. CPLR § 3212 (a) provides in pertinent part that, “[a]ny party may move for summary judgment in any action, after issue has been joined. . .” Where issue has not been joined, a court is powerless to grant summary judgment (*Chakir v. Dime Savings Bank of New York*, 234 AD2d 577 [2d Dept 1996]), and a summary judgment motion made under those circumstances is properly denied as premature (*Enriquez v. Home Lawn Care and Landscaping, Inc.*, 49 AD3d 496 [2d Dept 2008]). Accordingly, that branch of plaintiff’s motion for summary judgment against the corporate defendant, Royal Tate d/b/a Grazing Here, is denied.

In support of its summary judgment motion against Eugene Tate, plaintiff submits, *inter alia*, Tate’s verified answer, and the affidavit of plaintiff’s vice president, annexed to which is a copy of the agreement that forms the basis for this action.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court’s analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendants (*Makaj v Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

With respect to its breach of contract claim, plaintiff must establish its *prima facie* entitlement to summary judgment by providing evidence in admissible form of the existence of a contract between the parties, plaintiff’s performance and defendant’s alleged breach. (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

This action seeks to recover monetary damages sustained by plaintiff as the result of an alleged breach of the Merchant’s Agreement executed by both defendants on November 23, 2015. The Agreement provides that Royal Tate d/b/a Grazing Here (the corporate defendant) agreed to sell its future receivables with a face value of \$105,000.00 to plaintiff for an upfront, discounted price of \$75,000.00. The receivables were purchased by plaintiff as a percentage (9%) of the proceeds of each future sale by the corporate defendant, whether the proceeds were paid by cash, check, ACH (automatic clearing house), credit card, debit card, bank card, charge card and/or any other means. On that same date, the parties executed a separate agreement related to the manner in which plaintiff was to receive payment of the percentage of daily average credit card

receipts or daily average revenues, until such time as plaintiff received the \$75,000.00 purchase price advanced to the corporate defendant. In sum, the corporate defendant was obligated to deposit all of its receivables into a particular bank account to which the plaintiff would have access, in order to extract the daily payments. Adjustment of the daily payments, up or down, could be accomplished pursuant to the terms, upon written notice to the other. According to the terms, the initial daily payment amount was set at \$416.67; however, every two weeks was designated as a "Calculation Period," and the daily payment could be increased or decreased, depending upon the daily revenue of the corporate defendant.

In consideration of the plaintiff entering into the Agreement, and to induce plaintiff to enter into the Agreement, defendant Eugene Tate (Tate) personally guaranteed the obligations of the corporate defendant. Tate signed the Agreement in his capacity as "owner," and personally.

Section 3.9 of the Agreement specifically states that, "[t]he Seller [corporate defendant] agrees and acknowledges that it is not a debtor of the Buyer [plaintiff] as of the date of this Agreement."

Section 4.1 of the Agreement provides in pertinent part that, "[t]he 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 is a sale of the Purchased Amount and 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."

In the event of a breach of the Agreement, Section 4.4 provides that the plaintiff is entitled to, *inter alia*, collect from the defendants an estimated daily payment that represents the "Purchased Percentage" (9%) of the corporate defendant's Future Sales Proceeds for each business day that the plaintiff does not have access to the designated bank account of the corporate defendant.

The affidavit of plaintiff's vice president, Robert Knox, establishes not only that the parties entered into the Agreements as outlined, but that plaintiff fulfilled its obligation under the terms thereof. Mr. Knox further states that, in total, plaintiff has collected only \$38,999.22 of the purchased receivables, leaving an outstanding balance of \$66,000.78. Knox further alleges that, on or about March 28, 2016, Tate and the corporate defendant began interfering with plaintiff's ability to collect the purchased sales proceeds by placing a stop payment order on the designated bank account. Furthermore, the defendants have failed to deliver the purchased sales proceeds to

plaintiff by any other means. According to Knox, this constitutes defendants' breach of the terms of the Agreement.

Defendant Tate's answer contains a general denial of plaintiff's claims, asserts eight perfunctory defenses, and alleges four counterclaims sounding in usury, criminal usury/declaration that the loan is void *ab initio*, civil usury, and illegal pay day loan.

As to the counterclaims for usury, "there can be no usury in the absence of a loan or forbearance of money" (*Donatelli v. Siskind*, 170 AD2d 433 [2d Dept 1991]). "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" (Id.).

Here, the intention of the parties is made clear pursuant to the written terms of the agreement itself. As discussed, the terms of the agreement state that the transaction is not a loan, and that the purchase of the receivables "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."

Moreover, neither of the defendants is obliged to repay the amount absolutely under the agreement, unless there is a breach that triggers plaintiff's remedy to collect the undelivered future receivables as damages. Also, not only were the payments made contingent upon the corporate defendant's daily revenue, and could be adjusted accordingly, but the payments were not secured by any form of collateral, and there is no deadline by which to pay the receivables. As such, the monies advanced by the plaintiff were put at risk; thus, the transaction at issue is not a loan, and defendant Tate's counterclaims for usury must be dismissed (*see Frey v. Malrath Real Estate Development Corporation*, 199 AD2d 713 [3d Dept. 1993]; *Rubenstein v. Small*, 273 AD 102 [1<sup>st</sup> Dept. 1947]).

For the same reasons, the counterclaim sounding in an illegal payday loan is also dismissed. Not only has this Court determined that the transaction was not a loan, but the fact that Tate executed the guarantee does transport this transform this commercial transaction into a consumer debt. The cash advance was obtained for Tate's business.

Accordingly, plaintiff has established its *prima facie* entitlement to summary judgment as a matter of law as to the receivables due and owing from defendant Tate.

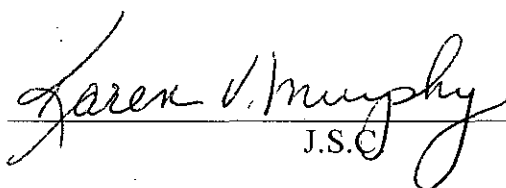
In opposition to the instant summary judgment motion, Tate submits<sup>1</sup> a memorandum of law, which is not evidence. The opposition papers, as such, are insufficient to raise a triable issue of fact sufficient to defeat plaintiff's summary judgment as to Tate, and the counterclaims have been dismissed.

Plaintiff's summary judgment motion is granted as to defendant Eugene Tate.

Submit a judgment, on notice, accompanied by an affirmation as to reasonable attorneys' fees and a bill of costs.

The foregoing constitutes the Order of this Court.

Dated: November 7, 2016  
Mineola, NY

  
J.S.C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>1</sup> It is questionable as to whether Tate himself actually e-filed the opposition papers. Document 66 is entitled "Legal Process Outsourcing Verification," the meaning of which escapes this Court. The "verification" is purportedly signed by an individual named "Jordan A. Christiansen," who claims that he is a "Supervising non-attorney paralegal under my business Seneca BPO and I assist the plaintiff herein." This purported verification is utterly meaningless, as is Christiansen's claim that he believes the submission to be true, upon his information and belief. Christiansen is not an attorney, and this document is unsworn.