

Merchant Cash & Capital, LLC v Transfer Intl. Inc

2016 NY Slip Op 32395(U)

November 2, 2016

Supreme Court, Nassau County

Docket Number: 605136/16

Judge: Robert A. Bruno

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

-----X

MERCHANT CASH AND CAPITAL, LLC,

Plaintiff,

-against-

TRANSFER INTERNATIONAL INC D/B/A ANDRADE
TRANSFER, and STEVE ANDRADE,

Defendants.
-----X

TRIAL/IAS PART 15

Index No.: 605136/16

Submission Date: 10/06/16

Motion Sequence: 001

DECISION & ORDER

Papers Numbered

Sequence #001

Notice of Motion, Affirmation & Exhibits	1
Memorandum of Law	2
Affidavit of Steve Andrade	3
Affirmation in Opposition & Exhibits	4
Memorandum of Law	5
Reply Affirmation & Exhibits	6

Upon the foregoing papers, plaintiff's motion for an Order (i) dismissing defendants' affirmative defenses pursuant to CPLR §3211; and (ii) striking scandalous and irrelevant content from defendants' answer pursuant to CPLR §3024(b); is determined as set forth below.

BACKGROUND

This is an action alleging breach of an agreement for the purchase and sale of receivables. In the Complaint, dated July 7, 2016 [*Mot. Exh. A*], plaintiff MERCHANT CASH AND CAPITAL, LLC ("MCC" or "plaintiff") alleges that on or about February 5, 2016, MCC entered into the subject purchase and sales agreement (the "Agreement" [*Mot. Exh. C*]) with defendants TRANSFER INTERNATIONAL INC D/B/A ANDRADE TRANSFER (the "Business Defendant") and STEVE ANDRADE (the "Guarantor Defendant"). Pursuant to the

MERCHANT v TRANSFER INTERNATIONAL
Index No. 605136/16

Agreement, the Business Defendant sold \$115,200.00 of its future sales proceeds and receivables to MCC for an upfront sum of \$80,000.00. The Agreement provided for MCC to receive the “purchased amount” in daily payments representing a percentage (13%) of the Business Defendant’s daily revenue, until the payments reached the total sum of \$115,200.00. The Agreement included a personal guarantee of the Business Defendant’s performance by the Guarantor Defendant. The Complaint alleges that defendants defaulted under the Agreement as of April 23, 2016, and that there is presently a balance due and owing of \$81,122.00.

In their Answer filed on August 31, 2016 [*Mot. Exh. B*], defendants assert the affirmative defense of usury. Essentially, Defendants allege that the transaction characterized by Plaintiff as purchase and sale was, in reality, a loan in the amount of \$80,000.00, for which Defendants were obligated to pay \$115,200.00. Based upon the calculations set forth in the Answer, defendants allege that the loan contemplates an annual interest rate of 59%, which violates New York Penal Law §190.40 and voids the loan.

Plaintiff now moves to dismiss defendants’ affirmative defenses for failure to state a cause of action, upon documentary evidence, and because defendants’ defenses are meritless. Plaintiff argues: (i) that the subject Agreement was not a loan – MCC’s right to payment was not absolute, but was contingent on factors outside of MCC’s control (the Business Defendant’s receipt of revenue); (ii) that the Agreement was not usurious – insofar as the length of time it would take for the purchased amount to be paid in full depended upon the Business Defendant’s daily revenues, the term of the purported loan, and thus, the purported interest rate, could not be determined at the outset; (iii) that there was no usurious intent – the Agreement expressly stated that the transaction was not intended as a loan, but as a sale of future receivables. Plaintiff also seeks to strike paragraphs 1-11 under the heading “Separate Defenses” from the Answer on the ground that the allegations of criminal conduct are meritless, irrelevant and prejudicial.

In opposition, defendants argue that the true nature of the Agreement was a loan. ANDRADE asserts that “[t]his Agreement was sold to me as a low interest loan to pay off a prior agreement with MCC (*ANDRADE Aff.*, ¶2). According to ANDRADE, the proposition that the daily payments were linked to the Business Defendant’s daily revenues is belied by the provisions of the letter addendum to the Agreement (*ANDRADE Aff., Exh. A*). The letter addendum specifies the initial daily payment amount as \$609.00, subject to adjustment as set forth in paragraphs D and E of the addendum. ANDRADE asserts, in essence, that the possibility of adjustment based upon the Business Defendants’ actual revenues was illusory – among other things, the provision for adjustment was unenforceable because there was no time limit for MCC to respond to defendants’ request for adjustment.

MERCHANT v TRANSFER INTERNATIONAL
Index No. 605136/16

To demonstrate usury, ANDRADE calculates the “interest rate” as follows: Defendants were required to repay \$115,200.00 for loan of \$80,000.00. The difference (\$35,200.00), if payable within one year, would represent 44% interest. Insofar as the loan was payable at \$609.00 per business day, however, the full amount of the loan would be payable in 265 days or 3/4 of a year. An interest rate of 44% for 3/4 of a year translates into an annual interest rate of 59% (ANDRADE Aff., ¶¶ 27-28).

In reply, plaintiff reiterates its argument that the subject transaction was, as expressly stated in the Agreement, a purchase and sale of receivables. Plaintiff emphasizes that MCC bore the risk that it might never be entitled to collect the full purchased amount, that the purchased future receivables might never be collected, that it might take far longer than expected to collect the purchased amount (in which case, the purported interest rate would be far lower than that calculated by defendants), or that the Business Defendant might not generate sufficient revenue to continue operating. Section 4.4 of the Agreement provides that, so long as the defendants did not violate the terms of the Agreement, the fact that the Business Defendant goes bankrupt or out of business would not be considered a breach and would not obligate either defendant to pay any balance due.

Further, plaintiff argues that, even if viewed as a loan, the principal amount is under \$250,000.00 and thus, the purported loan is too small to permit a defense of criminal usury, citing *Blue Wolf Capital Fund II, L.P. v Am. Stevedoring Inc.*, 105 AD3d 178, 182 (1st Dept. 2013).

DISCUSSION

A corporation, and the individual guarantor of a corporate obligation, are barred from asserting a defense of civil usury (*Arbuzova v Skalet*, 92 AD3d 816 (2d Dept. 2012); see General Obligations Law §5-521). Thus, defendants are limited to allegations of criminal usury (see Penal Law §§ 190.40, 190.42). Contrary to plaintiff’s argument, the Court does not find clear authority for the proposition that there is a minimum threshold for asserting the defense of criminal usury. Although the First Department in *Blue Wolf* [105 AD3d at 182] states, “a corporation may assert criminal usury as a defense where the amount of the loan or forbearance is more than \$250,000.00 and less than \$2,500,000.00”, that statement is permissive, rather than exclusive. It does not imply the converse – that criminal usury cannot be asserted with respect to a loan of a lesser amount. Rather, it implies that the \$250,000.00 cap applicable to the defense of civil usury does not apply in the case of criminal usury (see GOL §5-501[6][a]).

MERCHANT v TRANSFER INTERNATIONAL
Index No. 605136/16

Nonetheless, the party asserting the affirmative defense of usury bears the burden of proof. *Hochman v LaRea*, 14 AD3d 653 (2d Dept. 2005). The burden is a heavy one. Usury must be proven by clear and convincing evidence as to all of its elements. *Giventer v Arnov*, 37 NY2d 305 (1975); *Hochman*, 14 AD3d at 654. Usury will not be presumed from facts equally consistent with a lawful purpose. *Kaufman v Horowitz*, 178 AD2d 632 (1991). See also *Giventer*, 37 NY2d at 309; *Hochman*, 14 AD3d at 654. Rather, where the terms of the agreement are at issue and the evidence is conflicting, the payee is entitled to a presumption is that the transaction was not usurious. *Giventer*, 37 NY2d at 309.

To successfully raise the defense of usury, the defendant must allege and prove: (i) that a loan or forbearance of money; (ii) requiring interest in violation of a usury statute; (iii) was charged by the payee with the intent to take interest in excess of the legal rate. *Blue Wolf*, 105 AD3d at 183. If usury can be gleaned from the face of the agreement, intent will be implied. *Id.*

There is no usury if the transaction is not a loan. *Seidel v 18 E 17th St. Owners*, 79 NY2d 735 (1992); *Donatelli v Siskind*, 170 AD2d 433 (2d Dept. 1991). Although generally a contract is interpreted in accordance with the plain meaning of its terms and the parties' intent is found within the "four corners" of the contract (*Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]), when the defense of usury is asserted, the Court will look beyond the form of the agreement to the nature and substance of the transaction. *Seidel*, 79 NY2d at 744; *Blue Wolf*, 105 AD3d at 183.

To constitute a true loan, the agreement must "provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." *Rubenstein v Small*, 273 AD 102 (1st Dept. 1947). "Where the plaintiff runs the risk of losing all that he has advanced to the defendant," the transaction is not a loan. *Id.*, at 104.

Applying the above principles to the case at bar, the Court finds the express terms of the Agreement refute the defense of usury as a matter of law. Under the terms of the Agreement, plaintiff assumed the risk of nonpayment in the event of business failure or bankruptcy. Further, the Agreement provided that the amount of daily payments toward the total purchased amount could be adjusted downward in the event that the average daily receipts were less than anticipated, and adjusted upward in the event that the average daily receipts were greater than anticipated. Thus, plaintiff assumed the risk that, if the receipts were less than anticipated, the period of repayment would be correspondingly longer, and the investment would yield a correspondingly lower annual return.

MERCHANT v TRANSFER INTERNATIONAL
Index No. 605136/16

Defendants' argument that the mechanism for adjustment is "utterly unenforceable by the defendants and rendered useless" (*Memorandum of Law, p.10*) is not borne out by any reasonable interpretation of the provisions in question (see *Mot. Exh. C, letter addendum to Agreement, Paragraphs D and E*). When a contract does not specify a time for performance, the law implies a reasonable time. *Tedeschi v. Northland Builders, LLC*, 74 AD3d 1613 (3d Dept. 2010). Moreover, defendants' calculation of "interest" is speculative at best, and rests upon the unwarranted presumption that the daily payment amount is immutable. In view of the foregoing, the Court finds no basis to re-characterize the Agreement as a usurious loan.

Turning to that portion of the motion which seeks that to strike paragraphs 1-11 under the heading "Separate Defenses" from the Answer, the Court notes that the request is untimely (CPLR 3024[c]). To the extent that the Court has discretion to disregard such defect, the Court declines to exercise it in the absence of a showing sufficient to demonstrate that the material is scandalous or prejudicial, and not merely rendered unnecessary or irrelevant by the Court's dismissal of the usury defense. See *Matter of Emberger*, 24 Ad2d 864 (2d Dept. 1965).

The Court has considered the remaining contentions of the parties and finds that they do not warrant discussion.

Based upon the foregoing, it is

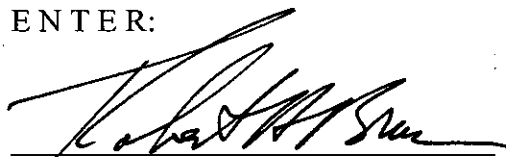
ORDERED, that the plaintiff's motion is *granted in part*, to the extent that the affirmative defense of usury is dismissed. In all other respects, the motion is *denied*,

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: November 2, 2016
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

NOV 04 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE