

**Merchant Cash & Capital, LLC v Yeshowa Med.
Servs., Inc.**

2017 NY Slip Op 30577(U)

March 22, 2017

Supreme Court, Nassau County

Docket Number: 602039/16

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MERCHANT CASH and CAPITAL, LLC,

Plaintiff,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 602039/16

- against -

Motion Sequence No. 004, 005,
006, 007

YEHOWA MEDICAL SERVICES, INC. d/b/a
FLORENCE MEDICAL CLINIC and THOMAS
N. TWEH, JR.,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2, 3, 4</u>
Answering Affidavits	<u>5</u>
Replying Affidavits	<u>6, 7</u>
Briefs: Plaintiff's / Petitioner's	<u>8</u>
Defendant's / Respondent's	<u>9</u>

The plaintiff Merchant Cash and Capital, LLC moves (Sequence 004) for an order striking the answer of the defendants Yehowa Medical Services, Inc. d/b/a Florence Medical Clinic and Thomas N. Tweh, Jr. for failure to produce discovery as required by the plaintiff's demands and the preliminary conference stipulation and court order dated June 28, 2016, or directing the defendants to produce all materials responsive to the plaintiff's discovery demands within 10 days or the defendants' answer will be stricken without further order.

The plaintiff asserts the defendants failed to comply with the defendants' discovery obligations, and refused to produce anything other than responses regarding a single affirmative defense, already dismissed from this action in a court order entered on August 2, 2015, despite the plaintiffs' good faith efforts to obtain discovery. In opposition, the defense objects to the tactical methods of opposing counsel regarding pretrial disclosure. The defense argues it is improper to file for a preliminary conference while refusing to respond to defense interrogatories. The defense points out a court order was filed striking the defense usury defense. The defense questions the reason why the plaintiff demanded production of financial records from April 1, 2015, and adds demand 9-11 are palpably improper seeking all communications; demands 12-14 and 19 improperly seek records only pertinent to collection of a judgment; and demands 15-16 and 20 are blunderbuss demands which are palpably improper with no focus. The plaintiff asserts the opposition papers are untimely, and the defendants contradict their position that does not need any discovery to defend this action while seeking summary judgment in their cross motion. The plaintiff points out the defendants do not dispute their responses to the plaintiff's demand for a verified bill of particulars was improper and defective, and that the defendants' response to the plaintiff's notice to admit was improper, unverified and defective.

The Court determines the plaintiff satisfies the burden for an order directing the defendants to produce all materials responsive to the plaintiff's discovery demands within

10 days or the defendants' answer will be stricken without further order. The plaintiff provides a sufficient showing that the defendants are refusing to obey a preliminary conference order for disclosure or wilfully failing to disclose information which the Court finds ought to have been disclosed by the defendants (CPLR 3126[3]; *Almonte v Pichardo*, 105 A.D.3d 687 [2d Dept. 2013]). In opposition, the defendants fail to demonstrate a reasonable excuse for their default in complying with the terms of the preliminary conference order and the plaintiff's discovery demands, and a potentially meritorious defense. The defendants fail to show the information and documents sought by the plaintiff are either privileged or palpably improper, and that the defense challenge was timely made (*Hunt v Odd Job Trading*, 44 AD3d 714, 715 [2d Dept. 2007]). The Court determines the defendants are required by a conditional order to fully comply with discovery or face the sanction of striking their answer.

The plaintiff moves (Sequence 005) for an order unsealing the defendants' improperly sealed filings on this docket, unsealing the defendants' counsel improperly sealed filings in the actions referenced in the moving papers, and ordering the defense counsel to stop improperly sealing motions and pleadings. The plaintiff asserts the defendants never sought the plaintiff's consent to file pleadings and motions in this action under a seal. The plaintiff points out it does not appear that any of the defense pleadings and motions in this action contain un-redacted information that is confidential under 22 NYCRR § 202.5(e).

Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records. This State has “long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly.” Thus, section 4 of the Judiciary Law requires that, with certain exceptions not applicable here, “[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same.” Likewise, sections 255 and 255-b of the Judiciary Law mandate that court records and docket books be available to the public [citations omitted]

Mosallem v Berenson, 76 AD3d 345, 348 [1st Dept. 2010].

However, that the public right to access judicial proceedings and court records is not absolute, and public inspection of such papers has been limited by numerous statutes and administrative rules. For example, 22 NYCRR § 202.5(e)(1) provides that “the parties shall omit or redact confidential personal information in papers submitted to the court for filing.” Confidential personal information includes a social security number, except the last four digits, tax payer information, an individual’s date of birth, full name of a minor and a financial account number (22 NYCRR § 202.5[e][1][i-iv]). Here, the Court determines the plaintiff satisfies the burden for an order unsealing the defendants’ improperly sealed filings on this in this action, and directs the defendants and their counsel to stop improperly sealing motions and pleadings in this action, but notes if motions and pleadings have been properly sealed under law, the Court is not directing unsealing those motions and pleadings (22 NYCRR § 202.5[e]). In opposition, the defendants fail to overcome the presumption by showing a reason, a rule, law or court order for sealing these records, and the defendant fail to show there is confidential personal information in the pleadings and motions in this action submitted to for filing

which will likely result in harm or prejudice to the defendants (*see Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499 [2d Dept. 2007]).

The plaintiff moves (Sequence 006) for an order granting summary judgment against Yehowa Medical Services, Inc. d/b/a Florence Medical Clinic and Thomas N. Tweh, Jr. jointly and severally, in the amount of \$35,923.06 plus prejudgment interest at 9% from the date of the defendants' breach to the date of entry of judgment, post judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees. The defendants oppose this plaintiff's motion.

The Court determines the plaintiff establishes a *prima facie* entitlement to summary judgment as a matter of law on this action for breach of a purchase and sale agreement. The plaintiff provides proof in admissible form of the written merchant cash and capital agreement dated May 28, 2015, together with the related written agreements, including guarantees, all executed by the defendants with the plaintiff, invoices showing nonpayment by the defendants after consideration and performance by the plaintiff and due demand for payment and an affidavit dated October 11, 2016, by Robert Knox, the plaintiff's vice president. Knox details that the Defendants breached the agreement by withholding sale proceeds that were purchased by the plaintiff in the amount of \$35,923.06 plus prejudgement interest at 9% from February 8, 2016, the date of the defendants' breach to the date of entry of judgment, post judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees in the amount of \$7,500.00. In

opposition, the defendants fail to raise a triable issue of fact. Reasonable attorneys' fees may be awarded according to the terms of the parties' agreement here (*Kamco Supply Corp. v Annex Contr.*, 261 A.D.2d 363 [2d Dept. 1999]).

The defendants cross move (Sequence 007) for an order denying the plaintiff's motion for summary judgment. The defense asserts the plaintiff's response to interrogatories and the merchant agreement and letter addendums demonstrate that the agreement was a loan at more than 25% annual interest. On July 29, 2016, Justice Jerome C. Murphy determined, in (Sequences 001 and 002), the defendants' contention that the agreements violate General Obligations Law § 5-501[1] and Banking Law § 14-a[1] was without merit, and the agreement among the parties did not constitute a loan. The plaintiff opposes this defense motion. The Court determines the defendants fail to establish a *prima facie* entitlement to summary judgment as a matter of law on this action for breach of a purchase and sale agreement. In opposition, the plaintiff provides proof in admissible form of the written merchant cash and capital agreement dated May 28, 2015, together with the related written agreements, including guarantees, all executed by the defendants with the plaintiff, invoices showing nonpayment by the defendants after consideration and performance by the plaintiff and due demand and an affidavit dated October 11, 2016, by Robert Knox, the plaintiff's vice president. Knox details that the defendants breached the agreement by withholding sale proceeds that were purchased by the plaintiff in the amount of \$35,923.06 plus prejudgment interest at 9% from February

8, 2016, the date of the defendants' breach to the date of entry of judgment, post judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees in the amount of \$7,500.00.

ORDERED that the motion by Merchant Cash and Capital, LLC (Sequence 004) is GRANTED striking the answer of the defendants Yehowa Medical Services, Inc. d/b/a Florence Medical Clinic and Thomas N. Tweh, Jr. unless the defendants to produce all materials responsive to the plaintiff's discovery demands within 10 days after service of a copy of this order with notice of entry upon the defendants' attorney or the defendants' answer will be stricken without further order, and it is also,

ORDERED that the motion by Merchant Cash and Capital, LLC (Sequence 005) is GRANTED unsealing the defendants' improperly sealed filings on this docket, unsealing the defendants' counsel improperly sealed filings in this action, and directing the defense counsel to stop improperly sealing motions and pleadings, and it is also,

ORDERED that the motion by Merchant Cash and Capital, LLC (Sequence 006) is GRANTED to the plaintiff for summary judgment against Yehowa Medical Services, Inc. d/b/a Florence Medical Clinic and Thomas N. Tweh, Jr. jointly and severally, in the amount of \$35,923.06 plus prejudgment interest at 9% from the date of the defendants' breach to the date of entry of judgment, post judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees, and it is also,

ORDERED that the motion by the defendants for denying the plaintiff's motion for summary judgment (Sequence 007) is DENIED, and it is further,

ORDERED that the plaintiff's counsel submit an affirmation regarding reasonable attorney fees as required under the parties' agreements within 45 days of the entry of this decision.

This decision will constitute the order and judgment of the Court.

So ordered.

Dated: **March 22, 2017**

ENTER:



J. S. C.

ENTERED

FINAL DISPOSITION

MAR 29 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE