

<b>Merchant Cash &amp; Capital, LLC v Sogomonyan</b>
2017 NY Slip Op 31111(U)
March 2, 2017
Supreme Court, Nassau County
Docket Number: 601496/16
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/IAS, PART 11  
NASSAU COUNTY

MERCHANT CASH AND CAPITAL, LLC,

Decision and Order

Plaintiff,

-against-

MOTION SEQUENCE:01, 02, 03  
INDEX NO.:601496/16

OLGA SOGOMONYAN d/b/a ST. OLGA  
TRANSPORTATION, and OLGA SOGOMONYAN,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion (Seq. No.1)	1
Memorandum of Law in Support (Seq. No. 1)	2
Affidavit in Opposition (Seq. No. 1 & 2)	3
Memorandum of Law in Opposition (Seq. No. 1 & 2)	4
Reply Affirmation (Seq. No. 1)	5
Notice of Motion (Seq. No. 2)	6
Reply Affirmation (Seq. No. 2)	7
Order to Show Cause (Seq. No 3)	8
Memorandum of Law in Support (Seq. No. 3)	9
Affidavit in Support (Seq. No. 3)	10
Reply Affirmation in Support (Seq. No. 3)	11
Affirmation in Opposition (Seq. No. 3)	12
Affirmation in Further Support (Seq. No. 3)	13
Letter Application	14

In an action to recover damages for, *inter alia*, breach of contract and breach of a guaranty, the Plaintiff moves for an order pursuant to: CPLR 3211 dismissing the Defendants' affirmative defenses (Motion Seq. No. 1); and CPLR 3212 granting it summary judgment against the Defendants (Motion Seq. No. 2). The Defendants move for an order "vacating the plaintiff's pendent lite lien and restraint on defendants' PayPal account; and restraining plaintiff from any further liens or restraints" pending the entry of judgment (Motion Seq. No. 3).

### Background

The Plaintiff, Merchant Cash and Capital, LLC ("Merchant") is engaged in the purchase and sale of future receivables and sale proceeds between commercial entities, often referred to as a "merchant cash advance." Defendant Olga Sogomonyan d/b/a St. Olga Transportation ("Company") is a sole proprietorship owned by individual Defendant Olga Sogomonyan (collectively referred to as "Defendants").

On December 15, 2015, Merchant and the Company entered into an agreement ("Agreement") whereby Merchant purchased \$99,750 of the Company's future sales proceeds for a purchase price of \$75,000 (Ex. "C" [Motion Seq. No. 1]). Pursuant to the Agreement, the Company agreed to pay Merchant \$99,750 by ensuring that all of its sales proceeds and receivables were deposited into one designated deposit account and permitting Merchant to electronically debit from that account 11% percent of the Company's daily sales proceeds until such time as Merchant collected the contracted for amount of \$99,750.

The Agreement contained the following unconditional personal guaranty by Olga Sogomonyan ("Guarantor"):

IN CONSIDERATION OF THE BUYER ENTERING INTO THIS AGREEMENT, AND TO INDUCE BUYER TO ENTER INTO THIS AGREEMENT, THE UNDERSIGNED PRINCIPAL(S) OF SELLER ("GUARANTOR(S)") HEREBY PERSONALLY GUARANTEE TO BUYER THAT: (1) ALL INFORMATION

PROVIDED BY SELLER TO BUYER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT IS TRUE, CORRECT AND COMPLETE, (2) SELLER SHALL NOT REPLACE THE CREDIT CARD PROCESSOR APPROVED BY BUYER OR ENGAGE AN ADDITIONAL CREDIT CARD PROCESSOR, IN EACH CASE, PRIOR TO THE TIME THAT BUYER HAS RECEIVED THE ENTIRE PURCHASED AMOUNT; AND (3) SELLER SHALL NOT BREACH, OR DO ANY OF THE ACTS PROHIBITED BY, SECTION 3.1 OF THIS AGREEMENT. This guarantee shall be the continuing, irrevocable, unconditional and joint and several obligations of the Guarantors and the Guarantors hereby waive demand of payment, notice of presentment, and any and all requirements of notice, defenses, offsets and counterclaims and any other act or omission of Buyer which changes the scope of the Guarantor's risk, and Guarantors further agree that Buyer may proceed directly against the Guarantors without first proceeding against Seller. Guarantor further guarantees the payment of and agrees to pay all indemnified amounts (as defined in section 5.7 of the Agreement). By signing below Guarantors agree to this Guarantee and each representation, warranty and covenant set forth in section 3 and 4.1 of this Agreement, which representations, warranties and covenants shall survive the termination of this Agreement as provided in Section 5.8 hereof (emphasis in original).

Other relevant provisions of the Agreement include:

Section 4.1 *Sale of Future Sale Proceeds*. *The Seller [Company] and the Buyer [Merchant] 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 . . . .*

Section 4.3 *Collection of Receivables*. *As provided herein, the Purchased Percentage of each Future Sale Proceeds due to the Seller shall be paid to Buyer by the credit card processor approved by Buyer, or shall be collected by Buyer from electronic check or ACH payments initiated by Buyer or its agents from the Bank Account . . . .*

Section 4.4 *Remedies*. *In the event of (a) any breach or default in the performance by Seller of any covenant or agreement contained in this Agreement . . . , the Buyer*

shall be entitled to all remedies available hereunder, under Article 9 of the Uniform Commercial Code or other applicable law. In the event that Buyer cannot access the Bank Account because of a Breach, then, without limiting Buyer's other rights and remedies, Buyer will be entitled to collect from Seller an estimated daily payment that represents the "Purchased Percentage" of Seller's Future Sales Proceeds for each business day Buyer does not have access to the Bank Account . . . *Buyer, Seller and Guarantor(s) acknowledge and agree that if Seller has not violated the terms of this Agreement, the fact that it goes bankrupt or out of business shall not (a) be considered a Breach, or (b) obligate Guarantor(s) to pay the Purchased Amount to Seller (emphasis added).*

\* \* \*

Section 5.7 Indemnified Amounts. In the event of a Breach, except as otherwise provided in Section 5.10, Seller and Guarantor(s), jointly and severally, shall assume liability for and do hereby agree to indemnify, protect, save and keep harmless Buyer and its agents and servants, from and against any and all liabilities, claims, losses, obligations, damages, penalties, actions, and suits of whatsoever kind and nature imposed on, incurred by or asserted against Buyer or its agents and servants, in any way relating to or growing out of such Breach (collectively, "Indemnified Amounts"), *including, without limitation, the payment of all costs and expenses of every kind of enforcement of Buyer's rights and remedies hereunder and/or the collection of amounts due to Buyer hereunder, including attorneys' fees and costs in any trial court or appellate court proceeding, any administrative proceeding, any arbitration or mediation, or any negotiations or consultations in connection with any Breach. Such Indemnified Amounts shall bear interest at the highest rate of interest allowed by applicable law until paid (emphasis added).*

A letter addendum ("Addendum"), which was also executed the same day as the Agreement, allowed each party to recalculate the daily payments every two weeks. Specifically, the Addendum provided:

Pursuant to the Merchant Agreement, Buyer has agreed to make a cash advance to Seller in the amount of the "Purchase Price" in order to purchase the "Purchased Amount" of either (a) the Seller's future credit card, debit card, bank card and/or other charge card (collectively, "credit card") receivables due to Seller from its credit card processor, or (b) the proceeds of future sales by Seller whether the proceeds are paid by cash, check, credit card and/or and other means. The Merchant Agreement specifies whether Buyer has purchased a specified percentage of future credit card receipts (the "Credit Card Program") or a specified percentage of future revenues of

Seller (the "Total Revenue Program").

Seller desires to participate in Buyer's "Adjustable ACH Program" pursuant to which, in lieu of Seller's credit card processor making payments directly to Buyer of a portion of all future credit card receivables, Buyer or its agents will initiate daily electronic check or automated clearinghouse (ACH) payments from Seller's bank account on each business day until the Buyer has received an amount equal to the Purchased Amount.

\* \* \*

B. Buyer shall initiate, on a daily basis on each business day, electronic check or ACH payments from the bank account identified in the ACH Authorization . . . maintained with the bank holding the Bank Account (the "Bank"), in an amount determined by Buyer in accordance with the provisions of this letter which represents the "Purchased Percentage" of Seller's daily average credit card receipts (in the case of the Credit Card Program) or daily average revenues (in the case of the Total Revenue Program), as specified in the Merchant Agreement (the "Daily Payment Amount").

C. The initial Daily Payment Amount shall be \$593.75 per day. The Daily Payment Amount is subject to adjustment as set forth in Paragraphs D and E below.

D. Every two (2) weeks after the funding of the Purchase Price to Seller (each such time period, a "Calculation Period"), either Buyer or Seller (the "notifying party") may give written notice to the other (the "receiving party") requesting an increase or decrease in the Daily Payment Amount based upon . . . daily average revenues . . . during the preceding Calculation Period. The Daily Payment Amount may be (1) increased if the amounts collected by Buyer from Seller during the most recently ended Calculation Period were less than the Purchased Percentage of all Credit card receipts or all revenues . . . of Seller during such Calculation Period, or (2) decreased if the amounts collected by Buyer from Seller during the most recently ended Calculation Period were more than the Purchased Percentage of all Credit Card receipts or all revenues . . . of Seller during such Calculation Period. The new Daily Payment Amount shall be equal to the product of (a) the Purchased Percentage times (b) . . . daily average revenues . . . of Seller during the most recent Calculation. *The intent of the foregoing adjustments shall be for Buyer to receive the Purchased Percentage of all Credit Card receipts or all revenues, as applicable, of Seller until Buyer has received an amount equal to the Purchased Amount (emphasis added).*

\* \* \*

H. In the event that Buyer cannot access the Bank Account or in the event that an electronic check or ACH payment initiated by Buyer from the Bank Account is not paid in full based upon insufficient funds in the Bank Account or otherwise, then to the extent not prohibited by applicable law and without duplication, Buyer will be entitled to collect a \$35 fee (or, if less, the maximum amount allowed to be charged under applicable law) for each business day Buyer does not have access to the Bank Account and for each electronic check or ACH payment that is not paid in full, which shall be in addition to the Daily Payment Amounts that otherwise became due. In addition, in the event that Buyer does not have access to the Bank Account because of a Breach, then, without limiting Buyer's other rights and remedies, Buyer will be entitled to collect from Seller the greater of the then-current Daily Payment Amount or the initial Daily Payment amount for each business day Buyer does not have access to the Bank Account.

On December 18, 2015, Merchant deposited the purchase price into the Company's account at JPMorgan Chase Bank ("Bank"). Merchant collected \$8,906.25 of the purchased future sales proceeds until January 20, 2016, after which Merchant tried, but was unable to collect, any more of the future sales. The Company "specifically instructed" the Bank "not to honor [Merchant's] debits of its 11% from the designated revenue deposit account" (Affidavit in Support at ¶ 12 [Motion Seq. No. 2]). The balance of future proceeds owing to Merchant is \$90,843.75 (Complaint at ¶ 12; Affidavit in Support at ¶ 19 [Motion Seq. No. 2]).

On March 7, 2016, Merchant commenced the instant action alleging causes of action for, *inter alia*, breach of contract and breach of a guaranty.

Defendants' answer, which contains general admissions and denials, also asserts, *inter*

*alia*, usury as an affirmative defense.<sup>1</sup>

Merchant now moves for an order pursuant to: CPLR 3211(b) dismissing Defendants affirmative defenses; and CPLR 3212 granting it summary judgment with respect to the causes of action for breach of contract, breach of guaranty, and attorneys' fees.

Defendants also moved, by order to show cause, for an order "vacating the plaintiff's *pendent lite* lien and restraint on defendants' PayPal account; and restraining plaintiff from any further liens or restraints" pending the entry of judgment (Motion Seq. No. 3).

For the reasons that follow, the motions of Merchant are granted and the motion of the Defendants is denied.

### The Court's Determination

#### *Merchant's Motion to Dismiss Affirmative Defenses*

In support of its motion to dismiss Defendants' usury defense, Merchant submits an attorney affirmation, the pleadings, a copy of the Agreement, and numerous judicial orders by various judges dismissing defenses predicated upon usury in similar transactions.

According to Merchant, there were multiple contingencies (under which the Defendants would not be obligated to deliver anything to Merchant) which run counter to the "distinguishing

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<sup>1</sup> Defendant's usury affirmative defense alleges that: the transaction at bar is a "usurious loan"; that Merchant may not recover either interest or principal; and that pursuant to the Agreement, Defendant's had been paying \$594 per day towards a total of \$99,750 after having received proceeds of only \$75,000, and therefore were charged annual interest of 50% (Answer at ¶¶ 38, 40, 43). Defendants also assert in their answer that: Merchant, in seeking "to enforce a barred debt", damaged the Defendants' business; payment "was made of any valid obligations"; and any "default" or "blocked account" fees "are an unenforceable penalty and not any reasonable liquidated damage" (Answer at ¶¶ 38, 40, 43-46).

hallmark of a loan” which is the “lender’s absolute right to repayment of the principal” (Affirmation in Support at ¶¶ 17, 19; Memorandum of Law in Support at pp 9-12 [Motion Seq. No. 1]).

In opposing Merchant’s motion, Defendants argue that the subject transaction was a loan, that it was not for the purchase of receivables, and it did not eliminate all risk or contingency of Merchant getting paid.

A defendant raising the defense of criminal usury must allege and prove that the lender: 1) knowingly charged, took or received; 2) annual interest exceeding 25%; 3) on a loan or forbearance (Penal Law § 190.40).<sup>2</sup>

The fundamental element of usury is the existence of a loan or forbearance of money and, thus, where there is no loan or forbearance, there can be no usury (*Seidel v 18 E. 17<sup>th</sup> St. Owners, Inc.*, 79 NY2d 735, 744 [1992]; *Donatelli v Siskind* 170 AD2d 433 [2d Dept 1991]; *Feinberg v Old Vestal Rd. Assoc., Inc.*, 157 AD2d 1002 [3<sup>rd</sup> Dept 1990]). In determining whether a transaction is usurious, the law looks not to its form, but its substance, or real character (*see Min Capital Corp. Retirement Trust v Pavlin*, 88 AD3d 666 [2d Dept 2011]; *O’Donovan v Galinski*, 62 AD3d 769 [2d Dept 2009]).

“There is a strong presumption against the finding of usury” (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]) and a “heavy burden rests upon the party seeking to impeach a transaction based upon usury. Thus, usury must be proved by clear and convincing evidence as to all its elements and usury will not be presumed” (*Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]; *Freitas v Geddes Sav. & Loan Ass’n*, 63 NY2d 254 [1984]; *Lehman v Roseanne Investors Corp.*, 106 AD2d 617 [2d Dept 1984]).

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<sup>2</sup> The first element requires proof of the general intent to charge a rate in excess of the legal rate rather than the specific intent to violate the usury statute (*Angelo v Brenner*, 90 AD2d 131 [3d Dept 1982]).

Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*Rubenstein v Small*, 273 AD 102 [1<sup>st</sup> Dept 1947]). Where payment or enforcement rests on a contingency, the contract is valid even though it provides for a return in excess of the legal rate of interest (*Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.*, 35 Misc 3d 1025[A] [Sup Ct Suffolk County 2012]; *Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 2012 WL 12284924, at \*5 [Sup Ct, Suffolk County 2012]; see also *Lehman v Roseanne Investors Corp.*, 106 AD2d at 617, *supra* ["loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest"]).

Here, Merchant has demonstrated that the Agreement was not a loan and, thus, the affirmative defense alleging that the transaction was based upon a usurious loan is without merit (CPLR 3211[b]). In this regard, the court notes the following: the Agreement allowed for the debit from the Company's designated bank account of 11% of the Company's daily receivables up until Merchant, as buyer, received the purchased amount of \$99,750; each party had the mutual right to adjust the daily payment amount in accordance with the daily revenues generated by the Company<sup>3</sup>; because the sale proceeds generated by the Company was a variable, the parties could not determine how long it would ultimately take for the Company to fully perform; any bankruptcy or cessation of business by the Company would not be considered a breach by the Company or obligate the Guarantor to pay the purchased amount; and Merchant and the Company expressly agreed that the transaction entered into was not intended to be construed as a loan (see *Greenfield v Phillies Records*, 98 NY2d 562 [2002] [best evidence of what parties to a written agreement intend is what they say in their writing]).

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<sup>3</sup> In this regard, section "D" of the addendum provides that the intent of such adjustment, which maybe recalculated every two weeks, is for Merchant to receive the purchased percentage of 11% of the Company's revenues until Merchant has received an amount equal to the purchased amount. If the Company's revenues dropped, the Company could request a decrease in the daily payment amount which would, in turn, extend the time in which Merchant would recover the amount equal to the purchased amount.

Accordingly, the affirmative defense of usury is dismissed (CPLR 3211[b]).

*Merchant's Motion for Summary Judgment*

Merchant moves for summary judgment against the Defendants with respect to the causes of action for breach of contract, breach of the guaranty, and attorneys' fees.<sup>4</sup>

Merchant's submissions, including the pleadings, the Merchant Agreement, and the affidavit of Robert Knox, Vice-President of Retention at Merchant, indicating an outstanding amount of \$90,843.75, prima facie establish its entitlement to judgment as a matter of law with respect to the breach of contract claims (*see Palmetto Partners v AJW Qualified Partners*, 83 AD3d 804 [2d Dept 2011]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).<sup>5</sup> The Company has failed to raise a triable issue of fact in opposition. In addition, the court grants Merchant's motion for summary judgment on its third cause of action for breach of guaranty.

In the fourth cause of action, Merchant seeks the recovery of costs, disbursements, and attorneys' fees based upon the express language of the Agreement which provides that the Company and the Guarantor agree to pay all costs associated with a breach and enforcement of the Agreement (*see* Ex. "B" at § 5.7 [Motion Seq. No. 2]).

Inasmuch as Merchant is entitled to summary judgment on the first, second, and third

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<sup>4</sup> Notably, Merchant does not seek summary judgment on its fifth cause of action sounding in conversion.

<sup>5</sup> The affidavit of Merchant's Vice-President, Robert Knox, establishes that the parties entered into the Agreement and that Merchant fulfilled its obligation under the terms thereof. Knox stated in his affidavit that on January 20, 2016, the Defendants denied Merchant access to the Company's account at the Bank and, consequently, deprived Merchant of its daily sales proceeds and, further, that all of Merchant's attempts to debit 11% of sales proceeds from the Company's account were rejected. Furthermore, the Defendants have failed to deliver the purchased sales proceeds to Merchant by any other means. Merchant has collected only \$8,906.25 of the purchased receivables, leaving an outstanding balance of \$90,843.75 (Affidavit in Support at ¶¶ 10-13, 19 [Motion Seq. No. 2]).

causes of action, the court also grants the branch of Merchant's motion seeking attorneys' fees pursuant to the Agreement and Guaranty in the amount of \$3,620.00.<sup>6</sup>

### *Defendants' Motion for a Preliminary Injunction*

The Defendants' motion seeking to: enjoin Merchant from imposing any liens or restraints on Defendants' accounts; and to vacate the "pendent lite lien and restraint on" Defendants' Paypal account is denied inasmuch as Defendants have failed to satisfy their burden of demonstrating, by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]).

In this regard, the court notes that the granting of summary judgment in favor of Merchant, as well as dismissal of Defendants' affirmative defense of usury herein negates Defendants' "likelihood of success on the merits." Furthermore, Defendants have failed to set forth that it will suffer irreparable harm absent the granting of an injunction (*see 306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011] [where the movant can be fully compensated by a monetary award, an injunction will not be granted because no irreparable harm will be sustained in the absence of injunctive relief]; *Liotta v Mattone*, 71 AD3d 741 [2d Dept 2010]; *Ginsburg v Ock-A-Bock Community Ass'n, Inc.*, 34 AD3d 637 [2d Dept 2006]).

### **Conclusion**

Based on the foregoing, it is hereby

Ordered that the motion of the Plaintiff for an order pursuant to CPLR 3211(b) is granted

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<sup>6</sup> In support of its application for attorneys' fees, counsel submits an affirmation as well as billing statements for services rendered in the instant action.

and the affirmative defense interposed in the Defendants' answer alleging that the transaction at bar is based upon a usurious loan is dismissed; and it is further

Ordered that the motion of the Plaintiff for an order pursuant to CPLR 3212 on the first, second, third and fourth causes of action is granted and Plaintiff is granted judgment against Defendants for the amount demanded in the complaint; and it is further

Ordered that the Plaintiff is awarded attorneys' fees in the amount of \$3,620.00, plus interest, costs, and disbursements, and it is further

Ordered that the motion of the Defendants is denied.

This constitutes the decision and order of the court.

Dated: March 2, 2017



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

MAR 06 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE