

Merchant Cash & Capital, LLC v Avtar Trucking, Inc.
2017 NY Slip Op 31123(U)
May 22, 2017
Supreme Court, Nassau County
Docket Number: 608476-2016
Judge: George R. Peck
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEORGE R. PECK

Supreme Court Justice

X TRIAL/JAS, PART 20
NASSAU COUNTY

**MERCHANT CASH & CAPITAL, LLC d/b/a
BIZFI FUNDING,**

Plaintiffs,

**INDEX NO. 608476-2016
MOTION SEQ. 002, 003 &
004
MOTION DATE 3-1-2017**

-against-

**AVTAR TRUCKING, INC. d/b/a AVTAR TRUCKING
and RAVINDER SINGH ,**

Defendants.

-----X-----
Upon the foregoing papers, it is hereby Ordered that [1] the application interposed by plaintiff, Merchant Cash & Capital, LLC d/b/a Bizfi Funding [hereinafter Merchant], which seeks an order pursuant to CPLR §§3211(a)(7), 3211(b) and 3024(b) striking the scandalous and irrelevant material set forth in the defendants' answer and dismissing the counterclaim alleged therein, is hereby GRANTED as set forth below (Sequence #002); [2] Merchant's application which seeks an order pursuant to CPLR §3126(3) striking the defendants' answer, is hereby GRANTED as provided below (Sequence #004), and; [3] the cross motion interposed by the defendants, Avtar Trucking, Inc. d/b/a Avtar Trucking [hereinafter Avtar] and Ravinder Singh, seeking an order granting a judgment by default on the counterclaim, is hereby DENIED as moot (Sequence #003).

On September 12, 2016, Merchant and Avtar entered into an agreement whereby Avtar sold \$26,035 of its future sales and receivables to Merchant for the sum of \$20,500 [hereinafter the Agreement] (see Murray Affirmation in Support at Exh. A). In accordance therewith, Merchant would receive daily payments of \$154.97 until the full amount of \$26,035 was satisfied with such payments to be deposited into a specific bank account authorized by Merchant (see Singh Affidavit at Exh. B). The Agreement included a personal guarantee from Ravinder Singh, President of Avtar, and further provided that "[Merchant, Avtar and Singh] acknowledge and agree that if

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[Avtar] 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 [Singh] to pay the Purchase Amount to [Merchant]" (see Murray Affirmation at Exh. A; Singh Affidavit at ¶1).

On or about November 2, 2016, Merchant commenced the underlying action seeking damages resulting from Avtar's breach of the Agreement by closing the designated bank account into which the daily payments were to be deposited, as well as from Ravinder Singh's breach of the personal guaranty (see Murray Affirmation in Support at Exh. A at ¶¶7,8,10-23). On or about December 7, 2016, the defendants interposed an answer containing an affirmative defense and counterclaim, both of which are predicated upon usury (*id.* at Exh. B at ¶¶1-95). The parties' applications referenced above thereafter ensued.

In moving herein, Merchant contends that the defendants' counterclaim and affirmative defense must be dismissed inasmuch as usury, in essence, is not a claim to be asserted but rather an affirmative defense which is legally unavailable to both Avtar and Singh (see Plaintiff's Memorandum of Law at pp. 3-4,9). Merchant further asserts that those paragraphs in the defendants' answer denominated 1 through 95 must be stricken as the allegations set forth therein are confusing, irrelevant and scandalous (*id.* at pp. 4-9).

The defendants oppose Merchant's dismissal application arguing that the Agreement was a usurious loan and simultaneously cross move for a judgment by default on the counterclaim contending that the plaintiff has failed to interpose a Reply thereto (see Defendants' Memorandum of Law at pp. 2-16).

"[U]sury is an affirmative defense, and a heavy burden rests upon the party seeking to impeach a transaction based" thereon (*Hochman v LaRea*, 14 AD3d 653, 654 [2d Dept 2005]). "To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring*, 105 AD3d 178, 183 [1st Dept 2013]). Thus, in the absence of a loan, there can be no usury (*Seidel v. 18 E. 17th St. Owners*, 79 NY2d 735, 744 [1992]; *Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]). To constitute a loan, the transaction

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in issue 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, 104 [1st Dept 1947]).

Here, the terms of the Agreement do not in any regard provide for repayment and rather expressly require Merchant to assume the risk of nonpayment in the event of either business failure or bankruptcy on the part of Avtar (*id.*). Given the foregoing, the Court finds that the Agreement is not a loan and usury is accordingly inapplicable thereby warranting dismissal of the defendants’ affirmative defense, as well as the improperly cast and meritless counterclaim (*id.*; *Seidel v 18 E. 17th St. Owners, supra* at 744; *Donatelli v Siskind, supra* at 434; CPLR §3211(a)(7); CPLR §3211[b]). Moreover, even assuming the Agreement was a loan, neither Avtar, as a corporation, nor Singh, as its individual guarantor, may assert the defense of usury (*Tower Funding v Berry Realty*, 302 AD2d 513, 514 [2d Dept 2003]; *Schneider v Phelps*, 41 NY2d 238, 242 [1977]).

As to Merchant’s application interposed pursuant to CPLR §3126(3), the record establishes that on March 20, 2017, counsel for the parties appeared at a preliminary conference at which time defendants’ attorney refused to submit to any depositions (*see* Murray Affirmation at ¶¶6-9, 12; Exh. 5). As a result, this Court granted Merchant leave to move for an order striking the defendants’ answer (*see* Murray Affirmation at ¶9; Exh. 5). In opposition, the defendants counter that the plaintiff’s application is inappropriate as all discovery is automatically stayed pursuant to CPLR §3214[b] (*see* Yosef Affirmation in Opposition at pp.1-2).

“A court may strike an answer as a sanction if a defendant ‘refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed’” (*Hoi Wah Lai v Mack*, 89 AD3d 990, 991 [2d Dept 2011] quoting CPLR §3126; *Shah v Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722, 724 [2d Dept 2016]). However, “[p]ublic policy strongly favors the resolution of actions on the merits whenever possible” (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2d Dept 2012]), and “[t]he drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious” (*Shah v Oral Cancer Prevention Intl., Inc., supra* at 724; *Singer v Riskin*, 137 AD3d 999, 1001 [2d Dept 2016]).

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"The scope of discovery in a civil action is governed by CPLR 3101 (a), which provides, in relevant part, that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof'" (*Friel v Papa*, 87 AD3d 1108, 1110 [2d Dept 2011]). Accordingly, Merchant is well within its right to depose the defendants (*id.*). Moreover, the Preliminary Conference Order clearly states that "Pursuant to CPLR 3214(b), service of a notice of motion under rule 3211, 3212 or 3213 shall **NOT** stay disclosure pending the determination of that motion."

Based upon the foregoing, it is hereby

ORDERED, that Merchant's application is hereby GRANTED and the defendants' counterclaim and affirmative defense, both of which are premised upon usury, are dismissed pursuant to CPLR §§3211(a)(7) and 3211(b) (Sequence #002); and it is further

ORDERED, that the application interposed by Merchant, which seeks an order pursuant to CPLR §3126(3) striking the defendants' answer, is hereby GRANTED unless the defendants appear for a deposition within thirty (30) days of the date of this Order. In the event of the defendants' failure to appear as ordered, upon receipt by the Court of an affirmation from Merchant's counsel attesting thereto, counsel is directed to settle judgment on notice (Sequence #004); and it is further

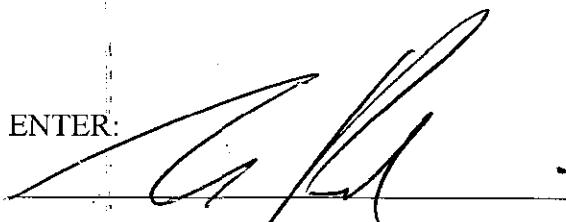
ORDERED, that the cross motion interposed by Avtar and Ravinder Singh, which seeks an order pursuant to CPLR §3215 granting a judgment by default on the counterclaim, is hereby DENIED as moot (Sequence #003).

This shall constitute the decision and order of this court. All matters not specifically addressed are herein denied.

Dated: May 22, 2017

Mineola, NY

ENTER:



HONORABLE GEORGE R. PECK, J. S.C.

ENTERED

MAY 22 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE