

LG Funding, LLC v Christenbury Eye Ctr., P.A.

2017 NY Slip Op 32609(U)

December 7, 2017

Supreme Court, Nassau County

Docket Number: 606785/17

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 29
NASSAU COUNTY

LG FUNDING, LLC,

Plaintiff,

-against-

MOTION # 01
INDEX # 606785/17
MOTION SUBMITTED:
SEPTEMBER 12, 2017

CHRISTENBURY EYE CENTER, P.A., and JONATHAN
CHRISTENBURY a/k/a JONATHAN DAVID
CHRISTENBURY,

Defendants.

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Memoranda of Law.....3, 4**

Defendants move for an order dismissing the complaint on the ground that the transaction at bar constituted a usurious loan.

On February 1, 2017, plaintiff and defendant, Christenbury Eye Center, P.A. (“Eye Center”) entered into an agreement entitled “Merchant Agreement” (the “Agreement”). Under the terms of the Agreement, Eye Center sold and plaintiff purchased Eye Center’s accounts receivable and other sources of revenue (collectively “Receivables”) for the sum of \$100,890.00. Eye Center represented that the Receivables if fully collected equaled the sum of \$142,254.90 (“Purchase Price”). The Purchase Price was to be made in weekly installments each in an amount equal to 15% of the Eye Center’s weekly revenues. There was no minimum weekly amount; so if there was no revenue, no payment was required. In the event of a default the full uncollected Purchase Price accelerated, becoming immediately due and payable. Defendant Christenbury personally guaranteed all of Eye Center’s obligations under the terms of the Agreement. Plaintiff alleges that defendants defaulted in performance under the Agreement by failing to remit the 15% of the weekly revenues and breaching other covenants and warranties.

A defendant raising the defense of criminal usury must prove that the lender: 1) knowingly charged, took or received; 2) annual interest exceeding 25%; 3) on a loan or forbearance (Penal Law Section 190.40). The fundamental element of usury is the existence of a loan or forbearance of money. Where there is no loan there can be no usury (*Seidel v. 18 E. 17th St. Owners, Inc.*, 79 NY2d 735, 744 [1992]; *Feinberg v. Old Vestal Rd. Assoc. Inc.*, 157 AD2d 1002 [3rd 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 Assn*, 63 NYS2d 254 [1984]; *Lehman v. Roseanne Investors Corp.*, 106 A.D.2d 617 [2d Dept 1984]).

Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*Rubenstein v Small*, 273 AD 102 [1st 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[4.] [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").

Defendants' point to a page of the Agreement entitled "Addendum." According to defendants the terms of the Addendum make the transaction a loan. Defendants claim that the Addendum could be read to require Eye Center to pay \$6,000.00 per week until the \$142,254.90 was paid off irrespective of the weekly revenue amount. By calculating payment of the difference between the Purchase Price and the potential collection of the amount of the Receivables over the 24 months it would take for payment of the Purchase Price, defendants impute an interest rate of 89% per annum. Defendants argue that the Agreement constitutes a usurious loan rather than a purchase and sale of assets and assert the defense of criminal usury.

The court disagrees. The main portion of the Agreement provides that defendants were to pay a specified percentage (or 15%) of weekly revenues. The Addendum modifies the payment provision stating that if the 15% equals more than \$6,000.00 in any given week, then the Eye Center need not pay any sum

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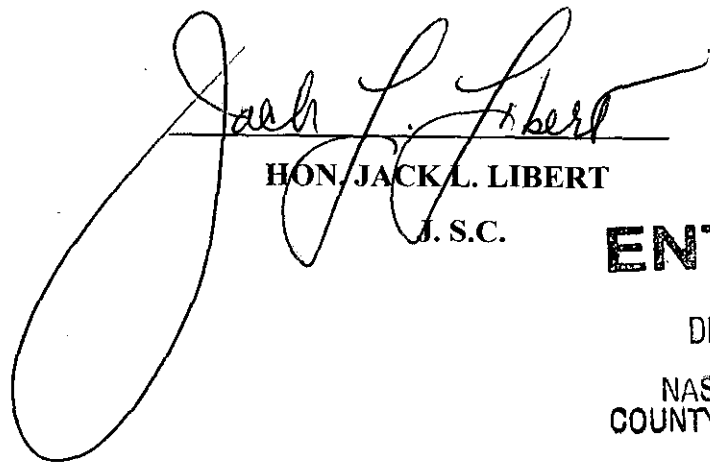
in excess of \$6,000.00. The Addendum is clear and unambiguous contrary to defendants attempt to characterize the phrase containing the words "specified amount" as uncertain in meaning, because that phrase is not a defined term.

The Agreement does not require *any* minimum payment to be made by the merchant. Payments are made from revenues, if any. Plaintiff assumed the risk that defendant would have no revenues. Plaintiff's ability to receive payment was contingent upon the success or failure of defendants' business. The transaction set forth by the Agreement was not a loan. Payments were based on a contingency. Usury laws do not apply.

ORDERED, the motion is **denied**. The parties shall appear for a Preliminary Conference on January 4, 2018, Lower Level, Supreme Court, Nassau County, 100 Supreme Court Drive, Mineola, NY 11501.

ENTER

DATED: December 7, 2017



HON. JACK L. LIBERT
J.S.C.

ENTERED

DEC 14 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE