

**Merchant Funding Servs., LLC v Realtime Carriers,
LLC**

2017 NY Slip Op 33542(U)

July 7, 2017

Supreme Court, Rockland County

Docket Number: Index No. 033639/2016

Judge: Gerald E. Loehr

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
MERCHANT FUNDING SERVICES, LLC,

Plaintiff,

DECISION AND ORDER

Index No.: 033639/16

-against-

REALTIME CARRIERS, LLC d/b/a REALTIME CARRIERS
and ROBERT L. WILLIAMS III,,

Defendants.
-----X

LOEHR, J.

The following papers numbered 1- 7 were read on the Defendants' motion to vacate a confession of judgment.

Papers Numbered

Notice of Motion - Affidavit - Exhibits	1
Memorandum of Law in Support	2
Affidavit in Opposition - Exhibits	3
Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5
Proposed Prder To Show Cause - Affirmation - Affidavit - Exhibits	6
Memorandum of Law in Support	7

Upon the foregoing papers, it appears that on August 16, 2016, Plaintiff, apparently an LLC with offices in New York and New Jersey, entered into a Secured Merchant Agreement with Defendant RealTime Carriers, a Georgia LLC. The nature of the Agreement is far from clear. On

the one hand, it states that it is for the “purchase and sale of future receivables,” specifically, the purchase and sale of \$31,900 (the “Purchased Amount”) in future receivables for an up front payment of \$22,000 (the “Purchase Price”), and that it shall not be construed as a loan, although the Purchase Amount was to be “paid” by the Defendants remitting to Plaintiff 15% (the “Specified Percentage”) of its future receivables as received. Simultaneously with the execution of the Secured Merchant Agreement, Defendant executed an Addendum that provided:

“By signing below, the Merchant hereby requests and acknowledges that the Specified Percentage shall be revised to \$398.75 per business day (the “Daily Payment) which the parties agree is a good-faith approximation of the Specified Percentage, based on the Merchant’s receipts due to [Plaintiff] pursuant to the Agreement.

* * *

“At the Merchant’s option, within five (5) business days following the end of a calendar month, the Merchant may request a reconciliation to take place, whereby [Plaintiff] may ensure that the cumulative amount remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage. However, in order to effectuate this reconciliation, upon submitting the request for reconciliation to [Plaintiff] – but in no event later than five (5) business days following the end of the calendar month – the Merchant must produce any and all evidence and documentation requested by [Plaintiff] in its sole and absolute discretion, necessary to identify the appropriate amount of the Specified Percentage, the foregoing includes without limitation, any and all bank statements, merchant statements or other documents necessary to ascertain the amounts of the Specified Percentage, including login to the Merchant’s bankaccount(s).

“The Merchant specifically acknowledges that : (li) the Daily Payment and the potential reconciliation discussed above are being provided to the Merchant as a courtesy, and that [Plaintiff] is under no obligation to provide same, and (ii) if the Merchant fails to furnish the requested documentation within five (5) business days following the end of a calendar month, the [Plaintiff] shall not effectuate the reconciliation discussed above.”

Defendant Williams, Defendant RealTime’s principal, Guaranteed RealTime’s performance under the Agreement and executed an Affidavit of Confession of Judgment on behalf of RealTime and himself in the amount of \$31,900 (less any payments made), together with attorney’s fees calculated to be 25% of such amount, and authorized the filing of same in this County – as well as

in other counties.¹ On September 1, 2016, Plaintiff filed the Affidavit of Confession of Judgment in this Court, supported by Plaintiff's Affidavit that the Defendants breached the Secured Merchant Agreement by failing to remit the Specified Percentage of receivables, except one payment of \$398.75, although Defendants were still in business and generating receivables. On the next day, the Clerk entered Judgment in the amount of \$31,500.75 plus \$7,875.31 in attorney's fees, with interest, costs and disbursements totaling \$39,725.76. Defendants now move to vacate the Judgment, first and foremost, on the basis that the Secured Merchant Agreement is a usurious loan.²

Corporations may not assert a civil usury defense, but rather, may only assert a criminal usury defense (*Professional Merchant advance Capital, LLC v C Care Services, LLC*, 2015 WL 4392081 [SDNY 2015]). Penal Law § 190 prohibits any entity from knowingly charging interest on a loan at a rate exceeding 25%. Criminal usury can be a defense to a corporation – or to an individual who has guarantied a corporate debt – in a civil action where the Penal Law has been violated (*id.*). The defense of criminal usury requires proof that the lender (1) knowingly charged, took or received (2) annual interest exceeding 25% (3) on a loan or forbearance (*id.*). There is a strong presumption against a finding of usury under New York law, and the party seeking to assert it as a defense bears a heavy burden as to all three elements (*id.*). However, in assessing the defense, the Court must look to the substance of the transaction and not just to its form (*id.*).

In the last few years, in over 20 cases in the New York metropolitan area, Courts have addressed the issues of whether this specific Agreement, or similar ones, were loans, and if loans, whether they were usurious. While the majority have found them not to be loans, or not usurious (*see, eg, K9 Bytes, Inc. v Arch Capital Funding, LLC*, 2017 WL 2219916 [Sup Ct, West Co]; *Merchant Cash And Capital, LLC v Wett Plumbing, LLC*, 55 Misc3d 1220(A) [Sup Ct, Nassau Co 2017]), a significant minority have found them to be loans, and usurious, or possibly so (*see Professional Merchant Advance Capital, LLC v C Care Services, LLC*, 2015 WL 4392081

¹ Plaintiff also filed a Financing Statement with respect to the Defendant's receivables. While this might be considered evidence that Plaintiff considered it a secured loan, the Court notes that under the UCC even absolute sales of accounts come under the scope of Article 9 in order to protect third parties (*see* UCC 9-109[a][3]). Therefore the filing of the Financing Statement is not evidence that the transaction here was a loan.

² As a procedural matter, Plaintiff argues that a confession of judgment can only be vacated by a plenary action, where the defense is usury, and not by a motion. Inasmuch as the Court is denying the motion on the merits, it will not address this procedural issue.

[SDNY]; *Merchant Funding Services, LLC v Volunteer Pharmacy*, 55 Misc3d 316 [Sup Ct, West Co 2016]). In deciding whether the transaction was a loan, probably the most significant factor is whether the Defendant is absolutely required to pay the Purchased Amount. Here, while on the surface, it appears that the Defendants only had to remit 15% of their receivables, implying that if they had no receivable, there would be nothing to remit, this suggests that it was not a loan. Moreover, even if it were a loan, since there is no time limit within which the Purchase Amount had to be paid, the calculation of an annual interest rate, the sine qua non for finding usury, becomes impossible. Looking deeper, however, the Secured Merchant Agreement, in addition to its name, provided that the Purchased Amount “shall be paid to [Plaintiff] by [Defendant].” Moreover, the Agreement provided that the Specified Percentage shall be revised to \$398.75 per business day.” At this rate, Defendants were required to pay the Purchased Amount in approximately 10 weeks, resulting in an effective annual interest rate of approximately 40%. And Defendant’s principal was required to guaranty the Agreement and to execute an Affidavit of Confession of Judgment. If the Agreement was not a loan with a specified amount which the Defendants were absolutely required to repay, what were the Defendants confessing? (*See Professional Merchant Advance Capital, LLC v C Care Services, LLC*, 2015 WL 4392081 [SDNY]).

Based thereon, it appears to this Court that this was a secured loan and not a purchase and sale of receivables. Be that as it may, Defendants confessed judgment. While usurious contracts have been declared void by statute since at least 1838, since at least 1853, it has been held that the defense of usury is personal to the defendant and may be waived such as by confessing judgment (*see Murray v Judson and Sands*, 9 NY 73 [1853]; *Lipedes v Liverpool & London & Globe Ins. Co.*, 184 AD 332 [4th Dept 1918]; *Barrett v Conley*, 35 Miscd 47 [Sup Ct, Erie Co 1962]; *accord, Professional Merchant Advance capital, LLC v C Care Services, LLC*, 2015 WL 4392081 [SDNY]). Accordingly, this Court finds that which the Agreement here was a usurious loan, the Defendants have waived this defense by confessing judgment.³

³ During the pendency of this motion, Defendants submitted a proposed Order To Show Cause to also vacate the Judgment, but now because the Affidavit of Confession of Judgment authorized its entry in more than one county. Defendants have provided no authority for that proposition. What they have provided is conjecture that the Plaintiffs have been forum shopping these confessions of judgment. Now, if the Plaintiff had submitted this Judgment to another court which had rejected it before filing it here, that might well provide a basis for vacating this Judgment. But in the absence of any evidence that the Judgment here had been rejected by another court, this Court has decided not to sign the proposed Order To Show Cause.

That brings us to the issue of the attorney's fee. While the Secured Merchant Agreement provided for reasonable attorney's fees on default, the inclusion of a percentage in the Affidavit of Confession of Judgment means a maximum and it is for the Court to determine what is reasonable based on the work actually done (*see, eg, Prince v Schacher*, 125 AD3d 626 [2d Dept 2015]; *Fleet Credit Corporation v Harvey Hutter & Co., Inc.*, 207 AD2d 380 [2d Dept 1994]). Accordingly, the Judgment is vacated as to the attorney's fees and, within 30 days hereof, Plaintiff shall efile proof of its reasonable attorney's fees, which shall include time and billing records.

This constitutes the decision and order of the Court.

Dated: New City, New York
July 7, 2017



Hon. GERALD E. LOEHR
J.S.C.

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