

**Platinum Rapid Funding Group Ltd. v Uncle Jimmy's
Brand Prods., LLC**

2018 NY Slip Op 30396(U)

February 27, 2018

Supreme Court, Nassau County

Docket Number: 608077/17

Judge: Sharon M.J. Gianelli

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 22
Present: HON. SHARON M.J. GIANELLI, J.S.C.**

X

PLATINUM RAPID FUNDING GROUP LTD.,
Plaintiff,

-against-

**UNCLE JIMMY'S BRAND PRODUCTS, LLC
d/b/a UNCLE JIMMY'S BRAND PRODUCTS
and JAMES F. URBANSKI,**

Defendants.

X

Index No. 608077/17

Mot. Seq. Nos. 01, 02
XXX

Papers submitted:

- Plaintiff's Notice of Motion _____ X
- Defendants' Affirmation in Opposition _____ X
- Plaintiff's Reply Affirmation _____ X
- Plaintiff's Notice of Motion _____ X
- Defendants' Affirmation in Opposition _____ X
- Plaintiff's Reply Affirmation _____ X

Motion by Plaintiff (Seq. No. 1) for an Order of this Court, pursuant to CPLR §3211, dismissing Defendants' counterclaims and affirmative defenses, and motion by Plaintiff (Seq. No. 2) for an Order of this Court, pursuant to CPLR §3212, granting summary judgment against the Defendants, are determined as hereinafter provided.

Underlying Facts

This action arises out of a Merchant Cash Advance Agreement (Agreement), dated June 7, 2017 (see Plaintiff's Exhibit F) whereby Plaintiff, PLATINUM RAPID FUNDING GROUP LTD. (Platinum) purchased from corporate Defendant, UNCLE JIMMY'S BRAND PRODUCTS, LLC d/b/a UNCLE JIMMY'S BRAND PRODUCTS (Uncle Jimmy's), a percentage of the proceeds of each future sale until a certain sum had been paid. For the purchase price of \$40,000.00, Platinum purchased \$53,200 of Uncle Jimmy's future

receivables. The Agreement was personally guaranteed by individual Defendant JAMES F. URBANSKI.

Platinum alleges that, on August 8, 2017, Uncle Jimmy's breached its obligation under the Agreement while continuing its normal business operations. Platinum further alleges that Uncle Jimmy's made payments totaling \$10,450.11 under the Agreement, leaving a balance of \$42,749.89. Platinum filed the Summons and Complaint on August 11, 2017 (see Plaintiff's Exhibit B). The Defendants filed an Answer with counterclaims on September 20, 2017, wherein they admit to executing the agreement, receiving \$40,000 from Platinum and paying \$10,450.11 pursuant to the Agreement, but allege that the Agreement is a criminally usurious loan (see Plaintiff's Exhibit C).

Analysis

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985], *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], *Zuckerman v. City of New York*, *supra*).

Here, the issue is whether the Agreement qualifies as a loan, which would be subject to the usury statute. Defendants contend that the Agreement is a criminally usurious loan disguised as a purchase and sale agreement, and is therefore void as a matter of law.

Defendants calculated an effective interest rate of 72.12%, a rate that exceeds the legal rate of interest of 25% per annum for a corporation (see Penal Law § 190.40). Plaintiff argues that the terms of the contract make clear that the agreement is not a loan and therefore not subject to usury laws.

The recent case of *IBIS Capital Group, LLC v. Four Paws Orlando LLC*, 2017 N.Y. Misc. LEXIS 884 WL 1065071 (Sup. Co. Nassau Co. March 10, 2017), is instructive. The Court in *IBIS* stated “[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan. 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” (*id.* at p. 2).

The Court in *IBIS* found that “IBIS could never have possessed usurious intent because it was impossible for the parties to know when, if ever, IBIS might collect the full purchased amount, or whether IBIS would even be entitled to collect the full purchased amount” (*id.* at p. 10). The Court further noted that the proposed “interest rate” put forth by the defendant improperly attempts to treat variables in the agreement that were subject to change as though they were fixed terms (*id.*).

Another recent case, *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc. 3d 807 (Sup. Co. Westchester Co. May 4, 2017), is likewise useful, reviewing *IBIS* in depth and providing factors that a court should consider to determine if repayment under an agreement is absolute or contingent.

First, it was noted in *K9 Bytes* that courts consistently find that a transaction is not a loan if a reconciliation provision exists, which allows the merchant to seek an adjustment of the payments based on the cash flow (*id.* at pp. 816-7). Here, such a provision exists in the second paragraph of the Agreement, which states, in part:

FUNDER will debit the Specific Daily Amount each business day and upon receipt of the Merchants monthly bank statements to reconcile the Merchant's account by either crediting or debiting the difference from or back to the Merchant's bank account so that the amount debited per month equals the specified percentage. (see: ¶2 of the Agreement)

Next, the Court in *K9 Bytes* explains that a transaction can only be a loan if it contains a finite term, as indefinite terms are consistent with the contingent nature of other types of transactions (*id.*). Here, the Agreement states on numerous occasions that no finite term exists. For example, the first page of the Merchant Agreement specifies that Uncle Jimmy's shall remit a certain percentage of each transaction, "until the amount specified below (the Purchased Amount) has been delivered by Merchant to FUNDER." Further, in Section 1.2, the Agreement states that "[t]here is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by FUNDER."

Finally, a transaction is a loan if there is recourse should the merchant's business fail (*id.* at p. 818). Section 1.2 of the Agreement states "Merchant going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Funder is entering into this Agreement knowing the risks that Merchant's business may slow down or fail, and Funder assumes these risks based on Merchant's representations warranties and covenants in this Agreement, which are designed to give Funder a reasonable and fair opportunity to receive the benefit of its bargain."

Regarding the distinctions between loans that are subject to usury laws and other transactions that are not, the Agreement contains clear language demonstrating that: (1) adjustments of the amount paid are to be made based on Uncle Jimmy's cash flow; (2) the term of the agreement was indefinite and contingent on Uncle Jimmy's cash flow; and (3) Platinum assumed the risks of Uncle Jimmy's business failure, in which case Platinum would receive no further payment. As such, the Agreement cannot be construed as a loan and is therefore not subject to usury laws.

The Defendants' attempt to impute conclusions of law onto Plaintiff via a Notice to Admit, for which no proof of service exists and for which the parties agreed via stipulation to give until January 30, 2018 for responses, is without merit. The Defendants' arguments all rest on the premise that the Agreement was a usurious loan, which is not the case.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion, pursuant to CPLR 3212, for summary judgment (Mot. Seq. 2) is **GRANTED**. As such, the Plaintiff's motion to dismiss Defendants' counterclaims and affirmative defenses (Mot. Seq. 1) is dismissed as moot; and it is further

ORDERED, that the Nassau County Clerk is directed to enter a judgment against Defendants Uncle Jimmy's Brand Products, LLC d/b/a Uncle Jimmy's Brand Products and James F. Urbanski, jointly and severally, for the sum of forty-two thousand, seven hundred forty-nine dollars and eighty-nine cents (\$42,749.89) with interest there on from August 7, 2017; and it is further

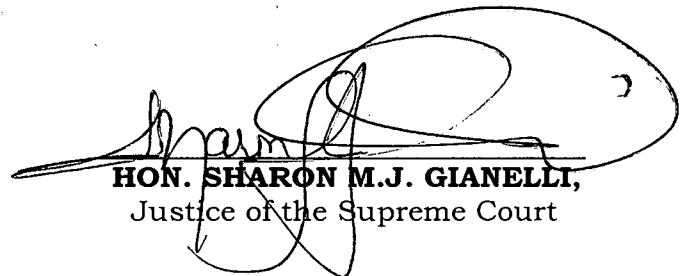
ORDERED, that all proceedings under Index No. 608077/17 are terminated; and it is further

ORDERED, that Plaintiff shall serve a copy of this Order upon Defendants by certified mail, with a return receipt.

All requests not specifically addressed herein are **DENIED**.

This constitutes the Decision and Order of the Court.

DATE: February 27, 2018
Mineola, New York



HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

ENTERED
MAR 02 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE