

<b>Funding Metrics, LLC v NRO Boston, LLC</b>
2019 NY Slip Op 32651(U)
August 28, 2019
Supreme Court, Westchester County
Docket Number: 64204/2016
Judge: John P. Colangelo
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To commence the statutory time period for 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 WESTCHESTER

-----X  
FUNDING METRICS, LLC D/B/A QUICK FIX  
CAPITAL,

Plaintiff,

-against-

DECISION AND ORDER  
Index No.: 64204/2016  
Motion Sequence #1

NRO BOSTON, LLC and ALICE INDELICATO

Defendants.

-----X  
FUNDING METRICS, LLC D/B/A/ QUICK FIX  
CAPITAL,

Plaintiff,

-against-

Index No.: 65963/2016  
Motion Sequence #1

NRO EDGARTOWN, LLC and ALICE INDELICATO

Defendants.

-----X  
COLANGELO, J.

The defendants in the above-captioned actions, NRO Boston, NRO Edgartown and Alice Indelicato (“Defendants”) have filed motions pursuant to CPLR §5015(3) seeking to vacate the Judgments by Confession entered against them (against NRO Boston and Alice Indelicato on October 3, 2016, and against NRO Edgartown and Alice Indelicato on October 21, 2016) on the grounds of fraud, misrepresentation and misconduct of an adverse party and on the ground that

such Judgments violate the strong policies of this State against the enforcement of criminally usurious loans. The motions involve the same parties, underlying forms of agreements, and issues of law, and to conserve judicial resources, the motions are hereby consolidated pursuant to CPLR §602(a).

The following papers were considered on the motion filed under Index No. 64204/2016:

Notice of Motion- Memorandum of Law-Affirmation-Exhibits 1-16	<u>10-28</u>
Memorandum of Law-Affirmation in Opposition-Exhibits 1& 2-Correspondence	<u>35-38, 56</u>
Reply Memorandum-Affirmation- Exhibits A-C	<u>39-43</u>

The following papers were considered on the motion filed under Index No. 65963/2016:

Notice of Motion-Memorandum of Law-Affirmation-Exhibits 1-16	<u>8-26</u>
Memorandum of Law-Affirmation in Opposition-Exhibits 1& 2-Correspondence	<u>32-35, 53</u>
Reply Memorandum-Affirmation- Exhibits A-C	<u>36-40</u>

Relevant Background

Defendants are the owners/operators of a small chain of clothing outfitters located in Massachusetts. Pursuant to Merchant Agreements between Defendants and Plaintiff Funding Metrics, LLC, d/b/a Quick Fix Capital (“QFC” or “Plaintiff”), QFC advanced funds to each of the NROs in return for the purported purchase of all of NROs’ future receipts up to a specified amount. The specified amount was to be paid via fixed daily online Automated Clearing House (“ACH”) debits in equal amounts that purportedly represented a specified percentage of NROs’ future receipts. The essence of Defendants’ motions is that the ACH withdrawals resulted in the charging of interest at rates in excess of 90% per annum.

QFC opposes the motions on substantive and procedural grounds, contending that each transaction was not a usurious loan nor was there usurious intent. As a procedural matter, QFC

argues that the motions should be denied because Defendants failed to proceed by plenary action, the motions are untimely, and the motions are facially defective since the judgments sought to be vacated are not attached thereto.

In support of the motions, Defendants cite to the case of *QFC, LLC v. Iron Centurian, LLC*, 2017 WL 2989222 (Sup. Ct. Westchester Cty 2017), where a contract identical to the Merchant Agreements in the instant cases (except for the difference in the amount of loans, the daily payments and the specified percentages) was found to be criminally usurious. Defendants take the position in the instant motions that the Judgments must be vacated because the financial arrangement contemplated under the Merchant Agreements was a usurious loan cloaked as a purchase of Defendants' receivables for the following reasons: there was no transfer of ownership of NROs' receivables despite QFC's "purchase" of same" by virtue of NROs' retention of control of the receivables and NRO's obligation to repay the purchased amounts from independent funds in the event there were insufficient funds to satisfy the daily ACH withdrawals; the Merchant Agreements eliminated all risk and contingency from QFC's ability to collect the daily ACH amounts; the fixed time period in which the purchased amount of receivables was required to be repaid; and the annual percentage rates for the loans being well in excess of legal rate of interest of 25% for a corporation (see Penal Law §190.40) given the amount of the fixed daily payments required to be paid over a fixed period of time.

According to the terms of the Merchant Agreement between QFC and NRO Edgartown dated June 7, 2016, QFC advanced NRO Edgartown the sum of \$200,000 in exchange for the purported purchase of all of NRO Edgartown's account receivables in the amount of \$286,000 (the "Purchased Amount"). The Purchased Amount was to be repaid by NRO Edgartown by

daily online ACH debits (referred to as “daily increments”) of \$2,600 which amount would be equal to the Specified Percentage of 114.40% as set forth on the first page of the Merchant Agreement. (Defs Exh. 2, p. 1 ¶2). Notwithstanding the Specified Percentage set forth in the Agreement, QFC estimated the repayment in real dollars to be \$2,600 per day. By remitting the sum of \$2,600 to QFC on a daily basis, the Purchased Amount of \$286,000 would be repaid in 110 payments or 22 weeks. The annualized interest rate for repayment of the Purchased Amount in this period of time was in actuality 102%. (Defs. Exh. 3).

The Merchant Agreement between QFC and NRO Boston dated July 7, 2016 called for QFC to advance the sum of \$200,000 in exchange for the purported purchase of all of NRO Boston’s account receivables in the amount of \$286,000 (the “Purchased Amount”). The Purchased Amount was to be repaid by NRO Boston by daily online ACH debits (referred to as “daily increments”) of \$2,363.64 which amount would be equal to the Specified Percentage of 11.64% as set forth on the first page of the Merchant Agreement. (Defs Exh. 4, p.1 ¶2). Notwithstanding the Specified Percentage set forth in the Agreement, QFC estimated the repayment in real dollars to be \$2,363.64 per day. By remitting the sum of \$2,363.64 to QFC on a daily basis, the Purchased Amount of \$286,000 would be repaid in 116 payments or 24 weeks. The annualized interest rate for repayment of the Purchased Amount in this time period was in actuality 93%. (Defs. Exh.5).

It is clear that the time periods for repayment of the Purchased Amount were to be strictly adhered to, because as with the identical terms in *Iron Centurion*, each NRO would be charged a restructuring fee of \$20,000 if the “term” of the NRO Agreements was restructured and/or extended. (See Addendums to Agreements, Exhs. 2 & 4).

The Merchant Agreements between QFC and NROs Edgartown and Boston shifted all risk and contingency from QFC's ability to collect the receivables, and made no provision for forgiveness of the loan in the event NRO could not collect the daily amount required by QFC. To the contrary, under the Agreements, Defendants remain absolutely liable for the Purchased Amount under all circumstances, and in the event of a default, which appears to be a virtual certainty under the Agreements' terms, Defendants became liable not only for the balance of the Purchased Amount, but also for additional fees and costs which include a "Default Fee of Twenty (20%) Percent of the of the original advanced amount or \$5,000, whichever is greater." Such fees would cost each NRO \$20,000. (See Addendums, Default Fee). Further, as Defendants correctly contend, an Event of Default would occur in any conceivable circumstance in which repayment of the Purchased Amount was at risk, including, without limitation, circumstances in which the NRO failed to collect or generate sufficient account receivables to make the daily payments and there were insufficient funds in the designated bank account for three consecutive days. (See Addendums, NSF fee).

CPLR §5015(a)(3) provides that the Court may vacate a judgment on grounds of "fraud, misrepresentation, or other misconduct of an adverse party." As in *Iron Centurion*, Defendants contend that the Merchant Agreements are criminally usurious and void *ab initio* as a matter of law because they contemplate payments by a corporate entity of interest at an annual rate well in excess of the legal rate of interest of 25% in violation of Penal Law §190.40. As the court stated in *Merchant Funding Services, LLC v. Iron Centurion*, 55 Misc. 3d 316, 320 (Sup.Ct., West. County 2016) "while the defense of civil usury is unavailable to corporate entities in New York, the defense of criminal usury may lie where the lender knowingly charges a corporate entity

annual interest in excess of 25% on a loan.”

A finding 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. 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. Accordingly, the borrower satisfies his prima facie burden of proving usury by showing that the note given to the lender evidences a loan and reserves an illegal rate of interest. If usury is proved, the loan is deemed void, and the lender sacrifices his principal and interest” (*In re David Schick, Venture Mtge. Corp., and A & D Trading Group, LLC, Debtors*, 245 B.R. 460, 473–474 [Bankr.S.D.N.Y.] [2000] [internal citations omitted]; General Obligations Law § 5–511[2] ).

In *Merchant Funding, LLC v. Volunteer Pharmacy Inc*, 55 Misc.3d 316, 320 (Sup. Ct., West. Co. 2016), the court recognized that “[i]n order for a transaction to constitute a loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender” (*Donatelli v. Siskind*, 170 A.D.2d 433[2d Dept.1991] [internal citations omitted] ).“Further, there can be no usury unless the principal sum is repayable absolutely” (*Transmedia Rest. Co. v. 33 E. 61st Rest. Corp.*, 184 Misc.2d 706, 711 [Sup.Ct., N.Y. Co. 2000] ).

In both Merchant Agreements, the Purchased Amounts were absolutely repayable. Moreover, NRO Edgartown was required on a daily basis to remit more than 100% of its collection of purchased receivables. The Merchant Agreement prohibited NRO Edgartown from obtaining any further financing (*Id.* §¶2.1 (v)), and the funds to maintain the daily remittance

amount in the account inevitably had to come from independent funds. As Defendants correctly point out, by requiring NRO Edgartown to remit all of the proceeds from its collected receivables and more to satisfy the daily payments, QFC ensured that NRO Edgartown would have insufficient funds to pay operating expenses, and would violate multiple covenants under the Agreement and likely default due to insolvency, bankruptcy, or temporary closure.

The same principle applies to the Merchant Agreement between QFC and NRO Boston, where the daily fee set by QFC required NRO Boston to pay 93% of its receivables on a daily basis, or risk the likely default due to insolvency, bankruptcy, or temporary closure.

QFC opposes the motions as procedurally defective for not proceeding by plenary action, and on the ground that the Merchant Agreements at issue are not usurious because they memorialized a purchase and sale of future receivables, and were not loans. QFC further contends that the motions must be denied as untimely. This Court finds all of QFC's contentions to be unavailing. The language of the Merchant Agreements and the requirement that there be a guarantor liable under the Merchant Agreements, in this Court's view, belies QFC's claim that the Merchant Agreements were in fact purchase and sale transactions.

The Purchased Amounts advanced were absolutely repayable, within a fixed period of time, with calculated interest that exceeds the legal rate. The terms of the Merchant Agreements placed an onerous burden on the Defendants to repay the Purchased Amounts so much so that a Default Event would occur and hefty financial penalties and fees assessed against Defendants if the daily repayment amount could not be maintained at the designated bank for three consecutive days. In addition and as set forth above, the Merchant Agreements eliminated all risk and contingency of non-collection from QFC, shifted the entire risk to Defendants and provided QFC

with full recourse in the event a customers' account was not collectible. (See Section 3.3 Chargeback). In order to further secure Defendants' payments under the Merchant Agreements, Alice Indelicato executed a guaranty and an Affidavit of Confession of Judgment with respect to each Merchant Agreement, whereby in addition to the indebtedness for the balance of the Purchased Amounts due, she would be liable for attorney's fees calculated at twenty-five (25%) percent of such sums. (Defs. Exhs. 10 & 11).

In short, there is no competent evidence that QFC "purchased" the NROs' receivables. The NROs retained ownership of the receivables, were required to collect them, bore all risk of non-collection, gave QFC a guaranty on the money advanced that was absolutely repayable during a fixed time period with calculated interest that exceeds the legal rate. Denominating loan documents by another name, such as "Merchant Agreements" as in this case, and including in such documents language of QFC's purported purchase of account receivables that is unsupported by actual NRO receivables dedicated to repayment, does not shield it from the judicial determination that it contemplates a criminally usurious transaction, which is void *ab initio* as a matter of law. (See *Merchant Funding Services, LLC v. Iron Centurion, supra*; see also *Merchant Funding, LLC v. Volunteer Pharmacy Inc., supra* at 322).

Based upon the foregoing, this Court finds that the real purpose of the Merchant Agreements was to lend money to NRO Edgartown and NRO Boston at the usurious interest rates set forth therein, and Defendants agreed to borrow the money based upon the same usurious terms dictated by QFC. The requirement of a guarantor for the Merchant Agreements, coupled with the facts and circumstances heretofore stated, demonstrate that the principal sums advanced were absolutely repayable with calculated interest that exceeds the legal rate. Defendants have

satisfied their *prima facie* burden proving usury by showing that the Merchant Agreements evidence a loan and reserves an illegal rate of interest. QFC has failed to come forward with competent evidence to the contrary.

This Court disagrees with QFC's contention that it must deny Defendants' motions due to their failure to proceed by plenary action. In *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 602-603 (1979), the Court of Appeals concluded that "it was an abuse of discretion as a matter of law to require that a litigant seeking to attack a judgment directly, proceed instead by the much more rigid and, therefore, more difficult and hazardous independent action route." The enactment of CPLR 5015 "was intended to assure that a broad class of persons, not limited to parties in the formal sense, could move in the original action on grounds vastly broader than permitted at common law or under prior practice, and thus to minimize the necessity for use of independent procedures of collateral attack upon a judgment." (*Id.*). The Merchant Agreements and other exhibits submitted in support of these motions clearly and unequivocally demonstrate that the Merchant Agreements are criminally usurious on their face, obviating the need for a superfluous plenary action. (*See Merchant Funding Services, LLC v. Iron Centurion, supra; see also Merchant Funding, LLC v. Volunteer Pharmacy Inc., supra*).

Accordingly, it is hereby

ORDERED that Defendants' motions are granted; and it is further

ORDERED that the Confession of Judgments, under Index numbers 64204/2016 and 65963/2016, entered in the Office of the Westchester Count Clerk on October 3, 2016 and October 21, 2016, respectively, are vacated; and it is further

ORDERED that the Judgment Clerk mark the judgment records accordingly.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 28, 2019  
White Plains, New York



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HON. JOHN P. COLANGELO, J.S.C.