

Principis Capital LLC v WTC Victor, LLC
2019 NY Slip Op 33678(U)
December 17, 2019
Supreme Court, New York County
Docket Number: 150521/2018
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2EFM

Justice

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INDEX NO. 150521/2018

PRINCIPIS CAPITAL LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

WTC VICTOR, LLC d/b/a WTC VICTOR LLC d/b/a WAXING
THE CITY AND MICHAEL CLARK,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for

REARGUMENT/RECONSIDERATION

In this action for breach of contract, defendants WTC Victor, LLC d/b/a WTC Victor LLC d/b/a Waxing the City ("WTC Victor") and Michael Clark ("Clark") move, pursuant to CPLR 2221, to reargue plaintiff Principis Capital LLC's motion ("the underlying motion"):

1) pursuant to CPLR 3212, for summary judgment on the complaint; 2) pursuant to CPLR 3211(a)(1) and (7) to dismiss defendants' counterclaim sounding in criminal usury; and 3) pursuant to CPLR 3211(b) to strike defendants' affirmative defense of criminal usury. Plaintiff opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the decision and order of this Court entered June 21, 2019, which granted the underlying motion by plaintiff in all respects. Doc. 23. Any additional relevant facts are set forth below.

In opposing the underlying motion, defendants argued that the “Purchase and Sale of Future Receivables Agreement” (“the agreement”) between plaintiff and WTC Victor dated October 25, 2017 (Doc. 22) was unenforceable since it constituted a criminally usurious loan. Docs. 15, 16.

In a reply memorandum of law, plaintiff argued that the agreement was one for the purchase of future receivables and was therefore not a loan subject to a criminal usury defense. Doc. 18.

By order entered June 21, 2019 (“the underlying order”) (Doc. 23), this Court granted plaintiff’s motion in all respects, holding, inter alia, that, since WTC was a corporation, it could not assert the defense of usury. Doc. 23 at 3.

LEGAL CONCLUSIONS:

The purpose of a motion for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. *See Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). Defendants correctly assert that reargument must be granted herein since this Court, in deciding the underlying motion, did not address the issue of criminal usury. Doc. 27 at par. 4. For the reasons set forth below, however, this Court is constrained, upon reargument, to adhere to its original determination.

Purchases and sales of future receivables are common commercial transactions expressly contemplated by the Uniform Commercial Code. *See Rapid Capital Finance, LLC v Nature's Market Corp.*, 57 Misc3d 979 (Sup Ct, Westchester County 2017).

"Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be." (*Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 744, 598 NE2d 7, 586 NYS2d 240 [1992] [internal quotation marks and citations omitted].)

In New York, there is a presumption that a transaction is *not* usurious. As a result, claims of usury must be proved by clear and convincing evidence, a much higher standard than the usual preponderance. (*Giventer v Arnow*, 37 NY2d 305, 309 [1975]). In determining whether a transaction is a loan or not, the court must examine whether or not defendant is absolutely entitled to repayment under all circumstances. "For a true loan it is essential to 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 App Div 102, 104 [1st Dept 1947]).

* * *

[T]here are certain factors that a court should look for to see if repayment is absolute or contingent. The first, and the one cited by each and every court that found that the transaction was not a loan, is whether or not there is a reconciliation provision in the agreement. The reconciliation provisions allow the merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof). If a merchant is doing poorly, the merchant will pay less, and will receive a refund of anything taken by the company exceeding the specified percentage (which often can also be adjusted downward). If the merchant is doing well, it will pay more than the daily amount to reach the specified percentage. (*See e.g. Retail Capital, LLC v Spice Intentions Inc.*, 2016 N.Y. Misc. LEXIS 4883, 2017 WL 123374 at *2, 2016 NY Slip Op 32614[U], *2 [Sup Ct, Queens County, Jan. 3, 2017] [not a loan when "(t)he agreement provided a reconciliation on demand provision whereby the parties (were each) permitted to demand the monthly reconciliation of funds from the other to ensure that neither entity collected more or less of the sales proceeds than they were contractually entitled to collect from the designated bank account"].)

If there is no reconciliation provision, the agreement may be considered a loan. (See *Professional Merchant Advance Capital, LLC v C Care Servs., LLC*, 2015 U.S. Dist. LEXIS 92035, *13, 2015 WL 4392081, *4 [SDNY, July 15, 2015, No. 13-cv-6562(RJS)] [agreement obligated merchant "to make a minimum weekly payment irrespective of (the) accounts receivable," such that it was a loan]; *Merchant Funding Servs., LLC v Volunteer Pharm. Inc.*, 55 Misc 3d 316, 318, 44 NYS3d 876, 878 [Sup Ct, Westchester County 2016]).

* * *

The next provision that is deemed quintessential is whether the agreement has a finite term or not. If the term is indefinite, then it "is consistent with the contingent nature of each and every collection of future sales proceeds under the contract." (*IBIS Capital Group, LLC v Four Paws Orlando LLC*, 2017 N.Y. Misc. LEXIS 884, 2017 WL 1065071 at *5, 2017 NY Slip Op 30477[U], *5 [Sup Ct, Nassau County, Mar. 10, 2017]). This is because defendants' "collection of sales proceeds is contingent upon [plaintiffs] actually generating sales and those sales actually resulting in the collection of revenue."

K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc 3d 807, 816-817 (Sup Ct, Westchester County 2017).

"The third factor to be considered in determining the finality of a repayment requirement is whether plaintiff has any recourse should the merchant declare bankruptcy (*K9 Bytes, Inc. v Arch Capital Funding, LLC, supra*; *IBIS Capital Group, LLC v Four Paws Orlando, LLC, supra*)."
NY Capital Asset Corp. v F & B Fuel Oil Co., Inc., 58 Misc 3d 1229(A), 2018 NY Slip Op 50310(U), *6 (Sup Ct, Westchester County 2018).

Reconciliation Provision

The agreement contains a reconciliation provision. Doc. 22 at par. 1. In brief, that paragraph provides that plaintiff was to collect future receivables based on amounts collected by

WTC Victor during a particular calendar month. Doc. 22 at par. 1. Payment of the future receivables was contingent upon WTC Victor “generating sufficient accounts receivable such that the ‘Specified Percentage’ of those receivables [would] support payment of the purchased amount over a reasonable period of time, and, therefore, the [amounts due were] not absolutely payable.” *Yellowstone Capital v Cent. USA Wireless*, 2018 NYLJ LEXIS 2431 (Sup Ct, Erie County 2018). Since the payments were based on a contingency, the agreement is valid even assuming, as defendants assert, that the return exceeded the legal rate of interest. *NY Capital Asset Corp.*, at *16.

Definiteness of the Term

The agreement does not contain a finite date for repayment and, thus, evidences the contingent nature of the repayment plan. Doc. 22. *See Rapid Capital Fin., supra*.

Bankruptcy

The agreement does not contain a provision regarding protection of WTC Victor in the event it filed for bankruptcy. Doc. 22. Although the existence of the guaranty could suggest that the agreement is a loan rather than an agreement to purchase receivables, the “protection of plaintiff’s ultimate ability to collect its full entitlement is insufficient, alone, to establish that [the agreement was] actually a loan.” *Rapid Capital Fin.*, 57 Misc3d at 984.

This Court further notes that the agreement provides that it “is not intended to be, nor shall it be construed as, a loan or an assignment for security from [plaintiff] to WTC Victor.” Doc. 22 at par. 5. Although this clause is not dispositive of whether the transaction was a loan, it is relevant in determining the true nature of the agreement (*NY Capital Asset Corp.*, at *15 -

*16), which, finds this Court, was a contingent contract for the sale of future receivables without a finite payment date.

Given that the agreement was not a loan, it could not have been criminally usurious. Indeed, in *Principis Capital LLC v 3148521 Canada Inc.*, 2018 NY Misc LEXIS 1616 (Sup Ct, NY County 2018), this Court (Cohen, J.) rejected the argument by defendant's attorney, who also represents defendants herein, that an agreement with terms identical to those in the agreement herein was usurious. In so holding, this Court relied on the recent decision of the Appellate Division, First Department in *Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507 (1st Dept 2018), *lv denied* 31 NY3d 910 (2018), which held that an agreement to purchase future receivables, which gave rise to a judgment by confession, did not constitute a usurious transaction. Counsel for the plaintiff in *Champion Auto Sales*, who commenced an unsuccessful action to vacate the judgment, was also the attorney representing the defendants herein.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the defendants' motion for reargument is granted; and it is further

ORDERED, that upon reargument, this Court adheres to its original decision; and it is further

ORDERED that this constitutes the decision and order of the court.

12/17/2019

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

KATHRYN E. FREED, J.S.C.