

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 531218/21  
Motion Date: 1-9-23  
Mot. Seq. No.: 1

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IMS FUND LLC,

Plaintiff,

-against-

**DECISION/ORDER**

COURTESY CASH LLC d/b/a COURTESY CASH  
AND TAX SERVICES and JAMES MAYEAUX,

Defendants.  
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Upon the following papers, listed on NYSCEF as document numbers 13-23 were read on this motion:

In his action to recover damages for the breach of a contract for the sale of future receivables, the plaintiff, IMS FUND LLC, moves for an order pursuant to CPLR 3212 granting plaintiff summary judgment against the defendants, COURTESY CASH LLC d/b/a COURTESY CASH AND TAX SERVICES and JAMES MAYEAUX, jointly and severally, in the amount of \$43,500.00 plus pre-judgment interest at nine (9) percent from November 18, 2021, to the date of entry of judgment, post judgment interest from the date of entry until paid, costs, disbursements, attorneys' fees; and 2) an award of reasonable attorney's fees and other litigation costs reasonably incurred; and 3) granting such other and further relief as the Court deems just and proper. Defendants oppose the motion.

In their answer to the complaint, the defendants asserted the affirmative defense that the contract at issue involves a criminally usurious loan agreement and is therefore unenforceable. If the contract is found to be a loan, criminal usury would be a defense to its enforcement, rendering it void (*see Davis v. Richmond Capital Group, LLC*, 194 A.D.3d 516, 517, 150 N.Y.S.3d 2). If the contract is indeed a loan agreement, it's terms would be criminally usurious. "The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be" (*LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 665, 122 N.Y.S.3d 309). To determine whether a transaction constitutes a usurious loan: "The court must examine

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whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan.

Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy” (*Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752, 754, 160 N.Y.S.3d 325, 326–27, citing *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d at 665–666, 122 N.Y.S.3d 309 [citations and internal quotation marks omitted]). Here, the contract contains a reconciliation provision which provides:

1.17 Merchant May Request Changes to the Payment Amount. The initial Payment Amount is intended to represent the Specified Percentage of Merchant’s future receipts. For as long as no Event of Default has occurred, once each calendar month, Merchant may request that IMS adjust the Payment Amount to more closely reflect the Merchant’s actual future receipts times the Specified Percentage. Merchant agrees to provide IMS any information requested by IMS to assist in this reconciliation. No more often than once a month, IMS may adjust the Payment Amount on a goingforward basis. IMS will give Merchant notice two business days prior to any such adjustment. After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Payment Amount until any subsequent adjustment.

Although this provision indicates that the defendant-merchant “may” request a reconciliation of the payment amount, the provision does not obligate the plaintiff to grant the request. The discretionary nature of the reconciliation provisions mitigates in favor of defendants’ claim that the contract involved as usurious loan agreement (see *Davis v. Richard Capital Group, LLC*, 194 A.D.3d 516, 517).

What constitutes a default under the contract is set forth in paragraph 3.1, which provides:

3.1 Events of Default. The occurrence of any of the following events shall constitute an “Event of Default” hereunder: (a) Merchant shall violate any term or covenant in this Agreement; (b) Any representation or warranty by Merchant in this Agreement shall prove to have been incorrect, false or misleading in any

material respect when made; (c) Merchant shall admit in writing its inability to pay its debts, or shall make a general assignment for the benefit of creditors; **or any proceeding shall be instituted by or against Merchant seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts;** (d) the sending of notice of termination by Guarantor; (e) Merchant shall transport, move, interrupt, suspend, dissolve or terminate its business; (f) Merchant shall transfer or sell all or substantially all of its assets; (h) Merchant shall make or send notice of any intended bulk sale or transfer by Merchant (*emphasis added*).

Further, the guaranty provides:

Personal Guaranty of Performance. The undersigned Guarantor(s) hereby guarantees to IMS FUND LLC. Merchant's performance of all the representations, warranties, covenants made by Merchant in this Agreement and the Merchant Agreement, as each agreement may be renewed, amended, extended or otherwise modified (the "Guaranteed Obligations"). Guarantor's obligations are due (i) at the time of any breach by Merchant of any representation, warranty, or covenant made by Merchant in this Agreement and the Merchant Agreement, and (ii) **at the time Merchant admits its inability to pay its debts, or makes a general assignment for the benefit of creditors, or any proceeding shall be instituted by or against Merchant seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts** (*emphasis added*).

The fact that the contract contains provisions suggesting that the obligation of the defendant-merchant and the defendant-guarantor to repay is absolute and that the defendant-merchant's bankruptcy constitutes an event of default under the contract, which would entitle the plaintiff to the immediate full repayment of any of the unpaid purchased amount, also mitigates in favor of defendants' claim that the contract involved as usurious loan agreement.

In sum, since the plaintiff did not establish as a matter of law that the defendants' defense that the contract at issue constitutes a criminally usurious loan agreement, plaintiff's motion for summary judgment must be denied.

Accordingly, it is hereby

**ORDERED** that the motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: March 8, 2023

**PPS**

**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

KINGS COUNTY CLERK  
FILED  
2023 MAR 13 PM 2:28

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