

At a term of the IAS Part of the Supreme Court of the State of New York,
 held in and for the County of Orange, at the 1841 Court House,
 101 Main Street, Goshen, New York 10924 on the 8th day of June, 2017.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF ORANGE

YELLOWSTONE CAPITAL LLC,

PLAINTIFF,

-AGAINST-

M N B WATERFORD LLC d/b/a MAC N' BREWZ!
 MAC N.CHEEZ! LLC d/b/a MAC N'CHEEZ!
 SOMERSET and GARY E SUSSMAN,

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

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

DECISION & ORDER

INDEX #EF001264/2017
 Motion date: 04/06/17
 Motion Seq. #1

The following papers numbered 1 - 13 were read on Defendants' motion for an order
 vacating a confession of judgment and voiding the parties' "Secured Merchant Agreement":

Notice of Motion, Affidavit/ Exhibits A-D/ Memorandum 1 - 7
 Affidavit in Opposition/ Exhibits 1-3/ Memorandum. 8-12
 Reply Memorandum 13

On January 19, 2017, the parties entered into a "Secured Merchant Agreement" (the
 "Agreement") pursuant to which plaintiff Yellowstone Capital, LLC ("YSC"), for the sum of
 \$50,000.00, purchased from defendant M N B Waterford LLC d/b/a Mac N' Brewz! Mac N'
 Cheez! LLC d/b/a Mac N' Cheez! Somerset (the "Merchant") 10% - the "Specified Percentage"-
 of Merchant's future accounts, contract rights and other obligations relating to the payment of
 monies from Merchant's customers...for the payment of Merchant's sale of goods or service until
 the sum of \$72,500.00 has been delivered by Merchant to YSC.

Paragraph 1.8 of the Agreement, entitled "Sale of Receipts" provided:

"Merchant and Yellowstone agree that the Purchase Price under this Agreement is in exchange for the Purchased Amount and that such Purchase Price is not intended to be, nor shall it be construed as a loan from Yellowstone to Merchant. Merchant agrees that the Purchase Price is in exchange for the Receipts pursuant to this Agreement equals the fair market value of such receipts. Yellowstone has purchased and shall own all the Receipts described in this Agreement up to the full Purchased Amount as the Receipts are created. Payments made to Yellowstone in respect to the full amount of the Receipts shall be conditioned upon Merchant's sale of products and services and the payment therefore by Merchant's customers in the manner provided in Section 1.1. In no event shall the aggregate of all amounts be deemed as interest hereunder and charged or collected hereunder exceed the highest rate permissible at law. In the event that a court determines that Yellowstone has charged or received interest hereunder in excess of the highest rate allowed by law then the rate in effect hereunder shall automatically be reduced to the maximum rate permitted by applicable law and Yellowstone shall promptly refund to Merchant any interest received by Yellowstone in excess of the maximum lawful rate, it being intended that Merchant not pay or contract to pay, and that Yellowstone not receive or contract to receive, directly or indirectly in any manner whatsoever, interest in excess of that which may be paid by Merchant under applicable law."

An Addendum to the Agreement provided in pertinent part:

- a. By signing below, Merchant requests and acknowledges that the Specified Percentage shall be revised to \$806.00 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 Yellowstone pursuant to the Agreement.

. . .

- c. 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 Yellowstone may ensure that the cumulative amount remitted from 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 Yellowstone - 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 Yellowstone 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 statement or other documents necessary to ascertain the amounts of the Specified Percentage, including login to the Merchant's bank account(s).
- d. The Merchant specifically acknowledges that (i) the Daily Payment and the potential reconciliation discussed above are being provided to the Merchant as a courtesy, and that Yellowstone 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, then Yellowstone shall not effectuate the reconciliation discussed above.

As of February 15, 2017, Merchant ceased making Daily Payments and thereby defaulted under the Agreement, whereupon YSC, exercising its contractual remedies, entered Judgment by Confession against the Merchant and its guarantor, Defendant, Gary E. Sussman. Defendants, claiming that the Agreement is, on its face and as a matter of law, a criminally usurious loan, now move, *inter alia*, for an order vacating the confession of judgment and voiding the parties' Agreement.

Generally, a debtor seeking to vacate a judgment entered against him upon the filing of an affidavit of confession of judgment may not proceed by way of motion, but must instead, see

such relief by commencing a separate plenary action. *See, The Regency Club at Wallkill, LLC v Bienish*, 95 AD3d 879 (2d Dept 2012); *Rubino v Csikortos*, 258 AD2d 638 (2d Dept 1999); *Cash and Carry Filing Service, LLC Pervuez*, 2017 WL 1401467 at *1 (1st Dept, April 20, 2017).

Defendants, citing *Merchant Funding Services, LLC v Volunteer Pharmacy, Inc.*, 44 NYS3d 876 (Sup. Ct. Westchester Co. 2016), assert that a plenary action is not required in the circumstances of this case because the Agreement, on its face and as a matter of law, is a criminally usurious loan. However, Defendants' position is grounded on a dubious misreading of the Agreement.

The Agreement on its face provided for YSC's purchase of 10% of Merchant's future receipts until such time as the sum of \$72,500.00 is paid. Paragraph 1.8 of the Agreement recited the parties' understanding - directly contrary to Defendants' claims herein - that (1) YSC's purchase price was being tendered in exchange for the specified amount of Merchant's future receipts, (2) that such purchase price is not intended to be a loan and (3) that payment shall be conditioned upon Merchant's sale of products and services and the payment therefore by Merchant's customers.

Notwithstanding these provisions, Defendants contend that the Addendum altered the essential nature of the Agreement by requiring a Daily Payment of \$806.00 thereby eliminating any element of risk or contingency in the amount or timing of payment to YSC, and converting the Agreement into a criminally usurious loan bearing interest at the rate of 127% per annum. The Court does not agree. The Addendum expressly provided that the \$806.00 Daily Payment was only "a good-faith approximation of the Specified Percentage" of 10% of Merchant's receipts and that Merchant was entitled to request a month-end reconciliation to insure that the

cumulative monthly payment did not exceed 10% of its receipts. Defendants' contention that YSC was entitled under the Addendum of the Daily Payment without being obligated to offer Merchant a month-end reconciliation is founded on an incomplete and palpably misleading quotation of paragraph "d" of the Addendum.

According to Defendants, paragraph "d" states:

The Merchant specifically acknowledges that ***the potential reconciliation***[is] being provided to the Merchant as a courtesy, and Yellowstone is under no obligation to provide same.

But the paragraph, as noted above, actually states:

"The Merchant specifically acknowledges that (i) the Daily Payment and the potential reconciliation discussed above are being provided to the Merchant as a courtesy, and Yellowstone 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, then Yellowstone shall not effectuate the reconciliation discussed above."

The Defendants' omission fundamentally alters the meaning of paragraph "d". Contrary to Defendants' assertion, the gist of the paragraph is that the institution of the fixed Daily Payment plus month-end reconciliation mechanism as a substitute for Merchant's daily payment of 15% of its actual receipts was a non-obligatory courtesy. It does not enable YSC to require the Daily Payment while refusing a request for reconciliation.

Defendants' further contention that the Agreement as a matter of law eliminated all risk or hazard of nonpayment by placing Merchant in default upon any material adverse change in its financial condition is not borne out by the language of the Agreement. Under Paragraphs 2.1 and 3.1, Merchant's *failure to report* a material adverse change in its financial condition, not the adverse change itself, is defined as a event of default.

Therefore, the Agreement is not on its face and as a matter of law a criminally usurious

loan. Consequently, Defendants have failed to establish an exception to the general requirement that relief from a judgment entered against them upon the filing of an affidavit of confession of judgment must be sought by way of a separate plenary action.

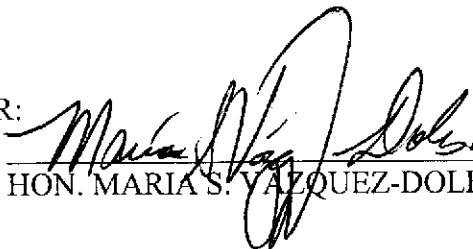
Upon review of the foregoing, it is hereby

ORDERED that Defendants' motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 8, 2017
Goshen, New York

ENTER:


HON. MARIA S. YAZQUEZ-DOLES, J.S.C.

To: Counsel of Record via NYSCEF