

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

POWER UP LENDING GROUP, LTD.,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 601388/2016

MOTION DATE: 7/11/16

Motion Sequence 001

-against-

CARDINAL RESOURCES INC. AND KEVIN JONES,

Defendants.

The following papers read on this motion:

Notice of Motion.....X
Affirmation in Support.....X

Motion by Plaintiff Power Up Lending Group, Ltd for the entry of a default judgment is **granted** to the extent indicated below.

This is an action for breach of a loan agreement and a separate factoring agreement. On October 1, 2015, defendant Cardinal Resources, Inc. entered into a “loan agreement” with plaintiff Power Up Lending Group, Ltd. Pursuant to the agreement, Power Up loaned \$51,000, less an origination fee of \$1,015, to Cardinal, in exchange for Cardinal’s promise to repay \$68,850. In the agreement, Cardinal promised to pay \$546.43 per day “until” the repayment amount was paid. The term of the loan was six months.

Under the agreement, the seller promised to deposit all receivables into a specific bank account, or “lock box.” Under section 1.6, the borrower and the guarantor indemnify Power

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Up for expenses, including attorney fees, resulting from claims for monies owed to Power Up by the borrower. The agreement was guaranteed by defendant Kevin Jones, the president of Cardinal Resources. Power Up alleges that \$44,807.26 has been repaid on this loan, and the “balance” is \$24,042.74. Power Up alleges that defendants defaulted on the loan on February 16, 2016.

On November 9, 2015, Cardinal entered into a “revenue based factoring agreement” with Power Up. Pursuant to this agreement, Power Up purchased \$49,000 of Cardinal’s receipts for \$35,000, less an origination fee of \$1,050. Cardinal was to pay \$388.89 per day from its receipts “until” the “purchased amount” of \$49,000 was paid. Based on the daily payment amount, this loan would also be repaid in six months. The factoring agreement was also guaranteed by Kevin Jones. Power Up alleges that \$21,777.84 has been repaid on this loan, and the “balance” is \$27,222.16. Power Up alleges that defendants also defaulted on the second loan on February 16, 2016.

This action was commenced on March 2, 2016. Plaintiff asserts claims for breach of the loan agreements and on the guaranties. Plaintiff also asserts a claim for legal fees.

By notice of motion dated June 10, 2016, plaintiff moves for a default judgment based upon defendants’ failure to appear and answer. Plaintiff requests judgment in the amount of \$66,264.90 based upon the loans, plus interest and attorney’s fees. There is no opposition to the motion.

Both loans may be tainted by the defense of usury (Gen Obligations Law § 5-501[1][2]; **Seidel v 18 E 17th Street Owners**, 79 NY2d 735, 744 [1992]). Under the October 1, 2015 loan, the difference between the \$68,850 payback amount and the \$51,000 loan amount, i.e. \$17,850, is interest. Since the \$68,850 was to be paid in six months, the effective interest rate is 70 %. Similarly with respect to the November 9, 2015 loan, the difference between the \$49,000 receivables purchased, and the \$35,000 purchase price, or \$14,000, is interest. Since the \$49,000 receivables were to be paid in six months, the effective interest rate is 80 %.

While corporations are ordinarily barred from asserting a usury defense, a corporation may assert the defense of criminal usury, i.e. interest greater than 25% per annum (Penal Law § 190.40; **Seidel v 18 E 17th Street Owners**, supra, 79 NY2d at 740, n.2). The

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While defendants should not be unjustly enriched, the court must sever those provisions of the agreements which are illegal under the usury statute. Deducting for payments made, the court concludes that \$5,177.74 is due under the October 1, 2015 agreement and plaintiff is entitled to interest on this sum at the rate of 9% from March 2, 2016. The court concludes that \$12,172.16 is due under the November 9, 2015 agreement and plaintiff is entitled to interest on this sum at the rate of 9% from March 2, 2016. Plaintiff is awarded an attorney's fee of \$1,000, without prejudgment interest.

Accordingly, plaintiff's motion for a default judgment is **granted**. Plaintiff may enter judgment with the clerk in the amounts indicated.

So ordered.

Date: AUG 08 2016


J.S.C.

XXX

ENTERED

AUG 16 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE