McNider Mar., LLC v Yellowstone Capital, LLC
2019 NY Slip Op 33418(U)
November 19, 2019
Supreme Court, Erie County
Docket Number: 806796/2018
Judge: Henry J. Nowak
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MCNIDER MARINE, LLC and
JOHN BRUCE MCNIDER,

Plaintiffs,

vs.

YELLOWSTONE CAPITAL, LLC,
YITZAK STERN and TSVI DAVIS,

Defendants.

DECISION

INDEX NO. 806796/2018

HON. HENRY J. NOWAK, J.S.C.
Justice Presiding

The dispute arises out of two secured merchant agreements between plaintiff McNider Marine LLC (McNider Marine) and defendant Yellowstone Capital LLP (Yellowstone) and a subsequent judgment by confession in the amount of $ 314,494.87 against McNider Marine and its owner, plaintiff John Bruce McNider. On July 6, 2018, plaintiffs filed an amended complaint seeking to vacate the judgment on the ground that the merchant agreements constituted criminally usurious loans. Plaintiffs assert three causes of action – (1) a RICO claim pursuant to 18 USC §1962 (c); (2) a conspiracy claim pursuant to 18 USC § 1962 (d); and (3) a claim to vacate the judgment by confession under CPLR 5015. Defendants move to dismiss the amended complaint pursuant to CPLR 3211, to strike allegations as scandalous and irrelevant, and for sanctions for frivolous conduct.

The court considered all papers filed in this action prior to oral argument on August 23, 2018, as well as post-argument submissions by plaintiffs on January 9, 2019, January 23, 2019

and April 11, 2019; by defendants on June 26,2019; and by plaintiffs on September 3, 2019. Furthermore, the court received and considered a Notice of Bankruptcy filed by plaintiffs in the United States Bankruptcy Court for the Southern District of Alabama on June 27, 2019, as well as a letter brief submitted by defendants that same day. The court finds that the automatic stay provided by section 362 of the United States Bankruptcy Code does not operate to stay the instant dispositive motion (*see In re Abreu*, 527 BR 570, 579 [Bankr EDNY 2015]).

Plaintiffs' Allegations

As required, the court accepts the facts as alleged in the amended complaint as true and accords plaintiffs the benefit of every possible favorable inference (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). Plaintiffs allege that Yellowstone is one of the largest merchant cash advance ("MCA") companies that lends money to struggling, unsophisticated small businesses. Defendant Yitzhak Stern has a controlling ownership interest in Yellowstone and is the company's Chief Executive Officer, while defendant Tsvi Davis is the company's Chief Underwriting Officer.

In their amended complaint, plaintiffs quote national news organizations and consumer protection advocates who claim that MCA companies engage in predatory lending practices. Plaintiffs also quote a series of public statements by and on behalf of Yellowstone reflecting that its MCA agreements, which purport to be purchases of receivables, are actually bad credit business loans. By disguising the nature of the transactions as purchases of receivables, Yellowstone does not disclose effective interest rates, which are criminally usurious. Yellowstone's business model relies upon the fact that in order for merchants to pay the usurious interest rates charged, they will have to enter into additional usurious loans with Yellowstone or other MCA companies. As a result of their conduct, Yellowstone and its affiliates have obtained

judgments against over 4,500 small businesses that allegedly defaulted under their MCA agreements. Yellowstone also uses its full recourse protections to collect from the personal assets of the individual owners.

McNider is the owner of McNider Marine, a small Alabama business engaged in selling and repairing boats. McNider Marine earned an annual profit of $ 69,165.00 in 2014 and $ 57,546.00 in 2015. On July 20, 2016, McNider Marine entered into a secured merchant agreement (the July agreement) with Yellowstone. The July agreement provides that Yellowstone would pay McNider Marine a "Purchase Price" of $ 200,000.00 in exchange for a "Purchased Amount" of $ 289,800.00, which would be paid back with 15% (the "Specified Percentage") of McNider Marine's future receivables. McNider Marine also authorized Yellowstone to debit 15% of its bank account on a daily basis, until the purchased amount was paid in full.

The July agreement itself does not state a specific duration for repayment. This standard form agreement prepared by Yellowstone provides that the purchase price "is not intended to be, nor shall . . . be construed as a loan." It further provides that the payments made to Yellowstone "shall be conditioned upon the Merchant's sale of products and services and the payments therefore by Merchant's customers."

The July agreement required McNider to execute a personal guarantee of performance and an affidavit of confession of judgment, in which McNider authorized the entry of judgment against McNider Marine and himself, jointly and severally, for the sum of any uncollected payments in favor of Yellowstone. Moreover, the July agreement states that, upon the violation of any provision contained in the agreement or the occurrence of default, "the Specified

Percentage shall equal 100%," and Yellowstone may invoke the abovementioned protections, "immediately and without notice to Merchant."

The parties entered into an addendum on the same date as the July agreement, whereby McNider agreed to revise the "Specified Percentage" of 15% of future receivables to a fixed amount of $ 2,415.00 per business day. The parties agreed this amount was a good-faith approximation of 15% of daily proceeds. The purchased amount was to be repaid through daily, equal automated clearing house withdrawals from a designated McNider Marine bank account in 120 business days, which, when annualized, translates into an effective interest rate exceeding 145%.

The addendum further provides that at McNider Marine'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 for the subject month via the Daily Payment is equal to the amount of the Specified Percentage." The addendum further provides that such potential reconciliation is being provided as a courtesy, and Yellowstone is under no obligation to provide it.

Pursuant to the July agreement, McNider Marine received $179,900.00 from Yellowstone with $ 21,100.00 withheld as service fee. Between July 20, 2016 and October 19, 2016, Yellowstone collected fixed daily payments of $ 2,415.00 totaling $ 147,315.00 from McNider Marine.

The parties then entered into a second merchant agreement on October 19, 2016 (the October agreement). Pursuant to the October agreement, Yellowstone agreed to advance McNider Marine $ 250,000.00 in exchange for the purchase of 15% of future receivables until

$ 373,750.00 was repaid to Yellowstone. However, McNider Marine received only $ 85,099.00 from Yellowstone, because Yellowstone used $ 142,485.00 of this advance to repay itself for the balance remaining on the July agreement and again withheld a $ 21,100.00 service fee.

Like the July agreement, the October agreement required McNider to execute a personal guarantee of performance and an affidavit of confession of judgment in favor of Yellowstone. In an addendum to the October agreement, the parties agreed to revise the "Specified Percentage" to a fixed amount of $ 3,398.00 per business day. This fixed daily payment bore no correlation to McNider's actual estimated receivables, which had not increased since July, when the parties agreed that $ 2,415.00 per business day was a good-faith approximation of 15% of daily proceeds. Yellowstone also knew that McNider Marine was making payments to at least four other MCA companies during this time, but required that none of those companies could draw from the designated McNider Marine bank account that was used to repay Yellowstone.

Making fixed daily payments of $ 3,398.00 to pay Yellowstone $ 373,750.00 would require 110 business days, which when annualized translates into an interest rate of more than 285%. Yellowstone collected these payments from McNider Marine's bank account from October 19, 2016 and December 16, 2016, for a total of $ 122,862.00.

After December 16, 2016, McNider Marine no longer had sufficient funds in the designated bank account to make the $ 3,398.00 daily payments to Yellowstone. Six days later, under index No. 814589/2016, Yellowstone sought a judgment by confession from the Erie County Court Clerk against McNider Marine and McNider personally for $ 314,494.87. In support of that judgment, Yellowstone filed a December 22, 2016 affidavit of non-payment by defendant Davis and McNider's October 19, 2016 affidavit of confession of judgment. Davis's affidavit alleged that Yellowstone "agreed to buy all rights of [McNider Marine's] future

accounts-receivable" pursuant to the October agreement. The judgment by confession was granted and entered by the Erie County Clerk on December 28, 2016.

Pursuant to the July and October merchant agreements, McNider Marine received a total amount of $ 254,000.00 from Yellowstone and paid back $ 270,177.00 in the span of five months. Yellowstone continues to hold a judgment of $ 314,494.87 against McNider Marine and McNider individually. After obtaining this judgment, defendants retained MCA Recovery, LLC, who issued collection notices on McNider Marine's local credit union and credit card processor. McNider Marine's credit account was and remains frozen, and its inventory was foreclosed upon. McNider Marine also lost its dealership license with a customer, resulting in a significant loss of business and damage to plaintiffs' business reputations.

Defendants' Claim that the Agreements Were Not Loans

Defendants move this Court to dismiss all three causes of action contained in the amended complaint, all of which depend upon the allegation that the July and October agreements constituted criminally usurious loans instead of purchases of accounts receivables. If a transaction is not a loan, there can be no usury, however unconscionable the contract may seem to be (*see Seidel v 18 E. 17th St. Owners, Inc.*, 79 NY2d 735, 744 [1992]). Defendants contend that the documentary evidence demonstrates as a matter of law that the July and October agreements were purchases of accounts receivable and not loans. "In determining whether a transaction is usurious, the law looks not to its form, but to its substance, or real character" (*IBIS Capital Group, LLC v Four Paws Orlando LLC*, 2017 N.Y. Slip Op. 30477[U], *2 [Sup Ct, Nassau County 2017]).

After analyzing specific MCA agreements, many New York courts have found that they constitute legitimate purchases of accounts receivables instead of loans with usurious interest

rates (*see e.g. Champion Auto Sales, LLC v Pearl Beta Funding, LLC*, 159 AD3d 507 [1st Dept 2018], *lv to appeal denied,* 31 NY3d 910 [2018]; *Yellowstone Capital LLC v Cent. USA Wireless LLC*, 60 Misc 3d 1220[A] [Sup Ct, Erie County 2018]; *Wilkinson Floor Covering, Inc. v Cap Call, LLC,* 59 Misc 3d 1226[A] [Sup Ct, NY County 2018]; *Rapid Capital Fin., LLC v Natures Mkt. Corp.*, 57 Misc 3d 979, 984 [Sup Ct, Westchester County 2017]; *K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807, 819 [Sup Ct, Westchester County 2017]; *IBIS Capital Group, LLC v Four Paws Orlando LLC*, 2017 N.Y. Slip Op. 30477[U], *7 [Sup Ct, Nassau County 2017]). Courts that found otherwise, that MCA agreements were usurious loans disguised as purchases of accounts receivable, typically found no provisions for forgiveness or modification of the loans, such as viable and enforceable reconciliation provisions, in the event that the funding companies could not collect the daily amounts required (*see e.g. Funding Metrics, LLC v NRO Boston, LLC,* 2019 N.Y. Slip Op 32651[U], *5 [Sup Ct, Westchester County 2019]; *P & HR Solutions LLC v RAM Capital Funding, LLC,* Sup Ct, NY County, January 18, 2019, Engoron, J., index No. 650238/2019; *Funding Metrics, LLC v D & V Hosp., Inc.*, 62 Misc 3d 966, 972 [Sup Ct, Westchester County 2019]; *Principis Capital, LLC v Gary Buchanan Enterprises, LLC*, Sup Ct, Kings County, June 6, 2018, Landicino, J., index No. 515816/2017; *QFC, LLC v Iron Centurian, LLC*, 2017 N.Y. Slip Op. 31438[U], *3 [Sup Ct, Westchester County 2017]; *Merchant Funding Servs., LLC v. Volunteer Pharmacy Inc.*, 55 Misc 3d 316, 318 [Sup Ct, Westchester County 2016]; *Pearl Capital Rivis Ventures v. RDN Constr.*, 54 Misc 3d 470, 474 [Sup Ct, Westchester County 2016]).

In *K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807 (Sup Ct, Westchester County 2017), the court considered a series of merchant agreements. Several of them required that the funding company "shall, upon [the merchant's] request," reconcile the merchant's

account according to the specified percentage (*id.* at 810). As a result, the court found that such agreements did not create an unlawful debt (*id.* at 817). Another agreement, however, did not include a reconciliation provision, and the court held that it "cannot find, as a matter of law, that the . . . transaction is not a loan" (*id.* at 819).

Focusing on the reconciliation provision in a given merchant agreement is appropriate because it often determines the risk to the funding company. If the funding company truly is collecting a specified percentage of accounts receivable, then the funding company bears the risk of a downturn in the merchant's business. The specified percentage typically is replaced by a fixed payment (as it was here), but if that payment is reconciled when accounts receivable drop below the merchant's original estimation, then it may take the merchant far longer to repay the amount advanced than the funding company had anticipated.

If, however, the merchant is unable to adjust fixed payments in the event of a reduction of its accounts receivable, and the funding company can collect the amount due and owing by way of a personal guarantee and confession of judgment, there is far less risk to the funding company. Therefore, whether the merchant may reconcile its fixed payment amount when there is a reduction of accounts receivable is often determinative of whether repayment is absolute or contingent. If repayment is absolute, then the arrangement must be considered a loan as opposed to a purchase of accounts receivable (*see QFC, LLC v Iron Centurian, LLC*, 2017 N.Y. Slip Op. 31438[U], *6 [Sup Ct, Westchester County 2017]; *Transmedia Rest. Co. v 33 E. 61st Rest. Corp.*, 184 Misc 2d 706, 711 [Sup Ct, NY County 2000]).[1]

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[1] Some courts have considered a second factor in determining whether a merchant agreement is a loan as opposed to a purchase of portion of accounts receivable – whether the payment arrangement includes a fixed or variable term (*see NY Capital Asset Corp. v F & B Fuel Oil Co., Inc.*, 58 Misc 3d 1229 [A] [Sup Ct 2018]; *K9 Bytes, Inc., supra*). When the specified

In this case, the court finds that plaintiffs have demonstrated that the reconciliation provisions contained in the addenda to the July and October agreements were illusory. First, the court cannot find from the language in the agreements that Yellowstone had any duty to reconcile. In fact, Yellowstone likely could refuse to even consider reconciliation if it contended that McNider Marine failed to sufficiently document a basis for it. Furthermore, even if Yellowstone was required to reconcile, there was no time to do so because McNider could request reconciliation only within five business days following the end of a calendar month. McNider Marine defaulted on December 16, 2016, so it could not request reconciliation until the first week of January 2017. Yellowstone filed for a judgment by confession on December 22, 2016 and obtained that judgment on December 28, 2016.

The notion of reconciliation for McNider Marine appears particularly futile because the fixed daily payment in the October agreement was not a good faith estimate of 15% of its receivables to begin with inasmuch as there was no evidence that the receivables had increased over 40% from the July estimate. Without the right to effectively reconcile the fixed dollar amount, the agreement resulted in a loan payable over a fixed term with a criminally usurious interest rate in excess of 285% (*see* Penal Law § 190.40).

Plaintiffs' RICO and Conspiracy Claims

The first two causes of action in the amended complaint allege violations of 18 USC §§ 1962 (c) and (d). Subsection (c) makes it "unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate,

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percentage is replaced by fixed payments, however, this factor is still dependent upon the viability of the reconciliation provision. If there is no ability of a merchant to reconcile, then fixed payments necessarily result in a fixed term. One must simply calculate how long it will take the merchant to pay the agreed sum based upon the fixed payments.

directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Subsection (d) makes it "unlawful for any person to conspire to violate the substantive provisions of RICO."

The United States Supreme Court has rejected an interpretation of civil RICO that would have confined its application to "mobsters and organized criminals" (*Sedima, S.P.R.L. v Imrex Co., Inc.*, 473 US 479, 499 [1985]). Instead, the Court held that the " 'fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth' " (*id.*, quoting *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F2d 384, 398 (7th Cir 1984). "Thus, a court should not dismiss a civil RICO claim if the complaint adequately alleges all elements of such a claim, even if the alleged conduct is not a quintessential RICO activity" (*Moss v BMO Harris Bank, N.A.*, 258 F Supp 3d 289, 298 [EDNY 2017]).

One of Yellowstone's bases to dismiss the RICO and conspiracy claims is that the underlying merchant agreements were not usurious loans as a matter of law; however, the court disagrees for the reasons set forth above. Yellowstone also submits that plaintiffs have failed to allege a pattern of racketeering activity or collection of unlawful debt. Plaintiffs acknowledge that their RICO claim is solely based on allegedly unlawful debt collection rather than a "pattern of racketeering activity" (18 USC § 1962 [c]). An "unlawful debt" is a debt that is "unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury," and that was incurred in connection with "the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate" (18 USC §§ 1961 [6] [A] and [B]); *see also Durante Bros. v. Flushing Nat. Bank*, 755 F2d 239, 246 [2d Cir 1985]).

Penal Law § 190.40 sets the enforceable rate for criminal usury in New York at 25%. The effective interest rates under the July and October agreements far exceed twice that rate. Therefore, the court finds that plaintiffs have adequately alleged that defendants participated in collection of an unlawful debt.

To establish a civil RICO claim for unlawful debt collection, a plaintiff also must allege (1) the existence of a RICO enterprise; (2) that each defendant conducted the affairs of the enterprise, and (3) injury to its business or property as a result of the RICO violation (*Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F3d 106, 119 [2d Cir 2013]; *Durante Bros. & Sons v. Flushing Nat. Bank*, 755 F2d 239, 248 [2d Cir 1985]).

RICO defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (18 USC § 1961 [4]). In other words, the enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct" (*United States v Turkette*, 452 US 576, 583 [1981]). "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." (*Boyle v United States*, 556 US 938, 946 [2009]).

"[T]he person and the enterprise referred to must be distinct," and, therefore, "a corporate entity may not be both the RICO person and the RICO enterprise under section 1962 (c)" (*Riverwoods Chappaqua Corp. v Marine Midland Bank*, 30 F3d 339, 344 [2d Cir 1994]). "This does not foreclose the possibility of a corporate entity being held liable as a defendant under section 1962 (c) where it associates with others to form an enterprise that is sufficiently distinct

from itself" (*id.*). Thus, "a defendant may be a RICO person and one of a number of members of the RICO enterprise" (*id.*).

Defendants contend that the RICO claims must fail because plaintiffs never allege how the RICO enterprise is distinct from the RICO person. The court rejects that contention. Plaintiffs have alleged in the amended complaint that the enterprise consisted of Stern, Davis, Yellowstone, MCA Recovery, LLC and several third-party investors. This enterprise allegedly consists of separate entities and individuals associated in fact, for the common purpose of carrying on an ongoing criminal enterprise of collecting upon unlawful usurious loans. Plaintiffs allege that defendants were related through common ownership, coordinated funding and coordinated efforts to make, service and collect on the unlawful loans. Therefore, plaintiffs have sufficiently pled the existence of a RICO enterprise.

Plaintiffs also have sufficiently alleged that each defendant conducted the affairs of the enterprise. The court rejects defendants' contention that plaintiffs' RICO claims against Stern and Davis must be dismissed as being based upon unparticularized legal conclusions alleged upon information and belief. New York law permits pleading claims upon information and belief where the facts are peculiarly within the opposing party's knowledge, provided that the allegations are accompanied by a statement of the facts upon which the belief is based (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). The complaint sufficiently sets forth specific roles performed by Stern and Davis in the enterprise.

Furthermore, plaintiffs have adequately alleged injury to McNider Marine's business or property as a result of the RICO violation. Due to Yellowstone's efforts to collect the allegedly unlawful debt, McNider Marine suffered frozen credit accounts, foreclosure of its inventory and

loss of its dealership license. Accordingly, defendants' motion to dismiss plaintiffs' first two causes of action is denied.

Plaintiffs' Claim to Vacate the Judgment

Yellowstone characterizes plaintiffs' third cause of action, seeking vacatur of the December 28, 2016 judgment filed under index no. 814589/2016, as a claim for civil usury. One basis Yellowstone raises to dismiss that cause of action is that businesses and their guarantors may not assert usury as an affirmative claim for relief and may only assert a violation of New York's criminal usury statute as an affirmative defense (*Hochman v LaRea*, 14 AD3d 653, 654 [2d Dept 2005]; *Dilg v Bank of U.S.*, 244 AD 223, 225 [1st Dept 1935]). Yellowstone also claims that plaintiffs third cause of action is barred by the one year statute of limitations found in CPLR 215 (6), which applies to actions brought by individuals "to recover an overcharge of interest or to enforce a penalty for such overcharge." Plaintiffs brought the instant action in April 2018, more than one year after both the October agreement and the December 28, 2016 judgment based upon the contemporaneous and (allegedly required) confession of judgment.

Plaintiffs did not raise such a defense or move to set aside the judgment in Yellowstone's action filed under index No. 814589/2016 on the basis of usury, likely because the judgment was obtained by confession. Courts have held that to vacate a judgment by confession, a plenary action is required (*L.R. Dean, Inc. v International Energy Resources*, 213 AD2d 455, 456 [2d Dept 1995]; *Malhado v Cordani*, 153 AD2d 673, 673 [2d Dept 1989]; *but see Funding Metrics, LLC v D & V Hosp., Inc.*, 62 Misc 3d 966, 972 [Sup Ct, Westchester County 2019] ["[W]here the circumstances underlying the default are such that the entry of judgment is so unfair as to violate defendants' due process rights, a plenary action might not be required."]). Yellowstone

does not dispute that a judgment debtor may bring a plenary action to vacate a judgment by confession on the basis of wrongful conduct.

In their third cause of action, plaintiffs do not specifically seek "an overcharge of interest or a penalty for such overcharge" (CPLR 215 [6]), nor could they since McNider Marine is not an individual. Instead, they seek to vacate the judgment based upon CPLR 5015 (a) (3), which provides that a "court which rendered a judgment or order may relieve a party from it upon such terms as may be just, . . . upon the ground of . . . fraud, misrepresentation, or other misconduct of an adverse party."

The court agrees with Yellowstone that plaintiffs fail to state a cause of action for fraud, insofar as plaintiffs have not alleged that they justifiably relied upon Yellowstone's assertions that it was purchasing a portion of McNider Marine's accounts receivable instead of lending money at a usurious interest rate. Indeed, the only misrepresentation alleged within that cause of action was not made to McNider, but to the court in Davis's characterization of the October agreement. Specifically, plaintiffs allege that in his December 22, 2016 affidavit of non-payment, "Davis represented that Yellowstone had 'bought' all of McNider Marine's future receivables" pursuant to the October agreement; that in doing so, Davis implied that the transaction "was an arms-length sale" and that his statements "were false and misleading."

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and the court shall "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Therefore, rather than focus on Davis's characterizations in his December 22, 2016 affidavit, the court must consider the full extent of the allegations of the amended complaint. The Court of Appeals has ruled that a "criminal usurer

. . . remains subject also to civil liability for his criminal act . . . to the debtor from whom the usurer could have collected neither principal nor interest" (*Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 591 [1981]). As a result, if plaintiffs can indeed demonstrate that the judgment was obtained as a result of criminal usury, this court finds that such conduct would constitute "misconduct of an adverse party" pursuant to CPLR 5015 (a) (3).

CPLR 5015 (a) (3) does not include a period of time by which to bring a claim of relief from a judgment.[2] Despite the fact that the alleged usury is a significant part of the misconduct plaintiffs assert, the court finds that the claim to vacate the judgment is one "for which no limitation is specifically prescribed by law," and therefore must be commenced within six years (CPLR 213 [1]).

As a result, this court finds that plaintiffs allege a viable third cause of action pursuant to CPLR 2015 (a) (3) to vacate a judgment based upon misconduct by an adverse party, and that such cause of action is not time-barred. Yellowstone's motion to dismiss the third cause of action is denied.

Defendants' Motions to Strike Scandalous and Irrelevant Allegations

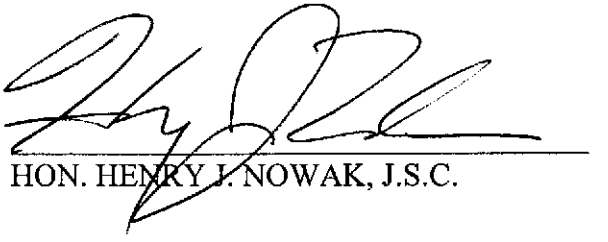
"A motion to strike scandalous or prejudicial material from a pleading (see CPLR 3024 [b]) will be denied if the allegations are relevant to a cause of action" *(New York City Health and Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391 [1st Dept 2005]; *see also Bristol Harbour Assoc. v. Home Ins. Co.*, 244 A.D.2d 885, 886 [4th Dept 1997]). Plaintiffs' references to public statements by and on behalf of Yellowstone reflecting that its

[2] When that relief is sought in the same action in which the judgment was obtained, the rule is that "the motion must be made within a reasonable time" (*Empire State Conglomerates v Mahbur*, 105 AD3d 898, 899 [2d Dept 2013]).

MCA agreements actually constitute bad credit business loans instead of purchases of accounts receivable are relevant to issues of usurious intent and misconduct. Claims that MCA companies engage in predatory lending practices are relevant to plaintiffs' RICO and conspiracy claims, particularly in regard to the conduct by the alleged enterprise. Therefore, the court denies defendants' motion to strike what they consider to be scandalous and irrelevant allegations from the amended complaint, as well as defendants' motion for sanctions against plaintiffs and their counsel.

Submit order.

Dated: November 19, 2019



HON. HENRY J. NOWAK, J.S.C.