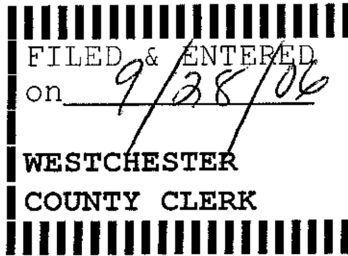

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: W. DENIS DONOVAN, J.S.C.

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

--X

ADVANCEME, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 1701/06
Motion Date: 9/22/06

AVITTO II, INC, SEVAN, INC., d/b/a OTTIVA, AVI SHARIFI, individually and d/b/a AVITTO and OTTIVA, ABC CORP., being a fictitious name as the real name is as of yet unknown, and DEF CORP., being a fictitious name as the real name is as of yet unknown,

Defendants

--X

DONOVAN, J.

The following papers were read on plaintiff's motion for a default judgment and for summary judgment:

	PAPERS NUMBERED
Notice of Motion/Affidavit/Affirmations/Exhibits(A-Q)	1
Affidavit in Opposition	2
Reply Affirmation/Exhibit	3

Upon the foregoing papers, the motion is determined as follows:

Plaintiff is in the business of purchasing future credit card receivables from retail merchants. Its main customers are small and medium sized restaurants and apparel stores. In negotiating a purchase, plaintiff evaluates the merchant's historic credit card sales, credit history, financial history, and need for operating cash. After this evaluation, the amount of future receivables and the purchase price are fixed, the purchase price being a specified percentage of the future receivables. The parties then sign a contract that requires the merchant to enter into an agreement with a designated credit card processor, which automatically credits the applicable percentage of the merchant's future credit card sales to plaintiff's account.

At issue in this action are three separate agreements. The first two agreements were between plaintiff and defendant Avitto II, Inc. In an agreement dated May 10, 2004, ("the May agreement") plaintiff purchased Avitto's future credit card receivables of $13,780.00 for $10,600.00. According to the complaint, defendant ceased processing its credit card transactions with the designated processor in March, 2005, at which time a balance of $8,419.46 remained unpaid. In a subsequent agreement, dated June 16, 2004, ("the June agreement") plaintiff purchased Avitto's future credit card receivables of $48,100.00 for $37,000.00. According to the complaint, Avitto ceased processing its credit card transactions with the designated processor in March, 2005, at which time a balance of $34,688.64 remained unpaid. Both agreements were guaranteed by defendant Avi Sharifi, Avitto's principal.

The third agreement, dated March 29, 2004, was between plaintiff and Sevan, Inc., d/b/a Ottiva. By that agreement, plaintiff purchased Sevan's future credit card receivables of $22,750.00 for $17,500.00. According to the complaint, defendant ceased processing their credit card transactions with the designated processor in March, 2005, at which time a balance of $14,057.89 remained unpaid. As with the two Avitto agreements, defendant Avi Sharifi, Sevan's principal, guaranteed this agreement.

Plaintiff served the corporate defendants by delivering the summons and complaint to the Secretary of State on February 10, 2006. It followed up with additional mailings to these defendants on February 27, 2006. Defendant Sharifi appeared and served an answer to the complaint. The answer asserted the affirmative defense that plaintiff misrepresented the terms of the agreements, which allegedly constituted usurious loans.

Plaintiff now moves for entry of judgments on default against Avitto and Sevan. It also seeks summary judgment against defendant Sharifi.

Neither of the two corporate defendants have opposed the motion for entry of default judgments against them. That portion of the motion, therefore, is granted without opposition.

The summary judgment branch of the motion relates only to defendant Sharifi's personal guarantee of all three agreements. In support, plaintiff submits copies of the agreements, including the guarantees, and an affidavit from a corporate officer, who

testifies to the payments plaintiff made under each agreement and to defendants' breach of the agreements in March, 2005. Plaintiff, therefore, has set out a prima facie case [*Marshall v Colvin Motor Parts, Inc.*, 140 AD 2d 673 (2d Dept. 1988)] and it is incumbent upon defendant to come forward with evidentiary facts showing the existence of a triable issue with respect to a bona fide defense [*Zuckerman v City of New York*, 49 NY 2d 557 (1980)].

In his opposing affidavit, defendant Sharifi abandons his claim of fraudulent misrepresentation and instead contends that the purchase agreements actually constituted loans advanced by plaintiff to the corporate defendants at usurious rates of interest. In support, he submits documentation demonstrating that his company did not receive the full purchase price stated in the May and June agreements because a portion of each purchase price was used to satisfy the outstanding balances from previous contracts. [Defendant does not address plaintiff's agreement with Sevan, Inc.] The result, according to defendant, is that the May and June agreements constituted usurious loans. Defendant further states that, in the event of a trial, he will produce several former employees of plaintiff who will testify to these practices.

At the outset, it is clear and undisputed that the corporate defendants breached their agreements with plaintiff by failing to continue processing credit card transactions through the designated processor. These breaches entitle plaintiff to damages, for which defendant Avi Sharifi is personally liable under his guarantees. In order to avoid summary judgment, defendant Sharifi must demonstrate that he is entitled to assert a defense of usury and, if so, that the defense is meritorious under the facts of this case.

The defense of usury only applies to a loan. In order for a transaction to constitute a loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender [*Donatelli v Siskind*, 170 AD 2d 433, 434 (2d Dept. 1991)]. In this case, each of the three agreements at issue is explicitly a sale of future receivables "and is not intended to be, nor shall it be construed as, a loan from the Company [plaintiff] to Merchant [defendant]." The merchant has no right to repurchase the future receivables from the plaintiff, and the agreement is to remain in full force and effect until the specified amount of future receivables is delivered to plaintiff. An additional sale factor is that the merchant relinquishes control over the collection and administration of the receivables. The designated processor automatically transfers the agreed-upon percentage of credit card transactions to plaintiff.

It appears from the record that the May and June agreements between plaintiff and Avitto were two of a series of transactions between the parties. The fact that plaintiff may have "rolled" the unpaid portion of one contract into a subsequent contract does not transform these transactions into loans. Furthermore, as a question of law, the purchase price advances made by plaintiff did not constitute loans because plaintiff bore the risk of not being repaid the advanced funds [see *Transmedia Restaurant Co., Inc., v 33 E. 61st Street Restaurant Corp.,* 184 Misc. 2d 706 (Sup. Ct. New York County 2000), *app wdn,*

273 AD 2d 950 (1st Dept. 2000)].

Finally, defendant's "promise" to produce witnesses to substantiate his claim of usurious loans does not raise any triable issue of fact. In opposing a motion for summary judgment, a party is obligated to lay bare his or her proof [see CPLR 3212(b)].

Based on the foregoing, defendant has not established that the agreements constituted loans rather than sales of future receivables. As such, defendant is not entitled to assert a defense of usury.

Accordingly, the motion for summary judgment is granted. Attorneys fees are granted in the amount of $5,600.00, which upon a review of the entire record and counsel's affirmation of services the court finds to be reasonable.

Settle order.

ENTER:

HON. W. DENIS DONOVAN
Justice Supreme Court

Dated: **September 26, 2006**
White Plains, New York

To: **KLAPPER & FASS**
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