

New York Court Voids MCA Contract Based on Merchant's Claims that Hurricane Matthew Caused Disruption of Business

January 30, 2019 | [Katherine C. Fisher](#)

On January 7, 2019, the Supreme Court of New York, Westchester County, vacated a confession of judgment and voided the underlying Merchant Agreement, concluding that the contract was a criminally usurious loan transaction. This case marks a development in MCA legal decisions for two reasons:

- Instead of focusing on the language of the contract, the court decided that the Merchant Agreement was a loan based on the MCA company's alleged servicing of the transaction; and
- At a time when confessions of judgment are under scrutiny in New York, the court vacated a confession of judgment that had been filed in 2016, signaling that merchants may be attempting to attack prior judgments.

Funding Metrics, LLC d/b/a Quick Fix Capital filed the confession of judgment on October 19, 2016. Quick Fix Capital alleged that the Palm Beach County merchant, D&V Hospitality, had stopped making payments on or about October 6, 2016, in breach of the Merchant Agreement. The Merchant Agreement, which had been entered into only two weeks earlier, provided that the merchant would deliver a total of \$29,200 in future receivables in exchange for \$20,000. The Merchant Agreement also provided that payments were conditioned upon the merchant's sale of products and payment by the merchant's customers. Along with the confession of judgment, Quick Fix Capital submitted an affidavit stating that the merchant stopped making payments despite the fact that it was still conducting regular business operations and was receiving accounts receivable. The county clerk entered the confession of judgment, entitling Quick Fix Capital to collect a total of \$34,713.93.

More than two years later, the trial court vacated the confession of judgment. The court based its decision on the affidavit of the owner of D&V Hospitality, stating that he stopped making payments because of Hurricane Matthew. On October 5, 2016, Florida Governor Rick Scott declared a state of emergency throughout the state and ordered mandatory evacuations, which included Palm Beach County. The owner claimed that on the morning of October 5, 2016, when he was forced to evacuate and close his business, he called the telephone number listed in the Merchant Agreement and advised Quick Fix Capital's agent that the business would be closed and that there would be no daily receipts. The owner claimed that, despite his telephone call advising it of the situation, Quick Fix Capital continued to withdraw daily ACH payments, even though the receivables were \$0. The owner further claimed that, as a result of the hurricane, it lost all of its perishable items and was eventually forced to close entirely.

The trial court found that the MCA contract lacked risk and contingency of repayment. The court noted that the MCA contract included a reconciliation provision in which the amount of any payment could be adjusted. "Yet, when unforeseen circumstances arose, which prevented D&V from making the required payments, via ACH debit or otherwise, [Quick Fix Capital] sought and obtained the entry of the judgment by confession." The court also noted that Quick Fix Capital did not address this issue in either its affidavit in support of the confession of judgment or in its response to the merchant's later challenge to the confession of judgment.

The decision was issued by Judge David Everett, the same judge who has in two prior cases found that an MCA transaction was a loan. But in those cases, the court cited the MCA company's failure to point to a non-recourse contract provision in which the funder assumed the risk that it might not be able to collect payment from the business's receipts. See *Pearl Capital Rivis Ventures, LLC v. RDN Constr., Inc.*, 2016 N.Y. Misc. LEXIS 3945 (N.Y. Sup. October 25, 2016) and *Merchant Funding Services, LLC v. Volunteer Pharmacy Inc.*, 2016 N.Y. Misc. LEXIS 4777 (N.Y. Sup. December 23, 2016). The Quick Fix Capital decision is the first in which a court has gone beyond the language of the contract to determine whether the transaction is a loan.

In addition, this case coincides with lawmakers in New York looking skeptically at confessions of judgment. Governor Andrew Cuomo's recently published Justice Agenda, available at: <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019StateoftheStateBook.pdf>, included proposals to limit the use of confessions of judgment in transactions with small businesses.

Our thanks to [Katherine C. Fisher](#) for providing this summary. If you have questions, please feel free to contact Kate at 410-782-2356 or kfisher@hudco.com.

[Funding Metrics, LLC v. D&V Hospitality, Inc.](#)

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