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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 102885/2011
ZORMATI, BEDIS
VS.
KREISBERG, LOUIS
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

FILED

AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

DECISION IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 7/28/11

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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BEDIS ZORMATI,

Plaintiff,

- against -

LOUIS KREISBERG, AMY HUNTINGTON, MADISON STRATEGIC PARTNERS NY, LLC., JAMES DARR and ENDURANCE FINANCIAL INTERNATIONAL, LLC,

Defendants.

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Index No. 102885/11

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Bedis Zormati ("Plaintiff") alleges in his complaint that, in July of 2009, defendant Kreisberg, as CEO of defendant Madison Strategic Partners NY, LLC ("Madison"), solicited Plaintiff to invest $150,000 in non-party Wealth Progression Advisors, LLC ("WPA") and defendant Endurance Financial International, LLC ("EFI"). Plaintiff states that defendants Kreigsberg, Huntington (COO of Madison), and Darr (founder and majority shareholder of EFI) "represented to Plaintiff his investment would be tripled and returned to him." "Based upon the representations made by Kreisberg, Huntington and Darr and their respective companies, Plaintiff agreed to tender thirty-five thousand dollars ($35,000.00) as a loan." Plaintiff states that, "[o]n November 30, 2009, [he] honored his obligation under the oral agreement" and wired $35,000 to Kreisberg. However, from the time Plaintiff tendered the $35,000, "Plaintiff has not received any information on the investment project nor has he been paid the promised triple return," nor has his initial $35,000 been returned. Plaintiff seeks judgment in the amount of $105,000, plus attorney's fees in the amount of $10,000.

Defendants now move for dismissal pursuant to CPLR §3211(a)(7). Defendants claim that, assuming the truth of Plaintiff's complaint for purposes of this motion, Plaintiff alleges a usurious loan which is void under the General Obligations Law

("GOL"). Defendants further argue that Plaintiff has failed to state a claim against Madison or Huntington[1] because they "are not alleged to have borrowed funds or guaranteed repayment." Defendants further claim that Plaintiff's claim for attorney's fees is without basis in law.

Plaintiff submits an affirmation in opposition to the defendants' motion.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action; or

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

GOL §5-501 provides that "[n]o person or corporation shall, directly or indirectly, charge, take or receive any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding [sixteen percent]" (*see also* Banking Law §14-a). GOL §5-511 provides that any loan agreement which violates §5-511 is void. As the Court of Appeals noted in *Seidel v. 18 East 17th Street Owners, Inc.*, "[t]he consequences to the lender of a usurious transaction can be harsh: the borrower is relieved of all further payment – not only interest but also outstanding principal .... In effect, the borrower can simply keep the borrowed funds and walk away from the agreement" (79 N.Y.2d 735, 740 [1992]). However, "an investment ... in the nature of a joint venture is not converted into a loan of money, and therefore usurious, by the fact that one party guarantees the other against loss on the capital advanced by him and that his profits shall amount to a certain sum" (*Leibovici v. Rawicki*, 57 Misc. 2d 141, 145 [Civ. Ct., N.Y. County 1968], *aff'd* 64 Misc. 2d 858 [App. Term 1st Dept. 1969]). "[A]n agreement to pay

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[1]Plaintiff has withdrawn his claims against defendant Darr.

an amount which may be more or less than the legal interest, depending upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid" (*Jean v. RS&P/WV-II Ltd. Partnership*, 2006 NY Slip Op 51630U, *5 [Sup. Ct., N.Y. County 2006], *citing Hartley v. Eagle Ins.*, 222 N.Y. 178, 184 [1918]).

Here, Plaintiff's complaint plainly states that he loaned defendants the $35,000 with the agreement and expectation that he would receive triple that amount. Indeed, he sues to recover $105,000 - 300% of the loan amount. The court notes that this action was commenced on March 9, 2011, and that Plaintiff states in his complaint that the loan was made in November 2009 - approximately one year and four months later. Thus, in his own words and in his own complaint, Plaintiff states that he made a usurious loan to the defendants. While, as noted, an agreement which *may* result in payment of more than the legal interest depending upon "a reasonable contingency" does not necessarily constitute usury, Plaintiff alleges that he "was *promised* a triple return of the loan in the amount of thirty-five thousand dollars ...." (emphasis added). This differs materially from, for instance, a guarantee to repay the $35,000, plus some percentage of profits, *if* the venture was profitable (*compare with Leibovici*, *supra*).

The complaint fails to allege facts which fit within any cognizable legal theory. To state a cause of action for fraud, Plaintiff would have to show "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]). Plaintiff fails to plead that defendants made a false statement or statements, and that they did so with knowledge of its/their falsity. Similarly, Plaintiff fails to plead facts which would give rise to a claim for negligent misrepresentation. "A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" (*Hudson River Club v. Consolidated Edison Co.*, 275 A.D.2d 218, 220 [1st Dept. 2000]). Here, Plaintiff does not plead any facts demonstrating a special relationship between the parties (*see Andres v. LeRoy Adventures*, 201 A.D.2d 262 [1st Dept. 1994]). Lastly, with respect to any potential breach of contract, Plaintiff does not allege that defendants in fact failed to invest the monies in the business venture as supposedly agreed, but rather that the extraordinarily high returns forecasted by the defendants failed to materialize.

Wherefore it is hereby

ORDERED that defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 28, 2011

EILEEN A. RAKOWER, J.S.C.