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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

AGILE OPPORTUNITY FUND, LLC and EASTERN MANAGEMENT & FINANCIAL, LLC,

Plaintiffs,

- against -

VECTORMAX CORPORATION,

Defendant.

Index No.: 015235/2009
Motion Date:10/28/2011
Sequence No:001, 002

The following documents were read on this motion:

Plaintiff' Motion for Partial Summary Judgment on First and Third Causes of Action 1.
Affirmation of VectorMAX in opposition to Motion for Partial Summary Judgment 2.
Defendant's Memorandum of Law in Opposition to Motion ..... 3.
Supplemental Affidavit of Jeffrey A. Miller, Esq. in Further Support of Motion ..... 4.
Affirmation of Max Folkenflik, Esq. in Further Opposition to Motion ..... 5.
Appendix to Exhibits to Sur-Reply Affirmation in Opposition to Motion ..... 6.
Motion for Leave to Amend Answer ..... 7.
Affirmation of Jeffrey A. Miller, Esq. in Opposition to Motion to Amend ..... 8.

PRELIMINARY STATEMENT

Plaintiff moves for partial summary judgment in the amount of not less than $1,075,297.23 on the First Cause of Action; and in the amount of not less than $460,841.67 on the Third Cause of Action.

Defendant moves for leave to amend its Answer to include an affirmative defense of usury.

BACKGROUND

Agile Opportunity Fund, LLC ("Agile") is the lender under two promissory notes executed by VectorMAX as borrower. The first note of December 26, 2007 is in the principal amount of $560,000; the second note of January 28, 2008 is in the principal amount of $224,000. The notes bore interest at the rate of 12% per annum, and provided that, in the event of default, the interest rate would increase to 17% per annum, and that the face amount of the notes, together with accrued interest would be immediately due and payable. The original maturity date of June 26, 2008 was extended to May 15, 2009. Plaintiff claims that as of May 6, 2011, defendant owed principal on the two notes of $784,000, $52,996.67 accrued interest at 12% between October 31, 2008 and May 15, 2009, $238,330.56 of accrued interest at 17% between May 15, 2009 through May 6, 2011.

Plaintiff Eastern Management & Financial, LLC ("Financial") is the lender under a promissory note made by VecorMAX on or about January 28, 2008, in the principal amount of $336,000. The note called for interest at the rate of 12% per annum and for 17% in the event of default. It also called for acceleration of the indebtedness in the event of default. As with the Agile Notes, the original maturity date was June 26, 2008, which was extended to May 15, 2009. Financial claims that as a result of the default on May 15, 2009, it is entitled to the principal sum of $336,000, interest at 12% from October 31, 2008 through May 15, 2009, in the amount of $22,700, and interest at the rate of 17% from May 15, 2009 through May 6, 2011 in the amount of $102,141.67

Defendants contend that the notes, with face amounts of $560,000, $224,000, and $336,000, were issued in return for advances of $500,000, $200,000, and $200,000 respectively. Dealing, for example with the December 28, 2007 note, defendants claim that the $60,000 over and above the $500,000 actually received, constituted a 12% interest charge. With an initial due date of June 26, 2008 with interest at 12%, the effective interest rate was 24% for six months, greater than the legally permissible rate of 25% per year.

Defendant makes the same argument with respect to the January 26, 2008 Agile Note with a face amount of $224,000, but an Issue Price of $200,000, a maturity date of June 26, 2008, and an interest rate of 12%, called for interest at the rate of 24% for 5 months. The Financial

Note of January 28, 2008 has a face amount of $336,000 and an Issue Price of $200,000, with a maturity date of June 26, 2008, and interest at the rate of 12% per annum.

In addition to the interest requirements on the Notes, under the accompanying Securities Purchase Agreement, as additional consideration for the $500,000 loan, VectorMAX issued to Agile warrants to purchase 125,000 shares of VectorMAX stock at $4.00 per share, and an additional warrant for 25,000 shares on the same terms.

The Securities Agreement also contemplated an additional $200,000 loan, ultimately made in the form of the Second Agile Note with a face amount of $224,000, with a $24,000 "original issue discount". As additional consideration for the second loan, the Securities Agreement also provided for additional warrants for 50,000 and 10,000 additional VectorMAX shares at $4.00 per share.

The Securities Purchase Agreement also gave Agile the right to "put" the initially issued warrants back to VectorMAX for a period of 5 years, at 35% of the original loan of December 26, 2008, or after the note was paid. Defendant contends that this put provision produces an additional 35% interest for loans which extended only 5 or 6 months. In addition, VectorMAX had the right under the Securities Agreement to repurchase up to 50% of the warrants for 50% of the original loan. Had VectorMAX exercised this call, it would have produced an additional interest of 42 ½% for the one-year term of the loan.

Defendant contends it payed usurious interest on the notes in the first half of 2008, and as the maturity date of June 28, 2008 approached, it became clear that VectorMAX would be unable to satisfy the notes. As a condition of extension to October 31, 2008, Agile insisted on "deferment payments". Defendants incurred $324,870 for the Agile Notes and $139,200 for the Eastern Note, $116,017 per month for a deferment of less than four months, essentially adding interest of 136% interest on top of the already scheduled interest.

Agile and Eastern also allegedly insisted on the receipt of an additional 300,000 shares of common stock, with a value of approximately $600,000, which they obtained on June 30, 2009.

Based upon the allegations of the Verified Complaint alone, defendants contend that the interest demanded on the $700,000 loaned for less than 19 months was $1,719,475.89, or 155% per annum. The interest claimed on the Eastern Note was $753,720.30 for 18 months, 167% per

annum.

Plaintiffs respond that the defendant's calculations of interest required by the promissory notes are erroneous, and that, in any event, the notes contain multiple savings clauses. Moreover, they contend that the inclusion in the interest calculation of the terms of the Securities Agreements and other agreements between the parties, first raised in a sur-reply, evidences defendant's recognition that the notes are not usurious on their face.

Defendant's original answer of 2009 did not include an affirmative defense of usury. They contend that they are entitled to an Order permitting them to amend the Answer to do so. Plaintiff contends that the failure to include such an affirmative defense constituted a waiver as a matter of law, and that, some two years later, there is no justification for such authorization.

DISCUSSION

Summary Judgment

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v.*

Martinez, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

The role of this Court, therefore, is not to decide whether or not the three loans are usurious, but whether or not defendants have raised triable issues of fact as to whether or not they are. Plaintiff makes the point that the notes, on their face, are not usurious, and, in any event, the claims are protected by the savings clause, which provides that "(n)otwithstanding any other provision hereof, interest paid or becoming due hereunder shall in no event exceed the maximum rate permitted by applicable law".

Were the promissory notes the only issues before the Court, it may well be that the plaintiff would be entitled to summary judgment. However, in examining the substance of a transaction which is suspected of usury, it does not matter whether the payments for the loan are direct or indirect. (*Vee Bee Service Co. v. Household Finance Corporation,* 51 N.Y.S.2d 590, [Sup.Ct., New York County, 1944]). That case involved the payment of a fee by the borrower of 5% of the amount borrowed, 40% of which was to pay Vee Bee Service Co., which provided certain consulting and underwriting services to some 52 banks. The other 60% of the 5% premium was maintained, initially in a special account, but thereafter not, to cover losses in the repayment of loans. In evaluating all the payments attendant to the loans, the decision noted that " . . . the Court should not be confined to its superficial form, but should examine into the real nature thereof. *Id.* at 597.

The Court there stated that the two elements of interest are " ' the inconvenience of parting with it (the principal) for the present, and the hazard of losing it entirely' ", citing Chase's Blackstone, 4th Ed. 65, 66. Nothing has changed since those statements. Where the lender provides for a legal rate of interest in the notes, but charges additional fees as protection against the risk of loss, it may well be that these charges are indirect charges of interest, however denominated, and may render the agreements in violation of the usury statutes.

Amendment of Pleadings

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides, in part, as follows:

> **Rule 3025. Amended and supplemental pleadings**
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> **(a) Amendments without leave.** A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.
>
> **(b) Amendments and supplemental pleadings by leave.** A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.
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> . . .

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. (*Lucido v. Mancuso,* 49 A.D.3d 220 [2d Dept. 2008]).

Defendants contentions require a scrupulous analysis of all of the loan agreements, but they are not "palpably insufficient" or "patently devoid of merit". Plaintiff contends that defendants, in failing to plead usury as an affirmative defense, have waived the claim. The initial waiver does not preclude defendant from seeking to reinstate the claim by seeking to amend its pleading. When, as in this case, a defendant fails to plead an affirmative defense, but asserts the defense in connection with a motion for summary judgment, the waiver is considered to have been retracted and the Court is free to consider the defense in the defense or support of a motion for summary judgment. (*Strauss v. BMW Financial Services Vehicle Leasing,* 29 Misc.3d 362

[Sup. Ct., Kings Co. 2010]).

The Court determines that defendant has raised significant material questions of fact as to whether or not, in the context of all the agreements between the parties, it was compelled to incur interest payments which exceeded the maximum rate permitted by statute. Motion Sequence 001 for Summary Judgment in favor of plaintiff on the First and Third Causes of Action is denied. Motion Sequence 002 by defendant for leave to amend the Verified Answer to include an affirmative defense of usury is granted.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2011

J.S.C.