SHORT FORM ORDER

Index Number: 33127-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 10-25-2011
Motion Submit Date: 11-15-2011
Motion Sequence .: 004 MD

_____X

RUSSELL V. LUGLI, Trustee of the Luigi Family Trust,

Plaintiff,

-against-

FRANK JOHNSTON,

Defendant.
_____X

Attorney for Plaintiff
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Mineola, New York 11501

Attorney for Defendant
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ORDERED that the defendant's motion (motion sequence # 004) for summary judgment dismissing the plaintiff's complaint is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Russell V. Lugli, as Trustee of the Lugli Family Trust (hereinafter the Trust), commenced this action to recover on a promissory note. The underlying facts are cogently set forth in the Decision and Order of the Appellate Division, Second Department dated November 30, 2010, on the defendant's appeal from the order of this Court, dated December 14, 2009, which granted the Trust's motion for summary judgment in lieu of complaint pursuant to CPLR 3213:

> On July 11, 2006, the defendant borrowed the sum of $200,000 from the Lugli Family Trust (hereinafter the Trust). In connection with this loan, the defendant executed a loan agreement and a promissory note.

> The loan agreement provided that the defendant was obligated to repay the Trust by August 11, 2006. The loan bore interest "at the rate of one percent per month, calculated and compounded monthly, from the date hereof until repayment of the full amount." The loan agreement further provided for a loan origination fee of 1.5% of the principal amount, which amounted to $3,000, and a late fee of 1% per month, beginning on August 11, 2006. The loan agreement was signed by both the defendant and the plaintiff, as trustee of the Trust.
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> On the same day that the loan agreement was executed, the defendant also executed a promissory note (hereinafter the note). The note provided that, by August 11, 2006, the defendant was obligated to repay the Trust the sum of $200,000, plus $2,000 in interest, as well as the $3,000 loan origination fee, for a total of $205,000. According to the note, after August 11, 2006, the interest rate of 1.5% per month would be applied to both the outstanding principal and to the 1% late fee. While the note's interest rate differed from that contained in the loan agreement, neither party asserts that the 1.5% monthly interest rate was the applicable rate for the loan past August 11, 2006.
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> The defendant failed to repay the loan.
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> (*Lugli v. Johnston*, 78 AD3d 1133, 1134-5 [2d Dept 2010]).

The plaintiff moved for summary judgment in lieu of complaint pursuant to CPLR 3213. The defendant opposed the motion arguing, among other things, that he had a bona fide defense of usury. By order dated December 14, 2009, this Court granted the plaintiff's motion and a judgment, upon the order, was entered on September 17, 2010, in favor of the plaintiff and against the defendant in the sum of $397,400. The defendant appealed from the judgment.

By Decision and Order dated November 30, 2010, the Appellate Division, inter alia, reversed the judgment, on the law, and denied the plaintiff's motion for summary judgment in lieu of complaint. The Appellate Division held that in opposition to the plaintiff's prima facie showing of entitlement to judgment as a matter of law, the defendant raised a triable issue of fact as to the applicability of the defense of usury. The court stated, in relevant part:

> Specifically, the defendant raised triable issues of fact with his contention

> that the annualized rate of the subject loan was at least 30%, in light of the combined annualized rates for interest and the loan origination fee, and that the loan's interest rate was, thus, in excess of the amount allowed by General Obligations Law § 5-501(1) and Banking Law § 14-a(1) (*see O'Donovan v Galinski*, 62AD3d at 769-770).

The defendant now moves for summary judgment following the completion of discovery. The defendant contends, among other things, that he is entitled to judgment as a matter of law dismissing the complaint and declaring the loan agreement and note void because there is no genuine issue of fact that the subject loan is usurious as it was a 30-day loan calling for interest of 1% per month (12% annually) and a loan fee of 1.5% (18% annually) in violation of General Obligations Law § 5-501(1) and Banking Law § 14-a(1). In support of the motion, the defendant submits, among other things, copies of the pleadings[1], the loan agreement and promissory note, as well as his own affidavit. He argues, among other things, that in an affidavit submitted in support of the his motion for summary judgment in lieu of complaint, the plaintiff admitted that the term of the subject loan was 30 days when he stated that the loan documents were executed on July 11, 2006, and that "[t]he Note provides that the balance due was to be paid to Plaintiff on August 11, 2006" and that "[t]he Loan Agreement further provides that the Loan was repayable by the borrower on August 11, 2006." Thus, the defendant contends that any argument by the plaintiff that the term of the loan was anything other than 30 days should be rejected as such an argument directly contradicts plaintiff's earlier admissions.

In opposition, the plaintiff submits his own affidavit and a combined affirmation and memorandum of law from counsel. In his affidavit, the plaintiff states, among other things, that although the loan documents contain a 30-day loan term, which plaintiff claims was inserted by the defendant, it was plaintiff's understanding, based on representations made by the defendant that he need the loan to complete a construction project that would take approximately four months, that the loan term was indeterminate and would be a minimum of four months and could be several months or years longer. Thus, the plaintiff contends (1) that the defendant cannot establish usurious intent by clear and convincing evidence, (2) that the defendant should be estopped from asserting the defense of usury because there was a "special relationship" between the parties, and (3) that the law of the case doctrine bars the defendant's motion for summary judgment.

In reply, the defendant again argues, among other things, that the loan was usurious as a matter

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[1] In its Decision and Order dated November 30, 2010, the Appellate Division deemed the motion and answering papers submitted on plaintiff's motion for summary judgment in lieu of complaint to be the complaint and answer, respectively.

of law and that the plaintiff's contention that the loan was for an indeterminate term must be rejected as it directly contradicts plaintiff's earlier admissions.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85, 487 NYS2d 316 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Merely pointing to gaps in the opposing party's proof is insufficient (*Healy v. Damus*, 88 AD3d 848 [2d Dept. 2011]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713, 641 NYS2d 701 [2nd Dept. 1996]). However, where a movant fails to meet its burden, the burden does not shift to the opposing party and the sufficiency of the opposition papers need not be considered (*Healy v. Damus*, supra). "Generally, successive motions for summary judgment should not be entertained, absent a showing of newly-discovered evidence or other sufficient cause" (*Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2d Dept 2010]).

Here, the defendant did not previously move for summary judgment; the plaintiff did. Therefore, the instant motion does not violate the general prohibition against successive motions for summary judgment. However, although the defendant did not previously move for summary judgment, in opposition to plaintiff's prior motion he argued, as he does now, that "the action must . . . be dismissed on the merits, as the loan agreement and note under which plaintiff seeks recovery are usurious and, therefore, void." (Defendant's Affidavit in Opposition sworn to September 14, 2009 at ¶ 26-¶39). Additionally, in opposition to plaintiff's prior motion, the defendant claimed, as he does in support of the instant motion, that the loan was for a term of 30 days and that the effective interest rate was in excess of 30% (Id.). In support of the instant motion, the defendant fails to set forth any newly-discovered facts that were unavailable to him or not presented by him in opposition to the plaintiff's earlier motion for summary judgment in lieu of complaint, that are relevant to the determination of whether the loan was usurious. He argues now, as he did then, that the evidence demonstrates, as a matter of law, that the loan was usurious. Thus, there is no basis to deviate from the Appellate Division's holding that there are triable issues of fact as the applicability of the defense of usury. Accordingly, the defendant's motion for summary judgment is denied.

The parties are reminded that a final pre-trial conference before the Court is scheduled for February 2, 20102 at 11:00 a.m., and that the trial of this action is scheduled to commence on February 22, 2012.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 20, 2012
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.