[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:103454/11
Motion No.:002

EDA LOGISTICS CORP. and
3 BEE, CORP.

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

B & B INTERNATIONAL CONNECTIONS, INC.,
EDWARD TKACH and
ALEXANDER TKACH,

Defendants

The following items were considered in the review of the following motion to dismiss.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants' motion to dismiss the plaintiff's complaint based on a defense founded on documentary evidence, and for failure to state a cause of action to CPLR § 3211(a)(1) and (7) is denied.

Facts

The defendants, B & B International Connections, Inc. ("B &B"), Edward Tkach and Alexander Tkach, executed two promissory notes. The first promissory note between the defendants as borrowers and 3 Bee Corp. as the lender for $200,000 was due on demand. The defendants executed the note on February 15, 2007 in Brooklyn, New York wherein Edward and Alexander Tkach each "separately and personally unconditionally" guaranteed payment of the demand note to B & B. The note listed the following pertinent terms:

> . . . the sum of $200,000.00 with interest thereon from February 15, 2007 on the unpaid principal at the rate of 18.00% per annum (1.5% per month).
>
> ***
>
> Failure to pay the entire balance due including principal and interest within fifteen days after the Due Date shall trigger Collection Costs of $40,000.00 and a default interest rate of 23.99% annually until such time as the principal, interest and late charges, if any are fully paid.

The defendant, B & B executed a second promissory note dated "April __, 2011 Linden, New Jersey" with EDA Logistics Corp. ("EDA") wherein Edward Tkach signed the note as president. The terms of the promissory note state that EDA loaned B & B in connection with a Joint Venture Agreement dated October, 2010 the sum of $650,000. The note listed the following pertinent terms:

> . . . the Lender may lend to the undersigned in accordance with a certain Joint Venture Agreement dated October, 2010 made By and Between the undersigned and the lender which sum of money will not exceed the sum of SIX HUNDRED FIFTY THOUSAND DOLLARS and no/100 ($650,000) together with interest a[t] the annual rate of 40.00% to be computed on the unpaid principal balance, said principal sum . . .

The defendant, Edward Tkach, personally guaranteed this promissory note in a separate agreement dated April 2011.

A search of the New York State Department of State Division of Corporations reveals that B & B International Connections, Inc. is a domestic business corporation based out of Kings County; 3Bee, Corp., is a domestic business corporation based out of Kings County; and EDA Logistics Corp., is a domestic business corporation based out of Rockland County. The documentation submitted on this motion to dismiss indicates that B & B International Connections, Inc. is located at 1375 East Linden Avenue, Linden, New Jersey.

Discussion

The New York General Obligations Law (GOL)§ 5-501 defines the rate of interest considered to be usurious in New York states in part that it ". . . shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law." Banking Law § 14-a(1) states, "[t]he maximum rate of interest provided for in section 5-501 of the general obligations law shall be sixteen per centum per annum."

"A corporation may not interpose a defense of civil usury (see General Obligations Law § 5-521[1]). An individual guarantor of a corporate obligation is also precluded from asserting such a defense. . . However, where a corporate form is used to conceal a usurious loan made for personal, not corporate purposes, the defense of usury may be interposed. . . Further, the prohibition against asserting such a defense does not apply to a defense of criminal usury where interest in excess of 25% per annum is knowingly charged . . ."[1] Additionally, "[t]here is a strong presumption against a finding of usury, and at trial the plaintiff will be required to establish usury by clear and convincing evidence."[2] Here, the defendants assert the that both loans are facially criminally usurious as a defense. Therefore, the burden is on the defendants to demonstrate their entitlement to the usury defense by clear and convincing evidence.

The defendants argue that while the first promissory note's interest may be designated as 18% it is an effective interest rate of 38% when one considers the $40,000 contractual collection cost and the default interest rate of 23.99%. The defendants argue that the Appellate Division, Second Department's decision in *Fereri v. Rain's International, Ltd.*[3] supports the inclusion of

---

[1] *Tower Funding, Ltd. v. David Berry Realty, Inc.*, 302 AD2d 513, [2d Dept 2003].

[2] *Ujueta v Euro-Quest Corp,* 29 AD3d 895, [2d Dept 2006].

[3] 187 AD2d 481, [2d Dept 1992].

the $40,000 collection cost into the calculation of interest. In *Fereri*, the Appellate Division, Second Department reversed the trial court's determination that the loan in question was not usurious after trial. There, the plaintiff commenced an action to recover the sum of $250,000 together with interest and attorney's fees allegedly owed by the defendants. On its face the loan agreement set the interest rate at 15% per year with an origination fee of $30,000. The defendants interposed the defense of criminal usury. At trial the parties stipulated that the interest rate of the loan was 26.14%, which is more than the 25% rate considered corporate usury. However, the trial court found that the plaintiff only received $12,500 of the $30,000 fee and therefore the loan was not usurious. The Appellate Division, Second Department reversed and held "[a]s stipulated by the parties, the loan agreement was usurious on its face, and thus, usurious intent may be applied."[4] *Fereri* is inapplicable in this instance because the interest rate charged is not criminally usurious on its face.

The defendants also argue that the second promissory note that was executed in New Jersey is criminally usurious based on its facial interest rate of 40%. While the lender, EDA and the borrower B & B are New York corporations, B & B lists its business location as 1375 East Linden Avenue, Linden, New Jersey in the joint venture agreement executed with EDA on October 12, 2010. It is undisputed that the 40% per year interest rate would be criminally usurious in New York. However, the plaintiff argues that New Jersey law should apply because it is undisputed that the parties executed the promissory note in Linden, New Jersey, with a corporation whose business is located in New Jersey.

The New Jersey statutes define usury in the following terms:

> Except as herein and otherwise provided by law, no person shall, upon contract, take directly or indirectly for loan any money, wares, merchandise, goods and chattels, above the value of $6.00 for the forbearance of $100.00 for a year, or when there is a written contract specifying a rate of interest, no person shall take above the

[4] Id. at 482.

value of $16.00 for the forbearance of $100.00 for a year.[5]

However, the New Jersey statute bars the assertion of usury as a defense by corporations, limited liability companies or limited liability partnerships.[6] The New Jersey statutes which was enacted in 1953 states:

> No corporation, limited liability company or limited liability partnership shall plead or set up the defense of usury to any action brought against it to recover damages or to enforce a remedy on any obligation executed by said corporation, limited liability company or limited liability partnership.[7]

In 1956 the Supreme Court of New Jersey evaluated this statute and stated:

> In some jurisdictions, including our neighboring state of New York, the courts have suggested that since the statutes prohibiting corporations from asserting usury as a defense were restorative of the common law they should be liberally applied. . . However, our own courts have taken a contrary position and have tended to restrict the application of the statutory provision in order that sympathetic sweep might be given to the State's policy against usury.[8]

The New Jersey Appellate Division of the Superior Court summarized the prohibition of the defense of usury to corporations in *Feller v. Architects Display Buildings, Inc.*[9] In that case the court summarized as follows:

---

[5] N.J.S.A 31:1-1(a).

[6] N.J.S.A 31:1-6.

[7] Id.

[8] In the Matter of Greenberg, 121 A2d 520, [1956].

[9] 54 NJ Super. 205 [1959].

> Our Supreme Court has stated . . . that if the corporate form is used to cloak a loan which in fact is intended to be a loan to an individual, the Alter ego of the corporation, then this statutory provision will not bar the plea of usury. In [a separate case] the Supreme Court stated if the corporation to which the loan was ostensibly made was specifically incorporated at the request of the lender's agent and subsequent to the application for the loan, the defense of usury would apply.[10]

Here, the documentary evidence does not support the application of these two exceptions to allow B & B, a corporation, to assert usury as a defense. Therefore, the motion to dismiss is denied.

Conclusion

Here, the defendants move to dismiss the plaintiff complaint arguing a full defense based on documentary evidence and the plaintiffs' failure to state a cause of action. Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence pursuant to CPLR § 3211(a)(1), the documentary evidence must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.[11] Similarly, on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must accept as true the facts alleged in the pleading and submissions in opposition to the motion, and accord the plaintiff every possible inference.[12] Here, the promissory notes are not usurious on their face and therefore the defendants' defense of usury must be demonstrated at trial by clear and convincing evidence.

Accordingly, it is hereby:

---

[10] Id at 212.(Citations omitted)

[11] *Berger v. Temple Beth-el of Great Neck,* 303 AD2d 346, [2d Dept 2003].

[12] *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co.*, 5 AD3d 352, [2d Dept 2004].

ORDERED, that the defendants' motion to dismiss the plaintiffs' complaint is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Tuesday, January 10, 2012 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: December 15, 2011

Joseph J. Maltese
Justice of the Supreme Court