STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

RONNI MANCINELLI, and his wife,
JENNIFER MANCINELLI,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-285
RJI NO. 55-08-00646

L.G.O. ENTERPRISES, LLC d/b/a
HORSELESS CARRIAGE CAR WASH,

Defendant.

Supreme Court Ulster County All Purpose Term, November 13, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Finkelstein & Partners, LLP
Ann Johnson, Esq.
Attorneys for Plaintiff
1279 Route 300, PO Box 1111
Newburgh, New York 12551

Basch & Keegan, LLP
Attn: Eli B. Basch, Esq.
Pro Se
307 Clinton Avenue, PO Box 4235
Kingston, New York 12402

Mainetti, Mainetti & O'Connor, P.C.
Alfred B. Mainetti, Esq.
Pro Se
130 North Front Street, PO Box 3058
Kingston, New York 12402-9434

William D. Pretsch, Esq.
Attorney for Raymond Lane
41 Pearl Street, PO Box 493
Kingston, New York 12402

TERESI, J.:

Ronni Mancinelli (hereinafter "Plaintiff"), represented by Basch & Keegan, LLP (hereinafter "Basch"), commenced this personal injury action in January 2008. After issue was joined, Plaintiff sought and obtained funds from Alfred B. Mainetti (hereinafter "Mainetti") and Raymond Lane (hereinafter "Lane"). It is uncontested that Plaintiff obtained a total of $28,500 from Mainetti and Lane, pursuant to six written agreements. Basch continued to represent Plaintiff until June 21, 2010, when Finkelstein & Partners, LLP (hereinafter "Finkelstein") replaced Basch as Plaintiff's counsel of record. Although the parties submitted no non-hearsay proof detailing the resolution of this matter, the Court Clerk's office's records indicate that it was settled in February 2013.

Plaintiff now moves to vacate the liens Mainetti and Lane claim to hold on Plaintiff's settlement. Without objecting to the motion's procedural regularity[1], Mainetti, Lane, and Basch[2] all appeared and opposed it. Because Plaintiff failed to demonstrate, as a matter of law, the invalidity of Mainetti and Lane's liens, his motion is denied.

While the assignment of a personal injury claim is void (GOL §13-101), "the assignment of its proceeds" is permissible. (Grossman v Schlosser, 19 AD2d 893 [2d Dept 1963]; Leon v Martinez, 84 NY2d 83 [1994]). Moreover, where such an assignment is an investment, not a

---

[1]To the extent this matter should have been brought as a CPLR §5239 proceeding, any such objection has been waived. Similarly, because the litigants have requested no evidentiary hearing, they waived any right to one. "When parties have charted their own course, they must be so bound." (Herman v Siegmund, 69 AD2d 871, 872 [2d Dept 1979]).

[2] Although Basch requested this Court to make a determination on the validity of his claimed lien, he made no cross motion for such relief. As such, this court should not entertain his request (Blam v Netcher, 17 AD3d 495 [2d Dept 2005]), which is denied without prejudice.

loan, this State's usury laws[3] are inapplicable "however unconscionable the contract may be." (Seidel v 18 E. 17th St. Owners, Inc., 79 NY2d 735, 744 [1992], quoting Orvis v Curtiss, 157 NY 657 [1899]; GOL §5–501[1], [2]; Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc., 35 Misc3d 1205(A) [Sup Ct, Suffolk County 2012]; Lynx Strategies, LLC v Ferreira, 28 Misc 3d 1205(A) [Sup Ct, NY County 2010]; Jimenez v Acheson, 42 AD3d 831, 832 [3d Dept 2007]).

In addition, as the party asserting usury, Plaintiff has the burden to establish his "usury defense... by clear [and convincing] evidence as to all the elements essential thereto." (Giventer v Arnow, 37 NY2d 305, 309 [1975], quoting Grannis v Stevens, 216 NY 583 [1916][internal quotation marks omitted]; Fried v Bolanos, 187 AD2d 108 [3d Dept 1993]). "[W]hen the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate." (Giventer v Arnow, supra at 309; Ujueta v Euro-Quest Corp., 29 AD3d 895 [2d Dept 2006]).

Here, Plaintiff failed to proffer clear and convincing evidence that his written agreements with Mainetti and Lane constitute usurious loans. Plaintiff submits his four written agreements with Mainetti ($18,500 in total), along with the two he entered with Lane (totaling $10,000). The written agreements are all identically phrased, and change only the name, amount, and date. Each states, in pertinent part, that:

> I, Ronni Mancinelli, hereby assign to [Mainetti or Lane] $5,000 [or $1,000 or $7,500] plus 20 percent per annum interest, payable directly from the proceeds of my lawsuit to [Mainetti or Lane] at the conclusion of my lawsuit before any payments to me. I direct that my attorneys pay him the said money with the accrued interest from [date of transfer] to the date of payment."

---

[3] "A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16%." (Abir v Malky, Inc., 59 AD3d 646, 649 [2d Dept 2009]; GOL §5-501[1]; Banking Law §14-a[1]).

Although the written agreement is not a model of clarity, the parties' intent can be "discerned from the four corners of the document itself" (Herbert v Schodack Exit Ten, LLC, 107 AD3d 1119, 1120 [3d Dept 2013]) when "considered as a whole." (Brad H. v City of New York, 17 NY3d 180, 185 [2011]). The agreements lack clarity because they neither specified the applicable "lawsuit" nor explicitly conditioned repayment on success in the "lawsuit." By reading the agreements as a whole, however, they are not ambiguous. Rather, the agreements' phrases "payable directly from the proceeds of my lawsuit" and "at the conclusion of my lawsuit before any payments to me" clearly indicate the parties' intent. The obvious intent being: Mainetti and Lane would be repaid with the proceeds of the lawsuit Plaintiff was then engaged in, i.e this lawsuit. By implication, with no language to the contrary, Mainetti and Lane's recovery was necessarily limited to the proceeds Plaintiff obtained in this lawsuit. Such a non-recourse agreement constitutes an investment, not a loan, rendering Plaintiff's usury defense inapplicable. (Seidel v 18 E. 17th St. Owners, Inc., supra; Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc., supra; Lynx Strategies, LLC v Ferreira, supra).

Because the agreements are not ambiguous "within the four corners of the document... extrinsic evidence may [not] be considered." (Id. at 186, quoting Innophos, Inc. v. Rhodia, S.A., 10 NY3d 25 [2008][internal quotation marks omitted]).

Even if the agreements were ambiguous and extrinsic evidence could be considered, Plaintiff still failed to offer clear and convincing evidence rebutting the presumption that Mainetti and Lane "did not make a loan at a usurious rate." (Giventer v Arnow, supra at 309). Conspicuously absent from this motion is an affidavit made by Plaintiff. He offers no justification for the agreements' use of the word "assign" or explanation of the agreements'

phrases discussed above. He offers instead only documentary exhibits and his attorney's affirmation, which is "probatively valueless and without evidentiary significance." (Chiarini ex rel. Chiarini v County of Ulster, 9 AD3d 769, 770 [3d Dept 2004], quoting Jabs v Jabs, 221 AD2d 704 [3d Dept 1995]). Plaintiff attached to his motion the six checks he received from Mainetti and Lane. On the checks' memo lines, each was labeled as a "loan." Plaintiff also submitted numerous letters in which Mainetti characterized the agreements as "loans" and as "promissory notes." Such extrinsic proof, however, is not dispositive. The nature and purpose of the transaction controls, not its "name, color, or form." (Feinberg v Old Vestal Rd. Assoc., Inc., 157 AD2d 1002, 1003 [3d Dept 1990], quoting Lester v Levick, 50 AD2d 860 [2d Dept 1975, Christ, J., dissenting], revd on dissenting mem below 41 NY2d 940 [1977]). These various mischaracterizations do not rebut the presumption against usury, with clear and convincing evidence, and failed to establish Plaintiff's entitlement to an order vacating his agreements with Mainetti and Lane. (*see generally* Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc., supra [use of "borrower" and "lender" in subject agreements was not determinative]).

Plaintiff also seeks to vacate Mainetti and Lane's liens because they do not comply with the "Attorney General['s]... guidelines for cash advance transactions with consumers who have pending personal injury actions." He made no showing, however, that such guidelines apply to the agreements at issue here. Nor would they, as such guidelines were entered into in a separate matter by non-parties to this lawsuit. Moreover, this misplaced reliance implicitly acknowledges that Plaintiff's agreements with Mainetti and Lane constitute non-recourse investments and not usurious loans.

Accordingly, Plaintiff's motion is denied in its entirety.

This Decision and Order is being returned to Mainetti. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 9, 2013
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated July 2, 2013; Affirmation of Ann Johnson, dated June 25, 2013, with attached Exhibits A-K.
2. Affidavit of Raymond Lane, dated August 29, 2013, Affirmation of William Pretsch, dated August 29, 2013.
3. Affirmation of Alfred Mainetti, dated August 27, 2013.
4. Affidavit of Eli Basch, dated August 22, 2013, with attached Exhibits A-H.