Murlar Equities Partnership v Jimanez
2016 NY Slip Op 31833(U)
September 1, 2016
Supreme Court, Bronx County
Docket Number: 17611-2006
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 4 x
MURLAR EQUITIES PARTNERSHIP

Plaintiff,

-against- Index No. 17611-2006

FRANKLIN JIMANEZ, NYC ENVIRONMENTAL CONTROL BOARD, ALL'S WELL THAT ENDS WELL, LLC, MARIZA COLON, and J&J DRY CLEANERS

Defendants
x

HON. HOWARD H. SHERMAN:

This motion by the defendant Franklin Jimanez ("Jimanez")[1] for an order substituting the firm of Anderson Shen P.C. in place and stead of The Law Office of Manuel Thillet as attorney for said defendant pursuant to CPLR §321 (b), granting summary judgment in favor of defendant Jimanez and ordering that the instant mortgage is void as criminally usurious pursuant to General Obligations Law §§ 5-501, 5-511 and Penal Law §§ 190.40, 190.42, vacating the Judgment of Foreclosure and Sale pursuant to CPLR §5015 (a)(3), dismissing the complaint and canceling the lis pendens attached to the subject premises pursuant to CPLR §3211 (a)(1) and (7), or staying the execution of the instant judgment, and/or vacating and restoring the plaintiff's motion for an order of reference and summary judgment pursuant to the calendar [sic] and allowing defendant Jimanez to interpose opposition and

[1]All of the underlying loan documents, and all of the Court documents with the exception of the summons and complaint, but including the Judgment of Foreclosure and Sale, reflect the spelling of the defendant's name as "Jiminez." In this order to show cause, however, his name is spelled "Jimanez" by both sides. There does not appear to be an order of this Court amending the caption to reflect this alternative spelling of the defendant's name.

staying execution of the instant judgment, and staying the auction of the premises if any has been scheduled, and for other relief, is decided as follows:

On or about July 18, 1986 the defendant Jimanez purchased premises known as 370 Willis Avenue, Bronx N.Y, a mixed use building containing a store, office and three apartments. On October 28, 2003 Jimanez executed a mortgage[2] in the principal amount of $150,000 in favor of plaintiff Murlar Equities Partnership ("Murlar"). The face interest rate of the loan was 16%. The mortgage and note provided that the first monthly installment was due on November 28, 2003 "in the amount of $2000 and thereafter in five additional installments, with the final installment in the amount of $152,000 for a total of six months (6) months up to and including May 27, 2004 when the entire unpaid balance of principal and interest shall be due and payable..."

According to the defendant Jimanez, due to numerous charges and fees imposed by the plaintiff, which he refers to as "discounts", the proceeds of this loan were a mere $84,849.20. These charges and fees included an attorneys' fee paid to plaintiff's counsel, a brokerage fee, and a payment to a certain Judah Langer. Jimanez therefore asserts that the effective interest rate of this loan was at minimum 31%, and perhaps as much as 65%. In either event, such a rate exceeds the criminal usury rate of 25% pursuant to Penal Law § 190.40 which, defendant alleges, would render this loan at its inception void and unenforceable.

This action in foreclosure was commenced on July 17, 2006.

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[2]The rider to the mortgage states that "this is not [a] purchase money mortgage but a business loan."

The defendant Jimanez, by his attorney Manuel Thillet, interposed an answer on September 22, 2006. No defense of usury was asserted in the answer. Summary judgment was granted in favor of the plaintiff and over the opposition of the defendant on January 29, 2007. Defendant's cross-motion to disqualify plaintiff's counsel was denied. An order of reference was issued on February 1, 2007. A Judgment of Foreclosure and Sale was granted on default on January 26, 2009. Apparently no effort has been made by the plaintiff to execute on this Judgment.

Mr. Thillet resigned from the practice of law on October 9, 2012.[3] On March 15, 2016, defendant Jimanez retained Anderson Shen P.C., and has now brought on this application.

That portion of the motion seeking leave to substitute Anderson Shen P.C. as counsel for defendant is granted without opposition, although this would appear to be academic in light of the fact that defendant Jimanez discharged his former counsel several years ago.

Contentions

The defendant Jimanez contends that the note and mortgage are usurious, and thus void and unenforceable, and that a defense of usury can be raised at any time, even after a Judgment of Foreclosure has been granted.

Under the civil usury statute, the maximum interest rate on a loan is 16% per annum. General Obligations Law §5-501 [1]. A loan is criminally usurious if interest is charged thereon at a

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[3]The file contains a signed document on Mr. Thillet's letter head stationary dated July 14, 2008 entitled "Disengagement Letter" whereby Mr. Jimanez released Mr. Thillet as his attorney as to several cases then pending in the Supreme and Civil Court.

rate exceeding 25%. Penal Law §190.40. The defendant moves for vacatur of the Judgment of Foreclosure pursuant to CPLR 5015 (a)(3) alleging fraud, misrepresentation or other misconduct on the part of the plaintiff, and for summary judgment in favor of defendant, and dismissal of this proceeding.

With respect to the defendant's proposed defense of usury, the plaintiff Murlar makes two major contentions. First, Murlar contends that Jimanez waived this defense by failing to assert it in the answer, or in opposition to the motion for summary judgment, or at any time during the ten year history of this proceeding. Second, Murlar argues that the terms of the loan in question do not exceed the civil or criminal usury rates. The plaintiff also relies on General Obligations Law §5-501 (6)(a) which provides that "No law regulating the maximum rate of interest which may be charged, taken or received, except §190.40 and §190.42 of the Penal Law, shall apply to any loan or forbearance in the amount of $250,000 or more, other than a loan or forbearance secured primarily by interest in real property improved by one or two family residence." However, in addition to the fact that this loan did not exceed $250,000 or more, this provision excludes criminally usurious transactions, and it is criminal usury which the defendant has alleged.

The *Band Realty* Calculation

The parties differ as to how the interest rate on this six month loan is to be calculated for the purposes of determining whether it is usurious or not.

In Band Realty Co. v. North Brewster Inc., 37 N.Y.2d 460 [1975], the formula for calculating the interest rate of a loan

for the determination of usury, where a discount has been retained by the lender, was set forth as follows: The discount, divided by the number of years in the term of the mortgage, should be added to the amount of interest due in one year, and this sum is compared to the difference between the principal and the discount to determine the true interest rate.

Calculation of the true interest rate of this loan must begin with an analysis of the extraneous charges at the closing, which are characterized by defendant as similar to pre-paid interest for the purposes of this discussion. The inclusion or exclusion of these charges, or 'discounts,' are crucial considerations with respect to the calculation of the actual interest rate of this loan.

However, the parties are not in agreement as to which 'discounts' are properly considered in this calculation. There is a $7500 discount fee, about which there is no dispute, and an attorneys fee of $2250, which the defendant would include in this calculation, but which the plaintiff would not.

With respect to the other alleged 'discounts' complained of by the defendant Jimanez, plaintiff contends that the sums of $11,000 paid to an entity known as Fairbanks Capital Corp., as well as the sum of $7,000 paid to a certain Judah Langer, were debts personally owed by Mr. Jimanez, and not discounts charged by the plaintiff/lender. Obviously, including any of these major expenses in the calculation would dramatically enhance the interest rate of the loan.

Utilizing this formula, and including only the $7500 origination fee, the plaintiff Murlar suggests the following calculation and analysis of this six month loan:

The interest rate on the principal amount of $150,000 was

fixed at 16%. The first installment payment was due on November 28, 2003 in the amount of $2000. There were five successive installment payments, with the final installment in the amount of $152,000. The total interest on the loan of $150,000 is therefore $12,000.00. Taken together with the discount fee, or origination fee, of $7,500.00, this results in a total of interest paid in the sum of $19,500. As the net advance was $142,500, plaintiff contends that the true interest rate on this short term loan was 13.68%. Even if the attorneys fee of $2,250 is included in this calculation - and it does not appear that the plaintiff intends to concede this point -- this results in a total interest paid in the sum of $21,750, which computes to a 15.5% interest rate, again less than the civil usury rates.

The Court's Calculation

A defense of usury must be established by clear and convincing evidence as to all of the elements. Feinberg v. Old Vestal Road Associates Inc., 157 AD 2d 1002 (3rd Dept 1990). In determining whether a transaction is usurious, the law looks not to its form, but to its substance or "real character". Lester v. Levik, 50 A.D. 2d 860, 862-863 [CHRIST, J., dissenting] rev'd on dissenting opn., 41 NY 2d 940 [1977].

As an initial matter, the Court finds that the inclusion of the attorneys fee of $2250 in the interest calculation is problematic, as it is a matter of dispute whether this fee was a "reasonable expense of the loan." How such fees are to be considered are questions of fact which depend on the circumstances pertaining when they were paid. Durante Bros & Sons Inc. V. Flushing Nat. Bank, 652 F. Supp. 101 [E.D.N.Y.

1986]. When fee payments do not actually reimburse lenders for expenses associated with the loan, but instead are a disguised loan payment, then such fee expenses can be considered in determining the interest rate. Hillair Capital Investments L.P. v. Integrated Freight Corp., 963 F. Supp 2d. 336 [S.D.N.Y.2013].

Accordingly, for the purposes of this motion, and for the limited purpose of calculating the interest rate on this loan, the Court will at this time consider only the single charge about which there is no dispute by either party, the origination fee of $7500.

Jimanez notes that the plaintiff's calculations result in an interest rate lower than the face rate stated on the instrument, a result which simply make no sense. The Court agrees.

The defendant Jimanez, in this Court's opinion, has employed the correct formula with respect to this six month loan. It has been frequently held that, where the loan term is less than one year, the interest rate must be annualized. O'Donovan v. Galinski, 62 A.D. 3d 769 [2nd Dept 2009]; Bakhash v. Winston, 134 A.D. 3d 468 [1st Dept, 2015]. Since this is a six month loan, the interest calculation itself must be annualized.

Applying the *Band Realty* formula to this matter, one must utilize twice the amount of the discount ($7500 divided by 50% = $15,000.00), and add this amount to the interest incurred over a one year period ($2000 X 12 = $24,000), thus arriving at the sum of $39,000.00.

The net loan funds advanced i.e. the loan principal [$150,000] minus the retained interest [$7500] equals $142,500.00. Expressed as a percentage of the net loan funds advanced, the $39,000 in total annual interest equals approximately 27.5% of $142,500. This percentage is clearly in

excess of the legally permissive maximum of 25% as set forth in Penal Law §190.40. The Court therefore concludes that the interest rate of this loan exceeds the criminal usury rate, as contended by defendant.

Waiver

The plaintiff argues that the defendant has nonetheless waived the defense of usury, which was never asserted by the defendant in an answer, nor throughout protracted Court proceedings, which culminated in a Judgment of Foreclosure that is now more than seven years old.

The Court has inherent discretionary power to vacate its judgments and orders for good cause shown, and the list of grounds annunciated under CPLR 5015 (a) is not exhaustive. McMahon v. City of New York, 105 A.D. 2d 101 (1st Dept 1984). In this case, the defendant has moved for vacatur of the judgment of foreclosure on one single ground: namely, that a claim of usury, in and of itself, sufficiently implicates public policy considerations to justify the vacatur of a default in the interest of justice, and without the need to demonstrate good cause. This is the holding in several judicial departments, which have all vacated defaults granted to lenders based upon the usury defense. Rockefeller v. Jeckel, 161 A.D. 2d 1090 [3rd Dept 1990); Vega Capital Corp. v. W.K.R. Dev. Corp., 98 A.D.2d 627 [1st Dept 1983]; Blue Wolf Capital Fund II, L.P. v. American Stevedoring Inc., 105 A.D. 3d 178 [1st Dept. 2013]; Mutual Home Dealers Corp. V. Alves, 23 A.D.2d 791 [2nd Dept 1965]; Anamdi v. Anugo, 229 A.D. 2d 408 [2nd Dept 1996]. Since the terms of the loan violate the criminal usury law, the loan transaction, and associated note

and mortgage are void and unenforceable. General Obligations Law §5-511.

The Court is aware that at least one exception to this rule was carved out by the Court of Appeals in Hammelburger v. Foursome Inn Corp., 54 NY 2d 580 [1981], which held that the defense of usury is indeed waivable under certain prescribed circumstances not present here. The *Hammelburger* Court held that a valid estoppel certificate executed by a mortgagor, and relied upon in good faith by an assignee precluded the assertion of usury, either civil or criminal. In this matter, there is no assignee or good faith reliance; Murlar is the mortgagee and Jimanez the mortgagor.

Moreover, there is no obligations on the part of movant to demonstrate good cause for the defendant's initial failure to set forth the affirmative defense of usury in timely fashion, since the public policy of this state precludes enforcement of such loans. See National Travis Inc., v. Gialousakis, 120 Misc 2d 676 aff'd 99 A.D.2d 800 [2nd Dept 1984]; Bernard v. DeGraffe, 27 Misc 3d 1216 [A], 910 N.Y.S.2d 760 [Sup Ct Bronx, 2010]; see also Vega Capital Corp. v. W.K.R. Dev. Corp. *supra* [default caused by law office failure vacated in interest of justice]. The Court is therefore constrained to find that the defendant's valid usury claim in itself implicates sufficient public policy considerations to justify the vacatur of the default in the interest of justice. Rockefeller v. Jeckel, *supra*.

As the Judgment of Foreclosure and Sale must be set aside, and the complaint dismissed based on the conclusive showing of usuriousness, the issue remains as to what must be the ultimate disposition of this tainted transaction. The plaintiff does not address this issue, aside from denying that the loan was

usurious, and contending that all objections have been waived. The defendant seeks vacatur of the Judgment of Foreclosure, dismissal of the complaint and cancellation of the lis pendens.

In Szerdahelyi v. Harris, 67 N.Y.2d 42, 50-51 [1986] the Court set out the parameters of the appropriate disposition under these circumstances as follows:

"A usurious transaction is void *ab initio*, and a return of excess interest cannot save to the lender the money actually advanced, or the interest due on the loan. Consequently the lenders need not return the lawful interest already paid by the borrowed, but they cannot recover either the money loaned or the interest remaining due in this transaction." The Court declared the note void and ordered the return of all pertinent documents, and further ordered the lender to return the amount of excess over the legal interest paid on the loan. In Blue Wolf Capital Fund v. American Stevedoring Inc., *supra*, the Court found that the loan in question was usurious, and deemed all of the loan documents void and unenforceable [General Obligations Law §5-511], "as it would be 'most inappropriate' to permit a usurer to recover on a loan for which he could be prosecuted." [*Id.*, 105 AD 3d at 184. The Court also rejected the lender's request to reform the loan transaction instead of voiding it, because equity was not available to a party with unclean hands.

When any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the usury laws, "the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled." General Obligations Law § 5- 511 [2]. As was observed in Seidel v. 18 East 17th Street Owners Inc., 79 NY 2d 735 [1992]: "New York

usury laws historically have been severe in comparison to the majority of States .... reflecting the view of the Legislature that the prescribed consequences are necessary to deter the evils of usury." Id at 740.

Accordingly, the motion by defendant is granted in all respects. The Judgment of Foreclosure and Sale is vacated, and the Court grants summary judgment in favor of defendant Franklin Jimanez dismissing the complaint and vacating the lis pendens.

Settle order.

DATE: September 1, 2016

HOWARD H. SHERMAN J.S.C.