Murlar Equities Partnership v Jimanez
2018 NY Slip Op 31227(U)
April 5, 2018
Supreme Court, Bronx County
Docket Number: 17611-2006
Judge: Howard H. Sherman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 4

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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.

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HON. HOWARD H. SHERMAN:

This is a motion by the defendant Franklin Jimanez for an order granting renewal and reargument of so much of this Court's decision dated September 29, 2017, which granted the motion by plaintiff Murlar Equities Partnership vacating the prior order of this Court dated September 1, 2016, and referred this matter to a referee for recalculation of amounts due at the legally maximum effective rate of interest, and upon such renewal and reargument, granting summary judgment in favor of the defendant dismissing the summons and complaint upon the grounds that the underlying mortgage and note is criminally usurious, void and unenforceable.

For reasons that follow, the Court grants reargument, but upon reargument, the Court denies the defendant's motion for summary judgment and adheres to its prior determination referring this matter to a referee for recalculation of amounts due at the legally maximum effective rate of interest.

The Prior Decision

This foreclosure proceeding concerns a mortgage loan on a residential and commercially mixed building. There is no dispute, based on the nature of the premises involved, that this loan was not subject to G.O.L. § 5-501, which only applies to real property improved by a one or two family residence.

In its prior determination dated September 29, 2107, the Court was called upon to evaluate the effect of a 'savings clause,' in light of the Court's prior determination that the loan in question imposed an interest rate which exceeded the criminal usury rate[1].

The savings clause,[2] which was a newly-located side agreement produced for the first time in conjunction with the motion, was deemed by the Court to clearly reflect the intention of the parties

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[1] The maximum per annum interest rate in New York is 16% under the civil usury statute and 25% under the criminal usury statute.

[2] The savings clause reads as follows:
"10. It is the intention of Lender, Borrower and Guarantor(s) to comply with the usury laws applicable to the Loan and all sums due under the Note, security agreement and mortgage. It is agreed that notwithstanding any provision to the contrary in the Note, mortgage and security agreement, or any other document securing the payment of sums due, no provisions shall require the payment of sums due, no provisions shall require the payment or permit the collection of interest or other sums in excess of the maximum permitted by law. If any excess of interest or other sums, whether contracted, charged or received under the Note or any other document, is determined by a Court of competent jurisdiction to be in excess of the maximum permitted by law, then the provisions of this paragraph shall govern and control, and neither the Borrower nor any other party liable for the payment of such sums shall be obligation to pay the amount determined to be in excess of permitted by law. [sic] Any such excess interest or other excess sums, which may have been collected, shall be, at the Lender's option, either applied as a credit against the unpaid principal balance or refunded to the Borrower. The effective rate of interest and other sums charged under the Note or other documents securing the payment of the sums due under the Note or other documents shall be automatically subject to reduction to the maximum lawful rate permitted under the usury or other applicable laws."

that any interest charged in excess of the legal rate be applied as a credit against the unpaid principal balance and be refunded to the defendant.

Where the written agreement is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms. Greenfield v. Philles Records, 98 N. Y.2d 562 (2002); R/S Associates v. New York Job Development Authority, 98 N.Y. 2d 29 (2002). The Court therefore concluded that the mortgage and note, when read in conjunction with this side agreement, could not be considered criminally usurious nor could the transaction be considered void and unenforceable. The Court declined to set aside the mortgage note as usurious and void, and directed a reference of this matter limiting the computation of interest to the legal rate. The defendant has now moved to renew and reargue this determination, and for an order voiding the note and granting summary judgment dismissing the complaint.

Reargument

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *Schneider v. Solowey,* 141 A.D. 2d 813 [2d Dept 1988]. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Fosdick v. Town of Hempstead, 126 N.Y. 651 [1891]; American Trading v. Fish, 87 Misc.2d 193 [S Ct. N.Y. 1975]. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. Foley v. Roche, 68 A.D.2d 558, 567–68, (1st Dept 1979).

Although styled as a motion granting leave to renew and reargue, there are no "new facts" alleged by the defendant, and this motion actually constitutes a reargument of the Court's prior legal determination. This reargument is based on the defendant's assertion that the Court overlooked allegedly binding First and Second Department case law holding that 'savings clauses' are insufficient to validate a loan in the event that criminal usury has been established. These three cases are Bakhash v. Winston, 134 A.D. 3d 468 (1st Dept 2015), Simsbury Fund Inc v. New St Louis Assocs., 204 A.D. 2d 182 (1st Dept 1994), and Fred Schutzman Co. v. Park Slope Advanced Med. PLLC, 128 A.D. 3d 1007 lv to app denied 26 NY 3d 903 (2015).

As noted by the plaintiff, none of these cases involve mortgage notes. Notably, the *Schutzman* case, which voided a usurious promissory note, not a mortgage loan, found the transaction in question to be voidable pursuant to General Obligations Law §5-511, which as previously noted is inapplicable here. The *Simsbury* Court upheld the voiding of an agreement to charge usurious interest on escrowed funds. The Court in *Bakhash* held that a note was not relieved of usurious effect by reason of a savings clause, but the Court did not void the note, but simply reversed a grant of summary judgment in favor of the plaintiff.

A similar rule was stated in Hillair Capital Investments v. Integrated Freight Corporation, 963 F. Supp 2d 336, 338-339 n.1 [S.D.N.Y. 2013), which concluded that a usury avoidance clause does not, by itself, save an agreement from a charge of usury, but it may be relevant to the issue of usurious intent.

Notwithstanding this discussion with respect to the efficacy of savings clauses, the gist of this controversy is the defendant's assertion that the mortgage note should be voided and deemed unenforceable. It is more accurate to argue that a savings clause does not 'cure' an otherwise

usurious note that exceeds the criminal usury rate, but this is collateral to the issue of determining an appropriate remedy. On the question of remedy, the defendant would argue that voiding a note bearing a criminally usurious rate of interest[3] is mandatory. It is not.

Voiding A Usurious Note

It has been observed that New York's usury laws are harsh, and the courts are reluctant to extend them beyond cases that fall squarely under the statutes. In Re Venture Mortgage L.P., 282 F 3d 185, 189-90 (2nd Cir 2002).

As already noted, as the loan in question does not violate the civil usury statute, GOL § 5-501, the voiding provision, GOL § 5-511, does not apply.

There is no specific statutory authority for voiding a loan which violates the criminal usury statute without violating the civil usury statute. Moreover, nothing in the criminal usury statute, Penal Law § 190.40, provides for voiding of the loan.

The most influential finding in the *In Re Venture Mortgage* matter, paradoxically, is mere dictum, and it is explicitly labeled as such. The Court's clear statement pointing out the incontrovertible fact that nothing in the criminal usury statute proves for the voiding of criminally usurious loans, concluding that it was an "open question" whether a criminally usurious loan was void under New York law has been quoted repeatedly in subsequent decisions.

One example is Koenig v. Slazer Enterprises Owner LLC, 27 Misc 3d 1212 (A) (2010):

"[I]t appears from a review of the complex and cross-referencing statutes that compose New York's usury laws that the voiding provision only operates to void loans that violated the civil usury

[3] The parties have not contested the Court's calculation deeming the rate of interest charged as being in excess of the criminal usury rate.

statute - a statute that by its terms applies only to loans of less than $250,000 (with interest in excess of 15%) - and might not operate to void a loan of $250,000 or greater even if such loan's annual interest rate exceeds 25% and is therefore criminally usurious. It is an open question whether the legislature intended that criminally usurious loans of $250,000 or greater be voided." The *Koenig* Court accordingly did not void the transaction in question, in which the borrower was a savvy businessman, but instead directed payment of principal plus interest as the statutory rate from the date of default through the date of the Court's determination.

The Appropriate Remedy

The Courts, in the wake of *Venture Mortgage*, have generally declined to void a loan for violation of the criminal usury laws, but have instead contemplated imposing a non-usurious rate. Prof. Merchant Advance Capital LLC v. C Care Svs. LLC, 2015 WL 4392081, n. 4 (S.D.N.Y. 2015); Koenig v. Slazer Enters., 910 N.Y.S. 2d 405 (Sup. Court Rockland County 2010).

Notably, the Court in In Re BH Sutton Mezz LLC, 2016 WL 8352445 (Bankr. S.D. N.Y. 2016) declined to void a usurious building loan in a matter in which the parties had, as here, entered into a usury avoidance clause, but nonetheless enforced the loan employing a non-usurious rate:

"Instead, considering the sophistication of the parties here and all the facts and circumstances of this case, the Court finds the appropriate remedy is to revise the interest obligation on the Building Loan to an appropriate non-usurious rate." *Id.*

This Court therefore in this non-residential context also adheres to this better approach of voiding only the usurious interest rate, not the entire loan agreement. Carleone v. Lion & the Bull Films Inc., 861 F Supp 2d 312 at 323 [S.D.N.Y. 2012].

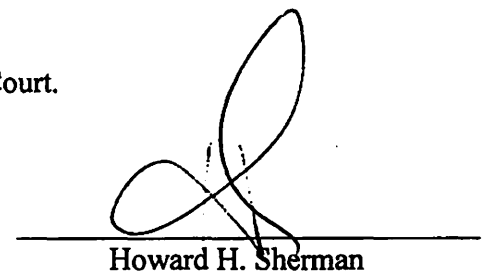
See also, Sabella v. Scantek Medical Inc., 2009 WL 3233703 [S.D.N.Y. 2009].

Finally, the Court sees no logic in imposing the harsher remedy of voiding the transaction in those cases where a savings clause was entered into, but not in those in which no such agreement was made, or vice versa for that matter. In the absence of statutory authority mandating voiding of the loan, the Court declines to impose such a remedy.

The Court is constrained, on reargument, to deny the motion by defendant and to adhere to its prior determination.

The Court's decision dated September 28, 2017 wherein the plaintiff was directed to settle an order denying the motion by defendant for summary judgment, and remanding this matter to the Referee to re-compute the amounts due to the plaintiff under the note and mortgage, remains in full force and effect.

This will constitute the order and decision of this Court.



Dated: April 5, 2018
Bronx, New York

Howard H. Sherman
J.S.C.