Winston Capital, LLC v Kirschenbaum
2019 NY Slip Op 31794(U)
June 21, 2019
Supreme Court, New York County
Docket Number: 850229/2014
Judge: Arlene P. Bluth
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850229/2014

MOTION DATE

MOTION SEQ. NO. 008

WINSTON CAPITAL, LLC,

Plaintiff,

- v -

JOSHUA KIRSCHENBAUM, BOARD OF MANAGERS OF THE 392 CENTRAL PARK WEST CONDOMINIUM, BOARD OF MANAGERS OF THE 400 CENTRAL PARK WEST CONDOMINIUM, UNITED STATES OF AMERICA INTERAL REVENUE SERVICE, SETH WINSLOW, A. ADADIAM B.V.B.A., ANDRE ABADJIAN, JOHN DOE, MARY DOE, the last two names being fictitious and intended to be the persons or corporations in possession of the mortgaged premises herein under foreclosure and described in the Complaint as tenants or occupants thereof, their true names being unknown to Plaintiff,

Defendant.

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DECISION AND ORDER OF REFERENCE

The following e-filed documents, listed by NYSCEF document number (Motion 008) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 189

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendant Kirschenbaum for summary judgment is denied and the cross-motion by plaintiff for summary judgment is granted.

Background

This foreclosure case concerns a note secured by residential apartments owned by Kirschenbaum located at 392 Central Park West and 400 Central Park West. Plaintiff claims that it is a commercial loan. There is no dispute that Kirschenbaum does not live in either of these units. Kirschenbaum moves for summary judgment on the ground that the subject note is usurious because plaintiff seeks to collect on the 16 % interest rate as well as the origination fee, document preparation fee and extension fee. He claims that these additional fees qualify as

"retained interest" and therefore make the loan usurious. Kirschenbaum insists that the Court must cancel the note and mortgage if it finds that the loan is usurious.

In opposition and in support of its cross-motion for summary judgment, plaintiff acknowledges that the 16% interest rate in this loan is the maximum "non-usurious" rate and claims that the banking regulation cited by Kirschenbaum (3 NYCRR § 4.2[a]) is inapplicable because that provision applies only to owner-occupied units.

In reply, Kirschenbaum does not contest the other branches of plaintiff's motion to *inter alia* dismiss his affirmative defenses; instead, he claims that many cases have held that other charges are included in calculating the interest rate and cites to (3 NYCRR § 4.2[b]) as the relevant regulation. Kirschenbaum argues that 4.2(b) also compels the conclusion that the loan is usurious.

In reply to its cross-motion, plaintiff complains that Kirschenbaum cannot change his mind about which regulation he is relying upon for the first time in reply. Plaintiff also argues that 4.2(b) does not require the Court to find the loan usurious. Plaintiff concludes that usury must be proved by clear and convincing evidence and Kirschenbaum failed to meet his burden.

Discussion

"A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16%. . . A usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon" (*Venables v Sagona*, 85 AD3d 904, 905, 925 NYS2d 578 [2d Dept 2011]) [internal quotations and citations omitted]).

3 NYCRR 4.2 provides that:

"The term interest as used in section 4.1 of this Part:

(a) when applied to any loan or forbearance secured primarily by an interest in real property improved by a one- or two-family residence occupied by the owner,

> shall include origination fees, points and other discounts and all other amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender in consideration for making the loan or forbearance. The fees, charges and costs described in section 4.3 of this Part do not constitute amounts paid or payable, directly or indirectly, to or for the account of the lender in consideration for making the loan or forbearance and are not included in "interest";
>
> (b) when applied to any other loan or forbearance, shall mean all amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender which would be includible as interest under New York law as it existed prior to the enactment of chapter 349 of the Laws of 1968."

As an initial matter, the Court observes that Kirschenbaum failed to meet his prima facie burden for summary judgment in his moving papers. He cited the incorrect provision, 4.2(a), which clearly does not apply in this case because Kirschenbaum does not live in these apartments. He may not remedy this error for the first time in reply. Moreover, Kirschenbaum's attempt to address this issue in reply is insufficient. The cases he cites (NYSCEF Doc. No. 184 at 2-3) do not stand for the proposition that *4.2(b)* requires origination fees, document preparation fees or extension fees to be included in calculating the interest rate. While Kirschenbaum argues that 4.2(b) means that interest comprises all amounts included as interest under New York law as it existed prior to the enactment of Chapter 349 of the Laws of 1968, he offers no explanation of what New York law was prior to that enactment and no case law exploring this issue.

The Court also notes the logical fallacy in Kirschenbaum's argument. If 4.2(b) had the same exact effect as 4.2(a), then there would be no purpose to having the two regulations. There would be one regulation that applied to all loans or forbearances regardless of whether they related to owner-occupied residences. But 4.2(a) specifically says that it applies to "a one- or

two-family residence *occupied by the owner.*" The inclusion of the "occupied by the owner" language implies that there is a different rule for residences that are *not* occupied by the owner.

There are very few cases that cite 4.2; two New York County Supreme Court cases questioned whether origination fees, points or other discounts constituted interest under 4.2 (*see Nautilus Capital LLC v 5th St. Parking LLC*, 2018 WL 2722869 n 5, [Sup Ct, New York County 2018]) [observing that attorneys' fees and origination fees are not considered interest]; *Marion Blumenthal Trust ex rel. Blumenthal v Arbor Commercial Mtge. LLC*, 40 MIsc3d 1215(A), 977 NYS2d 667 (Table) [Sup Ct, New York County 2013] [noting that "origination fees, points and other discounts are deemed interest only when applied or any loan or forbearance secured primarily by an interest in real property improved by a one-or two-family residence"]). However, these cases did not make a specific finding about the meaning or scope of 4.2(b). While Kirschenbaum correctly points out that other cases have included origination fees and similar fees as interest, none of the cases he cites are directly applicable to these circumstances and those decisions do not address 4.2(b).

"The imposition of civil liability for usury is closely circumscribed by the rules of construction traditionally applied to usury statutes, and the substantial burden of proof to be borne by the borrower which is only satisfied by clear and convincing evidence of each element of usury, including usurious intent. Usury penalties imposed for the violation of the statute are to be strictly construed and should not be held to include any violation which is not clearly within the plain intention of the statute. This view is in accord with the long line of authority establishing that usury must be proved by clear evidence as to all its elements and will not be presumed" (*Freitas v Geddes Sav. and Loan Assn.*, 63 NY2d 254, 260-61, 481 NYS2d 665 [1984]).

Here, Kirschenbaum failed to meet his burden to show by clear and convincing evidence that the loan was usurious. He merely points to a vague regulation in reply and offers nothing to show that the provision he cites compels the conclusion that the origination fees, document preparation fees or extension fees should be included as interest. And it was Kirschenbaum's burden to show, in the first instance, that these fees must be included in the interest calculation. After all, a loan is considered void if it exceeds the usury rate—Kirschenbaum cannot obtain that drastic relief without demonstrating that these fees must be included as interest.

The Court denies the branch of plaintiff's cross-motion that seeks an order directing the receiver, Greg Soumas, to pay to plaintiff the funds he has collected from monthly rents. Although the order appointing the receiver states on page 8 that "the balance of each month's rent [is] to be paid to Plaintiff" (NYSCEF Doc. No. 181, exh K), there has been no determination as to how much plaintiff is owed. Besides, after paying common charges, etc., there should be a balance in the receiver's account in case of emergency (such as needing a new appliance or water damage to the apartment). After the referee computes the amount due, plaintiff may make another application for the release of some amount of the funds held by the receiver when plaintiff moves for an order of judgment of foreclosure and sale.

Accordingly, it is hereby

ORDERED that the motion by defendant Kirschenbaum for summary judgment dismissing the case is denied; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is granted and Kirschenbaum's answer, affirmative defenses and counterclaim are severed and dismissed; and it is further

ORDERED that plaintiff is granted a default judgment against all non-appearing defendants; and it is further

ORDERED that Roberta Ashkin, Esq., 300 East 42nd Street, 14th Floor, New York, NY 10017 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption be amended to delete John and Mary Doe and the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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WINSTON CAPITAL, LLC,

Plaintiff,

v.

JOSHUA KIRSCHENBAUM, BOARD OF MANAGERS OF THE 392 CENTRAL PARK WEST CONDOMINIUM, BOARD OF MANAGERS OF THE 400 CENTRAL PARK WEST CONDOMINIUM, UNITED STATES OF AMERICA INTERAL REVENUE SERVICE, SETH WINSLOW, A. ADADIAM B.V.B.A., ANDRE ABADJIAN,

Defendant(s).
--X

and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre

Street, Room 119), who are directed to mark the court's records to reflect the parties being removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein; and it is further

Next Conference: November 26, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

6/21/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[ ] CASE DISPOSED	[X] NON-FINAL DISPOSITION	
APPLICATION:	[X] GRANTED [ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE