Shabat v Schnaier
2020 NY Slip Op 34136(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 652778/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM
Justice

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TAMIR SHABAT,

Plaintiff,

- v -

JOE SCHNAIER, SYLVIE SCHNAIER, and JOSEPH COHEN,

Defendants.

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INDEX NO. 652778/2019

MOTION DATE 11/07/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 24, 25, 26

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the plaintiff's moving papers, consisting of the notice of motion for summary judgment in lieu of complaint, affirmation dated May 8, 2019 of Jason, Kim, Esq, the affidavit of plaintiff Tamir Shabat, signed before a notary public on May 6, 2019, the Promissory Note dated July 6, 2018, the Security Agreement dated July 6, 2018, the Demand Letter dated January 22, 2019, the affirmation in reply dated August 26, 2019 of Jason Kim, Esq., the affidavit in reply of Tamir Shabat, signed before a notary public on August 26, 2019, the text message

trail dated July 5, 2018, and Memorandum of Law in reply filed on September 24, 2019, are hereby deemed the complaint in this action and the defendant's answering papers, consisting of the Memorandum of Law in Opposition filed on July 12, 2019, the affidavit of Joseph Schnaier, signed before a notary public on July 12, 2019, and the Wire Transfer record dated July 6, 2019, and Answer dated April 20, 2020 are hereby deemed the answer of defendants Joseph Schnaier and Sylvie Schnaier; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order or proposed competing preliminary conference order to 59nyef@nycourts.gov and NYSCEF on January 28, 2020.

DECISION

Plaintiff Tamir Shabat moves for summary judgment in lieu of complaint on a promissory note in the principal amount of $200,000.00, plus default interest of 16% from August 6, 2018 and attorney's fees, against defendants Joe Schnaier and Sylvie Schnaier. The Schnaier Defendants oppose the motion on the ground of usury.[1]

[1] Defendants' motion for summary judgment (motion sequence no. 002) was withdrawn on consent by order dated January 31, 2020 (NYSCEF Doc. No. 35). To the extent that some of the arguments made in connection with that motion were incorporated into the papers on motion for summary judgment in lieu of complaint, the Court has considered same.

The motion for summary judgment in lieu of complaint shall be denied.

Background

Defendants executed a promissory note dated July 6, 2018 (the Note) (NYSCEF Doc. No. 5) in favor of plaintiff in the amount of $200,000. The Note recited that it was "for value received", and that the face amount was "inclusive of interest." The Note was payable on or before August 6, 2018, with interest of 16% per annum upon default. A contemporaneously executed security agreement referencing the Note reflects that the amount loaned was $150,000, a fact confirmed by a wire transfer from plaintiff on July 6, 2018 (NYSCEF Document No. 15).

Defendants failed to pay the Note when due. By letter dated January 22, 2019, plaintiff's counsel notified defendants that they were in default of both Notes, as well as a forbearance agreement that had apparently been executed the previous November and had called for payment on December 10, 2018. The letter stated that plaintiff was willing to enter into another forbearance agreement extending the time for payment until January 30, 2019, in exchange for consideration of an additional $20,000. After defendants did not enter into the proposed agreement or pay, plaintiff filed this motion.

Discussion

A motion under CPLR 3213 may be defeated by the assertion of the affirmative defense of usury (see Bakhash v Winston, 134 AD3d 468, 469 [1st Dept 2015]). As plaintiff concedes, "[i]f usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law" (Kim Reply Aff. ¶ 36, *quoting* Fareri v Rain's Intl., 187 AD2d 481, 482 [2d Dept 1992]; see Blue Wolf Capital Fund II, L.P. v. Am. Stevedoring Inc., 105 AD3d 178, 183 [1st Dept 2013]). An issue of fact has been raised on the face of the documents before the court that the transaction is usurious. Read together with the Security Agreement, the Note evinces an effective interest rate of 33% per month, or $400% per annum. The discrepancy between the amount advanced and the amount payable is prima facie evidence of usury (see Babinsky v Skidanov, 12 AD3d 271, 271 [1st Dept 2004]; O'Donovan v Galinski, 62 AD3d 769, 769-70 [2d Dept 2009]; Karas v Shur, 189 AD2d 856, 857 [2d Dept 1993]). If proven, such rate is civilly usurious in violation of General Obligations Law § 5-501 and Banking Law § 14-a(1), which forbid a rate of interest that exceeds 16%, and criminally usurious in violation of Penal Law § 190.40, which penalizes a rate exceeding 25% (see Bakhash, 134 AD3d 468, 469).

Counsel for plaintiff argues that an attorney named Joseph Cohen, who represented plaintiff in numerous deals since 2011,

collaborated with defendants to defraud plaintiff, enticing him into providing defendants with a loan, knowing at all times that defendants had no intention of repaying it. Plaintiff asserts, in particular, that he was persuaded to advance the funds to defendants by such attorney Cohen. He claims that attorney Cohen introduced him to defendants socially in March 2018, sending him the following text message on July 5, 2018:

> Hey, I don't want to bother you but I did not realize the dire situation that Joe [Schnaier] got himself, the company and by default me in to as well. He, we have immediate need for 150k for tomorrow to stage off a disaster and protect the case and our investment, including the 90k shares. He is going to liquidate his wife's stock and is willing to pay back 200k for 150 in 30 days. He was even going to Israeli mafia in Brooklyn to get on the street. I know that you said NO but figured I would give it another shot based on the big (sic) he is offering. [Let me know] and if you want to speak call me.[2]

Plaintiff states that he was initially reluctant to make the loan, "but my relationship with Joseph Cohen, his proposed terms, and my desire to assist Defendants finally persuaded me

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[2] The court judicially notices, sua sponte, that the content of the text message is a suggestion to plaintiff that defendants were willing to seek a loan from organized crime figures, and that Cohen thought plaintiff might be enticed by the "big" they were offering - an apparent misspelling of "vig," which is "[a] term used by loan sharks to indicate the rate of interest" (People v Ardito, 86 AD2d 144, 149 [1st Dept 1982]).

to give Defendants the money". He contends that he had the Note and related documents drafted in accordance with Cohen's proposed terms and sent them to Cohen, who then emailed back the signed copies and facilitated the wire transfer. Counsel for plaintiff concludes that plaintiff had no usurious intent, and argues that since defendants initiated the transaction and fashioned its terms, they establish no usurious defense.

However, both issues involve questions of credibility that cannot be determined on motion for summary judgment in lieu of complaint.

An estoppel to assert usury will only be found where the borrower induces the lender's reliance on the legality of the transaction by reason of a fiduciary or confidential relationship between parties and the lender is inexperienced in financial matters (see Seidel v 18 E. 17th St. Owners, Inc., 79 NY2d 735, 743 [1992]; Abramovitz v Kew Realty Equities, 180 AD2d 568, 568 [1st Dept 1992]; Venables v Sagona, 85 AD3d 904, 905 [2d Dept 2011]; Schaaf v Borsher, 82 AD2d 880, 880 [2d Dept 1981]; Angelo v Brenner, 90 AD2d 131, 132 [3d Dept 1982]). The fact that the borrower set the rate of interest is insufficient, standing alone, to defeat a usury defense (Bakhash, 134 AD3d 468, 469; Pemper v Reifer, 264 AD2d 625, 626 [1st Dept. 1999]).

As in Angelo v Brenner, (90 AD2d 131, 133 [3d Dept. 1982]), there are issues of fact whether defendants are estopped from

interposing the defense of usury to prevent defendants from "achiev[ing] a total windfall", which requires a trial before a finder of fact, and cannot be resolved on the papers now before the court.

12/10/2020
DATE

DEBRA A. JAMES, J.S.C.

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