

Zelik v Rubashkin

2022 NY Slip Op 32954(U)

August 29, 2022

Supreme Court, Kings County

Docket Number: Index No. 501618/17

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of August, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X

JOSEPH ZELIK,
Plaintiff,

-against-

YITZCHOK DOVID RUBASHKIN, et al.,
Defendants.
-----X

DECISION AND ORDER

Index No. 501618/17

Mot. Seq. No. 9

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmations (Affidavits), and Exhibits Annexed _____	<u>308-376</u>
Affirmations (Affidavits) in Opposition and Exhibits Annexed _____	<u>381-390</u>
Reply Affirmations (Affidavits) and Exhibits Annexed _____	<u>391-397</u>

In this mortgage-foreclosure action, plaintiff Joseph Zelik (“plaintiff”) moves (in Seq. No. 9) for an order, in effect, pursuant to CPLR 2221 (e) and the decision/order of the Court, dated February 26, 2018 (Vaughan, J.) (the “prior order”), renewing, post-Note of Issue, its earlier pre-discovery motion (in Seq. No. 1) for an order: (1) pursuant to CPLR 3212, granting it summary judgment and dismissing the answer with affirmative defenses of defendant Yitzchok Dovid Rubashkin (“defendant”); and (2) pursuant to RPAPL 1321, appointing a referee to hear and compute the amount due and owing by defendant on his two notes and mortgages – the first set of the notes and mortgages which

is dated April 4, 2013 in the principal amount of \$499,990 (the “first loan”), and the second set of the notes and mortgages which is dated July 30, 2013 in the principal amount of \$250,000 (the “second loan” and, collectively, with the first loan, the “loans”) – and to ascertain and determine whether the mortgaged premises consisting of a one-family residential real property – which is located at 1349 President Street in Brooklyn, New York (the “premises”), and is occupied by defendant’s parents, Moshe and Fayge Rubashkin – can be sold as one parcel. Defendant opposes the motion on, among other grounds (as pleaded in his amended answer), that both loans (and particularly the second loan) were usurious (*i.e.*, that the effective interest rate charged on each loan exceeded the civil usury limit of 16%, thus rendering each such loan void). The motion was fully submitted on April 27, 2022, with the Court reserving decision.

By prior order, Justice Vaughan denied, with leave to renew after completion of discovery, plaintiff’s pre-Note of Issue motion for summary judgment, finding that defendant, at that time, “sufficiently raised a question of fact as to the reasonableness of the fees and whether they should be counted in calculating the effective interest rate of the subject loans” (Prior Order at 9) (NYSCEF Doc. No. 40). In so holding, Justice Vaughan observed that:

“Where, as here, the interest rate stated in the note is already at the legal maximum, the question before the court is whether the amounts deducted from the loan proceeds are reasonable or whether they are unreasonable and therefore constitute additional, disguised interest. *The reasonableness of each fee incurred and of the purpose for which it was incurred are questions of fact.*” (Prior Order at 9) (collecting authorities omitted; emphasis added).

On renewal, plaintiff's instant motion for summary judgment must be similarly denied. Whereas plaintiff has established his prima facie entitlement to judgment as a matter of law by submitting the mortgages/notes evidencing the subject loans, together with evidence of defendant's default (*see Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830 [2d Dept 2015], *lv dismissed* 25 NY3d 1096 [2015]), defendant, in opposition to plaintiff's prima facie showing, has again raised triable issues of fact with respect to defendant's affirmative defense of usury (*see Grodsky v Moore*, 136 AD3d 865, 865 [2d Dept 2016]; *Zanfini v Chandler*, 79 AD3d 1031, 1032 [2d Dept 2010]; *State St. Bank & Tr. Co. v Boayke*, 249 AD2d 535 [2d Dept 1998]; *see also Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895 [2d Dept 2006] ["Whether a transaction constitutes a 'cover for usury' is a question of fact."]). Here, the complex issue of whether each of the subject loans is (or is not) usurious can be judicially determined only at trial (*accord Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 971-972 [2d Dept 2013] [reversing on appeal a bench-trial decision that the loan was non-usurious]). Simply put, the numerous affidavits and the conflicting pretrial testimony do not permit the Court to resolve the issue of usury at the summary judgment stage as a matter of law.

Accordingly, it is

ORDERED that the plaintiff's motion in Seq. No. 9 is *denied in its entirety*; and it is further

ORDERED that defendant's counsel is directed to electronically serve a copy of this decision and order with notice of entry on both sets of plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**