

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D36679
C/hu

_____AD3d_____

Submitted - September 6, 2012

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-02990

DECISION & ORDER

Bernadette Pepin, et al., plaintiffs/counterclaim
defendants-respondents-appellants, v Vina Jani,
defendant/counterclaim plaintiff-appellant-
respondent; BJML, Inc., additional counterclaim
defendant-respondent-appellant.

(Index No. 50015/09)

Vina Jani, Orangeburg, N.Y., defendant/counterclaim plaintiff-appellant-respondent
pro se.

Schwartz & Ponterio, PLLC, New York, N.Y. (Matthew F. Schwartz of counsel), for
plaintiffs/counterclaim defendants-respondents-appellants and additional counterclaim
defendant respondent-appellant.

In an action, inter alia, for a judgment declaring, in effect, that a certain loan agreement is usurious, void, and unenforceable, the defendant/counterclaim plaintiff, Vina Jani, appeals from so much of an order of the Supreme Court, Kings County (Solomon, J.), dated March 24, 2010, as denied the motion of the plaintiffs/counterclaim defendants for summary judgment on the complaint and dismissing the counterclaims insofar as asserted against them without prejudice to renew the motion following the completion of discovery, and the plaintiffs/counterclaim defendants and the additional/counterclaim defendant cross-appeal, as limited by their brief, from so much of the same order as denied the motion of the plaintiffs/counterclaim defendants for summary judgment on the complaint and dismissing the counterclaims asserted by Jani against the plaintiffs/counterclaim defendants.

ORDERED that the appeal by the defendant/counterclaim plaintiff is dismissed,

December 5, 2012

Page 1.

PEPIN v JANI

without costs or disbursements, as the defendant/counterclaim plaintiff is not aggrieved by the portion of the order appealed from; and it is further,

ORDERED that the cross appeal by the additional counterclaim defendant is dismissed, without costs or disbursements, as the additional counterclaim defendant is not aggrieved by the order appealed from; and it is further,

ORDERED that the order is affirmed insofar as cross-appealed from by the plaintiffs/counterclaim defendants, without costs or disbursements.

The appeal by the defendant/counterclaim plaintiff, Vina Jani, from so much of the order as “denied without prejudice” the motion of the plaintiffs/counterclaim defendants (hereinafter collectively the movants) for summary judgment must be dismissed, as she is not aggrieved by that portion of the order (*see* CPLR 5511; *Mortgage Elec. Registration Sys., Inc. v McDuffie*, 33 AD3d 893, 894; *Matter of Roman Catholic Diocese of Rockville Ctr. v Board of Assessors of Inc. Vil. of Old Westbury*, 303 AD2d 515, 515; *Drepaul v Allstate Ins. Co.*, 299 AD2d 391, 392; *Bird v Bird*, 111 AD2d 204, 204-205; *Samuels v Ames Realty Corp.*, 79 AD2d 651, 651). We decline her request, in effect, to search the record and award her summary judgment dismissing the complaint and on her counterclaims.

The Supreme Court properly denied that branch of the movants’ motion which was for summary judgment on the complaint. “A corporation is prohibited from asserting the defense of civil usury” (*Arbuzova v Skalet*, 92 AD3d 816, 816; *see* General Obligations Law § 5-521; *Schneider v Phelps*, 41 NY2d 238, 242; *Tower Funding v Berry Realty*, 302 AD2d 513, 514). “An individual guarantor of a corporate obligation is also precluded from raising such a defense” (*Arbuzova v Skalet*, 92 AD3d at 816; *see Schneider v Phelps*, 41 NY2d at 242; *Tower Funding v Berry Realty*, 302 AD2d at 514). Here, although the interest rate on the subject loan agreement exceeded 16% per annum (*see* General Obligations Law § 5-501[1], [2]; Banking Law § 14-a[1]; *Tower Funding v Berry Realty*, 302 AD2d at 514), the movants failed to establish, prima facie, that the loan was made to the plaintiff Bernadette Pepin individually, and thus failed to establish their prima facie entitlement to judgment as a matter of law on the complaint. Moreover, for the same reason, the Supreme Court also properly denied that branch of the motion which was for summary judgment dismissing the counterclaims asserted by Jani, who allegedly extended the subject loan.

In light of our determination, we need not reach the movants’ remaining contention.

DILLON, J.P., DICKERSON, AUSTIN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court