

Marie Holdings, Inc. v VS Bros., LLC

2011 NY Slip Op 32701(U)

October 12, 2011

Supreme Court, Nassau County

Docket Number: 005198/11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
MARIE HOLDINGS, INC.,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 005198/11
Motion Seq. No: 1
Submission Date: 8/19/11**

-against-

**VS BROTHERS, LLC, PANKAJ BHAGAT and
NICK PETIKAS,**

Defendants.

-----X

The following papers have been read on this motions:

- Notice of Motion, Affirmation in Support, Affidavit and Exhibit.....X**
- Affidavit in Opposition, Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation.....X**
- Supplemental Affirmation in Opposition.....X**

This matter is before the Court for decision on the motion filed by Plaintiff Marie Holdings, Inc. ("Plaintiff") on June 27, 2011 and submitted on August 19, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting Plaintiff Summary Judgment in Lieu of Complaint and directing the entry of judgment for the Plaintiff and against the Defendants in the sum of \$203,132.04.

Defendants oppose Plaintiff's motion.

B. The Parties' History

In his Affidavit in Support, Thomas Gubitosi ("Gubitosi"), the President of Plaintiff

Corporation, affirms that on December 31, 2007, Plaintiff loaned \$175,000 to Defendant VS Brothers LLC (“LLC”), pursuant to a purchase-money mortgage and Balloon Note (“Note”) (Ex. 1 to Gubitosi Aff. in Supp.), which was personally guaranteed by Defendants Pankaj Bhagat (“Bhagat”) and Nick Petikas (“Petikas”). Interest was to accrue on the Note at the rate of 15%, compounded monthly.¹ The Note became due and payable in full on December 30, 2008, and Defendants have allegedly failed to make the required payments pursuant to the Note, and owe Plaintiff the sum of \$203,132.04, including interest. Plaintiff also seeks default interest of 18% pursuant to the Note, as well as costs and expenses including reasonable attorney’s fees.

In opposition, Bhagat affirms that this action arises out of a real estate transaction in which Bhagat and Petikas, through the LLC, intended to purchase a one-family residential dwelling located at 11 Humphrey Drive, Syosset, New York (“Premises”) for investment purposes. Bhagat alleges that the attorney who represented the Defendants in connection with that purchase had a conflict of interest by virtue of his simultaneous representation of Plaintiff. Bhagat also submits, *inter alia*, that the Note is usurious and, therefore, unenforceable in light of the fact that interest at a rate of 15% compounded monthly totals an annualized interest of 16.075%, which exceeds the 16% maximum legal interest rate for loans.

C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to judgment by producing the Note, which is an instrument for the payment of money pursuant to CPLR § 3213, and demonstrating Defendants’ failure to make required payments pursuant to that Note.

Defendants oppose Plaintiff’s motion on the grounds, *inter alia*, that 1) there exist questions of fact, including whether the mortgage at issue was procured in fraud and mistake in fact, and/or is barred by the doctrine of equitable estoppel, that make summary judgment inappropriate; and 2) the terms of the loan at issue were usurious, and therefore unenforceable, given that the repayment terms resulted in an annualized interest rate of 16.075%.

RULING OF THE COURT

A. Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

¹ As discussed *infra*, Defendants take the position that the Note effectively imposes interest in excess of 16% and, therefore, is usurious.

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

B. Usury

A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16%. New York Banking Law § 14-a (1); *Venables v. Sagona*, 85 A.D.3d 904 (2d Dept. 2011), quoting *Abir v. Malky, Inc.*, 59 A.D.3d 646, 649 (2d Dept. 2009) (internal citations omitted). A usurious contract is void and relieves the plaintiff of the obligation to repay principal and interest thereon. *Id.* See General Obligations Law § 5-511; *Seidel v. 18 East 17th Street Owners, Inc.*, 79 NY2d 735, 740 (1992); *Giventer v. Arnow*, 37 N.Y.2d 305 (1975).

Limited Liability Company Law ("LLCL") § 1104(a) provides that no domestic or foreign limited liability company shall interpose the defense of usury in any action. LLCL § 1104(b), however, contains an exception to that rule with respect to an LLC:

the principal asset of which is the ownership of a one or two family dwelling, where it appears either that such limited liability company was formed, or that the controlling interest therein was acquired, within a period of six months prior to the execution by such limited liability company of a bond or note evidencing indebtedness, and a mortgage creating a lien for such indebtedness on such one or two family dwelling.

In addition, with respect to the Note's provisions regarding compound interest, General Obligations Law § 5-527, titled "Enforceability of compound interest," provides as follows at subdivisions 1 and 2:

1. A loan or other agreement providing for compound interest shall be enforceable notwithstanding the date that such loan or other agreement providing for such compound interest shall have been executed; provided, however, that such compound interest shall begin to accrue and become due and payable on the later to occur of (a) June twenty-fourth, nineteen hundred eighty-nine or (b) the date that any obligation to pay such compound interest may have arisen, including, but not limited to, the date of any default or event of default under such loan or other agreement. For purposes of this subdivision, the term "compound interest" shall mean the accruing of interest upon unpaid interest irrespective of whether such unpaid interest is added to the principal debt.

2. The provisions of this section shall not be applicable to any loan or other financing agreement where the original principal debt is in an amount of two hundred fifty thousand dollars or less, or to any loan or other financing agreement secured primarily by a one or two family owner-occupied residence. For purposes of this subdivision the term "residence" shall include a lessee's interest in a proprietary lease granted by a cooperative housing corporation.

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion, based on the conclusion that there exist issues and potential defenses, including usury, making summary judgment inappropriate at this juncture. In light of the fact that the Note provides for an interest rate of 15% compounded monthly, and the fact that the sum of \$203,132.04 which Plaintiff seeks apparently includes \$28,132.04 in interest payments on a \$175,000 loan, Defendants have provided support for their claim that, by characterizing the interest as "compounded monthly," the Note allows Plaintiff to collect interest in excess of the 16% simple interest allowed by law. Moreover, the loan appears to come within the parameters of GOL § 5-527(2) and is arguably unenforceable pursuant to that provision as well.

Accordingly, the Court denies the motion. Furthermore, pursuant to CPLR § 3213, the Court deems the moving and answering papers to be the complaint and answer.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on October 31, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 12, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

OCT 18 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**