

Borowski v Fallerder

2001 NY Slip Op 30085(U)

May 18, 2001

Sup Ct, New York County

Docket Number: 124016/00

Judge: Paula J. Omansky

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY
Justice

PART 47
(OPJ)

Cleora Borowski

INDEX NO. 124016/00

MOTION DATE 3/22/01

MOTION SEQ. NO. 001

MOTION CAL. NO. 1

- v -
A. Falder

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Motion decided in accordance with
accompanying memorandum*

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 5/18/01

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X
CLEORA BOROWSKI

Index No. 124016/00

Plaintiff,

DECISION AND ORDER

-against-

ARNOLD FALLEDER

Defendant.

----- X
PAULA J. OMANSKY, J.:

In this action for failure to pay a promissory note, plaintiff Cleora Borowski moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, against defendant Arnold Fallerder in the sum of \$36,879.83 with interest thereon from January 1, 2000, on the ground that this action is based on promissory notes for the payment of money only.

Defendant cross-moves, pursuant to CPLR 3211(a) (7) ^{to} dismiss the action on that the action is time-barred under CPLR 213 and section 3-122(1) of the Uniform Commercial Code and on the ground that the interest rates charged are usurious and violate sections 5-501 and 5-511(2) of the General Obligations Law.

FACTS

On January 2, 1985, the litigants entered into a loan agreement whereby plaintiff agreed to loan the principal sum of \$15,000 to defendant, president and sole owner of The Fallerder Group, a non-party. Pursuant to the express terms of the loan, defendant agreed to repay \$15,000 by January 3, 1986, together with interest thereon at the rate of 18% per annum on \$10,000 and

interest at the rate of 19% per annum on \$5,000. To secure payment of the loan, defendant pledged his entire interest in his cooperative apartment 7B which is located at 160 West 87th Street in Manhattan.

On January 3, 1986, defendant reaffirmed his obligations under the loan agreement in two separate promissory notes executed by defendant. In the first promissory note, defendant agreed to re-pay plaintiff the principal sum of \$11,800.00, together with interest thereon at 18% per annum. In the second promissory note, defendants agreed to re-pay to plaintiff the principal sum of \$5,950.00 together with interest thereon at 19% per annum. Neither of these notes extend the re-payment date which was still listed as January 3, 1986.

Plaintiff alleges that from March 1986 to June 1999, defendant made 38 payments in amounts ranging from \$500 to \$1,000 per payment. These payments were made by defendant against his personal checking account or on checks drawn on his business account. Some payments were even made in cash which defendant tendered to an intermediary, Wayne Caputo, who would issue a receipt to defendant and forward the payment on a check drawn against Mr. Caputo's own account. Defendant's last used his own personal check to pay an installment on May 5, 1992. This payment totaled \$1,000. Plaintiff commenced this action in November 2000.

DISCUSSION

Statute of Limitations

Section 3-122 of Uniform Commercial Code provides that a cause

of action against the maker of a demand note accrues on the date of the note or, if no date is stated, on the date of issue (Skaneateles Sav. Bank v Modi Assocs., 239 AD2d 40, 42 [4th Dept], lv denied 92 NY2d 803 [1998], citing UCC 3-122[1][b]). However, article 3 of the Uniform Commercial Code does not contain any Statute of Limitations governing suits on commercial paper (Skaneateles Sav. Bank v Modi Assocs., supra). Therefore, the non-Code Statute of Limitations applicable to suits on written instruments applies (ibid.). CPLR 213(4) provides a six-year period in which to commence an action based upon a note.

Although defendant correctly notes that the initial obligation became due and owing on January 3, 1986, this action is not time-barred. Under appropriate circumstances, a partial payment has the effect of renewing the Statute of Limitations (Skaneateles Sav. Bank v Modi Assocs., supra, 239 AD2d, at 42; citing Chemical Financial Servs. Corp. v Zagaro, 173 Misc2d 745, 747 [Sup Ct, Kings County 1997] citing Lew Morris Demolition Co., Inc. v Board of Education of the City of New York., 40 NY2d 516, 521 [1976] [remaining citations omitted]). Since defendant made continuous payments from March 1986 to June 1999, a promise may be inferred that defendant would pay the balance of the note (Skaneateles Sav. Bank v Modi Assocs., supra; Chemical Financial Servs. Corp. v Zagaro, supra, 173 Misc2d, at 747; see, generally, Phoenix Acquisition Corp. v Campcore, Inc., 81 NY2d 138, 143 [1993]). Since defendant does not deny that the June 1999 check, which was made to Mr. Caputo, was intended to cover his loans with plaintiff, this court finds that

the part-payments of the total debt tolled the Statute of Limitations so that it did not begin to run until the last acknowledged payment, which occurred in June 1999 (Skaneateles Sav. Bank v Modi Assocs., supra; Chemical Financial Servs. Corp. v Zagaro, supra, 173 Misc2d, at 748). Since this action was commenced in November, 2000 --well within the six-year time period-- this matter was timely commenced and that branch of defendant's motion to dismiss is denied.

Usury

Pursuant to section 5-501 of the General Obligations Law a loan is deemed usurious if it exceeds an interest rate of 16% per annum (Tri-Land Props., Inc. v 115 West 28th Street Corp., 260 AD2d 295, 296 [1st Dept 1999]; Webar, Inc. v Capra, 212 AD2d 594, 595 [2d Dept 1995]; Brown v Blu, 1999 WL 1042904 [Sup Ct, NY County 1999]; Banking Law § 14-a). Moreover, section 5-511(2) of the General Obligations Law specifically provides that any note that recites a usurious rate of interest shall be void and the borrower is relieved of all further obligations to pay both principal and interest (Pemper v Reifer, 264 AD2d 625, 625 [1st Dept 1999] citing Seidel v 18 East 17th Street Owners, 79 NY2d 735, 740 [1992]). In such instances, the court shall enjoin prosecution and order the note to be surrendered and cancelled (Seidel v 18 East 17th Street Owners, supra, citing GOL § 5-511[2]; Brown v Blu, supra).

However, public policy in New York is more lenient towards higher interest rates in commercial loans on the grounds that businesses should be able to secure financing at the market rate

(Schneider v Phelps, 41 NY2d 238, 243 [1977]). In fact, section 5-521(1) of the General Obligations Law specifically provides that a corporation is prohibited from asserting the defense of usury (Seidel v 18 East 17th Street Owners, supra, 79 NY2d at 740-741; Webar, Inc. v Capra, supra, 212 AD2d, at 595, citing Schneider v Phelps, supra). New York also holds that the individual guarantors of a corporate obligation are precluded from asserting the defense of usury (Schneider v Phelps, supra at 242; Webar, Inc. v Capra, supra, citing General Phoenix Corp. v Cabot, 300 NY 87, 95 [1949]).

In this situation, defendant borrower signed a note which clearly stated that he was the president and sole owner of a corporate entity. Defendant does not explain why it was necessary to identify his corporate relationship if the loan was purely personal in nature. In particular, defendant does not even state in his opposition that the loan was granted to him solely in his capacity as a private individual for a personal purpose or that he qualifies for the exception in section 5-521(2) of the General Obligations Law which permits corporations, in which the sole asset is a one-or two-family home, to raise the defense of usury under certain circumstances (North Broadway Funding Corp. v Freed, 45 AD2d 759 [2d Dept 1974]). Therefore, defendant does not raise an issue of fact concerning the nature of the underlying loan and this court finds no grounds to order a hearing on this issue. Since defendant has failed to support his usury defense, his cross motion is denied. In turn, plaintiff's motion for summary judgment in lieu of complaint is granted.

Accordingly, it is

ORDERED that defendant's cross motion to dismiss is denied; and it is further

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$36,879.83, together with interest as allowed by law from January 1, 2000 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

DATED: May 18, 2001

ENTER:



PAULA J. OMSKY
J.S.C.