

**Schwartz v New Amsterdam Capital Partners**

2006 NY Slip Op 30099(U)

July 18, 2006

Supreme Court, New York County

Docket Number: 0060123/2006

Judge: Karen S. Smith

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

PRESENT: **KAREN SMITH**  
J.S.C.

PART 44

Index Number : 601238/2006

SCHWARTZ, BRADLEY

vs

NEW AMSTERDAM CAPITAL PARTNERS

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE 05/25/06  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to ~~for~~ dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is is decided in accordance with the attached memorandum decision and order.

**FILED**  
AUG 02 2006  
NEW YORK  
COUNTY CLERKS OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/18/06

KSS  
**KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 44

-----X  
BRADLEY SCHWARTZ,

Plaintiff,

-against-

Index no.: 601238/2006  
Motion seq.: 001  
Motion date: 05/25/2006

**DECISION AND ORDER**

NEW AMSTERDAM CAPITAL PARTNERS,

Defendant.

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

**FILED**  
AUG 02 2006  
NEW YORK  
CLERK'S OFFICE

Defendant's motion to dismiss the complaint and for summary judgment is denied with leave to re-submit, on the issue of jurisdiction, upon proper papers.

Plaintiff, Bradley Schwartz (hereafter referred to as "Schwartz), brought the instant action seeking to void a contract and vacate and set aside a confession of judgment and promissory note Schwartz had executed in favor of the defendant, New Amsterdam Capital Partners, Inc. (hereafter referred to as "NACP"). Schwartz contends that the contract between the parties is a void, usurious loan agreement and that the note and confession of judgment are; 1) derived from the usurious loan agreement and 2) the products of coercion and duress. Therefore, Schwartz alleges that all of the documents are void and unenforceable.

Prior to answering the complaint, NACP moves, as set forth in its Notice of Motion, for; "An order dismissing plaintiff's Summons and Complaint and/or granting defendant Summary Judgment...". Neither NACP's notice of motion, its supporting affidavit nor its memorandum of

law set forth the sections of the CPLR upon which it relies as the basis for its motion.

In so far as NACP's motion seeks summary judgment, the motion is denied. CPLR § 3212(a) specifically provides that a motion for summary judgment may be made; "...after issue has been joined...". There is no dispute that NACP has not yet answered the complaint in this matter. Thus, this branch of NACP's motion is premature.

The affidavit in support of NACP's motion and its memorandum of law argue for dismissal of the complaint based upon what would be grounds under CPLR §3211(a)(1) (documentary evidence), CPLR §3211(a)(5) (the commencement of this action more than one year after the entry of the confession of judgment), and CPLR §3211(a)(8) (improper service causing a lack of personal jurisdiction over the defendant).

A motion to dismiss pursuant to CPLR § 3211 addresses the face of the complaint. The standard for the disposition of such a motion is; "[t]he motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'. In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference" (*511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002], internal citations omitted). However, "...the rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom ... does not apply to allegations... consisting of ... factual claims either inherently incredible or flatly contradicted by documentary evidence" (*Mobil Oil Corporation v Joshi et al*, 202 AD2d 318,319 [1<sup>st</sup> Dept, 1994], internal citations omitted).

In the instant matter, plaintiff's complaint states a viable cause of action and the factual allegations asserted therein are not inherently incredible. As exhibits to its motion papers, NACP offers the contract between itself and Schwartz as well as a confession of judgment and promissory note signed by Schwartz. NACP contends that these documents conclusively establish that Schwartz's claim must fail.

However, the contract documents do not flatly contradict the allegations of Schwartz's complaint. The contract provides for the payment by NACP to Schwartz of the sum of \$50,000.00 which purports to be an "investment" in the proceeds of certain litigation. The contract also provides for the repayment of the sum advanced together with "interest" at the rate of 12.5 % per month. The repayment of the funds is conditioned upon Schwartz's prevailing in the litigated matters named in the contract. Reasonable persons could construe the language of the contract as a carefully worded attempt to avoid the consequences of a usurious loan transaction. Thus, the contract language does not flatly contradict the allegations of Schwartz's complaint.

NACP's contention that it may charge and receive interest in excess of legal rates because it is exposed to a risk that the funds will not be repaid is misplaced. NACP's position only has merit; "...in the absence of a showing that the risk assumed was so unsubstantial as to bear no reasonable relation to the amount charged." (72 NY Jur Interest and Usury § 83 [West Group, 2006]).

The issues of whether charging interest at the rate of 150% per annum bears some reasonable relation to the risk involved in this matter and, if the underlying transaction is determined to be usurious, whether the subsequent execution of the confession of judgment and

promissory note purges the transaction of the taint of usury cannot be resolved on the basis of “the four corners” of the pleadings and a review of the documents before the court without reference to information which is both; 1) extrinsic to the documents and pleadings and 2) not currently before the court. Therefore, these issues are not appropriate for resolution on this motion to dismiss the complaint and this branch of NACP’s motion must be denied.

NACP’s attempt to rely upon a one year statute of limitations is also misplaced. The one year time period (set forth in CPLR §5015[a][1]) only applies to circumstances where the basis for seeking relief from the judgment is “excusable default”. That is not the situation currently before this court. Schwartz’s contention is that the confession of judgment herein was obtained by coercion and duress and derived as the product of the original usurious loan agreement between the parties. Therefore, the court retains its inherent power to vacate the judgment in its discretion without regard to the time limitation (See 1 New York Civil Practice: CPLR P5015.06 Weinstein, Korn & Miller, Matthew Bender & Company, Inc. 2006) and, in the exercise of its discretion, the court denies this branch of NACP’s motion.

Finally, NACP asserts that the complaint herein was not properly served upon it but, was instead, delivered only to its attorney. However, Schwartz has filed an affidavit of service indicating the summons and complaint were served upon the Secretary of State on June 6, 2006. Said affidavit was filed in the clerk’s office on June 7, 2006. Although the filing of said affidavit occurred after the initial filing of the instant motion, it was well within the 120 day time-period provided by CPLR § 306-b. The filing of this affidavit renders this branch of NACP’s current motion moot. However, since NACP has not yet had the opportunity to do so, it is granted leave to submit a proper and timely application challenge to the affidavit of service. Accordingly, it is;

ORDERED: that NACP's motion for a summary judgment or, in the alternative, to dismiss the complaint herein, is denied with leave to submit a proper and timely application to challenge the facts set forth in the affidavit of service in this matter dated June 6, 2006 and it is;

FURTHER ORDERED: that NACPP shall have ten (10) days from the service upon it of a copy of this order, together with notice of entry hereof, within which to serve its answer to the complaint herein, and it is;

FURTHER ORDERED: that, at the preliminary conference, already scheduled for August 30, 2006 in this matter, counsel for both parties shall be familiar with the file and prepared to discuss possibilities for settling this case,

The foregoing constitutes the decision and order of this court.

Dated: July 18, 2006

ENTER:



Hon. Karen S. Smith, J.S.C.

**FILED**  
AUG 02 2006  
NEW YORK  
COUNTY CLERK'S OFFICE