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

PRESENT: SOLOMON PART 55
Justice

WEISS, STEVE

- v -

SCREEN ARTS CORP.

INDEX NO. 600304/2007
MOTION DATE 8-1-2007
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 3 |
| Answering Affidavits — Exhibits | 4 - 7 |
| Replying Affidavits | 8 - 13 |

Cross-Motion: ☑ Yes ☐ No

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

N.B. Preliminary conference scheduled in Part 55 for Monday, October 29, 2007 at 12:00 noon.

FILED
OCT 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/5/07

J.S.C.
HON. E. SOLOMON

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
----------X

STEVE WEISS and PHYLLIS M. SHAPIRO,

Plaintiffs,

INDEX NO. 600304/2007

-against-

SCREEN ARTS CORPORATION d/b/a, SCREEN ARTS CORP and NORMAN A. ADIE

DECISION and ORDER

Defendants.



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JANE S. SOLOMON, J.

Plaintiffs Steve Weiss ("Weiss") and Phyllis M. Shapiro ("Shapiro") move for summary judgment on their claims to recover money loaned to defendants, and to dismiss the affirmative defenses. Defendants Screen Arts Corporation d/b/a Screen Arts Corp. ("SAC") and its president Norman A. Adie ("Adie") (collectively, "Defendants") cross-move for summary judgment. For the reasons discussed herein, Plaintiffs' motion is granted in part, and the cross-motion is denied.

The Complaint contains six causes of action. The first and third are founded on an agreement between Weiss and Defendants (the "Weiss Compromise Agreement"), which Plaintiffs contend was breached when Defendants failed to make the seventh payment due thereunder on October 20, 2003, leaving $293,500

unpaid. The second and fourth causes of action relate to a similar agreement between Shapiro and Defendants (the "Shapiro Compromise Agreement"), which Plaintiffs contend also was breached on October 20, 2003, leaving $218,500 remaining unpaid.

Both the Weiss and Shapiro Compromise Agreements were entered into on or about September 15, 2003, and under both agreements Defendants acknowledged prior debts to Plaintiffs, promised that the Compromise Agreements "supercede and render null and void all prior notes and/or agreements to repay monies invested between the parties involved," and created a repayment schedule. The Complaint's fifth cause of action, by Weiss for $300,000 in principal and almost $455,000 in interest, and the sixth by Shapiro for $200,000 in principal and $236,560 in interest, allege that, if the Compromise Agreements are unenforceable, the Defendants should be liable on letter agreements which were cancelled when the parties entered into the Compromise Agreements.

The letter agreements referred to in the fifth and sixth causes of action are in pairs, dated between February 24, 2000 and June 21, 2002. The six pairs relied on by Weiss reflect, on their face, an aggregate "investment" of $1.1 million; the five pairs with Shapiro, on their face, reflect an aggregate investment of $900,000. However, all parties agree that the

funds provided by Plaintiffs were loans in the principal amount of half these amounts, and that each pair of letters relates to one loan with two rates of interest.

For example, on February 4, 2000, there are two letter agreements between Weiss and Defendants for an "investment" of $50,000. The first, to Weiss as "S. Weiss CPA", calls for payments of interest only at an 18% annual rate in "MEZUMIN" (Yiddish for "cash"). The second, to Weiss as "Steve Weiss", calls for payments at a 7% annual rate of interest and a final balloon payment of the principal and outstanding interest. Weiss argues that Adie's accountant Karl Schwarzmer ("Schwarzmer") approached him and created the dual note scheme with the bifurcated rate of interest. Defendants contend first that Weiss designed the scheme to avoid taxes and by-pass usury laws, and that they were forced to pay him yet an additional 7% in cash for introducing Shapiro, creating an effective interest rate of 32%.

The other five pairs of letter agreements with Weiss for various amounts have nearly identical terms. The five pairs of letter agreements with Shapiro have a similar scheme, with one letter of each pair requiring payment at a 12% annual rate, and the other at 6% annually. Following Defendants' default on these letter agreements, the parties entered into the Weiss and Shapiro Compromise Agreements.

Plaintiffs commenced this action on or around January 30, 2007. Defendants' answered and raised six affirmative defenses.

In opposing Plaintiffs' motion and in support of their own, Defendants submit a copy of a document dated February 22, 2005 bearing signatures of Weiss and Adie ("February 2005 Document") that appears to be a receipt for $325,000, with two additional sentences: First, "In Cash [mezumin] in full satisfaction of the principal monies owed on the notes between Steve Weiss and Phyllis M. Shapiro and Norman Adie and Screen Arts Corp."(Underscore in original); and second, "The Sum of Fifty Thousand Dollars ($50,000) will be paid as full satisfaction of any and all interest owed on the above notes within thirty-six (326) months of the above date, February 22, 2005." Weiss denies this document; he contends it is a forgery and that Defendants "lifted" his signature from another document. Plaintiffs further affirm that they did not receive any of the $325,000 allegedly paid, and point out that Defendants submit no evidence of payment.

## Discussion

**Summary Judgment**

As further explained below, questions of fact exist regarding the amounts repaid, whether the interest rates on the

loans were usurious, and which party initiated the terms of the letter agreements, so that summary judgment must be denied to both sides.

**Defendants' Affirmative Defenses**

Defendants' first affirmative defense is that the Complaint fails to state a cause of action. The First Department has held that such a defense "is mere surplusage which serves no purpose in an answer, belonging more properly in a motion to dismiss under CPLR 3211(a)(7)." Tache-Haddad Enters. v. Melohn, 224 A.D.2d 213, 214 (1st Dep't 1996). Moreover, the Complaint does state a claim, and the first defense is struck.

Defendants' second affirmative defense alleges waiver, estoppel and unclean hands. While Plaintiffs do not provide any authority to support their argument that this defense must meet the particularity pleading requirements of CPLR §§ 3013 and 3016, Defendants nevertheless provide no basis for these defenses in their opposition, and the defense is struck.

Defendants' third affirmative defense is that payment has been made. Defendants reliance on the February 2005 Document requires denial of the motion to strike this defense.

Defendants' fourth and fifth affirmative defenses are that the agreements are barred by the statute of frauds and statute of limitations, respectively. Because Plaintiffs are suing on written agreements that they allege were breached

slightly more than three years before the lawsuit was commenced, and CPLR § 213 provides for a six year statute of limitations, these defenses are without merit and are struck.

Defendants' final affirmative defense is that the interest rates on the underlying loans were usurious, making all of the agreements invalid and unenforceable. Although the Weiss and Shapiro Compromise Agreements do not, on their face, provide for interest, if the underlying notes were usurious, and the new payment schedules in the Compromise Agreements reflect the illegal interest, then the Compromise Agreements lacked consideration and also would be unenforceable.

Defendants correctly argue that Adie, as an individual borrower and not a guarantor of a loan to a corporation, may assert the defense of usury for loans with an annual interest rate greater than 16%. *See* Astra Pictures, Inc. v. Schapiro, 182 Misc. 19 (App. Term, NY County, 1944); General Obligations Law § 5-501; Banking Law § 14-a. With regard to SAC, although General Obligations Law § 5-521(1) ordinarily bars a corporation from asserting a usury defense, a corporation may assert the defense of criminal usury where interest exceeding 25% per annum is knowingly charged. General Obligations Law § 5-521(3); Penal Law § 190.40; Tower Funding, Ltd. v. David Berry Realty, Inc., 302 A.D.2d 513 (2nd Dep't 2003).

On their face, each pair of letter agreements with Weiss have a combined interest rate of 25%; each pair with Shapiro have a combined interest rate of 18%. The only argument Defendants present that these interest rates would violate the criminal usury statute is an allegation that they had to pay Weiss in cash a 7% commission for bringing Shapiro into the transaction in addition to the interest rate already charged on their loans. The Fourth Department has held that fees charged for loans which are in addition to the interest rate called for in the note may cause the loan to violate the criminal usury statute. *See* A.S.A.P. Funding Corp. v. Fariello, 164 A.D.2d 973 (4th Dep't 1990). It is not clear that a fee paid for introducing another lender to a transaction would cause the loans to Weiss to exceed the 25% threshold, but this Court declines to rule on the issue at this time.

Moreover, Plaintiffs correctly point out that, where an interest rate would otherwise be usurious, if Defendants, through their own conduct, induced Plaintiffs to loan money at a higher than permitted rate, they would be estopped from asserting the defense, voiding the transaction and achieving a windfall. *See* Seidel v. 18 East 17th St. Owners, Inc., 79 N.Y.2d 735 (1992). Among the factual disputes is which of Weiss or

Schwarzmer initiated the bifurcated loan scheme, so the motion to strike the sixth affirmative defense is denied.

Accordingly, it hereby is

ORDERED that Plaintiffs' motion is granted to the extent of striking Defendants' first affirmative defense (failure to state a claim), second affirmative defense (waiver, estoppel and unclean hands), fourth affirmative defense (the statute of frauds) and fifth affirmative defense (the statute of limitations), and otherwise is denied; and it further is;

ORDERED that Defendants' cross-motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear at a preliminary conference in Part 55 on Monday, October 29, 2007 at 12:00 noon.

Dated: October 5, 2007 ENTER:

J.S.C.

JANE S. SOLOMON