

Clever Ideas, Inc. v 999 Rest. Corp.

2007 NY Slip Op 33496(U)

October 12, 2007

Supreme Court, New York County

Docket Number: 0602302/2006

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____

PART _____

Justice

Index Number : 602302/2006

CLEVER IDEAS

vs

999 RESTAURANT

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE: _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

THIS CASE IS UNRESOLVEDLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

OCT 26 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: _____

10/12/07

HON. CHARLES E. RAMOS 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:COMMERCIAL DIVISION

-----X
CLEVER IDEAS,

Plaintiff,

Index No. 602302/06

-against-

999 RESTAURANT CORP., d/b/a NELLO
RISTORANTE NELLO BALAN, BNP DISTRIBUTING
CO., INC., DAIRYLAND USA CORP., REWARDS
NETWORK ESTABLISHMENT SERVICES INC.,
f/k/a IDINE RESTAURANT GROUP INC., IGT
SERVICES INC., INTERNAL REVENUE SERVICE,
NEW YORK CITY DEPT. OF FINANCE, NEW YORK
STATE TAX COMMISSION and SWEDE FARMS, INC.

Defendants.

-----X

FILED
OCT 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

Plaintiff, Clever Ideas, Inc., ("CI") moves pursuant to CPLR 3211 (a) (1), (5), (7) and (b) dismissing the counterclaim and affirmative defenses of defendants, 999 Restaurant Corp. d/b/a Nello Ristorante ("Nello") and Nello Balan ("Balan" or "Guarantor"). Defendants cross-move, pursuant to CPLR 3212, for summary judgment.

CI is an Illinois corporation that offers "advanced meal sales" agreements (the "Agreements") to restaurants. Balan owns and operates a restaurant called Nello.

In October of 2004, CI and Nello entered into the first agreement whereby Nello was advanced \$22,000. In return, Nello was required to repay CI \$44,000 through Diner's Club credit card purchases made at Nello. When such purchases were made, the funds were forwarded through credit card processing machines to CI and deducted from Nello's outstanding balance. In July of 2005, the parties entered into a second agreement whereby Nello

was advanced \$213,000 and required, by the same method, to repay CI \$319,000. CI required that Balan personally guarantee the Agreements, as well as subjecting the inventory, accounts receivable, equipment and furnishings of Nello to a security interest through a Uniform Commercial Code ("UCC") filing.

In April of 2006, Nello, in breach of the Agreements, changed credit card processors effectively refusing to remit further payments. A balance of \$134,175.94 remains. CI thereafter initiated this action to take possession of the items subject to the security interest, and for damages in the amount of the remaining debt plus interest and attorneys' fees. Nello and Balan contend that the Agreements were loans imposing an interest rate of approximately 36% and thus in violation of applicable civil and criminal usury laws. CI, among other things, contends that the monies were an advance and therefore not subject to such laws.

Choice of Law

The Agreements provide that disputes are to be resolved in accordance with Illinois law, a state with no usury statutes, criminal or otherwise. Defendant argues that the choice of law provision shall not be given effect. This Court agrees.

Where the parties have agreed on the law that will govern their contract, it is the policy of the New York courts to enforce that choice of law, provided that (a) the law of the state selected has a "reasonable relationship" to the agreement and (b) the law chosen does not violate a fundamental public

policy of New York. *Finucane v Interior Constr. Corp.*, 264 AD2d 618 (1999). Such a violation must amount to more than "a mere difference between the foreign rule and our own," and must violate fundamental principles of justice. *Boss v Am. Exp. Fin. Advisors*, 15 AD3d 306, 308 (1st Dept 2005), *affd* 6 NY3d 242 (2006). Thus, "there is some question whether, in the absence of a reasonable basis for choosing the law of the jurisdiction designated by the parties, their choice of law will be honored." *Freedman v Chem. Const. Corp.*, 43 NY2d 260, 265 (1977).

As to the reasonable relationship in this case, it is clear that the Agreements have little to do with Illinois and much to do with New York. Although CI is an Illinois corporation, the Agreements were signed in New York, Nello is a New York corporation, Guarantor is a New York resident, and CI has initiated this action in a New York court. Thus, all objective criteria point to the conclusion that New York, and not Illinois, bears the most reasonable relationship to the Agreements. See *North Am. Bank v Schulman*, 123 Misc 2d 516 (Westchester County, 1984) (provision of loan agreement designating law of Israel as applicable law not enforceable where agreement signed in New York, borrower was New York resident, and action brought in New York); *Am. Equities Group, Inc. v Ahava Dairy Prods. Corp.*, 2004 US Dist. LEXIS 6970 (SDNY 2004) (provision in contract designated law of New Jersey to be applied but was not enforceable because it was negotiated in New York, signed by defendant in New York, all performance there-under was in New York).

As to the public policy considerations, usury laws are a declaration of this State's public policy. The First Department has characterized usury as a question of supervening public policy. See *Guerin v New York Life Ins. Co.*, 271 AD 110 (1st Dept 1946). The Court of Appeals has stated in *Schneider v Phelps* [41 NY2d 238, 243 (1977)], "[the] purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation." Further, it has been reasoned from these cases that "the policy underlying our State's usury laws is in fact of a fundamental nature." *North American Bank, Ltd. v Schulman*, 123 Misc 2d 520, *supra*. This Court concurs. New York law applies.

Motion to Dismiss Usury Defense

Under New York's civil usury statute, "[n]o corporation shall hereafter interpose the defense of usury in any action." General Obligations Law ("GOL") 5-521(1). However, GOL 5-521(3) provides that:

"subdivision one of this section shall not apply to any action in which a corporation interposes a defense of criminal usury as described in section 190.40 of the penal law."

Thus where, as here, a corporation alleges both civil and criminal usury, the affirmative defense of usury is available.

Penal Law 190.40 states that:

"a person is guilty of criminal usury when . . . he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum"

The Second Circuit Court of Appeals, in affirming the lower

courts, which both held a usurious contract unenforceable, relied on both New York State criminal and civil usury statutes, stating in part:

"...a transaction that violates New York's criminal usury statute is void *ab initio*, either by virtue of 5-511 of New York's General Obligations Law or by reason of public policy." *In re Venture Mortgage Fund, L.P.*, 282 F3rd 185 (2d Cir 2003).

In order that the usury defense be applicable, the allegedly usurious transaction must be shown to be a loan or a forbearance of money. See *Rubenstein v Small*, 273 AD 102 (1st Dept 1947). For a transaction to constitute a loan, "it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." *Id* at 104.

The transactions at issue here are clearly payable absolutely, and thus loans. Beyond the superficial hazard associated with a New York restaurant's relatively meager chance of success, CI backed up the risk with the Balan's personal guarantee and a security interest in Nello's property. Moreover, any default of the Agreements (including the restaurant's closing or bankruptcy) would trigger payment¹. Hence, there are no reasonable means of non-payment, and accordingly no risk of non-payment. Consequently, the usury defense is available to

¹ The first agreement contained a cancellation clause allowing Nello to terminate the contract at any time (by breach or otherwise) and repay 70% of the outstanding balance to CI. However, the second, more sizeable loan, did not contain such a clause. In the second agreement, any default or breach would trigger full payment on the balance owed.

defendants and will not be dismissed.

Plaintiff relies heavily on *Transmedia Restaurant Co., Inc. v 33 E. 61st Street Restaurant Corp.*, 184 Misc 2d 706, 710 (Sup Ct, NY County 2000), wherein the court found a similar "advance meal sales" transaction to be an advance and not a loan. However, the *Transmedia* case is easily distinguishable from this case due to the absence of a personal guarantee and security interest, the presence of which ensure payment and reduce the necessary risk.

Summary Judgment

Defendants' seek to dismiss the complaint arguing that usury laws bar plaintiff's action.

In order to grant summary judgment, the court must determine whether a material and triable issue of fact exists. See *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact that requires a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

This motion is premature. At this early stage of litigation, defendants seek summary judgment on their affirmative

defense of usury. This Court is constrained, at this time, to grant such a motion. Due to the absence of an interest rate and a repayment period, the Court finds the intent of the parties at issue. Therefore, further discovery is required to delve further into the parties' intent. See *Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191 (1st Dept 1995) (when the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment). Consequently, defendants' motion for summary judgment is denied without prejudice.

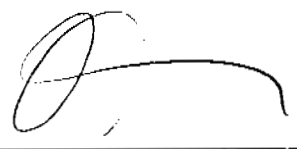
Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' affirmative defense of usury is hereby denied; and it is further

ORDERED that the defendants' motion for summary judgment is hereby denied.

Dated: October 17, 2007

FILED
 OCT 26 2007
 NEW YORK
 COUNTY CLERK'S OFFICE



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.