

Solomon v Langer

2008 NY Slip Op 31651(U)

June 11, 2008

Supreme Court, New York County

Docket Number: 0113701/2007

Judge: Joan Madden

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

PRESENT: Hon Joan A. Madden
Justice

PART 11

Judith Solomon

INDEX NO. 113701/07

MOTION DATE 2-28-08

- v -

MOTION SEQ. NO. 001

Andrew Langer

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for Summary Judgment in lieu of complaint.

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 is decided in accordance with the attached Memorandum Decision + Order.

FILED 7

JUN 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 11, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----x

JUDITH SOLOMON,

Plaintiff,

- against -

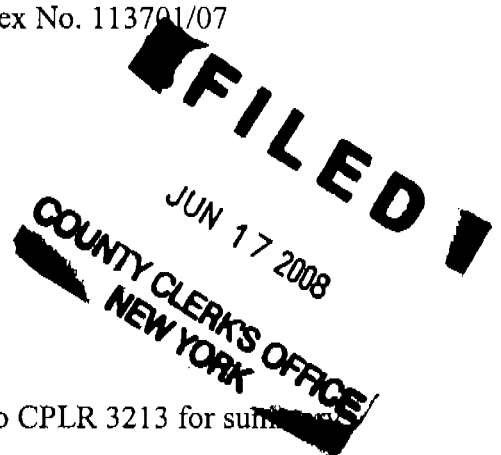
ANDREW LANGER,

Defendant.

-----x

JOAN A. MADDEN, J.:

Index No. 113701/07



Plaintiff Judith Solomon ("Solomon") moves pursuant to CPLR 3213 for summary judgment in lieu of complaint. Defendant Andrew Langer ("Langer") opposes the motion, which is granted for the reasons set forth below.

Background

This is an action to recover moneys due and owing under a promissory note. On February 14, 2006, Langer, as borrower, executed a promissory note, under which Langer agreed to pay Solomon, as the lender, \$200,000 in full at a rate of 10% per annum within six months from the execution date (hereafter "the Note"). The default interest rate under the Note is 18%. Under the terms of the Note, the \$200,000 was delivered to Langer in two \$100,000 installments with the first payment made on February 14, 2006, and the second on March 12, 2006.

In her affidavit, Solomon states that Langer has defaulted in his payment under the Note, and that principal balance of \$200,000 is due and owing, together with interest at the rate of 10% per annum from March 12, 2006, and attorneys' fees in the sum of \$3,750. Solomon further states that all necessary steps to declare the default have been taken to demand the repayment of the sum due, but that Langer has refused to make such a payment. On October 27, 2007, Solomon made this motion for summary judgment in lieu of complaint. In addition to her affidavit in support of the motion, Solomon submits the Note.

In opposition, Langer states in his affidavit that he repaid \$78,000 to Solomon's mother who was the person that caused the loan to be made, and that Solomon's mother did not intend for him to repay the balance of the loan. Langer also contends that the default interest rate of 18% indicated on the Note is usurious and should result in the forfeiture of the principal and interest due under the Note.

In reply, Solomon argues that her affidavit and supporting documentary evidence establish that Langer borrowed the money from her and promised to repay her. Therefore, Solomon asserts that any purported oral transactions between her mother and Langer do not provide a defense to payment under the Note since parol evidence is inadmissible to contradict the terms of the Note. Solomon next asserts that although an interest rate of 18% would be usurious, she is only seeking the interest at the rate of 10%.

Discussion

CPLR 3213 provides that, "[w]hen 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." Here, there is no dispute that the Note constitutes an instrument for payment of money only for the purposes of CPLR 3213. Moreover, Solomon has established a prima facie entitlement to judgment as a matter of law by submitting the Note executed by Langer and by demonstrating through her affidavit that Langer has failed to pay the full amount under the Note despite her demand for payment. See Israel Discount Bank of New York v 500 Fifth Ave. Associates, 167 AD2d 203 (1st Dept 1990); Gateway State Bank v Shangri-La Private Club for Women, Inc., 113 AD2d 791 (2d Dept 1985), aff'd 67 NY2d 627 (1986). Accordingly, the burden shifts to Langer to demonstrate, by admissible evidence, the existence of a triable issue of fact. Id.

As set forth below, Langer has not met this burden. Contrary to Langer's argument, his purported oral agreement with Solomon's mother is not a defense. The parol evidence rule bars the consideration of this purported oral agreement as the Note unambiguously indicates that it

was an unconditional promise to pay, and that debt was personally owed by Langer to Solomon. See Manufacturers Hanover Trust Co. v. Margolis, 115 AD2d 406 (1st Dept 1985)(holding that parole evidence could not be used to avoid borrower's obligation on unconditional promise to pay under promissory note); Gross v Frucheter, 230 AD2d (2d Dept 1996) (parole evidence rule barred evidence of purported oral agreement that defendant would repay promissory note when his financial condition improved).

Furthermore, Langer's claim of usury is without merit. A default interest rate is not usurious. See Klapper v Integrated Agricultural Management Co., Inc., 149 AD2d 765 (3d Dept 1989), citing Flynn v Dick, 13 AD2d 756 (1st Dept 1961)("The defense of usury does not apply where the terms of a promissory note impose a rate of interest in excess of the statutory maximum only after maturity of the note."); Hicki v Choice Capital Corp., 264 AD2d 710 (2d Dept 1999)(holding that the defense of usury does not apply where rate of interest in excess of statutory maximum is imposed after default). In any event, plaintiff is seeking 10% interest, and not the default rate of 18% interest.

Finally, while the Note provides for the recovery of attorneys' fees in the amount of \$3,750, Solomon must prove the reasonableness of the amount sought at a fee assessment hearing as directed below. See National Bank of North America v Arthur R. Smith Mechanical Corp., 74 AD2d 600, 600 (2d Dept)(award of attorneys fees against guarantors had to be based on reasonableness of legal services rendered).

Conclusion

In view of the above, it is

ORDERED that the motion of summary judgment in lieu of complaint is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Judith Solomon and against defendant Andrew Langer in the amount of \$200,000, together with the interest at the rate of 10% per annum from the date of March 12, 2006, until the date of entry judgment, as calculated by the Clerk, and thereafter at the statutory rate; and it is further

ORDERED that the claim for attorneys' fees is severed for an assessment to determine the reasonable amount of attorneys' fees; and it is further

ORDERED that on or before June 23, 2008, plaintiff shall file with the Clerk of Trial Support (room 158) a note of issue and statement of readiness and shall pay any appropriate fees and said Clerk is directed to assign this matter to Part 11 for an assessment of attorneys' fees; and it is further

ORDERED that plaintiff's failure to timely comply with the immediately proceeding paragraph shall result in the dismissal of her claim for attorneys' fees.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: ~~May~~ *June 11, 2008*, 2008



J.S.C.

FILED
JUN 17 2008
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NEW YORK