

**Clever Ideas, Inc. v 999 Restaurant Corp.**

2009 NY Slip Op 30284(U)

January 29, 2009

Supreme Court, New York County

Docket Number: 602302/06

Judge: Charles E. Ramos

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: CE Ramos

PART 53

Index Number : 602302/2006

**CLEVER IDEAS**

vs.

**999 RESTAURANT**

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

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

**IS DISPOSED OF**  
**IN ACCORDANCE WITH THE ABOVE**  
**MEMORANDUM DECISION**

**FILED**

FEB 10 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 1/29/09

[Signature]

HON. CHARLES E. RAMOS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
CLEVER IDEAS, INC.

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**  
FEB 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Charles Edward Ramos, J.S.C.:

Defendants, 999 Restaurant Corp., d/b/a Nello Ristorante, and Nello Balan (collectively "Nello"), move pursuant to CPLR 3212, for summary judgment (1) dismissing the complaint, and (2) for liability in its favor on its counterclaim to recover funds paid to plaintiff, Clever Ideas, Inc. (Clever Ideas), on the ground that two loan agreements between parties are civilly and criminally usurious, and thus void.

Background

The relevant facts are set forth in detail in this Court's decision dated October 17, 2007, and will not be repeated here.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure to make such a showing

requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 (1991).

#### Discussion

This Court previously held that Nello's prior motion for summary judgment was premature due to the lack of discovery needed to properly decide it. Specifically at issue is whether two loan agreements (the "loans")<sup>1</sup>, labeled "advanced sales" agreements, are usurious. The Court held that because the loans omit an interest rate and a repayment period, the parties' intent in entering into the loans had to be probed.

Usury must be proved by clear evidence as to all its elements and will not be presumed, and forfeiture imposed by usury statutes<sup>2</sup> is penal in nature. See *Giventer v Arnow*, 37 NY2d 305, 309 (1975). In cases of civil usury, the courts,

---

<sup>1</sup> It is law of the case that the two "advance meal sales" agreements set up by plaintiff in this case are loans. See Sequence 003 Decision, October 12, 2007.

<sup>2</sup> The current maximum annual interest rate under New York's civil usury statute is 16 percent. General Obligation Law § 5-501 (1); Banking Law § 14-a. New York's criminal usury statute is a maximum 25 percent per annum. Penal Law § 190.40. The laws defining and prohibiting usury are intended to protect against a lender's overreaching. *Norman Goldstein Associates v Bank of New York*, 204 AD2d 288, 289 (2d Dept 1994).

anxious to avoid the harsh penalty of forfeiture, have placed the burden of proving the transaction usurious on the borrower, declaring that the defense of usury must be decisively proved and not left to inference or implication. *Freitas v Geddes S&L Association*, 63 NY2d 254, 261 (1984), quoting *Brown v Robinson*, 224 NY 301 (1918). Clear and convincing evidence, of an act unequivocally exacting a rate of interest in excess of that allowed by law, places a transaction within the plain intent of the usury statute. *Id.*

The court will not assume that the parties entered into an unlawful agreement, and when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate. *Giventer* at 309. Moreover, where the usurious nature of the transaction does not appear upon the face of the instrument, it is the prevailing view that usury is a question of fact. *Hort v. Devine*, 1 AD3d 266 (1<sup>st</sup> Dept 2003), quoting *Freitas* at 262.

A defendant raising the defense of criminal usury must allege and prove that the lender (1) knowingly charged, took or received (2) annual interest exceeding 25% (3) on a loan or forbearance. Penal Law § 190.40.

Intent is an essential element of usury. *Freitas* at 262. It requires proof of the general intent to charge a rate in excess of the legal rate rather than the specific intent to violate the usury statute. *Angelo v Brenner*, 90 AD2d 131 (1982).

Limited discovery on intent has now been completed. Clever

Idea's CEO and chairman, Lee G. Suckow, testified that before his company decides to make a loan, a detailed investigation is completed on the business and the guarantor. Suckow EBT, Page 9. This investigation seeks various information such as the type of credit cards accepted, the volume of business transacted, the business' reputation, the existence of security interests, and a credit check of the guarantor. Id at 9-10. Based on the findings, Clever Ideas calculates an appropriate amount that the business (here a restaurant) would be able to repay within a twelve month period. Id at 54. This figure becomes the loan amount. Although Suckow's deposition touched upon his expectation with regard to a repayment period, evaluating whether Suckow's intent meets the clear and convincing standard of usury is for a trier of fact.

Accordingly, this matter is best resolved at trial.

Therefore, it is

ORDERED that the defendant's motion is denied; and it is further

ORDERED that the parties shall appear for a status conference on February 24, 2009 at 10:00 A.M. in Room 238.

Dated: January 29, 2009

  
\_\_\_\_\_  
J.S.C.  
CHARLES E. RAMOS

**FILED**  
FEB 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK