

Weiss v Screen Arts Corp.

2009 NY Slip Op 31045(U)

May 8, 2009

Supreme Court, New York County

Docket Number: 600304/2007

Judge: Jane S. Solomon

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

PRESENT: Hon. JANE S. SOLOMON PART 55
Justice

STEVE WEISS and PHYLLIS M. SHAPIRO,
Plaintiffs,
-against-
SCREEN ARTS CORPORATION d/b/a
SCREEN ARTS CORP and NORMAN A. ADIE,
Defendants.

INDEX NO 600304/2007
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1-7, were read on this motion to/for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits _____	5-6
Replying Affidavits _____	7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ J.S.C.

*MB 6-8-09 @ 12 NOON
pre-trial - see end
decision*

Dated: 5-8-09

FILED
MAY 12 2009
COUNTY CLERK'S OFFICE
NEW YORK
[Signature]
JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
STEVE WEISS and PHYLLIS M. SHAPIRO,
Plaintiffs,

Index No. 600304/2007

-against-

SCREEN ARTS CORPORATION d/b/a
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Defendants.
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Decision and Order

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NEW YORK

JANE S. SOLOMON, J.:

INTRODUCTION

Plaintiffs Steve Weiss ("Weiss") and Phyllis M. Shapiro ("Shapiro") sue to recover money loaned to defendants Screen Arts Corporation d/b/a Screen Arts Corp ("Screen Arts") and Norman A. Adie ("Adie"). Defendant Adie moves for summary judgment on the claims asserted against him. The motion is granted for the reasons set forth below.

FACTUAL BACKGROUND

Weiss is a certified public accountant who had worked with Adie's accountant, Karl Schwarzmer. Adie informed Schwarzmer that he needed to raise capital for his business, Screen Arts, and asked him to contact potential lenders. Schwarzmer approached Weiss, who agreed to make a loan. Weiss also presented the opportunity to Shapiro, one of his clients,

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who also agreed to participate.

In the aggregate, Adie borrowed \$1.1 million from Weiss and \$900,000 from Shapiro with each individual loan ranging from \$50,000 to \$150,000. The transactions were documented by letter agreements made in 2000 and 2001. There were two letters for each loan with different interest rates for the same principal. As to Weiss, one letter provided for interest to be paid in cash at a rate of eighteen percent; another letter set an interest rate of seven percent. As to Shapiro, one letter required interest to be paid in cash at a rate of twelve percent; another letter had a six percent interest rate.

In September 2003, Weiss and Shapiro each entered into an "Agreement to Compromise Debt" ("Compromise Agreement") with defendants (collectively referred to as the "Compromise Agreements"), where they agreed to accept a sum of money payable in installments for the full satisfaction of the balances due. Weiss agreed to accept \$317,000 and Shapiro agreed to receive \$236,000. Neither Compromise Agreement provides for the payment of interest.

When defendants failed to pay, this action ensued. The first and third causes of action are based on the Weiss Compromise Agreement and the second and fourth are for breach of the Compromise Agreement with Shapiro. The fifth cause of action by Weiss and the sixth cause of action by Shapiro allege that, if

[* 4]

the Compromise Agreements are unenforceable, defendants should be liable under the prior letter agreements. Defendants answered together and asserted usury as their sixth affirmative defense.

Plaintiffs then moved and defendants cross-moved for summary judgment. On October 5, 2007, the Court granted plaintiffs' motion to the extent of striking defendants' first five affirmative defenses. However, Adie was allowed to proceed with his usury defense because the combined interest rate for the letters memorializing each loan exceeded the sixteen percent maximum rate permitted by General Obligations Law § 5-501 and Banking Law § 14-a. The Court also held that the corporate defendant could pursue a usury defense for interest in excess of twenty-five percent (General Obligations Law § 5-521 and Penal Law § 190.40) because it was alleged that Weiss charged a seven percent commission that may have effectively raised the interest rates above the threshold.

Plaintiffs argued that usury was inapplicable because the Compromise Agreements do not provide for the payment of interest, but the argument was rejected because the sums due as principal included interest under the letter agreements. Also rejected was plaintiffs' argument that Adie was a corporate guarantor who could not assert usury as a defense, it being clear that he was liable as an individual borrower.

However, the Court denied the cross-motion because there was a factual issue as to whether defendants were estopped from interposing a usury defense. Plaintiffs claimed that defendants induced them into the transaction with knowledge that the rates were usurious.

DISCUSSION

Adie now moves at the conclusion of discovery, contending that discovery shows that he is not estopped from asserting usury as a defense. He maintains that he did not induce plaintiffs to engage in usury because he did not set the terms of the agreements. He contends that it was Weiss who structured the transaction with two agreements for each loan. He also argues that estoppel precludes a usury defense only when there is a fiduciary relationship between the borrower and the lender and states that there is no evidence that such a relationship existed here.

Plaintiffs respond by arguing that material issues of fact exist with respect to its estoppel argument. They contend that defendants should be estopped from raising a usury defense because Adie set the terms of the loans through Schwarzmer as his agent. Weiss testified at his deposition that Schwarzmer offered him the 25% interest rate, of which he was initially skeptical. He claims that Schwarzmer showed him other loan agreements made

by Adie with high rates of interest. He further avers that the letter agreements were drafted by Schwarzmer and submits affidavits from two others who loaned money to Adie at high interest rates. They state that defendants offered them the rates, decided to structure the transactions with two different rates for each loan, and drafted letter agreements for their signatures. Plaintiffs' opposition to the motion is unpersuasive because they do not address the fiduciary duty aspect of the estoppel issue.

Estoppel only applies to preclude a borrower's usury defense when a borrower has a "fiduciary or other like relationship of trust with the lender" and "fails to disclose the illegality of the rate of interest he proposes." *Abramovitz v. Kew Realty Equities, Inc.*, 180 A.D.2d 568, 568 (1st Dept. 1992) (emphasis added), *lv. denied*, 80 N.Y.2d 753 (1992); see also *Seidel v. 18 East 17th St. Owners, Inc.*, 79 N.Y.2d 735, 743 (1992); *Russo v. Carey*, 271 A.D.2d 889, 890 (3rd Dept. 2000).

Here, plaintiffs do not submit any evidence to show that there was a fiduciary relationship between them and Adie, or even Schwarzmer, that would impose a duty to disclose the illegality of the interest rates. As an accountant with a graduate degree in taxation, Weiss cannot claim that he was induced into a usurious transaction by a fiduciary. Moreover, it is undisputed that Shapiro did not have any direct contact with

Adie or Schwarzmer that would give rise to a relationship of trust and confidence.

CONCLUSION

Accordingly, it hereby is

ORDERED that Adie's motion for summary judgment dismissing the complaint as against him is granted; and it further is

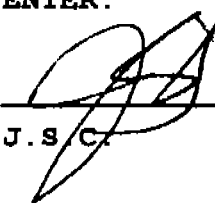
ORDERED that the claims against Screen Arts are severed for trial; and it further is

ORDERED that the remaining parties shall appear for a pre-trial conference in Part 55 on June 8, 2009 at 12:00 p.m.

Dated: May 8, 2009

ENTER:

J.S.C.


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