[* 1]

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

PRESENT: Shafer Justice PART 8

Selcuk, Sinan

-v-

Yuran, Burak

INDEX NO. 602506/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Vacate Default Judgment

	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 accord with the annexed memorandum.

FILED

JUN 24 2009

COUNTY CLERK'S OFFICE NEW YORK

Dated: 6/18/2009

MARILYN SHAFER 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: IAS PART 8

----------x

Sinan Selcuk,

Plaintiff,

Index No. 602508/08

-against-

Burak Yuran,

Defendant.

----------x

Marilyn Shafer, J.:

In this motion arising from a money judgment awarded by default, on January 7, 2009, to plaintiff Sinan Selcuk (Selcuk), defendant Burak Yuran (Yuran) moves, by order to show cause under motion sequence number 002, for an order: (1) pursuant to CPLR 5015, vacating the January 7, 2009 default judgment entered on January 21, 2009; (2) pursuant to General Obligations Law § 5-511 (1), declaring, after a hearing, that the loan, upon which the January 7, 2009 judgment is premised, is void for violating the usury laws of the State of New York; and (3) pursuant to CPLR 3215 (g) and 5015 (a) (3), enjoining plaintiff from enforcing the default judgment.

In a decision, dated February 10, 2009, pending the hearing of this motion, the court granted part of motion sequence number 002, to the extent of enjoining Selcuk, the judgment creditor, (a) from taking any action to enforce the January 7, 2009 default judgment; (b) from proceeding to collect from any third parties any debts owed to the plaintiff on account of the default judgment issued; (c) from serving any further subpoenas or restraining notices without permission of the court; or (d) from interfering in any manner with Yuran's possession, use, occupancy and enjoyment of the two partnership restaurants, herein "Salata." The court set a motion date of March 3, 2009 for a hearing regarding the usury portion of this motion.

Seventeen days later the parties submitted to the court a letter, dated February 27, 2009, and a signed stipulation, dated February 20, 2009 wherein the parties agreed, amongst other things: (1) that the January 7, 2009 default judgment in the amount of $474,953.64 be vacated; (2) that Selcuk shall no longer attempt to enforce the judgment or to collect money pursuant to the judgment; and (3) that Yuran shall withdraw all parts of his February 10, 2009 order to show cause, "except for so much of that motion seeking to declare the agreement between Burak Yuran and Sinan Selcuk dated November 7, 2007 void as usurious." Pursuant to the stipulation, this court vacates its default judgment. Using the following facts and law, the court addresses the remaining usury issue.

A Brief History of the Origin of the 2007 Agreement

Selcuk and Yuran are business partners who, pursuant to an October 3, 2005 registration filed with the New York Secretary of State, formed the entity "Salata" a/k/a Salata LLC, a limited liability company, for the purpose of operating a small gourmet restaurant on the upper east side of Manhattan. Salata was listed as the "registered agent" with Selcuk's address of 41 River Terrace, Suite 3604, in New York City as the agent's mailing address. The partnership gave both Selcuk and Yuran a 50% "share ownership" in Salata. Pursuant to an August 17, 2006 Agreement (the 2006 Agreement), Selcuk lent money to Yuran for Yuran's 50% partnership interest. Pursuant to the terms of the later 2007 Agreement, which was memorialized in a written and signed agreement, Yuran subsequently purchased Selcuk's "50% membership interest in Salata" (*see* March 3, 2009 Reply Memorandum of Law, Exhibit I, at 2, ¶ 3).

The 2007 Agreement replaced and incorporated the 2006 Agreement (March 10, 2009 Reply Memorandum of Law, Exhibit A, ¶ 1). The 2006 Agreement had replaced the Loan

Agreement made between Yuran and Selcuk on November 18, 2005 (*id.*, Exhibit B, ¶ 1). Both, the 2007 Agreement and the 2006 Agreement were drafted and prepared by Selcuk.

The 2006 Agreement

The 2006 Agreement, which is identified as a "Partnership Agreement," provided for a loan of $230,000.00 from Selcuk to Yuran for the purpose of funding Yuran's 50% stake in Salata LLC. Under the 2006 Agreement, Mr. Selcuk was in charge of the daily financial arrangements of Salata, including payments of all rental obligations to the Landlord, and other matters. Before the 2007 Agreement was entered into, Yuran had repaid $90,000.00 of the $230,000.00 loan, leaving a remainder of $140,000.00.

The November 7, 2007 Agreement

The $140,000.00 remainder was subsequently incorporated into the 2007 Agreement, entitled "Agreement Among Sinan Selcuk and Burak Yuran." Pertinent parts of the 2007 Agreement provide:

> **Terms of the Loan**
>
> Sinan Selcuk agrees to loan Burak Yuran $440,000 (the "Loan") in exchange for Mr. Selcuk's 50% share ownership in Salata LLC ("Salata"). The transfer of Mr. Selcuk's interest to Mr. Yuran is conditioned upon Mr. Yuran's payment in full of the loan amount of $440,000.
>
> Pursuant to the terms of the [2006] Partnership Agreement Mr. Selcuk loaned Mr. Yuran $230,000 and $140,000 of this amount remains unpaid by Mr. Yuran.
>
> **Repayment of the Loan**
>
> Mr. Burak Yuran will repay the Loan by making weekly cash payments of $4,000 to Mr. Sinan Selcuk (the "Repayment"). The first such payment will be be due on November 12, 2007.
>
> Each payment thereafter is due on or before every Monday at 5:00 pm EST (the "Due Date") at the primary business address of Salata, 1396 Madison Avenue, New York, New York 10029. It is Mr. Yuran's duty to make himself

available and the payment ready.

In the event that a payment is not made before the Due Date, a supplemental penalty payment in the amount of $4,000 will be added to the remaining amount. Thus this Repayment will be extended by one week and an additional payment of $4,000.

Events of Default

Any failure by Mr. Yuran to make the weekly payment of $4,000 for a period longer than 21 days will constitute an event of default.

An event of default will make the total remaining amount of the Loan to be payable upon Mr. Selcuk's request.

In the event that Mr. Burak Yuran fails to make a $4,000 payment for a period longer than 21 days at any time before the loan and any late penalties are paid in full Mr. Sinan Selcuk will have the right to seize Mr. Yuran's interest in the Liens (described below).

Selcuk's Complaint

Selcuk alleges in his complaint that "[u]nder the 2007 Agreement, Mr. Yuran from time to time failed to make his weekly payments and ceased making payment altogether after May 22, 2008. "As a result, Mr.Yuran has paid only $79,900 [toward the $440,000.00], and his total indebtedness under the 2007 Agreement, including non-payment premiums, is $448,000." The failure to make a payment for more than 21 days constituted a default.

Selcuk raises two causes of action in his complaint. The first cause of action seeks specific performance through the transfer of Yuran's 52% membership interest in the First Avenue Farmers Market LLC which served as collateral in case of a default (*id.*, at 4, ¶ 22). The second cause of action alleges a breach of contract based upon Yuran's failure to make his $4,000 weekly payments in accordance with the terms of the 2007 Agreement (*id.*, at ¶ 25).

Yuran's Answer

In his Answer, Yuran refers to the 2007 Agreement as being "corrupt and usurious." He alleges six affirmative defenses. The fourth affirmative defense alleges that Selcuk's claims in

the complaint are barred by the doctrine of unclean hands. The sixth affirmative defense alleges that the 2007 Agreement is usurious.

The Loan Status of the 2007 Agreement

The parties disagree as to whether or not the 2007 Agreement involves a loan.

> [A]s usury laws apply only to loans and forbearances, and not to investments, if the transaction is not a loan or forbearance of money there can be no usury, regardless of how unconscionable the contract may be.
>
> "In order for a transaction to constitute a loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d 483, 490 [Sup Ct, NY County 2008] [quoting from *Donatelli v Suskind*, 170 AD2d 433, 433-434 [2d Dept 1991]) (additional citations omitted).

Yuran claims that the 2007 Agreement, which he states was for a $440,000.00 loan from Selcuk, was for the purpose of enabling him to purchase Selcuk's 50% interest in Salata. Yuran states: "On November 7, 2007, my former partner, Sinan Selcuk, sold me his 50% shares of Salata LLC for [sic] $440,000 ('Loan')" (*see* February 9, 2009Yuran Affidavit, ¶ 3). Selcuk counters, in paragraph five of his March 3, 2009 affidavit: (1) that "Yuran's payment under the 2007 Agreement ... was not straight cash ... [but] a payment plan to pay the $440,000 purchase price;" (2) that "any attempt by [Yuran] to characterize the our transaction [the 2007 Agreement] to be a 'loan' is inaccurate;" (3) that "the 2007 Agreement makes clear that the so-called 'Loan' is given in 'exchange for Mr. Selcuk's 50% ownership in Salata LLC;'" and (4) that "the 2007 Agreement makes no reference to any moneys supposedly lent by me to Mr. Yuran."

Though Selcuk claims that the 2007 Agreement is a payment plan and not a loan, and specifically states in his affidavit that "the 2007 Agreement makes no reference to any moneys lent [by him to Yuran]," the 2007 Agreement, nonetheless, contains a section, entitled "Terms of

the Loan," and that section states: "**[t]he transfer ... is conditioned upon ... payment in full of the loan amount of $440,000. Pursuant to the terms of the [2006] Partnership Agreement Mr. Selcuk loaned Mr. Yuran $230,000 and $140,000 of this amount remains unpaid by Mr. Yuran**" [emphasis added]. The court reiterates that Selcuk prepared the 2007 Agreement and chose the language and terms used in the agreement. Furthermore, the 2007 Agreement is replete with the use of the term "loan" throughout the body of the agreement including the sentence "Sinan Selcuk agrees to loan Burak Yuran $440,000 (the "Loan") in exchange for Mr. Selcuk's 50% share ownership in Salata LLC ("Salata")."

The terms of an agreement, unless ambiguous, are to be interpreted based on the plain meaning of the language used (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570 [2002]; *Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d at 489). The 2007 Agreement implies that the $440,000.00 loan was comprised of an $140,000.00 remainder from the incorporated 2006 Partnership Agreement, thus, leaving a difference of $300,000.00 to be the amount applied towards Yuran's purchase of Selcuk's 50% of Salata. On its face, a plain reading of the 2007 Agreement indicates that it was an agreement that Selcuk would provide a loan of $440,000.00 to Yuran. This court has determined that the 2007 Agreement is a contract for a loan.

The Existence of Usurious Interest

"The laws defining and prohibiting usury are intended to protect against a lender's overreaching" (*Norman Goldstein Assoc. v Bank of New York*, 204 AD2d 288, 289 [2d Dept 1994]). It is well established that to constitute usury in a transaction, there must be, (1) a loan; (2) a taking or reservation of more than legal interest; and (3) such taking in pursuance of a corrupt agreement (*see Western Reserve Bank v Potter*, 1 Clarke 432 [1841]).

"[U]sury must be proven by clear and convincing evidence as to all its elements, and will not be presumed" (*Freitas v Geddes Savings & Loan Association*, 63 NY2d 254, 261 [1984]; *Goldstein v CIBC World Market Corp.*, 6 AD3d 295, 296 [1st Dept 2004]). An essential element of usury is intent which, if not evident on the face of a note, becomes a question of fact (*see Freitas v Geddes Savings & Loan Association*, 63 NY2d at 262). Selcuk argues that the 2007 Agreement is valid because Yuran has neither alleged nor proved usurious intent (*see* March 4, 2009 Selcuk memorandum of law, at 8-9). But, "[w]here the usurious interest is plain from the face of the instrument, usurious intent will be implied" (*Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d at 488, citing *Fareri v Rain's International, Ltd.*, 187 AD2d 481, 482 [2d Dept 1992]; *see also Giventner v Arnow* 37 NY2d 305, 309 [1975]). In this action, intent can be implied if there is an obvious usurious interest rate being imposed pursuant to the terms of the 2007 Agreement.

Yuran argues that the $4,000.00 late fee penalty payments in the November 7, 2007 Agreement, which he alleges are automatically imposed upon each failure to make a regular weekly payment of $4,000.00, are usurious in violation of General Obligations Law § 5-511 (*see* Yuran's March 10, 2009 Reply Memorandum of Law, at 2, ¶ [4] [d] and [h]). Late charges and penalties may serve as the basis for a finding that a loan agreement is usurious (*Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d at 488). *Funding Group* provides:

> the late charge provision ... which awarded a 120% per annum penalty, "while not technically interest, is unreasonable and confiscatory in nature and therefore unenforceable when examined in the light of the public policy expressed in Penal Law § 190.40, which makes an interest charge of more than 25% per annum a criminal offense"

(*Id.*).

Yuran claims that these penalty payments comprise a significant portion of the $448,000.00 that Selcuk seeks as damages in his complaint. Though Selcuk states that he is seeking a total of $448,000.00 in damages, not including prejudgment interest, he does not provide a detailed breakdown of how he calculated this specific amount, more specifically what portion, or portions comprises any $4,000.00 penalty payments, and the dates such were incurred.

The court takes note of the use of the plural terms "penalties" and "payments" in the 2007 Agreement. Selcuk uses the term "premium" in his affidavits to explain how penalties and payments are applied pursuant to the 2007 Agreement. He varies between the use of the terms "penalty" and "premium" in paragraph 7 of his October 29, 2008 affidavit attached to his default motion wherein he states: "[The 2007] agreement required Mr. Yuran to make weekly $4,000 payments to me. Failure to make such payments resulted in a $4,000 premium added to the total amount owed."

In an attempt to rebut Yuran's claim of an automatic recurring penalty, Selcuk also states the following in paragraph 7 of his March 3, 2009 affidavit:

> The 2007 Agreement provides for a single penalty each time Mr. Yuran failed timely to make a weekly payment. It does not provide, and I never intended for it to provide, for a recurring penalty of $4,000 per week for every week that Mr. Yuran failed to make a payment to me. Thus, Mr. Yuran's indebtedness to me is static, not increasing. Further, it was certainly not my intention with respect to the 2007 Agreement to collect usurious penalties on the amount Mr. Yuran owes me and, as I understand it, no monies I have demanded in this action are usurious under relevant New York law.

Yet, despite Selcuk's claim that it was not his intent for a recurring penalty of $4,000.00 to occur for every week that Yuran failed to make a payment, in paragraph eight of his March 3, 2009 affidavit, Selcuk nonetheless states:

> Under the 2007 agreement, Mr. Yuran from time to time failed to make his

> weekly payments for the Salata shares, and ceased making payment altogether after May 22, 2008. As a result, Mr. Yuran has paid only $79,000 and his total indebtedness under the 2007 Agreement, **including non-payment premiums**, is $448,000. There is no interest or other penalty continuing to accrue on Mr. Yuran's indebtedness other than the pre-judgment interest

[emphasis added]. Then, in Selcuk's March 4, 2009 memorandum of law, it is also stated: "the 2007 Agreement makes clear that Mr. Yuran incurred only a single, one time penalty for each default, and that his total indebtedness is not, therefore, continuing to increase." The phrase "each default" implies that there could be more than one default.

"[T]he maximum rate of interest provided for in section 5-501 of the general obligations law shall be sixteen (16%) per centum per annum" (Banking Law § 14-a). The maximum under the criminal usury statutes is 25% (*see* Penal Law § 190.40). The method for computing interest and, thus, determining if an interest rate, in violation of the state usury laws is being charged, is the traditional method (*see Band Realty Company v North Brewster, Inc.*, 37 NY2d 460, 466, *rearg denied* 37 NY2d 937 [1975]).

In addition to their different stances on whether or not an additional $4,000.00 penalty would be imposed each time Yuran failed to make his scheduled $4,000.00 weekly payment, Yuran and Selcuk argue that different interest rates are, in effect, based on the penalties. Yuran presents four different sets of usurious interest rate calculations alleging: (1) accrued interest, at $4,000 per week on the $4,000 missed payments, amounting to one hundred percent per week interest; or (2) 5,200% per year; or (3) the potential usurious interest due after 52 weeks at $4,000 per week, on an amount of $208,000 per year in interest on a $361,000 outstanding balance, equaling 57% per year (*see* October 8, 2008 Answer, ¶¶ 21-23); or (4) 34.55% (*see* Reply Memorandum of Law, at 5, ¶ 13 [referring to *Band Realty v North Brewster*, 37 NY2d at

462). Selcuk presents two sets of calculations contending interest rates of either 19.97% or 24.4% (*see* Selcuk's March 4, Memorandum of Law, at 7). It is not clear to the court if either Yuran or Selcuk based their calculations on the traditional method.

There is no question of fact per se as to whether or not there are penalties in the 2007 Agreement. In their affidavits Selcuk and Yuran present different viewpoints as to how the penalty payment premiums in the 2007 Agreement are to be calculated and applied to the calculation of damages. Yuran objects to and questions the makeup of the amount of $448,000.00 that Selcuk seeks in damages. Regardless of whether or not the interest on the penalties in the 2007 Agreement might be deemed usurious, there is a monetary limit on the amount of a loan that can be reviewed under General Obligation Law §§ 5-511 and 5-501 for purposes of declaring a contract void under those statutes.

General Obligations Law § 5-511

General Obligations Law § 5-511, entitled "Usurious contracts void," provides:

> All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is prescribed in section 5-501, shall be void ... .

However, pursuant to General Obligations Law § 5-501 (6) (a), statutory restrictions upon usurious loans are not applicable to loans over the amount of $250,000.00 (*Machidera v Newby Toms*, 258 AD2d 418 [1st Dept 1999]). Here, the alleged usurious loan at issue is in the amount of $440,000.00. "As pointed out in dicta by the court in *In re Venture Mortgage Fund, L.P.* (282 F3d 185 [2d Cir 2002]), 'Section 5-511 voids a loan that violates the civil usury statute (§ 5-501) but says nothing about a loan that violates the criminal usury statute'" (*see Funding Group, Inc. v*

Water Chef, Inc., 19 Misc 3d at 491). The effect of the difference between General Oblig. Law §§ 5-501 (6) (a) and (6) (b) is that commercial loans between $250,000 and $2.5 million are subject to criminal, but not civil, usury constraints (*In re Urban Communicators PCS Ltd. Partnership*, 379 BR 232, 250 n 49 [US BR SDNY 2007] as amended [Jan.31, 2008]), *mod in part and revd in part on other grounds* (394 BR 325 [SD NY 2008]). This court cannot, as a matter of law, find that the 2007 Agreement is usurious pursuant to General Obligations Law § 5-511.

The court defers discussion of other possibilities for resolving the action, including the defense of unclean hands, until discovery is completed, and will keep the injunctive relief in place.

Accordingly, based on this court's review of the facts and the law, and the documents submitted, it is

ORDERED that that portion of Burak Yuran's motion which sought to vacate the January 9, 2007 default judgment is granted; and it is further

ORDERED that that portion of Burak Yuran's motion for an order, pursuant to General Obligations Law § 5-511 (1), declaring that the 2007 Agreement is void for violating the usury laws of the State of New York, is denied; and it is further

ORDERED that that portion of Burak Yuran's motion seeking a temporary injunction to stay enforcement of any activity by Sinan Selcuk or his agents based on a default of the 2007 Agreement, which was granted in this court's February 10, 2009 order is continued pending a resolution of all other discovery matters in this action in accordance with this decision and order; and it is further

ORDERED that the prohibition of Sinan Selcuk and his agents from interfering in any manner with the possession, use, occupancy and enjoyment of Salata I and II, which was ordered in this court's February 10, 2009 order, is continued pending a resolution of all other discovery matters in this action in accordance with this decision and order; and it is further

ORDERED that the parties are directed to contact chambers within fourteen days from service of this order with notice of entry for the purpose of appearing at a compliance conference to set up an expedited schedule providing for deposition dates and the submission of all outstanding discovery including a detailed breakdown of all items, with pertinent dates, which comprise the total amount of $448,000.00 in claimed damages.

Dated:

6/18/09

ENTER:

MARILYN SHAFER

J.S.C.

J.S.C.

FILED

JUN 24 2009

COUNTY CLERK'S OFFICE
NEW YORK