Alpha Capital Anstalt v bioMetrix Inc.
2010 NY Slip Op 30045(U)
January 6, 2010
Supreme Court, Suffolk County
Docket Number: 26036-2009
Judge: Emily Pines
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SHORT FORM ORDER

Index Number: 26036-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 09-09-2009
Motion Submit Date: 11-04-2009
Motion Sequence No.: 001 MD

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ALPHA CAPITAL ANSTALT,

Plaintiff,

-against-

bioMETRIX INC. AND MARK R. BASILE,

Defendants.

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Attorney for Plaintiff
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ORDERED, that the motion (motion sequence number 001) by plaintiff for summary judgment in lieu of complaint is denied; and it is further

ORDERED, that the moving and opposition papers shall be considered the Complaint and Answer, respectively; and it is further

ORDERED, that a preliminary conference is scheduled for March 2, 2010 at 9:30 a.m. before the undersigned.

Plaintiff, Alpha Capital Anstalt ("plaintiff") moves, pursuant to CPLR §3213, for an Order granting summary judgment in lieu of complaint against defendant bioMETRX, Inc. (defendant) on two promissory notes and against defendant Mark R. Basile ("Basile") on a personal guaranty on one of the promissory notes. In support of the motion, plaintiff submits an affidavit of Konrad Ackermann

[* 2]

("Ackermann"), a director of plaintiff, copies of the notes and guaranty and calculations of outstanding amounts due and owing.

Ackermann states that on or about June 29, 2006, defendant issued to plaintiff a promissory note in the principal amount of $400,000.00 (the "June 2006 Note"), with interest at the rate of 8% per annum until default and the rate of 15% per annum after default. The note also provided an option for plaintiff to convert all or part of the note into common stock and according to Ackermann, plaintiff did convert a portion of the note into common stock. Ackermann states that the note came due on June 29, 2008 and defendant failed to pay the sums due and owing. Thereafter, on or about April 1, 2007, defendant executed an additional convertible promissory note in the principal amount of $96,666.67, which Ackermann states represented liquidated damages due and payable on the June 2006 Note. He further states that as of June 24, 2009, the amount of unpaid principal and accrued interest on the June 2006 Note was $378,695.23 and that interest accrued thereafter at the rate of $118.28 per day.

Subsequently, in July of 2007, defendant executed yet a third promissory note in the principal amount of $750,000.00 (the "July 2007 Note"). According to Ackermann, plaintiff did not loan defendant the full amount at the time of the execution of the July 2007 Note, but rather, promised to lend up to that amount, as requested from time to time by defendant. The July 2007 Note bears interest at the rate of 24.99% per annum and matured on July 2, 2008. Ackermann states that as of June 23, 2009, unpaid principal and accrued interest on the July 2007 Note was $292,452.63, with interest accruing thereafter at the rate of $101.43 per day. With regard to the July 2007 Note only, Ackermann states that Basile executed a personal guaranty wherein he agreed to pay any amounts due and owing under that note, with the limitation that he would not be required to pay until ten days after any judgment thereon against defendant was entered and remained unpaid.

Based on the foregoing, plaintiff seeks an Order granting judgment against defendant in the amount of $378,695.23 on the June 2006 Note and $292,452.63 on the July 2007 Note, and further granting judgment against Basile, ten days after entry of judgment against defendant, for all amounts which remain unpaid under the July 2007 Note. Plaintiff also seeks an award of interest which accrued after submission of the motion, plus counsel fees, and costs and disbursements on this motion.

Defendants oppose the motion by affirmation of counsel, an affidavit by Basile and attach a copy of an unexecuted Securities Purchase Agreement dated June of 2006. Defendants assert that plaintiff is barred from recovery under the promissory notes because they provided an interest rate in excess of the maximum permitted by law and thus were usurious. Initially, defendants attack the July 2007 Note which set interest at the rate of 24.99% based on a 360, rather than a 365 day year.[1] Defendants assert

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[1] The June 2006 Note did not contain such a provision.

that the use of a shortened year puts the effective interest rate over the 25% per annum and renders the loan criminally usurious under the Penal Law. Additionally, defendants assert that the July 2007 Note required defendant to pay interest on amounts advanced from July 1, 2007, even though plaintiff did not borrow any money until July 12, 2007 at the earliest, and thus, resulted in the plaintiff collecting interest greater than 25% per annum. Defendants also urge the Court to recognize that the July 2007 Note required defendant to pay certain other fees, which, when added to the principal and interest, increased the interest rate above 25% per annum. Based on all these allegations, defendants urge the Court to recognize that the July 2007 Note was usurious and plaintiff is barred from recovery under such promissory note.

Defendants also challenge the June 2006 Note, although they admit that this promissory note is not as egregious as the July 2007 Note. Here, defendants explain that pursuant to a Securities Purchase Agreement ("SPA"), referred to in the June 2006 Note, defendant was required to issue Series A Warrants and Series B Warrants to plaintiff. Pursuant to the Series A Warrants, plaintiff was permitted to purchase 400,000 shares of defendant's common stock for $1.75 per share, and pursuant to the Series B Warrants, plaintiff was permitted to purchase 200,000 shares of defendant's common stock for $0.10 per share. Defendants allege that as of June 29, 2006, defendant's stock closed at $1.35 per share and thus the Series B Warrants were worth $250,000.00 at the time they were issued. That is, defendant argues that plaintiff was going to be repaid the $400,000.00 it loaned defendant, plus interest, plus additional value worth at least $250,000.00. Such additional value must be considered in determining the effective interest rate and whether the loan was usurious. Defendant asserts that when same is considered, it results in an annual interest rate in excess of 70%.

Further, with regard to both promissory notes, defendants assert that plaintiff failed to establish how much is due under the notes and how interest was calculated. Additionally, on the issue of Basile's personal guaranty, defendants argue that such claim must be dismissed as premature because same was a guaranty of collection, not payment. That is, pursuant to the terms of the July 2007 Note, plaintiff must first pursue the corporate defendant for payment and obtain a Judgment against it and if such Judgment remains unsatisfied more than 10 days after issuance, plaintiff could demand payment from Basile. Since no judgment has been entered against the corporate defendant herein, they argue that any claim against Basile is premature. Based on all of the foregoing, defendants urge the Court to deny the motion for summary judgment in lieu of complaint in its entirety.

Plaintiff submits a reply affidavit by Ackermann in support of the motion for summary judgment. First, Ackermann asserts that the June 2006 Note is not usurious and argues that defendants have failed to raise a triable issue of fact in that regard in that the stated interest rate on that note was only 8% per annum. Further Ackermann takes issue with defendants' claims that the Series B Warrant was worth $250,000.00 because (1) plaintiff could not exercise the Warrant for at least six months after June 29,

2006 pursuant to the terms of the Warrant; (2) the Warrant only gave plaintiff the right to obtain restricted shares of stock which could not be sold on the market and is thus worth substantially less; and (3) the stock is thinly traded. Therefore, Ackermann argues, that the Series B warrant was not worth the $250,000.00 as claimed by defendants. Ackermann further claims that the calculations annexed to the moving papers clearly demonstrate the amounts due and owing under the June 2006 Note, notwithstanding defendants' argument to the contrary.

With regard to the July 2007 Note, Ackermann asserts that it is not usurious because it has a stated interest rate of only 24.99%. Ackermann dismisses defendant's arguments that it becomes usurious because the Note is calculated on a 360 day year, instead of a 365 day year, rendering the actual interest rate at 25.33%, and further that the additional fees raised the interest rate over 25% per annum. Plaintiff asserts that the use of a 360 day year is common practice and the effect on the interest rate is de minimis and cannot demonstrate an intent to exceed the maximum permitted interest rate. Additionally, he states that the July 2007 Note, on its face, expressly provides that defendant's total liability for interest payments shall not exceed the maximum permitted by law. Therefore, Ackermann argues that defendant is not required to pay interest in excess of the legal maximum rate and thus, the July 2007 Note cannot be usurious. Finally, with regard to the corporate defendant's liability, plaintiff argues that there is no basis to void the note based upon criminal usury.

Turning to Basile's arguments, plaintiff claims that it is only seeking entry of judgment against him in the event the bioMETRX does not pay for ten days after entry of judgment against it. Plaintiff argues that all of the issues can be resolved in one proceeding and it should not be required to commence a separate proceeding against Basile in the event bioMETRX does not pay the judgment. Based on the foregoing, plaintiff urges the Court to grant the motion for summary judgment in lieu of complaint in its entirety.

CPLR §3213 states in relevant part:

> **Motion for summary judgment in lieu of complaint**
>
> When 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.

Pursuant to GOL §5-501(1) and Banking Law §14-a, the maximum permissible interest rate on a loan less than $250,000.00 is 16% per annum. ***O'Donovan v. Galinski***, 62 AD3d 769, 878 N.Y.S.2d 443 (2d Dept. 2009). GOL §5-501(2) provides in part that "the amount charged ... as

[* 5]

interest shall include any and all amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender in consideration for making the loan...as defined by the banking board...". A loan at an interest rate exceeding 25% per annum constitutes criminal usury. **Penal Law §190.40.** General Business Law §5-521(3) permits a corporation to interpose a defense of criminal usury.

Penal Law §190.40 states:

> A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.

In determining whether a transaction is usurious, the Court must look to the substance rather than the form of the transaction. ***O'Donovan v. Galinski***, 62 A.D.3d 769, 878 N.Y.S.2d 443 (2d Dept. 2009). ***See also, Abir v. Malky, Inc.***, 59 A.D.3d 646, 873 N.Y.S.2d 350 (2d Dept. 2009)("When determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it."). The defendant seeking to raise the defense of usury must prove all of the essential elements by clear evidence, including the element of usurious intent. ***Greenfield v. Skydell***, 186 A.D.2d 391, 588 N.Y.S.2d 185 (1st Dept. 1992); ***Lewis v. Gummer***, 171 A.D.2d 989, 567 N.Y.S.2d 929 (1st Dept. 1991). "There is a strong presumption against the finding of usury." ***Transmedia Restaurant Co. v. 33 E. 61st Street Restaurant Corp.***, 184 Misc.2d 706, 710 N.Y.S.2d 756 (Sup. Ct. N.Y. Co. 2000); ***citing, Giventer v. Arnow***, 37 N.Y.2d 305, 372 N.Y.S.2d 63, 333 N.E.2d 366 (1975). Where usury does not appear on the face of the note, usury is a question of fact and if there are factual issues regarding usurious intent, summary judgment must be denied. ***Hort v. Devine***, 1 A.D.3d 266, 769 N.Y.S.2d 376 (1st Dept. 2003).

In the case at bar, the Court finds that questions of fact exist regarding the defense of criminal usury to each of the promissory notes. With regard to the June 2006 Note, while the stated interest rate of only 8% per annum clearly falls below the proscribed rate of 25% per annum, defendants have raised issues of fact regarding the effective interest rate when the Series B warrants and other fees and charges are included in the calculation of the rate. Although ultimately plaintiff may succeed on its claim for recovery, at this juncture, the Court finds summary judgment premature on the June 2006 Note.

The Court finds the July 2007 Note more problematic as it appears to the Court that plaintiff may have been attempting to extract a usurious interest rate by imposing a 24.99% per annum rate based on

[* 6]

a 360 day calendar year (thus effectively increasing the rate to an amount exceeding 25% per annum in violation of the Penal Law). However, the inclusion of paragraph 6(j) of the July 2007 Note which stated that the interest "shall not exceed the maximum lawful rate authorized under the applicable law", seems to contradict a usurious intent. Plaintiff seemed to be attempting to insulate itself from liability for criminal usury and at the same time imposing an interest rate that violates the statute. The Court believes that the contradictory language and intent of the agreement precludes the granting of summary judgment in lieu of complaint.

Based on the foregoing, the motion for summary judgment in lieu of complaint is denied in its entirety and the moving and opposition papers shall be considered the pleadings in this case. A preliminary conference is scheduled for March 2, 2010 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 6, 2010
Riverhead, New York

EMILY PINES
J. S. C.