

McNamara v Regensburg

2010 NY Slip Op 31163(U)

May 10, 2010

Sup Ct, Suffolk County

Docket Number: 07-6281

Judge: Denise F. Molia

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SHORT FORM ORDER

INDEX No. 07-6281

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 10-13-09
ADJ. DATE 01-29-10
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - MD
Mot. Seq. # 004 - MD

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JOHN McNAMARA, LAWRENCE JANNOTTI :
 SR., IRA, LEONARD MINIUTTI and MADELINE :
 MINIUTTI, his wife, PHILLIP ROSE, JOSEPH H. :
 TABOR, MARTIN BYRNE and CAROL :
 BYRNE, his wife, GEORGE C. SCHROEDER, :
 IRA, RHODA SHAPIRO, JOHN M. McNAMARA, :
 ROBERT L. ROSEN, MARK BALLERINI, :
 JOSEPH L. BALLERINI, DANIEL SAVARESE, :
 JOHN BYRNE, STEWART GROSS and JEAN :
 ANN GROSS, his wife, JOEL KAHAN, JESSICA :
 SEMONELLA, ANTHONY RELLA SELF :
 EMPLOYED PENSION PLAN, SUSAN L. :
 CERULLO, THOMAS J. MANZIONE, JORDAN :
 BAYER and CYNTHIA GLASSER, his wife, :
 KEITH FARRELL and GERALDINE RENART, :
 IRA., :

Plaintiffs, :

- against - :

CHARLES REGENSBURG, SR., CHARLES :
 REGENSBURG, JR., ERICA GROSSMAN, :
 HAROLD GUBERMAN, EQUITY :
 SETTLEMENT SERVICES, INC., "JOHN DOE" :
 and JANE DOE" fictitious names of tenants or :
 persons in possession, :

Defendants, :

-----X

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-5; Notice of Cross Motions and supporting papers 6-10,11-34; Answering Affidavits and supporting papers 35-36, 37-38; Replying Affidavits and supporting papers 39-41; Other Equity Settlement Service's memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

McNamara v Regensberg
Index No. 07-6281
Page No. 2

ORDERED that the motion by defendant Equity Settlement Services, Inc. for summary judgment dismissing plaintiffs' complaint against it is denied; and it is further

ORDERED that the cross motion by plaintiffs seeking summary judgment on the issue of liability as against Equity Settlement Services, Inc. is denied; and it is further

ORDERED that the cross motion by defendant Harold Guberman for summary judgment in his favor dismissing plaintiffs' complaint against him is denied.

On March 8, 2002, defendant Charles Regensburg borrowed \$400,000 from plaintiffs and executed a note agreeing to pay back the principal, with interest at the rate of 16 % per annum, over the course of twenty four months. As security for the loan, the defendants gave plaintiffs a mortgage on commercial properties known as 77 E. 3rd Street and 79 E. 3rd Street, located in Huntington, New York. The note evidencing the loan was executed by defendant Charles Regensburg Jr., who purportedly was granted the power of attorney to sign the promissory note guaranteeing the loan in his father's absence. The Regensburgs were further required under the terms of the loan agreement to pay an additional fee of 10 % as points charged on the loan by plaintiffs' representative, Joshua D'Avanzo. The Regensburgs were represented by defendant Harold Guberman at the closing. During the closing, defendant Equity Settlement Services, Inc. ("Equity") was retained to provide title insurance and record the mortgage on both properties. The subject mortgage agreement provided, among other things, that the mortgage was a blanket mortgage covering both properties, and that upon payment of the sum of \$200,000 plus any accrued interest thereon, plaintiffs would release their interest in either of properties to be designated by the Regensburgs.

As of September 13, 2002, the Regensburgs paid \$200,000 plus interest on the subject mortgage loan. In accordance with the Regensburgs' request, plaintiffs executed documents releasing the mortgage against the property known as 77 E. 3rd Street, Huntington, New York. However, the Regensburgs allegedly defaulted on their obligation to make the loan payments due on the remaining principal and interest owed in August 2003 and thereafter. As a result, plaintiffs conducted a title search on the remaining property in February 2004. At that time, plaintiffs allegedly discovered that the property had previously been conveyed to defendant Erica Grossman on August 8, 2003, and that their mortgage against the property was not recorded until October 11, 2003. Plaintiffs further learned that Erica Grossman took out a purchase money mortgage with Countrywide Home Loans ("Countrywide") in the sum of \$312,000 on August 8, 2003, and that the mortgage had been recorded on September 4, 2003, more than one month prior to recording of their mortgage. Plaintiffs assert that Erica Grossman is an associate of Charles Regensburg Jr., and that she was represented by Harold Guberman during the August 8, 2003 closing. An action for foreclosure against the property was commenced by Countrywide on January 4, 2006. Plaintiffs were named, among others, as defendants to the foreclosure action. A judgment of foreclosure and sale was entered on May 16, 2007, and the property was sold at public auction on November 1, 2007.

Plaintiffs subsequently commenced this action against the Regensburgs, Erica Grossman, Harold Guberman, and Equity. By their complaint, plaintiffs allege that the Regensburgs defaulted on the subject mortgage loan; that the Regensburgs and their attorney, Harold Guberman, fraudulently

McNamara v Regensberg
Index No. 07-6281
Page No. 3

transferred the property known as 77 E. 3rd Street to Erica Grossman; that the Regensburgs and Erica Grossman improperly retained the proceeds of the purchase money mortgage without paying off plaintiffs' preexisting mortgage; that Equity breached its contractual and fiduciary duties when it negligently failed to record plaintiffs' mortgage on the property for 19 months after its execution; and that the Regensburgs, Harold Guberman, and Equity fraudulently conspired to deprive plaintiffs of the sums due and owing to them. Plaintiffs also assert a cause of action against Harold Guberman based upon his alleged violation of Judiciary Law §487.

Equity now moves for summary judgment dismissing plaintiffs' causes of action against it on the ground that the subject mortgage loan is usurious, alleging all causes of action based on such loan, including the claims for negligence, fraud, and breach of contract, are unenforceable. Harold Guberman cross-moves for summary judgment dismissing plaintiffs' complaint against him on a similar basis. Specifically, Guberman asserts that the annual interest rate on the subject loan was actually 26 % inasmuch as the Regensburgs were required to pay 10 % interest in points charged on the loan, in addition to the 16 % annual interest already charged in the promissory note. Guberman further asserts that plaintiffs' causes of action against him based on fraud, conspiracy to commit fraud and breach of fiduciary duty are without merit, as he neither owed plaintiffs a fiduciary duty nor misrepresented that the subject mortgage had been recorded. The Court notes that Guberman also seeks summary judgment dismissing the claims against the Regensburgs and Erica Grossman. However, a review of the court's computerized records reveals that neither the Regensburgs nor Erica Grossman are represented by counsel in this action, and therefore, the portion of Guberman's motion seeking such relief will not be considered for purposes of this motion.

In opposition, plaintiffs argue that Equity's motion should be denied as procedurally defective, since it failed to include a complete set of the pleadings with its motion as required by CPLR 3212 (b). Alternatively, plaintiffs contend that Equity cannot assert the defense of usury, since corporations are barred from pleading such a defense. They also argue that Equity failed to include the defense in its answer, and that, even if the defense was applicable, Equity has no standing to assert it on behalf of the alleged borrowers. Plaintiffs oppose the motion by Harold Guberman on a similar basis, namely, that Harold Guberman has no standing to plead usury as a defense, and that the defense of usury is inapplicable since plaintiffs did not receive any of the fee derived from the points charged by their agent. Plaintiffs also cross-move for summary judgment on their causes of action against Equity based on breach of contract, breach of fiduciary duty, and negligence.

Initially, the Court notes that while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (*see Wider v Heller*, 24 AD3d 433, 805 NYS2d 130 [2005]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing party has not been prejudiced (*see* CPLR 2001; *see also Welch v Hauck*, 18 AD3d 1096, 795 NYS2d 789 [2005]; *Julien v New Greenwich Gardens Assoc., LLC.*, 21 Misc 3d 1132 (A), 875 NYS2d 821 [2008]). Thus, notwithstanding Equity's failure to include copies of the pleadings with its motion, to the extent the pleadings have been included in the cross motions by the plaintiffs and Harold Guberman, the record is sufficiently complete, and the Court may decide the motion on its merits (*see Welch v Hauck, supra; Julien v New Greenwich Gardens Assoc., supra*). Furthermore, while a party may be said to waive an affirmative defense by failing to assert it either in an answer or in a motion

McNamara v Regensberg
Index No. 07-6281
Page No. 4

to dismiss (*see* CPLR 3018 (b); *Bryant v Broadcast Music, Inc.*, 27 AD3d 683, 810 NYS2d 910 [2006]), the waiver of an unpleaded defense may be retracted and serve as a basis for an affirmative grant of relief in the absence of surprise and prejudice (*see Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 444 NYS2d 911 [1981]; *Kuhl v Piatelli*, 31 AD3d 1038, 820 NYS2d 149 [2006]; *Shelis v County of Fulton*, 14 AD3d 919, 789 NYS2d 737 [2005]; *Lewick v Kelsey*, 24 AD3d 918, 806 NYS2d 732 [2005]). Here, despite Equity's failure to include the defense of usury in its answer, plaintiffs were well aware of its reliance on the defense of usury as the issue was thoroughly explored during the depositions of the parties. Thus, plaintiff was neither surprised nor prejudiced by Equity's failure to include the defense in their answer prior to making the instant motion for summary judgment.

On a motion for summary judgment, the movant bears the initial burden of establishing his cause of action or defense sufficiently to warrant the court to direct judgment in his favor as a matter of law. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see Zuckerman v New York*, 49 NYS2d 557, 427 NYS2d 595 [1980]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

A party asserting the defense of usury must establish all the elements of the defense by clear and convincing evidence. "The usury statute provides that no person or corporation shall, directly or indirectly, charge, take, or receive any money on the loan or forbearance of any money at a rate of interest exceeding 16% per annum" (*Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 740, 586 NYS2d 240 [1992]; *see also Abir v Malky, Inc.*, 59 AD3d 646, 873 NYS2d 350 [2009]; *C&M Air Sys. v Custom Land Dev. Group II*, 262 AD2d 440, 692 NYS2d 146 [1999]). "When determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its clear character, rather than by the name, color, or form which the parties have seen fit to give it" (*Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895, 814 NYS2d 551 [2006]). The elements of usury may also be established where they appear on the face of the mortgage note (*see Freitas v Geddess Sav. & Loan Assn.*, *supra*). For example, where on the face of the note a defendant is charged points in addition to the maximum allowable interest rate, such a loan will be considered usurious because points are among those charges includable as interest charges under the General Regulations of the Banking Board (*see Freitas v Geddess Sav. & Loan Assn.*, 63 NY2d 254, 259, 481 NYS2d 665 [1981]; *see also* 3 NYCRR §4.2; 1 Bergman, *New York Mortgage Foreclosures* § 6.02 [2010]).

Although corporations are ordinarily barred from asserting a defense based upon usury, they may assert the defense when the rate of interest exceeds 25 % and, therefore, is considered criminally usurious (*see* General Obligations Law §5-521(3); Penal Law §190.40; *Seidel v 18 E. 17th St. Owners*, *supra*; *Abir v Malky, Inc.*, *supra*; *Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d 483, 852 NYS2d 736 [2008]). Upon finding a loan usurious, the Court must declare the transaction and its supporting documents void, enjoin prosecution on it, and order that all documents and collateral be

McNamara v Regensberg
 Index No. 07-6281
 Page No. 5

cancelled and surrendered (*see* GOL §5-511(2); *Southern Fin. Group v Collins*, 6 AD3d 692, 775 NYS2d 161 [2004]; *Fareri v Rain's Intl.*, 187 AD2d 481, 589 NYS2d 579 [1992]; *Szerdahelyi v Harris*, 67 NY2d 42, 48, 499 NYS2d 650 [1986]).

Although Equity established its prima facie burden on the motion by demonstrating that the additional 10 points charged by plaintiffs' agent Joshua D'Avanzo impermissibly inflated the rate of interest charged by plaintiffs to 26 % (*see* General Obligations Law §5-521 (3); Penal Law §190.40; *Abir v Malky, Inc.*, *supra*; *Fareri v Rain's Intl.*, *supra*; *Freitas v Geddess Sav. & Loan Assn.*, *supra*), whether D'Vanazo's commission is a cover for usury is a factual issue which must be demonstrated by clear and convincing evidence (*see Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 446 NYS2d 917 [1981]; *Ujueta v Euro-Quest Corp.*, *supra*; *Hicki v Choice Capital Corp.*, 264 AD2d 710, 694 NYS2d 750 [1999]; *Rumbaut v Reinhart*, 216 AD2d 551, 628 NYS2d 756 [1995]). Here, details regarding the calculation of Mr. D'Avanzo's fee and how it was to be paid are conspicuously absent from either the promissory note or the mortgage agreement. Moreover, D'Avanzo testified plaintiffs did not retain any of his fee and he regarded himself as a financial adviser who found mortgages for plaintiffs to invest in. Thus, triable issues exist as to whether D'Vanzo's fee was a mere commission, or whether it should be chargeable as interest on the loan against plaintiffs and was merely cover for a usurious loan (*see Ujueta v Euro-Quest Corp.*, *supra*; *Hicki v Choice Capital Corp.*, *supra*).

Inasmuch as a finding of usury requires the court to declare the transaction and its supporting documents void, and enjoin plaintiffs' prosecution of causes of action based upon the validity of those documents (*see* GOL §5-511(2); *Szerdahelyi v Harris*, *supra*; *Seidel v 18 E. 17th St. Owners*, *supra*; *Fareri v Rain's Intl.*, *supra*; *Southern Fin. Group v Collins*, *supra*), plaintiffs' cross motion seeking summary judgment on the issue of liability against Equity based on its causes of action for negligence, fraud, and breach of contract and fiduciary duty is denied. For the same reason, the motion by defendant Harold Guberman for summary judgment dismissing plaintiffs' complaint against him based on the defense of usury is denied.

Dated: 5-10-2010

Hon. Denise F. Molia

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION