

FECF Headlee Newburg Mgt. Invs. 10/06 LLC v Headlee Mgt. Corp.
2010 NY Slip Op 31413(U)
June 4, 2010
Supreme Court, New York County
Docket Number: 111657/09
Judge: Barbara R. Kapnick
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6-8-10

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 37

FECP

INDEX NO. 111657/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Headlee

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes

No

FILED

JUN 08 2010

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 6/4/10

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----x
FECF HEADLEE NEWBURG MANAGEMENT
INVESTORS 10/06 LLC,

Plaintiff,

-against-

HEADLESS MANAGEMENT CORP., ANDRE
MOGLIA, EXECUTOR OF THE ESTATE OF
JAN A. HEADLEE, DECEASED,

Defendants.

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 111657/09
Motions Seq. Nos.
001 and 002

FILED
JUN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Motions sequence numbers 001 and 002 are consolidated herein
for disposition.

Plaintiff FECF Headlee Newburg Management Investors 10/06 LLC
("FECF") claims that it loaned defendant Headlee Management Corp.
("Headlee") the principal amount of \$400,000 pursuant to a Loan
Agreement dated as of October 17, 2006. The loan was evidenced by
a Promissory Note between the parties bearing the same date. Also
on that date, Jan A. Headlee executed a Personal Guaranty
"absolutely and unconditionally" guaranteeing full and prompt
payment and performance of Headlee's obligations under the
Agreement and Note.

Mr. Headlee died on May 21, 2008 and Andre Moglia was
appointed as Executor of the Estate.

Plaintiff claims that defendant Headlee was obligated to make monthly interest payments of \$7667 starting on December 1, 2006 and continuing through May 1, 2011, but failed to do so beginning on February 1, 2009.¹

FECF sent formal notices to defendant Headlee in July 2009, pursuant to the Agreement and Note, notifying it of its failure to make the required payments.

According to plaintiff, an "Event of Default" occurs after the failure to pay once notice has been given. No payments were subsequently made.

Plaintiff now moves, under motion sequence number 001, for summary judgment in lieu of Complaint, pursuant to CPLR § 3213, against the defendants, jointly and severally, in the amount of \$461,336.00 plus costs, on the grounds that this action is based upon instruments for the payment of money only.

Defendant Headlee submitted papers in opposition in September 2009, but the Court was informed by letter dated January 5, 2010 that defendant Headlee had filed a Chapter 11 petition in the

¹ Plaintiff also alleges that the check with the interest payment for January 2009 bounced.

United States Bankruptcy Court in Poughkeepsie, New York on December 8, 2009, and thus the case is now stayed against the corporate defendant by virtue of the bankruptcy filing.

The Estate did not submit any papers in opposition, but rather moved under motion sequence number 002 for an Order: 1) pursuant to CPLR § 2201 granting a stay of the action; and 2) pursuant to CPLR §§ 3211(a)(3) and (a)(4) granting dismissal in its favor.

Plaintiff argues in the first instance that the Estate's motion is in actuality an untimely-filed opposition to its motion for summary judgment in lieu of Complaint and should be rejected.

This Court, however, in its discretion, will consider the Estate's motion on its merits.

The Estate argues first that plaintiff has no standing to sue because while it filed an application for authority to do business in New York as a foreign limited liability company on or about July 8, 2009, it has not filed a certificate of publication with the Department of State as required under § 802 of the Limited Liability Company Law.

Plaintiff, however, has annexed to its papers a copy of a certificate from the Department of State dated September 18, 2009

indicating that it is authorized to do business in the State of New York. Thus, plaintiff has standing to bring this action.

The Estate's next argument that this action should be dismissed on the grounds that plaintiff's action in the Surrogate's Court, Dutchess County (In the Matter of the Estate of Jan A. Headlee, File No. 2008-97049) constitutes a prior action pending for the same relief lacks merit, since the petition filed in the Surrogate's Court seeking to compel the Estate to set aside funds sufficient to pay any judgment against the Estate that should issue from this Court is merely a necessary adjunct to the proceedings herein, and serves only to guarantee that there will be funds in the Estate to satisfy any judgment this Court might enter.

The Estate next argues that plaintiff's motion is premature as no discovery has been conducted, and thus that it is prejudiced, since all of the essential information pertaining to the subject loan transaction is under the control and possession of the plaintiff. Defendant further argues that because of Mr. Headlee's death, the Estate is unable to ascertain whether or not he was required to pay points or other fees intended by plaintiff to disguise interest payments, since the Note calls for interest at the rate of 23%, which places it on the cusp of an illegal, or usurious, interest rate.

"It is well established that an unconditional guarantee such as the one involved here is an instrument for the payment of money only within the meaning of CPLR § 3213" *European Am. Bank & Trust Co. v. Schirripa*, 108 AD2d 684 (1st Dep't 1985). The Estate has set forth no evidentiary facts to counter any aspect of plaintiff's proof. Rather, the Estate argues that discovery might reveal that Mr. Headlee had paid fees which would increase the effective interest rate on the loan to more than 25%.

A party asserting the defense of usury must establish it by "'clear evidence as to all the elements essential thereto'" (citation omitted). "The court will not assume that the parties entered into an unlawful agreement ... On the contrary when the terms 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" (citations omitted).

People's Natl. Bank of Rockland County v. Kogan, 120 AD2d 718, 719 (2nd Dep't 1986).

Here, there is no evidence from defendant, only conjecture, and "there is a strong presumption against the finding of usurious intent, [moreover] ... a loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest (citation omitted)." *Lehman v. Roseanne Invs. Corp.*, 106 AD2d 617 (2nd Dep't 1984).

Further, "a borrower may pay reasonable expenses attendant on a loan without rendering the loan usurious (citations omitted)." *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 NY2d 124, 127 (1992).

In this case, Mr. Headlee was not even the borrower, but rather the unconditional personal guarantor of the borrower's obligations under the Agreement and Note.

Moreover, Mr. Headlee waived the right to assert "any and all defenses otherwise available to guarantor ..." (See Guaranty, ¶ 2) and the Guaranty specifically provides that it is "binding upon the estate, heirs, successors and assigns of Guarantor." (Guaranty, ¶ 8).

Finally, the Estate argues that plaintiff has failed to serve a necessary party to this action, namely William Wildman, a pro-se co-defendant. However, it is clear from a brief glance at the caption, that Mr. Wildman, although named as a defendant in a related case handled by this Court,² is not named as a defendant in this case.

Accordingly, this Court denies defendant's motion in its entirety and grants plaintiff's motion for summary judgment in lieu

² FECF Montgomery BWW Investors 8/06 LLC v WJV Alabama, Inc., Wing Joint Venture, Inc., William Wildman and the Estate of Jan A. Headlee, Deceased, Index No. 600732/09.

of complaint as against defendant Andre Moglia, Executor of the Estate of Jan A. Headlee, deceased.

- The Clerk is directed to enter judgment in favor of plaintiff FECP Headlee Newburg Management Investors 10/06 LLC and against defendant Andre Moglia, Executor of the Estate of Jan A. Headlee, deceased only in the amount of \$461,336.00 plus costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The case is severed and stayed as against co-defendant Headlee Management Corp.

This constitutes the decision and order of this Court.

Dated: June 21, 2010



BARBARA R. KAPNICK

BARBARA R. KAPNICK
J.S.C.
J.B.C.

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