Donenfeld v Brilliant Tech. Corp.
2011 NY Slip Op 30554(U)
February 28, 2011
Supreme Court, New York County
Docket Number: 600664/07
Judge: Debra A. James
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SCANNED ON 3/7/2011

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

NANCY L. DONENFELD and THELMA L. DONENFELD, AS TRUSTEE OF THE NANCY L. DONENFELD TRUST,

Plaintiff,

- v -

BRILLIANT TECHNOLOGIES CORPORATION f/k/a ADVANCED TECHNOLOGY INDUSTRIES, INC.; ADVANCED TECHNOLOGY INDUSTRIES, INC.; ALLAN KLEPFISZ; ETHEL GRIFFIN, PUBLIC ADMINISTRATRIX OF NEW YORK COUNTY, AS ADMINISTRATRIX OF THE ESTATE OF KURT SEIFMAN, DECEASED,

Defendant.

Index No.: 600664/07

Motion Date: 08/03/10

Motion Seq. No.: 02

Motion Cal. No.: 32

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 4 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3
Replying Affidavits - Exhibits	4

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers,

Plaintiffs NANCY L. DONENFELD and THELMA L. DONENFELD, AS TRUSTEE OF THE NANCY L. DONENFELD TRUST move, pursuant to CPLR 3212, for partial summary judgment on their first, third, seventh and eighth causes of action. Defendants Brilliant Technologies Corporation (BTC), Advanced Technology Industries, Inc.(ATI) and Allan Klepfisz (Klepfisz) cross-move, pursuant to CPLR 4511, to take judicial notice of the laws of the Country of Germany

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

Check One: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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regarding usury and/or criminal usury and, pursuant to CPLR 3212, for summary judgment dismissing the action on the grounds that the loan agreement between the parties was usurious and, therefore, void *ab initio*, or alternatively, that the debt has been satisfied.

Plaintiffs Nancy L. Donenfeld (Donenfeld) and Thelma L. Donenfeld, as Trustee of the Nancy L. Donenfeld Trust (the Trust), bring the within action to recover $260,000.00 plus interest and late fees, pursuant to a written loan agreement, dated June 5, 2001 (the Loan Agreement), between defendant ATI, now known as BTC, as borrower, and Donenfeld, as lender.

Donenfeld alleges that, beginning in late 2000, Kurt Seifman (Seifman), a man with whom Donenfeld had an intimate relationship, and who was also the majority shareholder of ATI, convinced Donenfeld to loan money from the Trust to ATI. Donenfeld alleges that she first entered into a loan agreement with ATI in October 31, 2000, when she loaned the corporation $300,000.00. Thereafter, on January 2, 2001, she loaned ATI an additional $100,000. These loans were to be repaid on April 29, 2001 and July 1, 2001, respectively.

Donenfeld alleges that ATI did not repay the initial $300,000.00 loan by April 29, 2001. She states that she was informed, at that time, by Hans Skrobanek (Skrobanek), ATI's President, James Samuelson (Samuelson), ATI's Chief Financial

Officer, Vice-President and Secretary and by Seifman, that ATI would not be able to repay the loans unless Donenfeld agreed to "convert" $180,000 of her $300,000 and $100,000 loans into restricted and unregistered shares of ATI and then "reloan" the remaining $220,000, along with another $40,000 to ATI. Skrobanek, Samuelson and Seifman represented that the new loan would be paid back, in full, in another 180 days. Donenfeld states that she agreed to this conversion without retaining the services of an attorney, and signed a written conversion agreement, dated May 1, 2001.

On June 5, 2001, Donenfeld and ATI entered into the Loan Agreement, which was drafted by ATI's attorneys. Under the terms of the Loan Agreement, ATI was required to repay the $260,000 loaned, with interest at the rate of 1% per month on the unpaid principal balance, no later than 180 days from June 5, 2001.

Donenfeld alleges that, as a late fee for failing to repay the $300,000 loan on time, she was issued 260,000 shares of restricted and unregistered stock in ATI. The Loan Agreement describes these shares as "equity incentive". Donenfeld alleges that she could not trade these restricted shares unless these shares were registered or qualified as exempt from registration under Rule 144 of the Securities and Exchange Act. Under the terms of the Loan Agreement, ATI agreed to take such steps as were

necessary to enable Donenfeld to trade her ATI shares without registration.

The Loan Agreement also provided that it was to be governed and construed in accordance with the laws of the Republic of Germany. It further provided for payment of all costs, expenses and attorneys' fees incurred by a party that successfully enforced any Loan Agreement provision. The Loan Agreement attached a promissory note, which was also dated June 5, 2001 (the Promissory Note), and was signed by Samuelson.

On December 5, 2001, ATI had not repaid the loan and Donenfeld and ATI entered into the First Amendment to the Loan Agreement (the First Amendment). Pursuant to the First Amendment, Donenfeld agreed to extend the maturity date of the loan to February 6, 2002, in consideration for which ATI issued and delivered to Donenfeld another 520,000 shares of restricted stock.

However, on February 6, 2002, ATI had not repaid the amount of money due and owing on the Loan Agreement. A week later, on February 13, 2002, Donenfeld and ATI entered into a separate letter agreement (the Letter Agreement), pursuant to which Donenfeld agreed to extend the due date of the Loan Agreement, and ATI agreed to repay Donenfeld, what was by then $280,686.16, by March 6, 2002, together with 1% monthly interest. Under the terms of the Letter Agreement, ATI gave Donenfeld an additional 283,306 restricted shares of ATI stock. In addition, ATI agreed that, if

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it did not repay the full amount it owed under the Letter Agreement by March 6, 2002, it would pay Donenfeld a late fee of $500 per day until the principal, interest and late fees were paid in full.

ATI did not pay the amount due under the terms of the Letter Agreement. Thereafter, it periodically sent account statements to Donenfeld. On March 26, 2003 Samuelson sent an account statement to Donenfeld indicating that, as of December 31, 2002, ATI had an outstanding balance due to Donenfeld of $459,892.67.

On December 5, 2004, ATI merged with LTDnetwork, Inc. (LTDN), whereby the former stockholders of LTDN owned a majority of the merged company, named ATI, and the LTDN management controlled the Board of Directors of ATI. Defendant Allan Klepfisz (Klepfisz) was the Chief Executive Officer and a director of LTDN from March 2000 until the merger in December 2004. After the merger, Klepfisz became the President and Chief Executive Officer of ATI. On May 1, 2006, ATI changed its name to BTC.

On April 4, 2006, Klepfisz sent an account statement to Donenfeld indicating that, as of December 31, 2005, ATI had an outstanding loan of $260,000 plus 1% per month interest accruing as of June 5, 2001 and a $500 per day late fee accruing as of March 6, 2002.

Donenfeld commenced the within action in March 2007, alleging causes of action for breach of contract with respect to

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the loan (first cause of action), breach of contract with respect to the registration rights (second cause of action), account stated (third cause of action), quasi contract (fourth cause of action), fraud (fifth cause of action), fraudulent inducement (sixth cause of action), action on a note (seventh cause of action) and restitution and unjust enrichment (eighth cause of action).

In defense of the action defendants assert that defendant Allan Klepfisz did not become legally associated with defendant ATI, now known as BTC, until December, 2004, when it merged with LTDN. Defendants assert that, prior to December 2004, neither Klepfisz, nor BTC had any ownership interest in, or control over, ATI.

Defendants also assert that the loan transactions in issue are usurious. Defendants point out that, under the terms of the Loan Agreement, in addition to the 12% interest rate, Donenfeld received 260,000 shares of ATI common stock, which defendants claim were then valued at approximately $293,000.00. In addition, under the First Amendment, Donenfeld received an additional 520,000 shares of ATI stock, valued at approximately $166,000.00, and then an additional 283,306 shares of stock, valued at approximately $118,080.00. Thus, according to defendants, Donenfeld has already received a total of 1,063,306 shares of stock, valued at approximately $577,989.00.

In addition, defendants assert that prior e-mail communications between Donenfeld and Skrobanek indicate that Donenfeld agreed to accept ATI shares of stock in lieu of repayment of her loan. In an e-mail dated October 23, 2002, Donenfeld wrote to Skrobanek as follows:

> Samuelson called me in April, told me that I could either accept that ATI was defaulting on their obligation to pay me back or I could accept a conversion and also not get any money returned-at least I could have some stock instead. I VERY VERY reluctantly accepted the conversion- Samuelson, in effect gave me no choice. I asked Kurt. He told me to trust Samuelson and do what he said. (Kurt was in Germany at the time and I guess you all discussed it. So I had to get 1 year restricted shares at 36 or 37 cents per share. That same day or within a day or two, Samuelson gave Glen Cramer a bridge loan to return all of his money in (I think) 3 months and to get (I think) 2 or 3 additional shares per dollar and even get an additional 1% interest per month on all of it. In order to right this total inequity, *I, of course, expect to have that Stock Conversion changed into bridge loans (from May 1, 2001)* instead, with all that implies-as the others got. I have been bringing it up to Samuelson and to Kurt often since I was forced to do it and nothing has occurred yet-although Kurt now almost understands it and wants to make it right (emphasis added).

Inasmuch as Donenfeld is requesting that her stock conversion be changed into a bridge loan *from May 1, 2001*, she is clearly referring to the stock conversion which occurred in May 2001, when her original loan to ATI was not repaid, and was instead converted into ATI common shares and the Loan Agreement.

Therefore, this communication does not, as suggested by defendants, evidence that the Loan Agreement was repaid. Moreover, subsequent to this e-mail, Samuelson informed Donenfeld, by letter March 26, 2003, that, as of that date, the $260,000 loan remained outstanding, and the interest accrued, as of December 31, 2002 was $199,892.67.

Considering defendants' cross-motion first, CPLR 4415 (b) provides that a New York court shall take judicial notice of the laws of foreign countries if "a party requests it, furnishes the court with sufficient information to comply with the request, and has given each adverse party notice of his intention to request it." A court may take judicial notice of foreign laws if a party submits expert opinion in the form of affidavits as to what the foreign law is, including copies of relevant statutes, rules and case law (Warin v Wildenstein & Co., 2001 WL 1117493, 2001 NY Slip Op 40127 (U) [Sup Ct, NY County] *affd*, 297 AD2d 214 [1st Dept 2002]).

Here, defendants have set forth the affidavit of Mr. Hildebrecht Braun, an attorney, who cites the German Code of Civil Law, § 138 ¶ 1, which, he states, provides "that a contract is immoral and thus from the beginning null and void if performance and consideration stand to each other in a marked disproportion". Mr. Braun further states that this provision is applied to loan contracts and that German jurisprudence holds that a loan contract

is immoral if the usual interest rate in the contract is exceeded by more than 100%. Mr. Braun states that, under German law, if more than double the usual interest has been agreed to, the loan contract is null and void. Mr. Braun further opines that, in this case, the "usual" interest rate should be held to be the usual New York'interest rate, which he further opines, at the time the unsecured loan was made, would have been 8%.

Mr. Braun's affidavit does not include a copy of the statute he cites to, or any German court decisions which would aide this court in its determination as to what is illegal under German law. This court therefore declines to take judicial notice of the subject German Code by reason of the lack of information sufficient to determine the statute's scope and effect (*see e.g.* Warin v Wildenstein & Co., 297 AD2d at 214).

Defendants next cross-move for summary judgment dismissing the complaint on the ground that the Loan Agreement and subsequent amendments are usurious and therefore void *ab initio*. New York recognizes two level of usury. "Civil usury" is defined by General Obligations Law (GOL) § 5-501 (1), which, in combination with Banking Law § 14-a (1), sets forth the maximum permissible level of interest on loans at 16% per year. Criminal usury is defined in New York Penal Law § 190.40 as a rate exceeding 25% per year.

Two important exceptions to the civil usury laws are relevant to this action. Under GOL § 5-521 corporations may not interpose the defense of usury in an action unless the interest rate on the loan in issue rises to the level of criminal usury. In addition, GOL § 5-501 provides that loans of $250,000.00, or greater, are not subject to the civil usury statute. The loan herein, was given to a corporation for $260,000 and is, therefore not subject to the civil usury statute.

In addition, the Loan Agreement on its face provides for interest at the rate of 1% per month, which is below the maximum level of interest allowed on a loan. Defendants' defense of criminal usury rests upon their assertion that the ATI common stock issued to Donenfeld was part of the interest on these transactions, and was of sufficient value so as to violate the penal law. However, it is un-controverted that each of the agreements subsequent to the initial loan agreement of June 5, 2001 were entered into as a result of ATI's default in payment of a prior obligation. Thus, the issuance of the ATI shares to Donenfeld in conjunction with these agreements constitute late fees or penalty interest rates which under New York law are not calculated as part of the interest rate on the loan <u>F.K Gailey Company v Wahl</u>, 262 AD2d 985 [4th Dept 1999]); (<u>In re Integrated Resources, Inc.</u>, 851 F Supp 556, 565 [SD NY 1994]. For these reasons, the cross motion is denied.

Plaintiffs argue that they have established all the elements of account stated and breach of contract. Defendant counters that, in addition to the interest of the initial loan of June, 2001 being usurious, at no time have plaintiffs ever provided documentation sufficient to establish a statement of an account between the plaintiffs and the defendants herein. The court disagrees with defendants.

Plaintiff on this motion submits three statements signed by officers of ATI acknowledging the debt owed to plaintiffs on ATI letterhead addressed to Nancy Donenfeld: the first dated April 3, 2002 signed by Skrobanek, the second dated March 26, 2003 signed by Samuelson, the third dated April 4, 2006 signed by Klepfisz. The later two statements acknowledged a late fee owed to Plaintiff of five hundred dollars per day late fee. All of the statements acknowledge the prior debt owed of $260,000 at an interest rate of 1% per month. See, Rosenman Colin Feund Lewis & Cohen v Carl Neuman, 93 A.D.2d 745 (1st Dept 1983) (where plaintiff has submitted defendant's written acknowledgment of indebtedness in the claimed amount and the amounts due plaintiff were not contested by defendant until suit was commenced, the written acknowledgment is a stated account.)

The Court of Appeals has defined account stated as follows:

> As was stated nearly one hundred years ago by Chief Judge Folger, "[a]n account stated is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory

> note had been given for the balance" (Volkening v DeGraaf, 81 NY 268, 270); and in Newburger-Morris Co. v Talcott (219 NY 505, 512) Judge Cardozo wrote as follows: "the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness, insimul computassent, so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained." Thus, while the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found (Corr v Hoffman, 256 NY 254, 266).

Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc., 37 NY2d 151, 153 -154 (1975). It is undisputed on this motion that defendants submitted statements, prepared and signed by officers of the defendant corporations, which acknowledge the debt owed to plaintiffs. On these facts, plaintiffs have set forth a prima facie case on its account stated cause of action. Plaintiffs motion for partial summary judgment is therefore granted.

Based upon the foregoing it is

ORDERED that the motion by plaintiffs Nancy L. Donenfeld and Thelma L. Donenfeld, as Trustee of the Nancy L. Donenfeld Trust, for partial summary judgment is GRANTED; and it is further

ORDERED that the cross-motion by defendants Brilliant Technologies Corporation, Advanced Technology Industries, Inc. and Allan Klepfesz to take judicial notice of the Laws of Germany and for summary judgment dismissing the action is DENIED; and it is further

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ORDERED and ADJUDGED that plaintiffs' motion for summary judgment is GRANTED on plaintiffs' third cause of action for account stated; and it is further

ORDERED and ADJUDGED that the Clerk shall enter judgment in favor of plaintiffs NANCY L. DONENFELD and THELMA L.DONENFELD, AS TRUSTEE OF THE NANCY L. DONENFELD TRUST and against defendants BRILLIANT TECHNOLOGIES CORPORATION f/k/a ADVANCED TECHNOLOGY INDUSTRIES, INC.; ADVANCED TECHNOLOGY INDUSTRIES, INC.; ALLAN KLEPFISZ; ETHEL GRIFFIN, PUBLIC ADMINISTRATRIX OF NEW YORK COUNTY, AS ADMINISTRATRIX OF THE ESTATE OF KURT SEIFMAN, DECEASED in the amount of $260,000.00 plus interest at the rate of 1% per month from June 5, 2001 through the date of entry of judgment to be calculated by the Clerk plus a late fee of $500 per day from March 6, 2002 through the date of entry of judgment to be calculated by the Clerk in the amount of $____________________ , plus costs and disbursements associated with this application of $______________, as taxed by the Clerk, for the total amount of $________________ , and the Plaintiffs shall have execution therefor.

Dated: February 28, 2011 ENTER:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DEBRA A. JAMES J.S.C.
J.S.C.