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SHORT FORM ORDER

INDEX NUMBER: 32873-2010

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

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

Original Motion Date: 09-30-2010
Motion Submit Date: 02-01-2010
Motion Sequence No.: 001 MOTD CASEDISP

[X] FINAL
[ ] NON FINAL

_____X

LAWRENCE DENSEN,

Plaintiff,

-against-

MICHAEL AHSLEY,

Defendant.

_____X

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ORDERED, that the motion by plaintiff (motion sequence number 001) pursuant to CPLR 3213 for summary judgment in lieu of complaint is denied; and it is further

ORDERED, that pursuant to CPLR 3212(b), upon searching the record, the defendant is granted summary judgment and the complaint is dismissed.

BACKGROUND

Plaintiff, Lawrence Densen, commenced this action pursuant to CPLR 3213 by the filing of this motion for summary judgment in lieu of complaint. The submissions reflect that on August 24, 2005, plaintiff loaned the sum of $265,000.00 to defendant Michael Ashley. Defendant executed a Note dated August 24, 2005, that required that the loan be repaid on August 24, 2007. The Note provided that the loan would bear interest "at 20.00% per year compounded quarterly. At the end of the two year period . . ., the principal of $265,000.00 and compounded interest of $126,525.70, for a total amount due of $391,525.70 will be repaid to Lawrence Densen, in one

lump sum payment payable to 'Pensco Trust Company Custodian FBO-Lawrence Densen, IRA DEIDC'". The Note also provided for a late charge of two percent (2%) and for the payment of costs and expenses, including attorneys' fees, incurred in enforcing the note. Paragraph 3 of the Note, entitled "Loan Charges", states, in relevant part:

> If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest of [sic] other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit . . .

On August 31, 2008, an Amendment to Note was executed by the parties whereby the maturity date of the Note was extended to August 31, 2010, and the defendant agreed to continue to compound interest payments quarterly in accordance with the original note.

In support of the instant motion, plaintiff submits an affidavit establishing the default by defendant. Although plaintiff's affidavit states that copies of the Note and Amendment to Note are attached as exhibits, same are not attached thereto. However, copies are attached to defendant's opposition papers. Plaintiff states that defendant has not repaid the loan and that defendant owes the amount of $386,330.54, plus interest pursuant to the terms of the Note from August 24, 2005 until the date the Note is paid in full, plus attorneys' fees and expenses incurred. Plaintiff also states that he has incurred legal expenses in the amount of 35% of the amount outstanding under the Note.

Defendant opposes the motion and submits an affidavit with exhibits annexed thereto. Defendant contends: (1) that plaintiff lacks standing to bring the action because the Note reflects that the source of the funds was not plaintiff but rather non-party Pensco Trust Company Custodian FBO-Lawrence Densen, IRA DEIDC; (2) that plaintiff failed to comply with a condition precedent in the Note by failing to give 30 days written notice of the default to defendant before commencing this action; (3) that defendant is entitled to a set off by virtue of a separate loan made by defendant's company to plaintiff in 2009 that has not been paid back; and (4) that the Note is void because the interest imposed is usurious in violation of Penal Law § 190.40.

Specifically, defendant contends that the proceeds of the loan at issue were utilized by defendant's business, Cooper Capital Group Ltd. ("Cooper"), were deposited into Cooper's account, and were utilized by Cooper for its investment purposes. Additionally, in 2009, in order to facilitate an investment, Cooper lent plaintiff $1,688,000.00, and plaintiff executed a separate Loan Agreement and Note in that amount. Plaintiff then acquired 1,688 shares of stock of Gateway bank. Defendant claims that part of the loan by Cooper to plaintiff "necessarily included [plaintiff's] loan to Cooper/[defendant]." Thus, defendant claims that "there is a complete set off

of the claims raised in this lawsuit, by virtue of the loan made by Cooper to [plaintiff]".

With regard to his contention that the Note is void because it is criminally usurious, the defendant states that the total principal and accrued interest over the five-year term of the Note, as amended, amounts to $703,123.89, of which $265,000 is principal and $438,123.89 is interest. The total amount of interest ($438,123.89) divided by the number of years of the loan (five) provides annual interest of $87,624.78, which, when divided by the principal amount ($265,000) yields an annual interest rate of 33%, which violates Penal Law § 190.40.

In reply, the plaintiff argues, among other things, that Penal Law § 190.40 does not apply to the loan at issue because GOL § 5-501(6)(b) exempts loans in the amount of $2,500,000.00 or more from the provisions of Penal Law § 190.40. Although the plaintiff argues that calculating interest on the loan compounded quarterly does not rise to the level of usury, he fails to provide any calculations. He simply contends that interest of 20% per year, as provided for in the Note, results in 5% per quarter, which is not usurious. The plaintiff also argues that paragraph 3 of the Note is an "anti-usurious clause" which, if it is determined that the interest rate exceeds permissible limits, should be enforced to reduce the rate of interest "to that which is permitted by law."

DISCUSSION

As recently observed by the Appellate Division, Second Department in *Lugli v. Johnston* (78 AD3d 1133, 1134-5 [2d Dept 2010]):

> In accordance with CPLR 3213, a party may commence an action in lieu of complaint when the action is "based upon an instrument for the payment of money only or upon any judgment." A promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time (citations omitted). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman v. Sinorm Deli*, 88 NY2d 437, 444; citations omitted).
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> To establish a prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms (citations omitted).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law.

The motion papers include a copy of the Note executed by the defendant and the Amendment to Note. The Note, as modified by the Amendment to Note, is an instrument for the payment of money only as it contains an unconditional promise by the defendant to pay the plaintiff. The plaintiff's affidavit establishes the failure by the defendant to pay in accordance with the Note's terms. No outside proof is needed.

Contrary to the defendant's contention in opposition to the motion, the plaintiff has standing to bring this action as the Note clearly and unequivocally indicates that the plaintiff, Lawrence Densen, is the lender. The fact that the Note states that the funds for the loan came from the plaintiff's IRA account and that repayment will be made to the plaintiff payable "Pensco Trust Company Custodian FBO-Lawrence Densen, IRA DEIDC" is irrelevant.

Additionally, contrary to the defendant's contention, paragraph 4(C) of the Note did not obligate the plaintiff to send written notice of default to the defendant prior to commencing the instant action. That paragraph provides:

> If Ashley is in default, the Note Holder ***may*** send a written notice stating that if the overdue amount is not paid by a certain date, the Note Holder ***may*** require Ashley to pay immediately the full amount of Principal which has not been paid and all the interest that is owed on that amount. That date must be at least 30 days after the date on which the notice is mailed to Ashley or delivered by other means. (emphasis added).

It is clear that the notice provision of paragraph 4(C) was not mandatory. Rather, it gave the plaintiff the option of providing written notice and demanding immediate payment. Therefore, it was not a condition precedent and the plaintiff's failure to send the defendant written notice is not fatal to this action.

Next, the defendant's contention that he is entitled to a complete set off of the claims raised by the plaintiff in this action by virtue of a loan made by the defendant's corporation to the plaintiff is without merit. The defendant's self-serving statement that "part of the loan to Mr. Densen necessarily included Mr. Denson's loan to Cooper/Ashley" is not supported by any documentary evidence. The Note itself does not indicate that the amount of payment was to be off set by any amounts owed by the plaintiff to the defendant's corporation under a separate note. Moreover, the loan from the defendant's corporation to the plaintiff occurred in 2009, three and one-half years after the Note.

Nevertheless, the Court finds that the Note violates Penal Law § 190.40 and, therefore, was void *ab initio*.

> New York law prohibits usury both civilly and criminally . . . In its present form, the civil usury statute (General Obligations Law § 5-501[2]), provides that "[n]o person or corporation shall, directly or indirectly, charge, take or receive any money . . . on the loan or forbearance of any money . . . at a rate exceeding" 16% per annum. The rate is established by Banking Law § 14-a. A loan is usurious if the lender intends to take and receive a rate of interest in excess of that allowed by law, even if the lender has no specific intent to violate the usury laws. *Hammond v. Marrano*, 88 A.D.2d 758, 759, 451 N.Y.S.2d 484 (4th Dept 1982).

(*Bakis v. Levitin*, 3 Misc.3d 1110(a), 2004 WL 1365874 [Sup Ct Nassau Cty 2004]).

GOL § 5-511(1) provides, in relevant part:

> All bonds, bills ,notes, assurances, conveyances, all other contracts or securities 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 . . . of any money . . ., *than is prescribed in section 5-501,* shall be void . . . (emphasis added).

However, GOL § 5-501(6) sets forth exceptions to the applicability of GOL § 5-511:

> a. *No law* regulating the maximum rate of interest which may be charged, taken or received, *except section 190.40 . . . of the penal law, shall apply to any loan . . . in the amount of two hundred fifty thousand dollars or more . . .*
>
> b. *No law* regulating the maximum rate of interest which may be charged, taken or received, *including section 190.40 . . . of the penal law, shall apply to any loan . . . in the amount of two million five hundred thousand dollars or more . . .*(emphasis added).

Penal Law § 190.40, New York's criminal usury statute, provides:

> 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 . . . as interest on the loan . . . of any money . . ., at a rate exceeding *twenty-five* per cent per annum or the equivalent rate for a longer or shorter period. (Emphasis added).

Although GOL § 5-511 does not operate to void loans of $250,000 or more with interest in excess of 16% (*see* GOL § 5-501[6][a]), it has been held that loans which are criminally usurious, i.e. in violation of Penal Law 190.40 are void *ab initio* preventing the lender from recovering either the principal or the interest (*Fareri v. Rain's Inter. Ltd.*, 187 A.D.2d 481 [2d Dept 1992][promissory note in the amount of $250,000 with an effective rate of interest of 26.14% violated Penal Law 190.40 and was void *ab initio*]; *Bales v. Pfeifer* (NYLJ, Apr. 26, 2005, at 19, col 1 [Sup Ct, Nassau County, Austin, J.][loan of $300,000 bearing interest rate in excess of 100 percent per annum void because criminally usurious]).

Here, the Note amount exceeds $250,000.00. Thus, GOL 5-501 does not apply (*see Machidera Inc. v. Toms*, 258 A.D.2d 418 [1st Dept 1999]). However, when calculated pursuant to the method authorized by the Court of Appeals in *Band Realty Co. v. North Brewster, Inc.* (37 N.Y.2d 460 [1975][annual rate = total interest paid/total years]), the Note exacted an effective rate of interest in excess of 30%. Therefore, the Note, as amended, is in violation of Penal Law 190.40 and was void *ab initio* (*see Fareri* at 482).

The plaintiff's contention that even if the Note is found to be usurious it is nevertheless enforceable because paragraph 3 of the Note operates to reduce the interest rate to the legal rate in the event of a finding of usury is without merit. Such language does not make the subject Note nonusurious (*see Simsbury Fund, Inc. v. New St. Louis Assocs.*, 204 A.D.2d 182 [1st Dept 1994]).

Accordingly, the plaintiff's motion for summary judgment in lieu of complaint is denied and, upon searching the record pursuant to CPLR 3212(b), the defendant is granted summary judgment and the complaint is dismissed.

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

Dated: April 15, 2011
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[X] FINAL
[ ] NON FINAL