

Abir v Estate of Zabian
2011 NY Slip Op 32449(U)
July 22, 2011
Sup Ct, NY County
Docket Number: 106787/2010
Judge: Lucy Billings
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x
MINOO ABIR,

Plaintiff

Index No. 106787/2010

- against -

DECISION AND ORDER

ESTATE OF MOZAFAR ZABIAN a/k/a
MOZAFAR ZAHABIAN,

Defendant

LUCY BILLINGS, J.S.C.:

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).

I. BACKGROUND

Borrower Mozafar Zabian gave plaintiff lender a promissory note dated March 20, 2002, in the principal amount of \$40,000, in consideration for plaintiff's loan of that amount. The note required monthly payments of interest at 16.5% per year and was payable in full 30 days after demand. Plaintiff claims no interest payments have been made since October 2009. The borrower died December 20, 2009. On February 24, 2010, the Surrogate's Court in New York County appointed David Zahabian Administrator of the borrower's estate.

Plaintiff now moves for summary judgement in lieu of a complaint to recover the note's principal plus accrued interest and late fees. N.Y. C.P.L.R. § 3213. Defendant cross-moves to dismiss the complaint, based on defenses of improper service of the motion; the estate's lack of capacity to be sued, instead of the estate's administrator; failure to file a notice of claim and bring the action in Surrogate's Court; premature commencement of the action; and usury. C.P.L.R. § 3211(a)(1), (2), (3), (7), and abir.135

(8). Plaintiff in turn cross-moves to substitute David Zahabian, Administrator of the Estate of Mozafar Zabian (a/k/a Mozafar Zahabian), as defendant. C.P.L.R. §§ 1002(b) and 1003.

The parties do not dispute that plaintiff and the deceased borrower entered into a loan agreement for \$40,000, payable on demand, with monthly payments of 16.5% interest; that the borrower made his last payment two months before he died; and that no further payment has been made. Plaintiff thus establishes his prima facie claim for payment of a sum certain. Defendant nonetheless sets forth its several defenses to support its cross-motion to dismiss the action.

II. SUBSTITUTING THE DEFENDANT

Plaintiff also does not dispute that the defendant to be sued is the administrator of the estate, David Zahabian as Administrator of the Estate of Mozafar Zabian (a/k/a Mozafar Zahabian), rather than the estate itself, and moves to substitute him as defendant. N.Y. Est. Powers & Trusts Law (EPTL) § 11-3.1; C.P.L.R. § 1003. Although substitution of that defendant would comply with EPTL § 11-3.1, that substitution would not avert defendant's defenses of premature filing and usury. N.Y. Surr. Ct. Proc. Act (SCPA) § 1806; N.Y. Gen. Oblig. Law § 5-501, 5-511(2).

III. PLAINTIFF ADEQUATELY SERVED THE ADMINISTRATOR OF THE ESTATE.

Plaintiff's affidavit of service of his motion describes attempted service at the address the estate's administrator listed as his residence in the petition for letters of

administration. The affidavit then describes substitute service at his place of business, on a person who identified himself as the administrator's manager, a person of suitable age and discretion, followed by first class mail service to the administrator at his place of business. C.P.L.R. § 308(2). Although the administrator alleges that he never received the original motion in lieu of a complaint, he never disputes the validity of the addresses used for his residence or place of business, nor that a manager at his place of business matched the description in the affidavit of service or was a person of suitable age and discretion. Therefore nothing demonstrates that service of the motion in lieu of a complaint on David Zahabian failed to comply with C.P.L.R. § 308(2).

IV. UPON ADEQUATE SERVICE OF A NOTICE OF CLAIM, PLAINTIFF MAY BRING THIS ACTION IN SUPREME COURT.

Plaintiff also adequately served a notice of claim on the estate's administrator by certified mail, return receipt requested, at his residence. SCPA § 1803(2). Surrogate's Court Procedure Act § 1803(2) merely requires "delivery" and does not limit the means of achieving it, via mail or otherwise. The administrator admits that he received the notice, and thus it was delivered, at his residence. The notice of claim must be delivered to the estate's fiduciary, but need not be filed in Surrogate's Court. SCPA § 1802(3). The action likewise need not be brought in Surrogate's Court, but may be brought in Supreme Court as plaintiff did here. SCPA § 1810.

V. PLAINTIFF COMMENCED THE ACTION PREMATURELY.

The court nevertheless must deny plaintiff's motion for summary judgment in lieu of a complaint and dismiss the action because plaintiff commenced it prematurely. A prerequisite to plaintiff's action is defendant's rejection of plaintiff's notice of claim. SCPA § 1806. Neither party demonstrates that defendant rejected the notice of claim before plaintiff commenced this action. The notice of claim may be considered rejected 90 days after service, SCPA § 1806, but plaintiff concedes he commenced this action by serving the estate's administrator less than 90 days after service of the notice of claim. Therefore defendant's time to acknowledge the claim had not yet expired when plaintiff commenced this action.

VI. THE LOAN IS USURIOUS.

Even were the court to take into account the time that now has elapsed since plaintiff served the notice of claim, his action fails on its merits. A loan with interest over 16% per year is usurious and void by law, so that the borrower need repay neither the principal nor interest. N.Y. Gen. Oblig. Law §§ 5-501, 5-511(2). Absent a special or fiduciary relationship intended to influence the lender and injury to the lender from that influence, the loan is void regardless which party drafted the loan or suggested the rate. Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d 735, 743 (1992); Pemper v. Reifer, 264 A.D.2d 625, 626 (1st Dep't 1999); Russo v. Carey, 271 A.D.2d 889, 890 (3d Dep't 2000). Plaintiff alleges neither a fiduciary relationship with

the borrower, nor that plaintiff was injured by relying on the borrower, as opposed to injury simply from the nonpayment now claimed.

Regarding the interest charged, plaintiff alleges that the missed payments began as of November 2009. The deceased made monthly interest payments of \$550, representing 16.5% interest per year, for seven years and eight months, between execution of the note in March 2002 and the default, totaling \$50,600. The payments fully repaid the \$40,000 principal and provided plaintiff a 26.5% profit on the loan rather than inflicting any injury. See Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d at 743. Although the borrower's estate may not recover funds the borrower already paid to plaintiff other than the amount in excess of 16% interest, the borrower's previous payments do not estop the estate from now claiming a usury defense, as the usurious interest voids the loan and relieves the borrower and his estate of the obligation to make further payments. Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d at 744.

VII. CONCLUSION

After oral argument and for the foregoing reasons, the court denies plaintiff's motion for summary judgment in lieu of a complaint, grants defendant's cross-motion to dismiss the action, and denies as futile plaintiff's cross-motion to substitute a

defendant. C.P.L.R. §§ 1003, 3211(a), 3213. This decision constitutes the court's order and judgment of dismissal.

DATED: July 22, 2011

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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).