

**Realty Holdings of Am., LLC v Stein**

2013 NY Slip Op 32945(U)

November 19, 2013

Supreme Court, New York County

Docket Number: 650865/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 650865/2013
REALTY HOLDINGS OF AMERICA,
vs.
STEIN, ANDREW
SEQUENCE NUMBER : 001
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO.
MOTION DATE 11/4/13
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1-13
Answering Affidavits — Exhibits No(s)
Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 11/19/13

[Signature] J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
REALTY HOLDINGS OF AMERICA, LLC,

Index No.: 650865/2013

Plaintiff,

**DECISION & ORDER**

-against-

ANDREW STEIN,

Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Plaintiff Realty Holdings of America, LLC moves for summary judgment in lieu of complaint against defendant Andrew Stein pursuant to CPLR 3213. Plaintiff's motion is granted, on default, for the reasons that follow.

*Factual Background & Procedural History*

On May 21, 2009, Stein executed a note in favor of plaintiff for \$128,000 with 12% annual interest, payable in full on June 22, 2009.<sup>1</sup> Stein has not made any payments on the note. Plaintiff commenced this action on March 12, 2013, by filing the instant motion for summary judgment in lieu of complaint, asserting a claim for \$254,048.17, which includes the \$128,000 in principle and the accrued interest as of March 1, 2013, totaling of \$126,048.17 (including default interest of 18%). Stein defaulted on the motion.

This case was originally assigned to another judge and hearings and supplemental briefing was held before her. On October 31, 2013, the judge recused herself, and the case was reassigned to this part. To date, Stein, who has been duly served with all filings in this action, is still in default.

<sup>1</sup> The note also provides for attorneys' fees, but plaintiff waived its request for attorneys' fees. *See* 10/16/13 Tr. at 3.

### *Discussion*

“Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is ‘based upon an instrument for the payment of money only or upon any judgment.’” *Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). “An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time.” *Id.*, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 (1996). “However, ‘[t]he 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.’” *Id.* A motion for summary judgment in lieu of complaint is governed by the usual standards for motions for summary judgment brought pursuant to CPLR 3212: *McBean v Goodman*, 27 Misc3d 1212(A), at \*2 (Sup Ct, Kings County 2010), citing *Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985).

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated

allegations, or expressions of hope are insufficient to defeat a summary judgment motion.

*Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff has established his *prima facie* case by submitting evidence of Stein's default on his obligations under the note. Stein was duly served, but did not submit opposition papers. As for usury, a concern raised by the previous justice, plaintiff demonstrates that it is not an issue.

"There is a strong presumption against a finding of usury." *Zhavoronkin v Koutmine*, 52 AD3d 597, 598 (2d Dept 2008). "Intent is an essential element of usury. A defendant seeking to interpose the defense of usury must prove all of the essential elements thereof by clear evidence. The court will not assume that the parties entered into an unlawful agreement, and when the terms of the agreement 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." *Greenfield v Skydel*, 186 AD2d 391 (1st Dept 1992) (internal citations omitted). That being said, when "a lender enters into a usurious transaction, the borrower is relieved of all further obligation to pay both principal and interest." *Pemper v Reifer*, 264 AD2d 625, 626 (1st Dept 1999).

Pursuant to General Obligation Law (GOL) § 5-501, "[t]he maximum interest rate permissible on a loan is 16% per annum, and any interest rate in excess of that amount is usurious." *O'Donovan v Galinski*, 62 AD3d 769 (2d Dept 2009). However, "a loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest." *Lehman v Roseanne Investors Corp.*, 106 AD2d 617, 618 (2d Dept 1984). Where a usurious rate is not found on the face of the note, the defendant has the burden of proving that

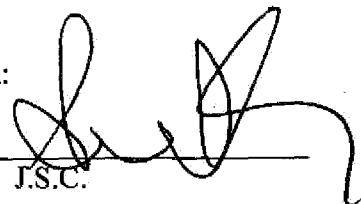
plaintiff intended for the transaction to be usurious at the inception. *See B.D. Estate Planning Corp. v Trachtenberg*, Index No, 651006/2011, Dkt. 74, at \*10 (Sup Ct, NY County Mar. 1, 2013), citing *Tchlenoff v Dyner*, 178 Misc 790, 791 (Sup Ct, NY County 1942); *Brest v Kleidman*, 300 AD2d 133 (1st Dept 2002); *see also Phlo Corp. v Stevens*, 2001 WL 1313387, at \*4 (SDNY 2001) (Chin, J.), *aff'd* 62 Fed Appx 377 (2d Cir 2003) (“Where a note is not usurious on its face ... the note is usurious only if both parties specifically intend for interest to be paid at a rate above the legal rate. Such intent must be shown by clear, unequivocal and convincing proof”). Additionally, usury cannot be based on default interest alone. *See Kraus v Mendelsohn*, 97 AD3d 641 (2d Dept 2012) (“The defense of usury does not apply where ... the terms of the [note] impose a rate of interest in excess of the statutory maximum only after default or maturity”).

Since defendant defaulted, the affirmative defense of usury was not raise or proved. A defendant cannot default and expect the court to interpose affirmative defenses on his behalf. In any event, the subject note is not usurious. Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Realty Holdings of America, LLC is granted on default against defendant Andrew Stein, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendant in the amount of \$254,048.17.

Dated: November 19, 2013

ENTER:

  
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J.S.C.