

B.D. Estate Planning Corp. v Trachtenberg
2013 NY Slip Op 33373(U)
March 1, 2013
Sup Ct, New York County
Docket Number: 651006/2011
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Kornreich
Justice

PART 54

B. D. Estate Planning Corp

INDEX NO. 651006/11

- v -

Trachtenberg

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

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

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
44	
47-49, 50, 51-66	
70, 71, 73	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decreed in accordance with the attached decision.

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

Dated: 3/1/13

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

-----X

B.D. ESTATE PLANNING CORP.,

Index No.: 651006/2011

Plaintiff,

DECISION & ORDER

-against-

MARCY TRACHTENBERG, as Trustee of the
Ellis Limquee Family Insurance Trust, and
CAROLYN LIMQUEE,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Defendant Carolyn Limquee (Carolyn) moved for summary judgment against plaintiff B.D. Estate Planning Corp. (BD) pursuant to CPLR 3212. Defendant’s motion is denied for the reasons that follow.

I. Factual Background & Procedural History

In early 2007, Carolyn and her late-husband, Ellis Limquee (Ellis), were solicited by non-party Mark Resnick to purchase a life insurance policy for Ellis pursuant to a “Life Alternative Program” (the Program), whereby no premium payments would be required from the policy holder.¹ Under the Program, an unfunded trust was created to borrow money to make the premium payments. The insurance broker would then attempt to sell the policy. The worst case scenario from the policyholder’s perspective was that the policy would not be sold or the premium payments would cease being made and the policy would lapse. Critically, however, the

¹ Resnick knew the Limquees because he had previously sold Ellis a \$50,000 life insurance policy.

policyholder had no risk of loss because he would not pay any money for either the loan or the policy. Moreover, neither the policyholder nor the beneficiary of the trust would be liable to the lender because the trust was the debtor, not any of the policyholders or beneficiaries.

Ellis agreed to participate in the Program and was issued a \$4 million life insurance policy from The United States Life Insurance Company dated, March 28, 2007 (the Policy). Ellis was 73 years old when the Policy was issued. In July 2007, a trust was established for the benefit of Carolyn called the Ellis Limquee Family Insurance Trust (the Trust). The trustee was defendant Marcy Trachtenberg. Ellis transferred the Policy to the Trust. The Trust then entered into a Life Insurance Premium Financing Agreement (the Financing Agreement) with non-party, The Brown Investment Fund, L.P. (Brown), whereby Brown loaned \$234,720 at 15% interest to the Trust. This money was used to make premium payments on the Policy for approximately two years. The Financing Agreement provided Brown with the option of lending the Trust more money to make further premium payments. As collateral, Brown held an assignment of the Policy.

Resnick was unable to sell the Policy. Brown decided not to exercise its option to lend more money to the Trust and Ellis chose not to make the premium payments on his own. As a result, the Policy lapsed on June 28, 2009. Resnick then approached non-party Michael Bindow and his company, plaintiff BD, to purchase the assignment of the Policy from Brown to reinstate the Policy. Though Bindow never dealt directly with the Limquees, as discussed further *infra*, he was heavily involved with the implementation of the Program. BD purchased all of Brown's rights related to the Trust and the Policy for \$1,000. BD then entered into an agreement with the Trust whereby BD loaned money to the Trust to reinstate the Policy and make further premium payments. This agreement led to the execution of a Promissory Note dated July 27, 2009 (the

First Note), whereby BD would lend \$344,158.02 to the Trust at 15% annual interest. Section 2 of the First Note, entitled Prepayments, provides as follows:

Borrower may prepay this Note, in whole or in part, at any time prior to the Maturity Date [November 27, 2009]. Repaid funds shall be applied FIRST, to the payment of accrued and unpaid interest under this Note; and SECOND, to the repayment of the outstanding principal balance under this Note. In the case of death a prepayment penalty of 50% of any insurance proceeds [of the Policy], less the loan balance, shall apply; this provision shall extend to any death within 90 days of receipt of prepayment.

The Note is governed by New York law and contains a provision in which the Trust consents to the jurisdiction of this court. On November 27, 2009 (the maturity date of the First Note), BD and the Trust executed a second Promissory Note (the Second Note), whereby BD would lend \$387,908.54 to the Trust. The Second Note is the note at issue in this case.² The Terms of the Second Note are virtually identical to the First Note, including an identically worded Section 2. The Maturity Date of the Second Note was February 27, 2009.³

Ellis died on February 9, 2010. As of that date, BD had only loaned \$26,112.42 to the Trust, which the Trust used to make premium payments on the Policy. On June 24, 2010, the Trust received a \$4 million payment under the Policy. To date, the Trust has not paid BD any money.

On April 15, 2011, BD commenced this action against Trachtenberg, as trustee of the Trust, asserting two causes of action: (1) breach of contract; and (2) legal fees. In an Order dated

² Carolyn erroneously contends that the First Note is the source of BD's claims. *See* Affidavit of Steven W. Wolfe dated June 15, 2012, p. 9 n. 11. However, the Complaint clearly states that BD is suing under the Second Note. *See* Complaint ¶ 42. Moreover, the Second Note was the operative agreement when Ellis died.

³ This appears to be a typo because the maturity date obviously cannot precede the loan.

July 19, 2011, this court granted Carolyn's motion to intervene, which was unopposed. Carolyn then served her Answer, which contained four affirmative defenses: (1) failure to state a claim; (2) civil usury; (3) criminal usury; and (4) unconscionability. Carolyn's defenses are based on the alleged improper acts of BD, Bindow, and Trachtenberg related to the Program. Carolyn's core contention is that all of the operative agreements are tainted by Bindow's relationship with the Trust.

Bindow picked Trachtenberg, his sister-in-law, who had no relevant professional qualifications to be the trustee. At her deposition, Trachtenberg testified that she did not conduct a meaningful review or analysis of any of the contracts that she signed on behalf of the Trust, including the subject promissory notes, which were both drafted by Bindow. Moreover, though the promissory notes provided that the Trust "has been represented by its own competent counsel in connection with this Note," Trachtenberg testified that she did not consult with an attorney in connection with any of the contracts she signed on behalf of the Trust.

Trachtenberg further testified that at the time she signed the promissory notes, she was not aware of the terms of Section 2. Rather, she signed every agreement given to her by Bindow without negotiating terms or proposing changes. In fact, she never even met or communicated with Ellis or Carolyn. Thus, the contracts that plaintiff seeks to enforce were drafted exclusively by plaintiff, without any meaningful representation by the trustee, and without the knowledge of the Trust's beneficiary (Carolyn). It was only after Carolyn hired independent counsel and the instant action was commenced that she became aware of the details regarding the execution of the promissory notes.⁴

⁴ Defendants have not asserted any claims against Trachtenberg or defenses based on breach of fiduciary duty or fraud.

After the instant action was commenced, Bindow and Resnick were indicted in the United States District Court for the Southern District of New York on charges of mail and wire fraud in connection with the sale of life insurance policies. Though the indictment is a mere accusation and has no dispositive impact on the instant motion, the charges against Resnick have impacted this case because he invoked his Fifth Amendment right against self-incrimination at his deposition and refused to answer many of the questions. At this time, the court will not address the issue of whether adverse inferences should be drawn from Resnick's deposition because such a determination is not pertinent to this motion.

II. Discussion

It is well established that 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 evidentiary proof 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).

A. Unconscionability

“It is well settled that ‘[a] determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice.’” *Lawrence v Miller*, 48 AD3d 1, 5 (1st Dept 2007) (quoting *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1 (1988)); *see also Brower v Gateway 2000, Inc.*, 246 AD2d 246, 253 (1st Dept 1998). However, “under certain circumstances substantive elements alone may be sufficient to render the terms of a contract unenforceable. Such a determination requires extreme cases where the contractual terms are ‘so outrageous and oppressive as to warrant a finding of unconscionability irrespective of the contract formation process.’” *Vilella v AT&T*, 35 Misc3d 1224(A), at *8 (Sup Ct, NY County 2012) (quoting *State v Wolowitz*, 96 AD2d 47, 68 (2d Dept 1983)); *see also Brower*, 246 AD2d at 254.

Binday's influence over Trachtenberg and the manner in which Trachtenberg carried out her duties as trustee have, at a minimum, an air of impropriety. There are questions of fact as to whether the Trust had a “meaningful choice” regarding the terms of the subject contracts due to Trachtenberg's relationship with Binday. Nevertheless, even if the promissory notes were procedurally unconscionable, they are not void because they are not substantively

unconscionable. If BD ultimately prevails on the merits, Carolyn will still be left with almost \$2 million, a large sum of money for which she expended no effort and took no financial risk. Her fortuitous financial situation would not have been possible were it not for BD's actions.

Notwithstanding the possible illegality of Bindow and Resnick's actions (which will be adjudicated in the federal criminal action, not in this case), the net result of the underlying transactions is neither outrageous nor oppressive. Though BD has not moved for summary judgment, in searching the record, the court *sua sponte* grants partial summary judgment to BD and dismisses Carolyn's affirmative defense of unconscionability.

B. Interpretation of Section 2

Carolyn argues that Section 2 of the Second Note does not, or at a minimum is ambiguous as to whether BD is entitled to 50% of the proceeds of the Policy.

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms. The court should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless.

Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." *Beal Savings Bank v Sommer*, 8 NY3d 318, 324-25 (2007) (internal citations and quotation marks omitted). "Whether a contract is ambiguous is a question of law, and extrinsic evidence may not be considered unless the document itself is ambiguous." *Savoy Mgmt. Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 521 (1st Dept 2008).

Section 2 of the Second Note is, as BD concedes, inartfully drafted. However, Section 2 is not ambiguous. Though the first half of the section addresses voluntary prepayments, the

second half of the section provides for a “prepayment penalty of 50%” upon Ellis’ death (which is not a discretionary payment). Regardless of the wisdom of including the latter provision in this section, Section 2 clearly provides for the Trust to pay BD half of the proceeds from the Policy upon Ellis’ death. Whether such a provision renders the Second Note usurious is a separate question.

C. Usury

“Usurious loans are void as a matter of law.” *Borowski v Falleder*, 296 AD2d 301 (1st Dept 2002). “It is well established that where 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, pursuant to GOL § 5-501(6)(a), the civil usury limit of 16% does not apply to loans of \$250,000 or more. Instead, such loans are subject to the 25% criminal usury rate set forth in Penal Law § 190.42. Additionally, GOL § 5-521 provides that “corporations generally cannot avail themselves of the protection of the [civil] usury statutes.”⁵ *Essex v Newman*, 237 AD2d 486 (2d Dept 1997). However, corporations may maintain a defense of criminal usury. GOL § 5-521(3).

“There is a strong presumption against a finding of usury, and . . . the defendant [is] required to establish usury by clear and convincing evidence.” *Zhavoronkin v Koutmine*, 52

⁵ For the purposes of GOL § 5-521, “[t]he term corporation . . . shall be construed to include all associations . . . having any of the powers and privileges of corporations not possessed by individuals or partnerships.” The court will not address the question of whether a trust is considered a corporation under § 5-521, and thus may not assert a civil usury defense, because, as discussed *infra*, the viability of the usury defense at issue turns on the element of intent (and not on whether the interest rate falls between 16% and 25%).

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). “[W]here usury does not appear on the face of the note, usury is a question of fact.” *Hort v Devine*, 1 AD3d 266 (1st Dept 2003) (quoting *Freitas v Geddes Savings and Loan Ass’n*, 63 NY2d 254, 262 (1984)).

Here, the rate on the notes at issue is 15%. This rate is within the legal limit. However, Carolyn’s usury defense is based on the \$2 million (50% of the proceeds from the Policy) sought by BD pursuant to Section 2. The \$2 million must be included in the calculation of the effective annual interest rate because such a payment cannot be used to evade the usury laws merely by couching it as a bonus, fee, or prepayment penalty, since “[i]t is substance rather than form which determines whether such a bonus provision is ... merely a cover for exacting a greater sum in interest than the law allows.” *Cusick v Ifshin*, 70 Misc2d 564, 568 (Civ Ct, NY County 1972) (citing *Hartley v Eagle Ins. Co. of London*, 222 NY 178 (1918)).

In *Hartley*,⁶ the Court of Appeals confronted the same issue as here, which is the validity of an agreement that includes a payment conditioned on a person’s death, such that there is a reasonable possibility that the payment will result in a usurious interest rate. To determine if the \$2 million payment is usurious, “the question is: Did the parties intend to evade the usury statutes of the state, or was the interest payable so large that, in view of all the circumstances, an intent to

⁶ The case, though decided in 1918, is still good law. See *Zormati v Kreisberg*, 2011 WL 3439156 (Sup Ct, NY County 2011) (Rakower, J.)

provide for the payment of interest beyond the legal rate will necessarily be imputed to them?"

Hartley, 222 NY at 187. Here, as in *Hartley*, the effective annual interest rate depended on when a particular individual died. In this case, the longer Ellis lived: (1) the greater the principal (it would increase by approximately \$112,000 per year, which is the annual premium amount that would need to be advanced); and (2) the lower the effective annual interest rate on the \$2 million.⁷

Summary judgment is denied on the usury defense for failure of Carolyn to carry her burden of presenting *prima facie* evidence of BD's usurious intent. The intended or expected effective annual interest rate that the \$2 million represented at the time the Second Note was entered into is a material question of fact. The terms of the Second Note and the effective interest rate based on Ellis' actual date of death are not dispositive of BD's intent at the time the Second Note was executed. See *Tchlenoff v Dyner*, 178 Misc 790, 791 (Sup Ct, NY County 1942) ("In order for a transaction to be usurious it must be such at the inception"); see also *Brest v Kleidman*, 300 AD2d 133 (1st Dept 2002). To prevail at trial, Carolyn must present *clear and convincing* evidence (See *Zhavoronkin, supra*) either that (1) BD actually intended to obtain a usurious rate by contracting to obtain half the proceeds from the Policy; or (2) there is no reasonable amount of time that Ellis could have lived (given the additional premiums that would be lent and accrued interest) where the \$2 million amount would not be usurious.⁸

⁷ The effective annual interest rate on the \$2 million decreases as more money is lent because the principal amount increases while the \$2 million amount is fixed. Moreover, even if no further money were lent, the effective annual rate of interest would decrease each year because the amount of the return (\$2 million) remains constant while the duration of the loan increases.

⁸ The failure to submit actuarial tables to establish Ellis' life expectancy is not fatal because "tables of mortality are at best only slight evidence of the expectancy of life of any particular person to be considered in connection with proof of his health, constitution, habits, and mode of living." *Hartley*, 222 NY at 186; see also *Gilliard v New York City Health and Hospitals Corp.*,

With regard to the second option, the court finds it instructive to refer to the expert report (the Report) submitted by Carolyn that calculates the effective annualized rate of return when the \$2 million payment is incorporated into the money owed to BD.⁹ See Affidavit and Report of Martin A. Denman dated June 1, 2012. The Report indicates that the annualized rate of return as of February 9, 2012 (the date of Ellis' death) is 991.57%. The Report also indicates that the annualized rate of return as of June 1, 2012 (the date of the Report) is 194.45%. Thus, in less than two and a half years, the annualized rate of return decreased approximately 800%. Ellis died at the age of 76. To prove usurious intent, Carolyn would have to establish that there is no age to which Ellis could have reasonably expected to live where the annualized rate of return would have been within the legal limit. Carolyn has not submitted such evidence, and the court will not, on its own, undertake to perform the mathematical analysis that ought to be performed by an actuary. Accordingly, it is

ORDERED that the motion by defendant Carolyn Limquee for summary judgment against plaintiff B.D. Estate Planning Corp. is denied; and it is further

ORDERED that, in searching the record, the court grants partial summary judgment to plaintiff B.D. Estate Planning Corp. and dismisses defendant Carolyn Limquee's affirmative defense of unconscionability.

Dated: March 1, 2013

ENTER:



J.S.C.

77 AD2d 532, 533 (1st Dept 1980).

⁹ In referencing the Report for the purposes of the instant motion, the court is not making a determination as to its admissibility at trial or the qualifications of the expert. Rather, the court is merely using the Report as a pedagogical device.