

Tate v National Bank of California

2016 NY Slip Op 32396(U)

November 28, 2016

Supreme Court, Nassau County

Docket Number: 606106/2016

Judge: Edward A. Maron

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. EDWARD A. MARON, J.S.C.

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EUGENE TATE,

Plaintiff

-against-

NATIONAL BANK OF CALIFORNIA,

Defendant.

**Trial/IAS Part 14
Index No.: 606106/2016**

**Motion Seq.: 001
Submission Date: 9/28/16**

XXX

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Papers Submitted:

- Notice of Motion to Dismiss Plaintiff’s Complaint, Affirmation, Exhibits Annexed,
- Memorandum of LawX
- Plaintiff’s Memorandum of Law in OppositionX
- Affirmation in Opposition to Cross-Motion and in Support of Motion, Exhibits AnnexedX
- Reply Memorandum of Law, Affirmation, Exhibits Annexed X

Defendant moves by Notice of Motion, dated September 12, 2016, seeking an order pursuant to C.P.L.R. §3211(a)(7) dismissing the Plaintiff’s Complaint as against Defendant, National Bank of California (hereinafter referred to as “NBC”). Plaintiff has not submitted an Affidavit in opposition to the application, but rather a Memorandum of Law. In the Memorandum of Law, Plaintiff states he has “moved to this court with its Memorandum of Law in Support of its Complaint and in Support of its Motion seeking the transfer of this matter to a NACHA Complaint Department.” Plaintiff has not properly moved for such relief and the Court will not consider the arguments or allegations contained in Plaintiff’s Memorandum of Law pertaining to such purported application to transfer.

RELEVANT BACKGROUND

This action was brought by Plaintiff, Eugene Tate (hereinafter referred to as “Tate”), as an individual and *pro se*, to recover damages and other relief available at law and in equity on behalf of

himself as well as on behalf of his sole proprietor business, Royal Tate, LLC d/b/a Grazing Here (hereinafter referred to as “Royal Tate”).

In his Complaint, Tate sets forth allegations related to a financial transaction between Merchant Cash and Capital, LLC (hereinafter referred to as “MCC”) and Royal Tate. Pursuant to a contract dated November 23, 2015, Royal Tate sold \$105,000.00 of its business sales receivables/revenue to MCC, to be paid to Plaintiff from a percentage of Royal Tate’s daily revenue/bank deposits, for an up-front sum of \$75,000.00 from MCC. The Complaint asserts allegations against Defendant that it, as an Originating Depository Financial Institution (“ODFI”), initiated alleged usurious loan debits and credits in the Automatic Clearing House (“ACH”) Network for entities such as MCC (or other third party senders acting on its behalf) to and from customer accounts such as Royal Tate, LLC. The Complaint further makes references to a class action suit, and characterizes the contract dated November 23, 2015 as a usurious transaction. NBC is not a party to the contract.

NBC argues that Tate lacks standing to bring this action as he was not a party to the loan. Tate does not refute that the contract was between MCC and Royal Tate, but he argues instead that he is “a sole proprietor, although his company is incorporated. Accordingly, all debts accrued by ‘Royal Tate, LLC d/b/a Grazing Here’ are effectively Plaintiff’s personal debts, an upon which [Tate] is inherently personally liable. There being no legal separation between Plaintiff [Tate], and [Royal Tate], the monies given to Plaintiff [Tate] as such, is considered a consumer debt, rather than commercial debt.” Plaintiff’s argument is simply legally unfounded.

DECISION AND ORDER

“Generally, corporations have an existence separate and distinct from that of their shareholders, and an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation (*New Castle Siding Co. v. Wolfson*, 97 A.D.2d 501, 502, 468 N.Y.S.2d 20 [2nd Dept. 1983]), *aff’d*, 63 N.Y.2d 782, 470 N.E.2d 868 [1984] [internal citations omitted]). “The fact that an individual closely affiliated with a corporation (for example, a principal shareholder, or even a sole shareholder), is incidentally injured by an injury to the corporation does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation” (*Id.*). Here, Royal Tate, as a duly incorporated entity, entered into the purchase and sale agreement with MCC, a contract to which Tate was not a party. Tate therefore lacks standing to bring this action thereby warranting dismissal of the action. But, even if, *arguendo*, Tate brought this action on behalf of Royal Tate, the action must even so be dismissed since a limited liability company cannot appear *pro se* but

must appear by and be represented by an attorney (*see* C.P.L.R. §321).

C.P.L.R. §3211(a)(7) states that “a party may move for judgment dismissing one or more causes of actions asserted against him on the ground that the pleading fails to state a cause of action”. When seeking dismissal pursuant to C.P.L.R. §3211(a)(7), the standard generally is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (*D’Amico v. Arnold Chevrolet*, 2011 N.Y.Slip Op 50457 [Sup. Ct. Suff. Cty. 2011]).


The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit into any cognizable theory (*Id., Nonnon v. City of New York*, 9 N.Y.3d 825,842 N.Y.S.2d 756 [2007]). However, allegations consisting of bare legal conclusions are not entitled to the consideration of every favorable inference and should be disregarded by the court (*Beattie v. Brown & Wood*, 243 A.D.2d 395, 663 N.Y.S.2d [1st Dept. 1997]). Here, even if the Court found that Tate had standing to bring this action on his own behalf or even on behalf of Royal Tate, the Complaint fails to state even a single cause of action for any claims lying in usury.

It is not refuted or disputed that all of the causes of action pleaded by Tate in the Complaint sound in usury. It is clear that General Obligations Law §5-501 applies to loans or forbearances of any money, goods, other things in action, and “[a]lthough the usury statute in issue (General Obligations Law, § 5–511, subd. 1) speaks of ‘money, goods or other things in action,’ a necessary element of [a] statutory cause of action in usury is the existence of a loan of money (*DeSimon v. Ogden Associates*, 88 A.D.2d 472, 477, 454 N.Y.S.2d 721, 725 [1982] [internal citations omitted])”. The Court has reviewed the documents annexed to the Complaint and finds that the contract at issue here is clearly and unequivocally structured as a purchase and sale agreement - not a loan. Accordingly, it also for this reason that the Complaint must be dismissed in its entirety.

In consideration of the foregoing, it is hereby
ORDERED that Plaintiff’s Complaint is dismissed in its entirety.
All matters not decided or requests for relief not granted herein are hereby **DENIED**.
This constitutes the decision and order of this Court.

Dated: November 28, 2016
Mineola, New York

ENTERED
DEC 06 2016
NASSAU COUNTY
COUNTY CLERK’S OFFICE

ENTER: 

EDWARD A. MARON, J.S.C.