Chartock v National Bank of California
2017 NY Slip Op 30357(U)
January 17, 2017
Supreme Court, Queens County
Docket Number: 708688/16
Judge: Timothy J. Dufficy
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35/Commercial Division

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DANIEL CHARTOCK,

Plaintiff,

-against-

NATIONAL BANK OF CALIFORNIA, 1 GLOBAL CAPITAL, LLC.,

Defendants.

---x

Index No.: ~~707688/16~~ 708688/16
Mot. Date: 9/22/16
Mot. Cal. No. 16
Mot. Seq. 1

The following papers read on this motion by defendant **NATIONAL BANK OF CALIFORNIA** (California) for an order pursuant to CPLR 3211(a)(7) dismissing the instant action for failure to state a cause of action.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Memorandum-Exhibits	EF 20-22; EF 26-37
Memorandum of Law	EF 23
Memorandum in Opposition	EF 38
Exhibits	EF 39-44
Reply Affirmation-Exhibits	EF 45-46
Memorandum of Law	EF 47

As an initial matter, the markings on the motion papers and in the Court's CMS computer system indicate that these papers were fully submitted without opposition. However, this was a clerical error, as the Court received the motion papers with answering affidavits, reply affidavits, and memoranda of law. As such, this motion is fully submitted.

Upon the foregoing papers, it is ordered that the motion is granted.

This action involves the purchase of receivables by 1 Global Capital LLC (Global) and a non-party, The Attitude Group Inc. (Attitude). Plaintiff pro se claims, *inter alia*, that the transaction was a usurious loan. Movant California allegedly initiated usurious loan debits and credits via ACH on behalf of Global to and from customer accounts such as Attitude. Under the agreement, Attitude agreed to sell $207,000 of future receivables for an up-front discounted price of $150,000. Attitude further agreed to deposit future receivables into a bank account and authorize Global to obtain a specified percentage of the deposits of future receivables until such time as Global receive the full $207,000 purchased amount. The agreement authorized Global to debit such portion of future receivables from Attitude's bank account on a daily basis. The agreement also authorized Global to debit a specified daily amount each day of $1,162.92, which would be reconciled monthly such that the ultimate amount paid would reflect the agreed-upon portion of the deposits of future receivables to be paid to Global. The $207,000 purchased amount was to be paid over an indeterminate amount of time. Attitude's payment of the purchased amount was contingent on Attitude's actually generating future receivables. The amount of time it would take for Global to obtain the purchased amount was contingent upon the amount of proceeds generated by Attitude. Global bore the risk that Attitude might pay the purchased amount over a very long period of time. Moreover, if Attitude did not generate future proceeds from its business, Global had no recourse against Attitude.

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. (*See* Allianz Underwriters Ins. Co. v Landmark Ins. Co., 13 AD3d 172, 174 [1st Dept. 2004]). The Court determines only whether the facts as alleged fit within any cognizable legal theory. (*See* Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." (511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." (Quatrochi v Citibank, N.A., 210 AD2d 53, 53 [1st Dept 1994]) [*Internal citation omitted*).

The first and second causes of action of the plaintiff's complaint allege criminal usury as against movant California. The third cause of action contains allegations based on an improper usurious loan. The fourth cause of action was intended to assert a cause of action for aiding and abetting civil usury. The fifth cause of action alleges that California aided and abetted the allegedly usurious lenders violation of New York's criminal usury law. The sixth cause of action alleges that California was unjustly enriched by virtue of wrongfully retaining transaction fees. The seventh cause of action alleges that California engaged in deceptive business practices. The eighth cause of action alleges that California should be enjoined from serving as an originating depository financial institution for allegedly usurious lenders. Hence, the thrust of all eight causes of action are allegations of usury. The complaint, albeit inartfully, seeks to represent a class.

The Court initially notes that the signatory to the subject agreement was the corporation with which the plaintiff was affiliated, rather than the individual plaintiff. Although the plaintiff may have been Attitude's sole officer and shareholder, a corporation has a separate legal existence from its shareholders even where the corporation is wholly owned by a single individual *(see* Harris v Stony Clove Lake Acres, 202 AD2d 745, 747 [3d Dept. 1994]; New Castle Siding Co. v Wolfson, 97 AD2d 501, 502, 468 NYS2d 20 [2d Dept. 1983], *affd* 63 NY2d 782 [1984]). "[C]ourts are loathe to disregard the corporate form for the benefit of those who have chosen that form to conduct business" (Baccash v. Sayegh, 53 AD3d 636, 639 [2d Dept. 2008] *citing* Harris v Stony Clove Lake Acres, *supra* at 747). Accordingly, the plaintiff lacks standing, and his complaint is dismissible on that basis.

However, even assuming that standing were conferred, the agreement between the parties is unquestionably a purchase of receivables, and hence, not a loan, to which the laws of usury apply. This was established in Merchant Cash & Capital v Edgewood Group, LLC, 2015 U.S. Dist. LEXIS 94018, 2015 WL 4451057 (U.S.D.C., S.D.N.Y, Koeltl, J.), Merchant Cash & Capital, LLC v Yehowa Med. Servs., Inc., 2016 NY Misc.

LEXIS 3065 *, 2016 NY Slip Op 31590(U) [Sup Ct. Nassau Co. 2016; Murphy, J.]); Merchant Cash & Capital, LLC v Liberation Land Co., LLC, 2016 NY Misc. LEXIS 4854, 2016 NY Slip Op 32589(U) [Sup Ct. Nassau Co. 2016; Mahon, J.]; Retail Capital, LLC. d/b/a Credibly v Spice Intentions Inc. d/b/a Curry Heights, and AK M Karim, Index No. 713376/15, Sup. Ct. Queens Co. [2016; this Court]) and other courts facing this issue.

Even further assuming that the agreement was a loan, usury is an affirmative defense, and a heavy burden rests upon the party seeking to impeach a transaction based upon usury *(see* Hochman v. LaRea, 14 AD3d 653, 654; Gandy Mach. v Pogue, 106 AD2d 684). The maximum per annum interest rate for a loan or forbearance of money is 16%, under New York's civil usury statute, and 25% under the state's criminal usury statutes (*see* General Obligations Law § 5-501 [civil usury]; Penal Law §§ 190.40, 190.42 [criminal]). It is well settled, however, that where a loan is made to a corporation, the corporation and the individual guarantors of a corporate obligation are prohibited by statute from interposing the defense of usury (*see* General Obligations Law § 5-521; Schneider v Phelps, 41 NY2d 238; Webar, Inc. v Capra, 212 AD2d 594, 595 [1st Dept. 1995]). An exception to the general rule is recognized, however, " 'where the corporate form is used to conceal a usurious loan to an individual to discharge his personal obligations, and not to further a corporate enterprise' " (Webar, Inc. v Capra, *supra*, at 595 *quoting* Sanders & Assocs. v Friedman, 137 AD2d 677; *see eg* Donenfeld v Brilliant Tech. Corp., 2011 NY Misc. LEXIS 934, *11, 2011 NY Slip Op 30554(U), 10 [Sup Ct. NY Co. 2011]). The applicability of this exception has not been demonstrated.

To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate (*see* Giventer v Arnow, 37 NY2d 305, 309). If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law (*see* Fareri v Rain's Intl., 187 AD2d 481, 482). Usury must be proved by clear and convincing evidence as to all its elements and usury will not be presumed (*see* Freitas v Geddes Sav. & Loan Assn., 63 NY2d 254, 261).

Here, Attitude is precluded by General Obligations Law §5-521(1) from interposing the defense of civil usury, and cannot assert criminal usury as a cause of action, rather than as an affirmative defense.

Finally, the *pro se* plaintiff has fallen woefully-short of establishing that he can represent a putative class for several reasons. First, he has not demonstrated that he is aggrieved by the complained-of conduct, since he was not a party to the agreement. Second, he has not demonstrated class definition and numerosity *(see* Colbert v Rank Am., Inc., 1 AD3d 393 [2d Dept. 2003]; CPLR 901[a]). Next, he is appearing *pro se*, has no counsel, and has not demonstrated adequacy of representation; that is, that he has the experience and skills necessary to undertake this type of litigation. Fourth, he fails to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901[a][5]). Finally, the parties' agreement contains a waiver of class actions, which would preclude such class action, in any event.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that motion by defendant **NATIONAL BANK OF CALIFORNIA** for an order pursuant to CPLR 3211(a)(7) dismissing the instant action for failure to state a cause of action is granted in all respects; and it is further,

ORDERED, that all other applications not specifically addressed herein are denied in all respects.

Dated: January 17, 2017

TIMOTHY J. DUFFICY, J.S.C.

FILED

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COUNTY CLERK
QUEENS COUNTY