Piccirilli v Benjamin
2017 NY Slip Op 33574(U)
May 31, 2017
Supreme Court, Broome County
Docket Number: Index No. EFCA2017000315
Judge: Donald F. Cerio, Jr.

STATE OF NEW YORK
COUNTY OF BROOME SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

LUCIANO PICCIRILLI,

Plaintiff,

v.

RONALD R. BENJAMIN,

Defendant.

DECISION AND ORDER

Index No. EFCA2017000315

RJI: 2017-0202-M

The instant matter comes before the court upon the Plaintiff's Amended Notice of Motion for Summary Judgment in Lieu of Complaint Pursuant to CPLR 3213, dated February 13, 2017, seeking an order of this court directing judgment against the defendant in a sum certain upon an instrument for the payment of money only.[1] Accompanying the Amended Notice was the February 6, 2017, Affidavit in Support of Summary Judgment in Lieu of Complaint of Attorney Alan J. Pope, and the February 7, 2017, Affidavit in Support of Summary Judgment in Lieu of Complaint of Luciano Piccirilli. The defendant responded by the February 24, 2017, Notice of Cross-Motion and Attorney Affirmation of Attorney Ronald R. Benjamin, seeking to: (1) consolidate the Broome County action entitled *Ronald R. Benjamin v. Luciano Piccirilli, Index No. EFCA2017000114*; (2) summary judgment, or; (3) a declaration that the promissory note and accompanying documentation which is the subject of these actions is null, void and unenforceable. Plaintiff replied by submitting the Plaintiff's Memorandum of Law and Reply Affidavit in Support of Summary Judgment of Luciano Piccirilli, dated March 1, 2017, and the February 27, 2017, Affirmation of Stephen L. Yonaty, Esq. Defendant subsequently submitted th March 30, 2017, Defendant's Surreply Affirmation, and plaintiff the April 7, 2017, Reply Affirmation of Stephen L. Yonaty and the April 10, 2017, Reply Affidavit of Luciano Piccirilli.

The parties have submitted this matter to the court for its consideration.

In the first instance, with respect to the defendant's motion to consolidate the instant proceeding with that entitled *Ronald R. Benjamin v. Luciano Piccirilli, Index No. EFCA2017000114*, same is granted in light of the common questions at issue, as a matter of judicial economy and in an effort to promptly resolve the dispute between these parties.

[1]This matter had originally been commenced by the February 6, 2017, Notice of Motion for Summary Judgment in Lieu of Complaint Pursuant to CPLR 3213.

In reviewing this particular matter it is evident that Mr. Benjamin, a well seasoned attorney at law, had sought and obtained from Mr. Piccirilli, a loan in the principal amount of $200,000 in 2013. In furtherance of this agreement between the parties a Promissory Note and an Affidavit of Judgment by Confession for Money Due, were signed by Mr. Benjamin on October 16, 2013. Additionally, a mortgage was apparently executed at this same time by Mr. Benjamin for the benefit of Mr. Piccirilli.[2] In addition to the foregoing, a Consulting Services Contract was entered into between Mr. Benjamin and Mr. Piccirilli on October 16, 2013, wherein Mr. Piccirilli would provide consulting services to Mr. Benjamin pertaining to business and/or construction matters and Mr. Benjamin would pay for such services rendered. The term of this contract was for eighteen months wherein Mr. Benjamin would pay Mr. Piccirilli a flat fee of $10,000 for the first twelve months of the contract and another $5,000 for the successive six months.

Thereafter, and a matter which is not in dispute, Mr. Benjamin did not make any payments with respect to the obligation set forth within the promissory note, nor did he make payments with respect to the Consulting Contract. While Mr. Piccirilli does not seek any relief with respect to any purported default pertaining to the Consulting Contract, Mr. Benjamin asserts that this contract was a component of a "sham" employed to mask the true amount of interest which was to be applied with respect to the $200,000 loan, asserting that there were no actual consulting services which were to be provided to him by Mr. Piccirilli. Mr. Benjamin takes the position that the "sham" served to provide to Mr. Piccirilli interest in an amount greater than that permitted by General Obligations Law §5-501. This particular provision of law provides that an interest rate on a promissory note greater than 16% is usurious and, as a consequence of such usury, rendering the note unenforceable and void.

Mr. Benjamin asserts that his engagement in this "sham" was the product of financial stresses rather than that of a reasoned, rational approach. Mr. Piccirilli, on the other hand, takes issue with this representation, as does Attorney Yonaty who prepared the documents at issue, alleging that it was Mr. Benjamin who was the driving force behind this endeavor and that his present posture should not be countenanced by this court. Mr. Piccirilli does not specifically address the circumstances surrounding the execution of the Consulting Contract, choosing rather to defer for the present as he is not seeking redress regarding any claims associated with this contract.

Generally, 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. 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." (*Blue Wolf Capital Fund II, LP v. American Stevedoring, Inc., 105 AD3d 178, 183, 1st Dpt. 2013; internal citations omitted).* An unambiguous instrument, such as the promissory note at issue here, upon viewing it's four corners, does not demonstrate, by clear and convincing evidence, that the instrument is usurious. While the interest rate reflected in the promissory note

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[2]A copy of the mortgage had not been submitted with the pleadings. However, Exhibit 4 of the March 1, 2017, Reply Affidavit of Luciano Piccirilli reflects the filing by Attorney Yonaty of a mortgage with the Broome County Clerk's Office on March 16, 2013, in an amount of $200,000 pertaining to Ronald Benjamin.

approaches the usurious rate of 16%, i.e., 15%, such is not, alone, an indication of usury given the risk attendant to repayment of the loan.[3] The question then arising is with respect to the consulting contract and whether, by its contemporaneous execution with the note, it was intended to be an instrument by which additional interest pertaining to the original loan amount of $200,000 was to be secured. If it were, the combined payments would result in a usurious transaction.[4] As parol evidence may be used to establish the defense of usury, the circumstances surrounding the execution of the various instruments signed on or about October 16, 2013, may be introduced even though the instruments, themselves, are unambiguous. (*See Stransky v. Dipalma, 137 AD3d 1734, 4th Dpt. 2016).*

As was held in Wagner v. Zeh, 45 Misc.2d 93, S.Ct. Albany Co., 1965, *aff'd* 26 ad2d 729, 3rd Dpt. 1966:

> A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a Judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a "day in court". Understandably, courts speak of the summary judgment restrictively. Summary judgment is a harsh remedy and the requirement of the rule should be strictly complied with in order to entitle a party to that relief. (Bakerian v. Horn, 21 AD2d 714). To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues. (Di Menna & Sons v. City of New York, 301 NY 118; Braun v. Carey, 280 App. Div. 1019). On the other hand, the court should not hesitate to give this remedy the full purpose for which it is intended. Given the statutory sanction, it is the duty of the court, not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues of fact from immaterial ones. The task of the court now is to determine if a "material issue of fact" is presented. (Di Menna & Sons v. City of New York, supra.; *96 Bakerian v. Horn, supra.). As an adjective "material" means "substantial; of consequence; important; going to the essence or the merits; relating to matter of substance, rather than form." (Ballentine's Law Dictionary.)

Once the moving party establishes his entitlement to judgment as a matter of law, the burden then shifts to the opposing party to establish, by admissible proof, that some genuine issue of a material fact exists. Card v. Brown, 43 AD3d 594 (3d Dept 2007); Chunn v. Carman, 8 AD3d 745 (3d Dept 2004). In the face of a motion for summary judgment, the party against whom it is

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[3]The parties recognized that timely repayment was dependent, in large part, upon realization of a significant fee pertaining to the *Wilcox v. Newark Valley Central School District* case which was then on appeal.

[4]If there were to be such a finding, the language contained within the note providing that a finding of usury would be cured by reducing the rate to a non-usurious rate, would not survive judicial scrutiny as reformation is not an equitable remedy available to a party with unclean hands. (*See Blue Wolf at 184).*

sought is obligated to lay bare his proof, that is, to demonstrate by affidavit or otherwise that one or more triable issues of fact genuinely exist. If such proof is not forthcoming, summary judgment may well be the result. Zuckerman, *supra*; RM & M Framemakers v. Baucom, 198 AD2d 695 (3d Dept 1993). If a party seeks summary judgment dismissing a cause of action asserted against him, that party must proffer evidence showing that his adversary's pleadings contain no meritorious claim. Franceschi v. Consolidated Rail Corp., 142 AD2d 915 (3d Dept 1988).

The court reviews a summary judgment motion in the light most favorable to the party opposing it, giving that party the benefit of every inference that may be reasonably and fairly drawn. *Card v. Brown*, *supra*; *Secore v. Allen*, 27 AD3d 825 (3d Dept 2006). Through that prism, the court determines whether any triable issue of a material fact exists. If it does, then resolution of the issue must await trial. If it does not, then the court may summarily grant judgment without the need for a trial. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957);Gadani v. Dormitory Authority of the State of New York, 43 AD3d 1218 (3d Dept 2007); *Raven Industries, Inc. v. Irvine*, 40 AD3d 1241(3d Dept 2007).

Thus, the Court's function is to ascertain if there are any issues of fact rather than seeking to determine the issues on the submissions alone. (See Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395). Upon a motion for summary judgment the Court is not to determine questions of credibility as such is a matter of sufficient materiality as to form the basis upon which denial of a summary judgment may lie. (Glick and Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, and; Trionfero v. Vanderhorn, 6 AD3d 903).

Upon the record before this court there exist material questions of fact precluding the grant of summary judgment. As such, the respective motions for summary judgment are denied. Pursuant to CPLR §3213, the moving and answering papers are now deemed to be the complaint and answer, with respect to the matter captioned *Luciano Piccirilli v. Ronald R. Benjamin, Index No. EFCA2017000315*. With respect to *Ronald R. Benjamin v. Luciano Piccirilli, Index No. EFCA2017000114,* the parties have filed and served the complaint and answer to this particular proceeding and same is now consolidated herewith.

It is, therefore,

ORDERED, that Plaintiff Piccirilli's motion for summary judgment in lieu of complaint is DENIED; and it is

ORDERED, that Defendant Benjamin's motion to consolidate is GRANTED; and it is

ORDERED, that Defendant Benjamin's motion for summary judgment is DENIED; and it is

ORDERED, that, pursuant to CPLR §3213, the moving and answering papers are now deemed to be the complaint and answer, with respect to the matter captioned *Luciano Piccirilli v. Ronald R. Benjamin, Index No. EFCA2017000315*; and it is

ORDERED, that a preliminary conference is to be promptly scheduled.

Enter.

DATED: May 31, 2017
Wampsville, New York

Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice
County of Broome

FILED
JUN 02 2017
BROOME COUNTY CLERK