Concrete Capital, LLC v Olympic Prop. Partners, LLC
2018 NY Slip Op 30804(U)
May 1, 2018
Supreme Court, New York County
Docket Number: 161804/2015
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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CONCRETE CAPITAL, LLC,

Plaintiff,

Index No.: 161804/2015

-against-

Mot. Seq. No. 002

OLYMPIC PROPERTY PARTNERS, LLC, ROBERT FRIEDMAN a/k/a NAFTALI R. FREIDMAN, SETH G. WEINSTEIN, and STEPHEN CHALK,

Defendants.
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MELISSA A. CRANE, J.S.C.:

Defendants Olympic Property Partners, LLC ("Olympic"), Robert Friedman a/k/a Naftali R. Friedman, Seth G. Weinstein ("Weinstein"), and Stephen Chalk move, pursuant to CPLR 3211 (a)(1), (a)(4), (a)(5), and (a)(7), to dismiss the amended complaint of plaintiff Concrete Capital, LLC ("Concrete") based on documentary evidence, another action pending, and failure to state a cause of action. For the following reasons, the court grants the motion.

Background

In 2015, Concrete began discussions with Olympic to provide a construction loan related to a re-development of a building in Dallas, Texas (amended complaint, ¶ 10). Concrete alleges that, during the negotiations, Olympic's principal, Weinstein, made false statements regarding other funding sources, and other properties that would secure the loan if Olympic defaulted (*id.*, ¶¶ 20-22). On June 5, 2015, Concrete issued a memorandum to Olympic documenting Concrete's proposed loan terms (*id.*, ¶ 23). The proposed loan was for a total of $3,050,000 for a term of four months, with an initial disbursement of $1,350,000 and a loan fee of $550,000 (Silverman affirmation dated 11/15/16, exhibit E, June Memorandum at 1). The individual defendants had to guarantee the loan personally (*id.*). Interest on default was to be the lower of

either 24% per year or the highest legal rate (*id.* at 2). The memorandum was "not a commitment to provide financing" (*id.* at 1). The transaction did not close pursuant to the June memorandum (Silverman affirmation, exh F, email dated 6/5/15 from Weinstein to Jonathan Schneps ["Schneps"]).

On July 10, 2015, after renewed negotiations, the parties entered into a Loan Agreement (Silverman affirmation, exh I, Loan Agreement dated 7/10/15). Concrete agreed to loan Olympic $3,050,000, with an advance payment of $1,000,000 and the remainder upon request in minimum increments of $500,000 (*id.*, ¶ 1.01). Olympic had to pay Concrete a 25% fee for each payment, and interest of the lower of either 24% per year or the highest legal rate if it defaulted (*id.*, ¶ 1.02). No interest was required prior to a default (*id.*) In the event any interest rate imposed on Olympic was usurious, plaintiff would reduce that rate to the maximum allowable rate, and would credit any previous payments to the principal balance of the loan rather than interest (*id.*). Only a writing could modify the Loan Agreement (*id.*, ¶ 1.14), that stated it represented the complete agreement of the parties as to its subject matter (*id.*, ¶ 1.15).

Plaintiff contends that this document signifies the parties' intent not to bind themselves to the usury laws, as the total face amount of the loan exceeded $2,500,000 (amended complaint, ¶ 25). In addition to the Loan Agreement, the parties also entered into a Cooperation and Undertaking Agreement ("the CUA"), that stated Olympic would pay Concrete a $250,000 fee out of the loan proceeds that was "irrevocable and earned" (Silverman affirmation, exh H, CUA at 1). Further, defendants collectively issued Concrete a promissory note for $1,000,000 (Silverman affirmation, exh H, Promissory Note).

On August 15, 2015, Concrete alleges that the parties entered into a Loan Modification

Agreement ("the LMA") (amended complaint, ¶ 34).[1] Concrete further alleges that, pursuant to the LMA, defendants waived all defenses to their indebtedness and released Concrete from all claims they might have had (*id.*, ¶ 35). The maturity date for the $1,000,000 promissory note was pushed back to October 12, 2015 (*id.*, ¶ 36), the face amount of the note was increased to $1,666,000 at defendants' request (*id.*, ¶ 37). Defendants delivered a new promissory note for $666,000 (Silverman affirmation, exhibit J, promissory note dated 8/17/15). Further, the parties entered into a new Cooperation and Undertaking Agreement (the Second CUA), under which defendants acknowledged that a $166,000 fee was due for the $666,000 loan (Silverman affirmation, exhibit J, Second CUA at 1). On September 17, 2015, defendants delivered a Corrected Promissory Note with a maturity date of October 30, 2015 and a total face value of $1,666,000 (Silverman affirmation, exhibit J, Corrected Promissory Note dated 9/17/15). Additionally, Concrete alleges that the parties entered into a Corrected Loan Modification and Extension Agreement ("the Second LMA"), under which defendants purported to waive any claims or defenses related to the loan documents (amended complaint, ¶ 44).[2]

On October 14, 2015, the parties executed a Loan Modification and Extension Agreement ("the Third LMA"). The Third LMA increased the face amount of the loan to $3,153,878 (Silverman affirmation, exh K, Third LMA at 1). Defendants agreed to a general waiver of claims and defenses and a general release (*id.*, ¶¶ 9-10), and the parties stated that the Third LMA "constitute[d] the entire understanding of the parties" (*id.*, ¶ 16). In addition, defendants issued Concrete a promissory note for $3,153,878 with a maturity date of November 15, 2015 (Silverman affirmation, exh K, Promissory Note dated 10/14/15), and the parties entered into a

[1] This document was not attached to any of the moving papers.
[2] This document also was not attached to any of the moving papers.

new Cooperation and Understanding Agreement (the Third CUA). Under the Third CUA, defendants acknowledged that they owed a $787,878 fee for the additional loan disbursement (Silverman affirmation, exh K, Third CUA at 1). In connection with these documents, Concrete wired Olympic $700,000 (amended complaint, ¶ 55).

In total, Concrete lent Olympic a total of $1,950,000 (*id.*, ¶¶ 22, 56). On November 9, 2015, defendants allegedly informed Concrete that they would not make any payments on the loan (*id.*, ¶ 56).

Procedural History

On November 16, 2015, Concrete filed and served a summons with notice on defendants (NYSCEF Doc. No. 1, summons with notice). An accompanying affidavit of service stated that service was made by priority mail, and lists an entity named Olympic Capital Partners, but not Olympic itself (NYSCEF Doc. No. 2, affidavit of service dated 11/19/15). This action was not commenced, however, until February 8, 2016, when Concrete served and filed its initial complaint (NYSCEF Doc. No. 6, verified complaint dated 2/8/16).

Before commencing this action, Concrete filed an involuntary petition against Olympic in the Bankruptcy Court for the Southern District of New York (Silverman affirmation, exhibit L, involuntary petition dated 11/19/15), seeking the full face-value of the loan (*id.* at 2). Defendants filed a notice of suggestion of bankruptcy with this court to stay the action (NYSCEF Doc No. 4, notice of bankruptcy dated 12/17/15). On January 26, 2016, the Bankruptcy Court (Drain, J.) granted Olympic's motion to dismiss the petition, awarded Olympic its fees and costs incurred with the petition and motion in an amount to be determined, and retained the matter for further proceedings (Silverman affirmation, exhibit N, order dated 1/26/16 at 2-3). Defendants assert that Concrete appealed the decision (Weinstein aff dated 11/16/16, ¶ 49; Silverman

affirmation, exhibit O, court tr dated 8/25/16 at 12:1-20).

Thereafter, defendants moved to dismiss for, among other things, improper service, and the fact that the bankruptcy action was ongoing and Olympic had not been discharged therefrom (NYSCEF Doc. No. 7, notice of motion dated 2/29/16). Concrete then cross-moved to amend its complaint and extend time for service (NYSCEF Doc. No. 31, notice of cross motion dated 4/6/16). After argument, the court denied the motion, granted the cross motion, and ordered that Concrete file an amended complaint within 25 days, and serve it pursuant to the CPLR within 120 days (NYSCEF Doc No. 49, order dated 8/25/16).

On September 19, 2016, plaintiffs filed the amended complaint. The amended complaint alleges four causes of action: breach of the Third LMA and ancillary agreements (first cause of action); breach of the LMA (second cause of action); unjust enrichment (third cause of action), and; reformation (fourth cause of action). Defendants now move to dismiss the amended complaint based on documentary evidence, another action pending, and failure to state a cause of action

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Breach of Contract (First and Second Causes of Action)

For its first and second causes of action, Concrete asserts that defendants breached both the Third LMA and the Loan Agreement, respectively, by failing to repay any of the loans Concrete advanced. Defendants argue that the loans at issue are both civilly and criminally usurious, and therefore void and uncollectable. Specifically, defendants argue that the various loan transactions the parties entered into carried an interest rate of 25% or more, and thus violate the civil (16%) and criminal (25%) usury limits. According to the defendant's math, the face amount of the total potential loans, less Concrete's retained fees, was $2,287,500, while the total Concrete actually lent was just $1,950,000, both of which are less than the $2,500,000 maximum under which the usury laws apply. Further, they assert that civil usury does not require proof of intent, while a court will imply criminal intent if usury is apparent from the face of the loan documents. Moreover, defendants claim that, as the retained fees were not to reimburse Concrete's expenses on the loan, they are interest. Additionally, defendants point out that the usury savings clause is ineffective under New York law. Finally, defendants argue that any general waiver the loan documents contain is ineffective to bar a usury defense, because this waiver must be specific.[3]

In opposition, Concrete argues that the Loan Agreement has a face amount of up to $3,050,000, and, therefore, must be exempt from the usury laws, even if subsequent transactions would be usurious. Further, it asserts that the usury defense is inapplicable to loans that further a for-profit business. Moreover, it claims the usury defense is barred even where the loan was

[3] Defendants also argue that the court should not consider the Loan Agreement because, among other things, it was not signed contemporaneously with the closing of the transaction. This argument raises disputed issues of fact that cannot be resolved on a motion to dismiss (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

disbursed in installments that may themselves have appeared usurious. Additionally, plaintiff disputes defendants' ability to resolve this issue on a motion to dismiss, as usury requires a fact intensive inquiry where usury is not apparent from the face of the transaction. Finally, it contends that, in any case, either the usury saving clause or defendants' waiver would bar a defense of usury.

Civil usury occurs when interest is "charged, taken, or received on any loan or forbearance at a rate exceeding such rate of interest as may be authorized by law at the time the loan or forbearance is made." Pursuant to Banking Law § 14-a, that rate is 16% per year (General Obligations Law § 5-501 [4]). Any usurious loan is void, and the court should "enjoin any prosecution thereon, and order the same to be surrendered and cancelled" (General Obligations Law §§ 5-511 [1], [2]).

While corporations may not raise civil usury as a defense, the General Obligations Law does not bar corporations from raising criminal usury as a defense (General Obligations Law § 5-521 [3]). Criminal usury is charging with knowledge "any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding [25% per year] or the equivalent rate for a longer or shorter period" (Penal Law § 190.40).

"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" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013]). "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" (*id.*). "To determine whether a transaction is usurious, courts look not to its form but to its substance or real character" (*id.*). In order to

calculate the interest rate, courts take the sum of the stated annual interest rate and any loan funds the lender retains as interest, divide that sum by the difference of the gross amount of the loan minus the total interest, and express that number as a percentage of the net loan funds (*id.* at 183-184, citing *Band Realty Co. v North Brewster, Inc.*, 37 NY2d 460, 462 [1975]). Money the lender retains, that is not for the purpose of reimbursing expenses related to the loan, is properly considered interest (*Blue Wolf Capital Fund II*, 105 AD3d at 183; *Sandra's Jewel Box v 401 Hotel, L.P.*, 273 AD2d 1, 3 [1st Dept 2000]; *Hope v Contemporary Funding Group*, 128 AD2d 673, 673–74 [2d Dept 1987]). Finally, when a loan is for less than a year, the interest rate must be annualized (*Bakhash v Winston*, 134 AD3d 468, 469 [1st Dept 2015]).

Here, the parties agree that Concrete made three advances of $1,000,000, $666,000, and $1,487,878 to defendants. From those payments Concrete deducted fees of $250,000, $166,000, and $787,878 (a total of $1,203,878), leaving actual funds disbursed to defendants of $750,000, $500,000, and $700,000, a total of $1,950,000. While the loans were ostensibly interest free absent defendants' default, Concrete does not claim that the fees were necessary to pay expenses. Moreover, none of the loan documents state that the fees charged in connection with the advances were to to pay expenses, rather than merely retained. Thus, the fees are properly considered to be interest. Applying the above formula to the total that plaintiff received over the course of the parties' dealings yields an interest rate of 61.7% over the course of 128 days. This yields an annualized interest rate (*Bakhash*, 134 AD3d at 469) of 175.9%, almost eight times the maximum the law allows. In addition, were the court to adopt plaintiffs' preferred calculation and treat each advance separately, the advances would still be usurious. The same formula applied to each advance yields annualized interest rates of 200% (33.3% over two months), 163.7787% (33.2% over 74 days), and 1,283.8% (112.5% over 32 days), for the July, August,

and October advances, respectively.

While Concrete argues that the formula should be based on the face amount of the loans, it is settled law that the formula is based on the amount actually received (*Band Realty Co.*, 37 NY2d at 462; *Blue Wolf Capital Fund II*, 105 AD3d at 183). For that same reason, the $2,500,000 cap on loans subject to the usury laws is inapplicable. Moreover, as usury is apparent from the face of the loan documents, the court may imply Concrete's intent to charge a usurious rate and find usury as a matter of law. Concrete's reliance on *Greenfield v Skydell* (186 AD2d 391 [1st Dept 1992]) to the contrary is unavailing, as in that case the parties' agreement did not contain a stated rate of interest, making it impossible to determine whether the agreement was usurious on its face (*id.* at 391).

Neither the purported usury savings clause contained in each set of loan documents, nor defendants' general waiver of claims and defenses, bar defendants from raising a usury defense. A usury savings clause "does not make the subject note nonusurious" (*Bakhash*, 134 AD3d at 469). Regarding waiver, a waiver of a defense to usury must be specific and voluntary (*see Le Vine v Flynn*, 231 AD2d 555, 556 [2d Dept 1996] [waiver of usury specifically made in so ordered stipulation in foreclosure action]). Concrete's reliance on *JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC* (84 AD3d 613 [1st Dept 2011]) to the contrary is unavailing, as the defendants had discontinued their affirmative defenses with prejudice by stipulation (*id.* at 613).

Finally, Concrete's argument that Olympic may not raise criminal usury as a defense because it is a corporate entity is flatly contradicted by General Obligations Law § 5-521 [3]. To the extent Concrete argues that the individual defendants are barred from raising usury as a defense because the loans were made to further a for-profit enterprise, the authority cited in its

brief is unavailing.

Accordingly, that branch of defendants' motion to dismiss the first and second causes of action for breach of contract is granted.

Unjust Enrichment (Third Cause of Action)

For its third cause of action, Concrete asserts that, should its breach of contract claims fail, defendants should not be able to unjustly enrich themselves by retaining the loan proceeds. Defendants argue that Concrete may not recover in equity after charging a criminally usurious rate of interest. Further, they assert that the unjust enrichment claim is duplicative of the breach of contract claims and must be dismissed on that basis. In opposition, Concrete argues that the claims may be pleaded side by side, and that unjust enrichment may be available even if Concrete has unclean hands.

To state a claim for unjust enrichment, a plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). Where payments are made pursuant to a contract, they cannot be the basis of an unjust enrichment claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here, the breach of contract claims and the unjust enrichment claims both arise out of the same loan transactions, and the court therefore dismisses the unjust enrichment claim as duplicative. Moreover, it is settled that a party may not seek relief from the court in carrying out an illegal contract or recovering the fruit of a criminal act (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469-70 [1960]). As the Court of Appeals has said, when a transaction is found to be usurious, "the borrower is relieved of all further payment--not only interest but also

outstanding principal, and any mortgages securing payment are cancelled. In effect, the borrower can simply keep the borrowed funds and walk away from the agreement" (*Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 740 [1992]). *Chirra v Bommareddy* (22 AD3d 223 [1st Dept 2005]), that Concrete cites to the contrary, is distinguishable. In that case, the Court was addressing unjust enrichment vis a vis a claim regarding a contract that, unlike a usurious contract, was not automatically void and unenforceable (*id.* at 224).

Accordingly, that branch of defendants' motion to dismiss the third cause of action is granted.

Reformation (Fourth Cause of Action)

For its fourth cause of action, Concrete seeks to reform the loan documents so as to read the way Concrete argues they should be read and exempt them from the usury laws. Defendants contend that Concrete cannot reform the contracts for the same reason as they are barred from raising unjust enrichment, and, moreover, that the amended complaint does not allege a mutual mistake showing that the loan documents are materially different than the parties' meeting of the minds. In opposition, Concrete disagrees. As the Appellate Division, First Department has recently held, in a case involving a usurious contract, "an equitable remedy like reformation is unavailable to a party with unclean hands" (*Blue Wolf Capital Fund II*, 105 AD3d at 184).

Accordingly, that branch of defendants' motion to dismiss the fourth cause of action is granted. The court has examined the remainder of the parties' arguments with respect to CPLR 3211 (a) (1) and (a) (7), and finds them to be unavailing. As the reasoning set forth above constitutes an independent ground to dismiss the amended complaint, the court need not address the balance of this application.

Accordingly, it is hereby

ORDERED that the motion of defendants Olympic Property Partners, LLC, Robert Friedman a/k/a Naftali R. Friedman, Seth G. Weinstein, and Stephen Chalk, to dismiss the amended complaint against them, is granted, and the complaint is dismissed in its entirety as against these defendants,

ORDERED that the Clerk is to enter judgment accordingly.

Dated: 5/1/2018

ENTER:

HON. MELISSA A. CRANE, J.S.C.