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| <b>American Express Natl. Bank v Evelt, Inc.</b>                                                                                                                                                                               |
| 2019 NY Slip Op 31521(U)                                                                                                                                                                                                       |
| May 30, 2019                                                                                                                                                                                                                   |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 652948/18                                                                                                                                                                                                       |
| Judge: Arthur F. Engoron                                                                                                                                                                                                       |
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 37

AMERICAN EXPRESS NATIONAL BANK,

Index No.: 652948/18

Plaintiff,

- against -

DECISION/ORDER

EVELT, INC.,

Defendant.

**ENGORON, A, J.:**

In this action for breach of a loan agreement, plaintiff American Express National Bank moves, pursuant to CPLR 3211 (a) (7) and 3013, to dismiss defendant Evelt Inc.’s counterclaim for usury.

Plaintiff and defendant entered into a Business Loan and Security Agreement (Agreement) dated November 30, 2017, pursuant to which plaintiff loaned the principal sum of \$162,022 to defendant, and defendant promised to pay plaintiff “the principal amount of the Loan, the Loan Fee and all other amounts this Agreement requires you to pay.” Agreement, Ex. A to Complaint, NYSCEF Doc. No. 2, ¶ 6. Defendant agreed to pay plaintiff “an amount equal to the Repayment Amount [\$692.81] on each Business Day . . . until the Outstanding Balance is paid in full.” *Id.*, ¶ 7.1. Defendant also agreed to pay a non-refundable Loan Fee equal to 6.9% of the original principal balance of the loan, and any fees, costs and expenses incurred by plaintiff in connection with “any rejected ACH transaction (‘Returned Debit ACH Entry’) or returned check.” *Id.*, ¶¶ 7.3, 7.4 (a).

The maturity date of the Agreement was November 29, 2018 (*see* Maturity Date Notice, Ex B to Complaint, NYSCEF Doc. No. 3), at which time any outstanding balance was

“immediately due and payable in full.” Agreement, ¶ 7.2 (b). The Agreement provided, however, that “if the principal amount of the Loan, the Loan Fee and all other amounts (including, without limitation, fees and charges) due under this Agreement . . . have been paid prior to the Maturity Date, . . . the Term will end and you will have no further obligations to us.” *Id.*, ¶ 2. The Agreement also provided that “[i]t is possible to calculate an implicit interest rate based upon the principal amount of the Loan advanced, the date and amount of payments received with respect to the Loan and the Loan Fee . . . or any other fees paid. However, this Agreement does not have an interest rate. . . .” *Id.*, ¶ 7.2 (c).

Plaintiff commenced the instant action in June 2018, asserting causes of action for breach of contract and account stated. The complaint alleges that defendant failed to make payments according to the terms of the Agreement and owes a balance of \$144,816.31. Defendant answered and asserted a counterclaim, alleging that “[u]pon information the Business Loan and Security Agreement referred to in the complaint was usurious . . . [and] as a result thereof the loan was void from the inception.” Answer, NYSCEF Doc. No. 6, ¶¶ 7-8.

Plaintiff moves to dismiss the counterclaim on the grounds that it fails to meet pleading requirements under CPLR 3013 and fails to state a cause of action under CPLR 3211 (a) (7).

It is well settled that on a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211 (a) (7), the pleadings are to be afforded a liberal construction. *See* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon*, 84 NY2d at 87-88; *see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 (2018); *Mandarin*

*Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011).

While the pleading standard is a liberal one, however, conclusory assertions of wrongdoing with no factual specificity are insufficient to survive a motion to dismiss. See *Godfrey v Spano*, 13 NY3d 358, 373 (2009); *Publications Intl. Ltd. v Phoenix Intl. Publ., Inc.*, 161 AD3d 421, 422 (1<sup>st</sup> Dept 2018); *Barnes v Hodge*, 118 AD3d 633, 633 (1<sup>st</sup> Dept 2014); *Shariff v Murray*, 33 AD3d 688, 690 (2<sup>nd</sup> Dept 2006). “Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” CPLR 3013; see *Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348, 350 (2d Dept 2004); *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 681-682 (3d Dept 1996); *Matter of Reden v Nassau County Civ. Serv. Comm.*, 133 AD2d 694, 694 (2d Dept 1987).

Under New York’s civil usury statute, a loan is deemed usurious if the interest rate exceeds 16% per annum. See General Obligations Law § 5-501 (1); Banking Law § 14-a. A loan is deemed criminally usurious under Penal Law § 190.40 if the interest rate exceeds 25%. A corporation is prohibited, under General Obligations Law § 5-521 (1), from asserting “the defense of usury in any action,” with the exception, under General Obligations Law § 5-521 (3), that a corporation is not barred from interposing a defense of criminal usury. See *Schneider v Phelps*, 41 NY2d 238, 242 (1977); *72<sup>nd</sup> Ninth, LLC v 753 Ninth Ave., Realty, LLC*, 168 AD3d 597, 598 (1<sup>st</sup> Dept 2019); *Fred Schutzman Co. v Park Slope Advanced Med., PLLC*, 128 AD3d 1007, 1008 (2d Dept 2015). “A defendant raising the defense of criminal usury must allege and prove that the lender (1) knowingly charged, took or received (2) annual interest exceeding 25%

(3) on a loan or forbearance.” *Funding Group, Inc. v Water Chef, Inc.*, 19 Misc 3d 483, 488 (Sup Ct, NY County 2008), citing Penal Law § 190.40; *see People v Iannone*, 45 NY2d 589, 592 (1975; *Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 183 (1<sup>st</sup> Dept 2013).

Further, “[t]he statutory exception for interest exceeding 25 percent per annum is strictly an affirmative defense to an action seeking repayment of a loan and may not . . . be employed as a means to effect recovery by the corporate borrower.” *Intima-Eighteen, Inc. v A.H. Schreiber Co.*, 172 AD2d 456, 457-458 (1<sup>st</sup> Dept 1991) (citations omitted). A corporation “can assert criminal usury as a defense, [but it] cannot bring civil claims under the criminal statute.” *Colonial Funding Network, Inc. for TVT Capital, LLC v Epazz, Inc.*, 252 F Supp 3d 274, 279-80 (SDNY 2017), quoting *Scantek Medical Inc. v Sabella*, 582 F Supp 2d 472, 474 (SDNY 2008); *see IBIS Capital Group, LLC v Fletcher*, 2018 WL 2187076, 2018 NY Misc LEXIS 1651, 2018 NY Slip Op 30829(U) (Sup Ct, Rockland County 2018).

Here, defendant, a corporation, is statutorily prohibited from asserting a defense, or an affirmative claim, of civil usury. Defendant also fails to adequately allege a defense of criminal usury in violation of Penal Law § 190.40, in that it failed to allege that the lender knowingly charged, took or received annual interest exceeding 25% on the loan. Defendant does not allege what amount it received, what amount of principal and interest or other fees was paid, or otherwise allege in what manner the loan was usurious. Nor is it apparent from the face of the Agreement that there was an intent to charge more than the legal interest rate. *Cf. Blue Wolf Capital Fund*, 105 AD3d at 183. Defendant’s apparent claim that the Agreement could be usurious because it contains no interest rate is insufficient under the pleading requirements.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss is granted and the first counterclaim is dismissed.

Dated: 5/30/19

ENTER:

A handwritten signature consisting of the letters 'A' and 'E' enclosed within a circular scribble.

ARTHUR ENGORON, J.S.C.