

Piccirilli v Benjamin
2020 NY Slip Op 35784(U)
October 2, 2020
Supreme Court, Broome County
Docket Number: Index No. EFCA2017000315
Judge: Donald F. Cerio, Jr.
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STATE OF NEW YORK
COUNTY OF BROOME

SUPREME COURT

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

LUCIANO PICCIRILLI,

DECISION AND ORDER

Plaintiff,

v.

Index No. EFCA2017000315

RONALD R. BENJAMIN,

Defendant.

RONALD R. BENJAMIN,

Plaintiff,

Index No. EFCA2017000114

LUCIANO PICCIRILLI,

Defendant.

This matter comes before the court upon Defendant Ronald R. Benjamin's March 17, 2020, Notice of Motion and accompanying Affidavit in Support of Summary Judgment seeking to dismiss the plaintiff's complaint. Plaintiff Luciano Piccirilli subsequently submitted the August 28, 2020, Notice of Cross Motion for Summary Judgment along with the August 28, 2020, Affidavit in Support of Cross Motion for Summary Judgment of Alan J. Pope, Esq., and the August 28, 2020, Piccirilli Memorandum of Law in Support of Cross Motion for Summary Judgment, in support of the plaintiff's cross motion for summary judgment and in opposition to the defendant's motion.

The defendant thereafter filed the Defendant's Reply and Opposition Affidavit dated September 7, 2020, and the plaintiff filed the September 9, 2020, Affidavit in Sur-Reply of Alan J. Pope, Esq.

This matter was subsequently heard on submission before this court on September 11, 2020.

Initially, this court views the present motions in conformity with statutory and decisional law. 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 NY118; *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 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).

The defendant's motion for summary judgment seeking dismissal of the plaintiff's complaint asserts that the promissory note, dated October 16, 2013, and the Consulting Services Contract, also dated October 16, 2013, were, in reality, a singular transaction between the defendant and the plaintiff as a "sham" to avoid a finding that the true interest amount associated with the loan from the plaintiff to the defendant was usurious. This court again adopts by reference the factual findings set forth in its Decision and Order dated May 31, 2017, with respect to the facts underlying this action.

The plaintiff, upon his opposition to the defendant's motion and in furtherance of his cross motion, seeks a finding that he is entitled to a determination by this court, as a matter of law, that the loan was not usurious, that the defendant had failed to perform his obligations pursuant to the contract, and that the plaintiff should be granted summary judgment with respect to the unpaid balance of the loan, interest, fees and costs.

Here, having considered both the motion and cross motion for summary judgment, and upon a review of the submissions including the excerpted deposition testimony, the promissory note and the consulting contract, this court concludes that there are clearly material questions of fact present which preclude the grant of summary judgment. The documents, alone, independent of one another, provide a sufficient basis upon which this court could grant summary judgment upon the cross motion. Upon considering these documents independent of each other, as the plaintiff would propose, this court would conclude that the terms and conditions are clear, that there is no violation of the usury statute, that there has been a breach by way of the defendant's failure to pay the monies owed, and that the plaintiff is entitled to judgment. On the other hand, if these documents are viewed in their totality, that is, as documents prepared jointly with the purpose of evading the constraints of the usury law, as is proffered by the defendant, a distinct question arises as to whether these documents, when viewed together as a single transaction, demonstrate a usurious intent on behalf of the parties. There exists a material question of fact with respect to which version is more likely an accurate reflection of what had been undertaken during the time in question. As such, this is a question of fact for the finder of fact which precludes the grant of summary judgment on behalf of either party.

Therefore, upon the foregoing, having given due consideration to the submission of counsel, it is

ORDERED, that defendant's motion for summary judgment is denied; and it is

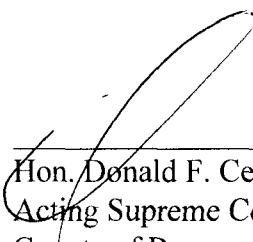
ORDERED, that the plaintiff's cross-motion for summary judgment is denied; and it is

ORDERED, that the plaintiff is to promptly file the trial Note of Issue; and it is

ORDERED, that a pretrial conference is now scheduled to be conducted remotely on Friday, October 16, 2020, at 11:00 AM.

Enter.

DATED: October 2, 2020
 Wampsville, New York



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

