Arnett v Sparta Commercial Servs., Inc.
2022 NY Slip Op 33784(U)
October 31, 2022
Supreme Court, New York County
Docket Number: Index No. 655338/2018
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** ***Justice*** **PART** **34M**

--X

JAN M. ARNETT,

Plaintiff,

- v -

SPARTA COMMERCIAL SERVICES, INC.,

Defendant.

--X

INDEX NO. 655338/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion for SUMMARY JUDGMENT.

Plaintiff, Jan M. Arnett (plaintiff), commenced this action seeking damages for breach of contract and breach of the implied covenant of good faith and fair dealing stemming from the alleged breach of a promissory note between plaintiff and defendant, Sparta Commercial Services, Inc. (defendant). Plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint. Defendant cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The motion and cross-motion are opposed. For the following reasons, plaintiff's motion is denied, and defendant's motion is granted.

BACKGROUND

Plaintiff is an individual residing in New Jersey. Defendant is a Nevada corporation with a principal office located at 555 Fifth Avenue, 14th Floor, New York, New York (NYSCEF doc. no. 40, complaint ¶ 2; NYSCEF doc. no. 41, answer ¶ 2).

Plaintiff testified that he was approached by an individual named Peter Bisulca (Bisulca) to inquire whether plaintiff was willing to loan defendant money (NYSCEF Doc No. 35, Arnett tr at 20-22). Bisulca said that "he represented [defendant's chief executive officer] Anthony Havens, and he made the proposal, the offer for the loan in question . . . [Bisulca] was representing the company's business interests" (*id.* at 20-21). Bisulca and Havens "were proposing for [plaintiff] to lend the money through a promissory note with the terms that they themselves prescribed," with the proposed terms being "[p]retty much whatever is on the promissory note" (*id.* at 24-25). Plaintiff was a stockholder in defendant at the time of the offer (*id.* at 15).

Havens testified that defendant historically sought loans from "long-term shareholders of the company" (NYSCEF doc. no. 36, Havens tr at 66). Havens stated that defendant entered into similar promissory notes involving a cash component and the issuance of restricted common stock (*id.* at 48-49). Defendant had defaulted on promissory notes prior to entering into the promissory note with plaintiff (*id.* at 50).

In February 2015, plaintiff and defendant entered into a promissory note dated February 26, 2015, in which plaintiff agreed to lend defendant the principal amount of $50,000 "at the simple rate of 20% per annum" with the note to mature on August 26, 2015 (NYSCEF doc. no. 33 ¶ 4; NYSCEF doc. no. 43 at 3). Section 3 of further provides that:

> "[w]ithin 5 business days of the full funding to this Note, the Company shall deliver to the Lender, $20,000 worth of the Company's restricted common stock valued at a 20% discount from the quotient of the ten-day volume weighted average closing price ('VWAP') of the Company's common stock for the ten trading days immediately prior to the funding of the Note (denominator)"

(NYSCEF doc. no. 33 ¶ 7; NYSCEF doc. no. 43 at 3).

Section 4 of the note also states that:

> "[a]s security for the repayment of this Note, this Note shall be collateralized by such number of shares of the Company's restricted common stock, $0.01 par value, as equals three (3) times the quotient of the principal amount of this Note divided by the ten day volume weighted average closing price ('VWAP') of the Company's common stock for the ten trading days immediately prior to the funding of this Note (the 'Reserved Shares'). The Reserved Shares shall be reserved by the Company's Transfer Agent. In the Event of Default (as defined herein), then immediately thereafter, if not cured, the Lender shall not be entitled to receive, in full satisfaction of this Note without any further obligation of the Maker, the Reserved Shares"

(NYSCEF doc. no. 33 ¶ 9; NYSCEF doc. no. 43 at 3).

On September 17, 2015, the parties entered into an allonge to the promissory note, in which, among other things, (1) the note's maturity date was extended to February 26, 2016; (2) on or before October 18, 2015, defendant was to pay plaintiff, in cash, the accrued interest on the note as of August 28, 2015, in the amount of $5,000; and (3) within 10 business days of the execution of the allonge, defendant was to "deliver $20,000 worth of the Company's restricted common stock valued at a 20% discount from the quotient of the ten-day volume weighted average closing price (VWAP) of the Company's common stock for the ten trading days immediately prior to the funding of the Note (denominator)" (NYSCEF doc. no. 33 at ¶ 13; NYSCEF doc. no. 45 at 2).

Upon defendant's failure to make any payment to plaintiff on the February 26, 2016 maturity date, the parties entered into an amendment to the promissory note date dated February

25, 2016, in which: (1) the note's maturity date was again extended to August 26, 2016; (2) on or before April 25, 2016, defendant was to pay plaintiff, in cash, the accrued interest on the note as of February 25, 2016 in the amount of $10,000; and (3) within 10 business days of the "increase of the Company's authorized shares," defendant was to deliver "$3,300 worth of the Company's restricted common stock valued at a 20% discount from the quotient of the ten-day volume weighted average closing price (VWAP) of the Company's common stock for the ten trading days immediately prior to" February 25, 2016 (NYSCEF doc. no. 33 ¶ 19; NYSCEF doc. no. 47 at 2). Section 4 of the amendment provides that:

> "[o]n or before November 1st, 2016, the Company shall deliver to the Lender, $16,700 worth of the Company's restricted common stock valued at a 20% discount from the quotient of the ten day volume weighted average closing price (VWAP) of the Company's common stock for the ten trading days immediately prior to the August 26, 2016 [sic]; with a floor conversion price of $0.0012 per share"

(NYSCEF doc. no. 33 ¶ 20; NYSCEF doc. no. 47 at 2). Section 5 of the amendment states that:

> "[t]he number of shares of the Company's restricted common stock, $0.001 par value, reserved as Collateral for the Note shall be increased such that the number of shares, shall equal three (3) times the quotient of the principal amount of this Note plus accrued and unpaid interest to date (currently $10,000) divided by the ten day volume weighted average closing price ('VWAP') of the Company's common stock for the ten trading days immediately prior to the execution of this Amendment"

(NYSCEF doc. no. 33 ¶ 21; NYSCEF doc. no. 47 at 2).

Upon defendant's breach of the amendment to the promissory note, the parties entered into an amendment dated August 22, 2016, in which: (1) the note's maturity date was extended to August 27, 2017; (2) on or before May 1, 2017, and upon "an increase in the Company's authorized shares," defendant was to deliver "$20,000 worth of the Company's restricted common stock valued at a $20% discount from the quotient of the ten day volume weighed average closing price (VWAP) of the Company's common stock for the ten trading days immediately prior to the issuance of the shares, with a floor conversion price of $0.001 per share"; (3) commencing October 11, 2016 and continuing through August 27, 2017, pursuant to a repayment schedule, defendant was to pay plaintiff a total of $70,000, with defendant having the option of repaying the note in full, on or before November 21, 2016, in the amount of $67,500; and (4) if the scheduled repayments were in arrears as of March 2017, plaintiff was entitled to an additional $10,000 worth of defendant's restricted stock (NYSCEF doc. no. 33 ¶ 25; NYSCEF doc. no. 48 at 2-3).

Havens testified that defendant has remitted a total of $2,700 in cash payments to plaintiff (NYSCEF doc. no. 36, Havens tr at 97-98).

In support of plaintiff's motion for summary judgment on the breach of contract claim, plaintiff argues that he performed by loaning defendant $50,000, and that defendant failed to comply with the terms of the promissory note. He further argues that his damages should include repayment of the principal, accrued interest, and restricted stock.

According to plaintiff, defendant's usury defenses are without merit. Plaintiff maintains that civil usury does not apply to loans to corporations, and criminal usury does not apply because: (1) defendant prepared the terms of the promissory note; (2) the shares of restricted common stock are subject to a Nevada choice-of-law provision; (3) the shares of restricted common stock remain restricted and unmarketable; and (4) the defense of usury does not apply to defaulted obligations. Further, plaintiff argues that defendant's conduct constitutes a breach of its duty of good faith and fair dealing. In this regard, plaintiff asserts that defendant entered into a cycle of loan terms with plaintiff that it did not have the ability or intention of honoring. Plaintiff also contends that, even if the loan were criminally usurious, the remedy is to revise the interest to a nonusurious rate.

Defendant counters that the deposition transcripts submitted by plaintiff are not in admissible form, as the transcripts were never sent to defendant for review and signature. Defendant further argues that the terms of the promissory note are criminally usurious and void ab initio from the start. According to defendant's calculation, the note charged an interest rate of 20% per annum and an additional $24,000 in restricted stock, resulting in annual interest rate of over 70% (value of restricted stock / value of principal loan = additional interest). In addition, the default provision charging $150,000 of shares is criminally usurious on its face. Additionally, according to defendant, the usury savings clause is unenforceable under New York law. Therefore, defendant asserts that the entire transaction is void from its inception.

In reply, plaintiff argues that defendant's cross motion should be denied because it failed to submit a statement of material facts.

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' " (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also* CPLR 3212 [b]). Once such a prima facie showing has been made, the burden shifts to the non-moving party "to establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As a preliminary matter, defendant's failure to submit a statement of material facts in support of its cross motion for summary judgment is not fatal (*see* 22 NYCRR 202.8-g [a] ["Upon any motion for summary judgment . . ., there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which

the moving party contends there is no genuine issue to be tried"]). While it would have been a better practice for defendant to submit a statement of material facts, the court is not required to blindly adhere to the rule (*see Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022]; *see also Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]; *Muscato v Spare Time Entertainment*, 74 Misc 3d 1215[A], 2022 NY Slip Op 50127[U], *1-2 [Sup Ct, Schenectady County 2022]). Because defendant responded to plaintiff's statement of material facts, plaintiff suffered no prejudice. The Court, therefore, exercises its discretion to excuse defendant's noncompliance with the rule. Accordingly, the Court shall consider defendant's cross motion.

Contrary to defendant's contention, the deposition transcripts submitted by plaintiff are in admissible form. The transcripts are certified by the court reporter as accurate and defendant does not challenge their accuracy (*see Singh v New York Hous. Auth.*, 177 AD3d 475, 475 [1st Dept 2019]; *Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591, 591-592 [1st Dept 2016]; *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]). In addition, plaintiff's deposition transcript is admissible because "[a] party to an action, or a witness on behalf of a party to an action, does not need to comply with the formalities of CPLR 3116 (a) in order to use its own deposition transcript in support of his own summary judgment motion, since, by submitting the transcript in support of his own motion, it accepts the accuracy of the transcript" (*Nyambuu v Whole Foods Market Group, Inc.*, 191 AD3d 580, 582 [1st Dept 2021]; *accord Castano v Wygand*, 122 AD3d 476, 477 [1st Dept 2014] ["There was no requirement that (driver's) deposition transcript be signed by him in order to be admissible in support of the city defendants' motion because (driver) accepted its accuracy by submitting it in support of his motion for summary judgment dismissing the complaint"]). As a result, the Court shall consider these transcripts.

The Court also notes that New York law, not Nevada law, applies to all matters relating to the note and its performance and enforcement. "Where the parties have made an agreement including an explicit choice-of-law clause and the chosen jurisdiction bears a reasonable relationship to the parties or the transaction in question, the courts will honor the parties' choice" (*Gordon v Verizon Communications, Inc.*, 148 AD3d 146, 156 [1st Dept 2017]). The note states that "[t]he laws of the State of New York, without giving effect to its conflicts of law principles, govern all matters arising out of or relating to this Note and all of the transactions it contemplates, including, without limitation, its validity, interpretation, construction, performance, and enforcement" (NYSCEF doc. no. 43 at 5). Given that defendant has a principal place of business in Manhattan, the parties reasonably chose New York law to govern disputes arising of the note (*see Marine Midland Bank v United Mo. Bank*, 223 AD2d 119, 123 [1st Dept 1996], *lv dismissed* 88 NY2d 1017 [1996] [enforcing New York choice-of-law provision to dispute arising out of promissory note]). That the shares have a Nevada choice-of-law provision does not change the fact that the parties agreed that New York law would govern all matters arising out of or relating to the note and its enforcement.

To recover for breach of contract, the plaintiff must demonstrate the following elements: (1) the parties entered into an agreement; (2) plaintiff's performance; (3) defendant's failure to perform; and (4) damages (*VisionChina Media, Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]).

Under section 190.40 of the Penal Law, a loan is criminally usurious when the lender "charges . . . as interest on the loan . . . a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period."

"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.*).

There is a presumption against a finding of usury because "where usury has occurred, the borrower can simply keep the borrowed funds and walk away from the agreement" (*Roopchand v Mohammed*, 154 AD3d 986, 988 [2d Dept 2017] [internal quotation marks and citation omitted]).

"Where . . . the object of the parties is a loan of money . . . , any consideration paid or secured to the [lender] . . . will in general be considered as interest" (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 337 [2021] [internal quotation marks and citation omitted]).

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*Signature Realty, Inc. v Tallman*, 2 NY3d 810, 811 [2004] [internal quotation marks and citation omitted]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Whether a contract provision is ambiguous is a question of law for the court to decide (*W.W.W. Assoc.*, 77 NY2d at 162). Generally, a contract provision is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]).

Considering the substance of the transaction, the note is criminally usurious on its face. In *American E Group LLC v Livewire Ergonomics Inc.* No. 1:18-CV-3969-GHW, 2020 WL 469312, at *11 [SD NY Jan. 28, 2020], *affd* No. 21-1891-CV, 2022 WL 2236947 [2d Cir June 22, 2022]), a particularly instructive case, a corporation borrowed $30,000 from a lender, and agreed to repay the loan in full in six months at an interest rate of 20% per annum. The borrower also agreed to issue $50,000 worth of stock as additional consideration for the loan (*id.*). The District Court held that the note was criminally usurious on its face, reasoning that:

> "Here, however, the value of the Restricted Stock to be provided pursuant to the Note is unambiguous. The Note states that, as additional consideration for this Note, Defendant will give to Plaintiff restricted shares of Defendant equal to $50,000 that will be convertible to freely tradeable shares on the Maturity Date. Plaintiff was clearly entitled to receive Restricted Stock with a value of $50,000 on the date of issuance—not a particular number of shares with an estimated value as of either the date of issuance or the Maturity Date. Plaintiff's arguments that the value of the Restricted Shares might have changed following the date of their issuance are not pertinent. The Note called for Plaintiff to be provided assets worth $50,000 as

> consideration for the loan. The monetary value of the Restricted Stock to be delivered pursuant to the Note is unambiguous[;] therefore[,] the implied interest rate can be determined from the face of the Note. If the analysis ended there, the implied interest rate of the Note would greatly exceed 25% and the Note would be criminally usurious and void"

(*id.* *7). The court also held that the usury savings clause did not otherwise save the note, and that the note was criminally usurious on its face (*id.* *8).

In this case, the note contains a 20% interest rate per annum, but the $20,000 in restricted common stock also counts as interest (NYSCEF doc. no. 43 at 3; *see Hillair Cap. Invs., L.P. v Integrated Freight Corp.*, 963 F Supp 2d 336, 340 [SD NY 2013] ["Defendants are correct that the stock payment should be taken into consideration in determining the interest rate"]). Plaintiff was clearly entitled to receive $20,000 in restricted common stock on the date of issuance, not on the maturity date. Plaintiff's contention that the value of the restricted stock may be uncertain is irrelevant. Given that the monetary value of restricted stock is unambiguous, the implied interest rate can be determined from the face of the note (*see id.*). Thus, the total annual interest rate on the $50,000 principal greatly exceeds the 25% threshold for criminal usury (*see id.*).[1]

The note does state that "[n]otwithstanding any other provision hereof, or in any instrument, agreement, or document referred to herein, interest paid or becoming due hereunder shall in no event exceed the maximum rate permitted by law" (NYSCEF doc. no. 43 at 3). However, this language does not make the subject note nonusurious (*see Bakhash v Winston*, 134 AD3d 468, 469 [1st Dept 2015]; *Simsbury Fund v New St. Louis Assoc.*, 204 AD2d 182, 182 [1st Dept 1994]).

Moreover, even if defendant drafted the note, that does not relieve plaintiff from a defense of usury (*see Bakhash,* 134 AD3d at 469; *Pemper v Reifer*, 264 AD2d 625, 626 [1st Dept 1999]).

Furthermore, plaintiff fails to raise any triable issue of fact as to whether defendant should be estopped from raising a criminal usury defense. "[A] borrower may be estopped from interposing a using defense when, through a special relationship with the lender, the borrower induces reliance on the legality of the transaction" (*Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 743 [1992]). "Otherwise, a borrower could void the transaction, keep the principal, and 'achieve a total windfall, at the expense of an innocent person, through his own subterfuge and inequitable deception'" (*id.*, quoting *Angelo v Brenner*, 90 AD2d 131, 133 [3d Dept 1982]). Here, there is no evidence of a fiduciary or confidential relationship between the parties (*see Venables v Sagona*, 85 AD3d 904, 905 [2d Dept 2011]). Nor is there any evidence that plaintiff was inexperienced in loan transactions and relied on Bisulca's or defendant's experience in loan transactions (*see Russo v Carey*, 271 AD2d 889, 890 [3d Dept 2000]; *Angelo*, 90 AD2d at 132).

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[1] In light of this determination, the Court need not determine whether the note is usurious in light of the provision permitting plaintiff to receive the reserved shares in the event of default.

As the note is criminally usurious, it is void ab initio (*see Adar Bays, LLC*, 37 NY3d at 333 ["Thus, loans proved to violate the criminal usury statute are subject to the same consequence as any other usurious loans: complete invalidity of the loan instrument"]).

Finally, to the extent that plaintiff argues that defendant breached a covenant of good faith and fair dealing, the Court of Appeals has held that "[t]he usury laws take precedence over any such implied covenants" (*Seidel*, 79 NY2d at 744).

In light of the above, defendant's cross motion is granted, and plaintiff's motion is denied.

CONCLUSION

Accordingly, it is hereby

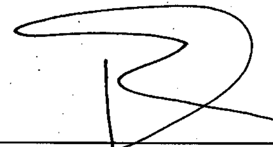
ORDERED that the motion of plaintiff for partial summary judgment is denied; and it is further

ORDERED that the cross motion of defendant for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant shall serve a copy of this decision and order, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



10/31/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	**GRANTED IN PART**	X	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**