To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X
CHRISTOPHER SCIARRA,

Plaintiff,

-against-

KIM MILLMAN,

Defendant.
----------X

DECISION AND ORDER
Index No.: 50440/2020
Motion Date: 10/11/2022
Seq. No. 2

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 24 were read on this motion (Seq. No. 2) by defendant for an order granting summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion / Memorandum of Law / Affirmation (Krellenstein) / Exhibits 1 – 12	1 – 15
Affidavit in Opposition (Sciarra) / Exhibits A – E / Memorandum of Law	16 – 22
Reply Affirmation (Krellenstein) / Memorandum of Law	23 – 24

Upon the foregoing papers, the motion is granted, and the complaint is dismissed.

This action arises out of an alleged loan of funds from plaintiff to defendant. Plaintiff commenced a prior action under Index # 69359/2017 (the 2017 action), alleging that the parties' agreement was evidenced by a promissory note. Plaintiff acknowledges that this action seeks to enforce the same loan as the 2017 action. The promissory note, annexed to the verified amended complaint in the 2017 action, calls for 30 percent interest in the amount of $20,400.00 on a principal sum of $68,000.00 over a term of 15 months, with a further $3,735.00 repayment "deferred" (Exh. 2).

By Notice of Motion filed on August 21, 2022, defendant seeks an order granting summary judgment dismissing the complaint. Defendant contends that she is not personally liable for the alleged debt, as the loan plaintiff seeks to enforce was made to nonparty Opus Private Client Group, and that plaintiff has admitted that defendant fully repaid any funds which were loaned to her personally. Defendant further contends that the loan plaintiff seeks to enforce is void ab initio on the ground of its usurious interest rate, as evidenced on the face of the promissory note. Defendant also contends that the parties never reached any enforceable agreement as to the terms of repayment of the alleged loan.

In opposition, plaintiff asserts that the subject loan was made to defendant personally in the principal amount of $52,000.00, and that the parties contemplated interest at a rate of either 4% or 7%. Plaintiff contends that defendant is estopped from asserting usury as a defense because defendant drafted the promissory note. Plaintiff further contends that, if the agreement was initially usurious, the parties later abandoned the high interest rate and entered into a new agreement which became valid and enforceable.

In reply, defendant points out that plaintiff concedes that the promissory note is usurious on its face and contends that plaintiff failed to raise a triable issue of fact as to whether the transaction was not usurious. Defendant, who disputes plaintiff's claim that she drafted the promissory note, contends that the drafter of the note is of no moment given the facts of this action.

The Court has fully considered the submissions of the parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he 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. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v Long Island Power Auth.* (294 AD2d 348, 348, [2d Dept 2002]):

> It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v. Bay Isle Oil Co.*, 111 AD2d 366).

In New York, the civil usury statute provides that "[n]o person or corporation shall, directly or indirectly, charge, take or receive any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding the [maximum permissible interest rate]" (General Obligations Law §5-501[2]). The maximum rate of interest for a loan to an individual is 16% per annum. Any rate in excess of that amount is usurious (Banking Law §14-a[1]; *O'Donovan v Galinski*, 62 AD3d 769 [2d Dept 2009]). "A usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon" (*Zanfini v Chandler*, 197 AD3d 594 [2d Dept 2021]; General Obligations Law §5-511[1]).

As an exception to this rule, the statute provides that when a bank or loan association violates the usury statute, it instead forfeits all interest on the loan. This exception clearly does not apply here (*see* General Obligations Law §5-511[1]; *Adar Bays, LLC, GeneSYS ID, Inc.*, 37 NY3d 320 [2021]). The usury statute is strictly construed, the burden of proof is on the borrower, and usury must be established by clear and convincing evidence (*Zanfini v Chandler*, 197 AD3d 594 [2d Dept 2021], *citing Freitas v Geddes S&L Ass'n*, 63 NY2d 254 [1984]). In determining whether the interest rate on a loan is usurious, the law looks not to its form, but its substance, or real character (*O'Donovan v Galinski*, 62 AD3d 769 [2d Dept 2009]). To constitute usury, "it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms" (*Bouffard v Befese*, 111 AD3d 866 [2d Dept 2013][internal quotations omitted]).

Defendant on her motion made a prima facie showing of her entitlement to judgment as a matter of law by demonstrating that the terms of the alleged loan were usurious, in that the note called for interest of 30% of the principal over a period of 15 months. Such terms plainly violate the civil usury statute by charging an interest rate in excess of 16% per annum on a loan to an individual.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's claim that the parties contemplated an interest rate of either 4% or 7% is belied by the face of the promissory note, which calls for monthly interest payments of $1,360.00 per month for 15 months and a total interest of $20,400.00 on a principal of $68,000.00. Having asserted in a verified pleading in the 2017 action that he seeks to enforce the terms of the promissory note, and having sworn in an affidavit that this action seeks to enforce the same debt, plaintiff is barred by the doctrine of judicial estoppel from asserting in opposition to the instant motion that the note did not express the terms of the

agreement. "The doctrine of judicial estoppel or estoppel against inconsistent positions precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed (*Festinger v Edrich*, 32 Ad3d 412, 413 [2d Dept 2006]).

Plaintiff's contention that the parties subsequently entered into a legally enforceable agreement, so as to cure the usurious terms in the promissory note, again is belied by the evidence in the record. Specifically, defendant submitted five cancelled checks in the amount of $1,360.00, the monthly interest payments indicated on the face of the promissory note (Exh. 8). The various e-mails and communications relied upon by plaintiff in support of the contention that the parties at some point modified the original agreement are insufficient to raise a triable issue of fact, as they cannot be construed to establish an enforceable contract and evidence at most that plaintiff rejected defendant's efforts to modify the agreement. *Matter of Jackson*, 120 Ad2d 309 [3d Dept 1986], cited by plaintiff, does not compel a different result, as the parties in that action executed a second promissory note at a legal interest rate, and no such transaction occurred in this matter.

Plaintiff's further contention that defendant is estopped from asserting usury as a defense is unavailing. The cases cited by plaintiff do not support his argument, as they involve the doctrine of estoppel in pais, which bars a borrower from asserting a usury defense "when, as a result of a special relationship existing between the lender and borrower, the borrower induces reliance on the legality of the transaction" (*Russo v Carey*, 271 AD2d 889, 890 [3d Dept 2000]). The other case cited by plaintiff in fact recognizes that, in the absence of such a special relationship, "the fact that the borrower sets the rate of interest does not relieve the lender from a defense of usury" (*Pemper v Reifer*, 264 AD2d 625, 626 [1st Dept 1999]). In the absence of evidence establishing a special relationship, or evidence establishing that defendant intentionally set a rate she knew to be

usurious for the purpose of avoiding repayment, plaintiff failed to raise a triable issue of fact as to whether defendant can assert a defense of usury (*Roopchand v Mohammed*, 154 AD3d 875 [2d Dept 2017]).

The agreement entered into between these parties, as evidenced by the promissory note annexed to the verified amended complaint in the 2017 action, which plaintiff acknowledged is the same debt he seeks to enforce in this action in his Affidavit sworn on May 16, 2020, is usurious on its face and cannot be enforced. "Indeed, where usury has occurred, the borrower can simply keep the borrowed funds and walk away from the agreement" (*Roopchand*, 154 Ad3d at 988 [internal quotation and citation omitted]). In light of this finding, the Court need not and does not evaluate defendant's alternative arguments for dismissal of this action.

Accordingly, it is hereby

ORDERED that the motion is granted, and the complaint is dismissed; and it is further

ORDERED that defendant shall have judgment dismissing the complaint, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that, within ten (10) days of the date hereof, defendant shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff; and it is further

ORDERED that within ten (10) days of service of notice of entry, defendant shall file proof of said service via NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 19, 2022
White Plains, New York

E N T E R:

Damaris E. Torrent

HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF