

Wacht v Stern

2023 NY Slip Op 30211(U)

January 20, 2023

Supreme Court, New York County

Docket Number: Index No. 158606/2021

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

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JAMES WACHT

Plaintiff,

- v -

ARTHUR STERN,

Defendant.

-----X

INDEX NO. 158606/2021

MOTION DATE 09/27/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, it is hereby ORDERED that the defendant, Arthur Stern's motion for an Order pursuant to *CPLR §3211(a)(1) and (a)(7)*, to dismiss this action with prejudice is DENIED. Plaintiff filed opposition and defendant filed a reply.

The plaintiff filed this action seeking damages to recover for an alleged breach of a settlement agreement after the defendant failed to perform under a promissory note. The Complaint alleges that on February 11, 2015, the defendant, Mr. Stern, entered into a promissory note, in which he agreed to pay the plaintiff, Mr. Wacht, and a non-party, the principal amount of \$330,000.00, in equal shares of \$165,000.00, with interest on the loan at a rate of 18% per annum. Per the complaint, as of February 1, 2018, the defendant owed a balance on the promissory note, in total of \$492,584.00, after making some payments, which includes an unpaid principal amount of \$330,000.00 and \$162,584.00 in unpaid interest from the maturity date to January 31, 2019. The complaint alleges that on February 1, 2019, the defendant and the plaintiff entered into a Settlement Agreement whereby the defendant acknowledged his default under the Promissory Note.

In support of the motion to dismiss, the defendant argues that the interest charged in the promissory note at a rate of 18% per year is a usurious rate. Defendant submits that pursuant to *General Obligations Law §5-501(1)* it is illegal to charge or receive money as interest on this loan at a rate exceeding 16% per annum as required under *Banking Law § 14-a*. Therefore, the defendant contends that the settlement agreement is entirely predicated based on the usurious terms of the promissory note, and the alleged breach cannot state a cognizable claim for relief. Further, the defendant argues that the settlement agreement is equally void and unenforceable as a matter of law.

In opposition, the plaintiff argues that the usury defense is inapplicable under these circumstances because the principal amount is over \$250,000.00. See, *General Obligations Law §5-501(6)*. The plaintiff states that on February 11, 2015, the defendant entered into a promissory note, promising to pay both the plaintiff and a non-party, Ross Jacobs, each being the holder, the total sum of \$330,000.00. The plaintiff claims that the defendant assured that the promissory

note would be repaid in two years. On the same date of the promissory note, the defendant pledged and granted a first security interest in the defendant's partnership interest in 337 ECK Holdings LLC and Echelon Real Estate Ventures LLC, in which he is the principal. Plaintiff argues that the promissory note was entered into by the parties as a "sophisticated joint venture," and that the underlying transaction was not simply a loan, but rather a series of transactions. Plaintiff asserts that the defendant benefitted from the joint venture, and did not pay the promissory note. Further, plaintiff argues that on February 1, 2019, the defendant entered into a Settlement Agreement in which the defendant acknowledged his default and outstanding balance of \$492,584.00. The plaintiff submits the redacted settlement agreement (*NYSCEF Doc No. 17*), and a confession of judgment signed by the defendant and dated February 15, 2019 (*NYSCEF Doc No. 18*).

In reply, the defendant further argues, *inter alia*, that the confession of judgment was executed in connection with the agreement with the same usurious interest rate making it void as a matter of law.

On a *CPLR §3211* motion to dismiss, the court will 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 [internal quotations and citation omitted].” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

The defendant asserts that he is entitled to a judgment dismissing the complaint, and that, as a matter of law, the transactions between the parties constituted usurious loans. However, the court's review of the promissory note, in question, the settlement agreement and an affidavit of the defendant admitting his default and consenting to the judgment on the subject loan, all indicate that the total loan amount made to the defendant was in the amount of \$330,000.00, and thus, the 18% interest applied to the loan amount is not usurious as a matter of law.

The promissory note, dated February 11, 2015, is annexed as an exhibit to the motion (*See, NSYCEF Doc No. 10*), which states in relevant part:

FOR VALUE RECEIVED, ARTHUR STERN, an individual (the "Maker") hereby promises to pay to ROSS JACOBS and JAMES WACHT, each an individual (each being the "Holder"), the total sum of Three Hundred Thirty Thousand and No Cents (\$330,000.00) Dollars (the "Principal Amount") in equal shares of One Hundred Sixty-Five Thousand and No Cents (\$165,000.00), with interest accruing at a rate equal to eighteen percent (18%) per annum (the "Interest Rate"). Interest on this Note shall be calculated on the basis of a 30-day month and a 360-day year for the actual number of days elapsed. This Promissory Note (the "Note") shall evidence such indebtedness, which shall include the outstanding principal, accrued interest and any unpaid late fees (the "Indebtedness").”

The Settlement Agreement, dated February 1, 2019, states in relevant part:

“The Maturity Date having passed, the Maker [defendant] owes a balance of \$492,584.00 under the Promissory Note as of the date hereof, which includes \$330,000.00 representing the unpaid Principal Amount,

\$162,584.00 in accrued and unpaid interest from the Maturity Date to January 31, 2019, and \$6,000.00, representing legal fees through January 31, 2019.”

The Affidavit of Judgment by Confession, signed by the defendant, Arthur Stern and dated February 15, 2019, states in relevant part:

“In the Settlement Agreement, I agreed that, in the event I failed to perform any of the terms of the Settlement Agreement, Plaintiffs may enter judgment against me in the amount of \$492,584.00, plus interest and the costs, including attorneys' fees, of filing and enforcing the judgment, minus any payments made by me to Plaintiffs pursuant to the Settlement Agreement prior to the entry of Judgment.”

The New York General Obligations Law (GOL) § 5-501, which defines the rate of interest considered to be usurious in New York, states in part that it “... shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law.” *Banking Law § 14-a(1)* states: “[t]he maximum rate of interest provided for in section 5-501 of the general obligations law shall be sixteen per centum per annum.” *EDA Logistics Corp. v. B & B Intern. Connections, Inc.*, 2011 N.Y. Slip Op. 33364[U] [N.Y. Sup Ct, Richmond County 2011]. “Pursuant to *General Obligations Law § 5-501*, it is illegal to charge 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 16% per annum, the maximum rate prescribed in *Banking Law § 14-a*.” *DeStaso v. Bottiglieri*, 52 A.D.3d 453 (2d Dep’t 2008); see, *General Obligations Law § 5-501(2)*; *Banking Law § 14-a[1]*; *O’Donovan v. Galinski*, 62 A.D.3d 769,770 (2d Dep’t 2009); *Bietola v. McCue*, 308 A.D.2d 416 (1st Dep’t 2003); *Browowski v. Fallerder*, 296 A.D.2d 301 (1st Dep’t 2002). Thus, “[a] usurious contract is void and relieves the plaintiff of the obligation to repay principal and interest thereon.” *Abir v. Malky, Inc.* 59 A.D.3d 646,649 (2d Dep’t 2009); see also, *Seidel v. 18 East 17th Street Owners, Inc.*, supra, 79 N.Y.2d at 743-744; *Szerdahelyi v. Harris*, 67 NY2d 42, 47-50 (1986); *O’Donovan v. Galinski*, supra, 62 A.D.3d at 770, citing, *Glatter v. Klein* (N.Y. Sup Ct, New York County 2011).

The New York General Obligations Law (GOL) § 5-501 also sets forth the exception to the usury rule, and states in part that: “[n]o law regulating the maximum rate of interest which may be charged, taken or received... shall apply to any loan or forbearance in the amount of two hundred fifty thousand dollars or more[.] A loan of two hundred fifty thousand dollars or more which is to be advanced in installments pursuant to a written agreement by a lender shall be deemed to be a single loan for the total amount which the lender has agreed to advance pursuant to such agreement on the terms and conditions provided therein.” *General Obligations Law § 5-501(6)(a)*. Here, the Note amount exceeds \$250,000.00. The Settlement Agreement as well as the underlying promissory note were made for a loan in the total amount of \$330,000.00. Therefore, the 18% interest rate in the agreement at issue is not usurious on its face. Therefore, the defendant’s motion to dismiss must be denied.

Accordingly, it is hereby

ORDERED that defendant Arthur Stern’s motion to dismiss the complaint pursuant to *CPLR §3211* is DENIED; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, the defendant shall serve a copy of this decision/order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

1/20/2023

DATE


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LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE