

Welz v Brown

2023 NY Slip Op 30569(U)

February 16, 2023

Supreme Court, New York County

Docket Number: Index No. 151408/2021

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

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THEODORE WELZ and 571 ACAD STREET 3C, LLC,

Plaintiffs,

- v -

AILENE BROWN, SN FUNDING LLC, ISRAEL
ROSENBERG, THE PEOPLE OF THE STATE OF NEW
YORK, THE COMMISSIONER OF TAXATION AND
FINANCE OF THE STATE OF NEW YORK, THE NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD, and
JOHN DOES #1-10,

Defendants.

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INDEX NO. 151408/2021

MOTION DATE 04/21/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34

were read on this motion to DISMISS (& CROSS-MOTION FOR DEFAULT JUDGMENT).

Upon the foregoing documents, defendant Ailene Brown’s motion to dismiss the complaint as time-barred and for failure to state a cause of action pursuant to CPLR 3211(a)(5) and (a)(7), and to vacate a notice of pendency recorded against the property located at 571 Academy Street, Unit 3C, New York, NY 10034, is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 19, 25, 32), and the exhibits attached thereto, in which the court concurs as hereinafter summarized.

Plaintiffs seek to void defendant Brown’s deed to the property under a variety of statutes, but the underlying basis of their claims is that the loan entered into between plaintiff Theodore Welz and defendant SN Funding LLC was usurious, and therefore SN Funding could not have acquired good title upon Welz’ default under the loan agreement, requiring that both SN Funding’s deed to the property, and the subsequent deed marking Brown’s purchase, must be

voided as fruit of a usurious loan. The statute of limitations on a claim to recover against a usurious agreement is governed by a one-year statute of limitations, running from the date when unlawful interest was paid or, as here, where property was delivered pursuant to the loan (CPLR 215[6]; *Mill St. Realty v Reineke*, 159 AD2d 494, 494 [2d Dept 1990]). This action was commenced on February 9, 2021 (complaint, NYSCEF Doc. No. 1) – almost two years after the property was deeded to SN Funding on March 6, 2019 (deed, NYSCEF Doc. No. 22). While plaintiffs argue that the ten-year statute of limitations applicable to an action to quiet title should apply instead, plaintiff’s only available argument to support a quiet title action relies on a finding that the initial loan to SN Funding was usurious. “In applying a statute of limitations a court must look to the essence of the claim and not to the form in which it is pleaded” (*Guzman v 188-190 HDFC*, 37 AD3d 295, 296 [1st Dept 2007]; *see also ABC Radio Network, Inc. v State of New York Dept. of Taxation and Fin.*, 294 AD2d 213, 214 [1st Dept 2002] [“the essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is”]). Accordingly, the claim is one for an action to recover an unlawful overcharge or property transferred thereunder, and plaintiffs’ claims against Brown are time-barred.

Moreover, plaintiffs also fail to state a cause of action against Brown. A transaction that is lawful at its inception may not later be voided if modified to include a usurious rate of interest; only the modification may be voided (*Brest v Kleidman*, 300 AD2d 133 [1st Dept 2002], *lv denied* 99 NY2d 642, *rearg denied* 100 NY2d 577 [2003]). Here, the complaint fails to allege the rate of interest for the original loan agreement. Moreover, the subsequently assertedly usurious rate of interest was 33% on a loan of \$285,666.50. Based on the amount loaned, the only usury claim available is one for criminal usury (General Obligations Law § 5-501[6][a]). Criminal

usury may only be raised as an affirmative defense, and may not be used affirmatively to recover allegedly illegally charged or conveyed interest or property (*see Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 184 [1st Dept 2013]). Plaintiffs suggest that these arguments are unavailable to Brown, as she was not a party to the loan agreement or modifications. However, as plaintiffs seek to void the deed giving Brown title to the property, Brown is entitled to contest the claim that plaintiffs assert entitles them to have the deed voided.

As the complaint against Brown must be dismissed, so too must the notice of pendency be vacated. Brown is the only defendant who conceivably has a claim of title to the property, and as the claims against her have been dismissed, the notice of pendency is subject to mandatory cancellation pursuant to CPLR 6514(a) (*Freidus v Sardelli*, 192 AD2d 578, 580 [2d Dept 1993]).

Plaintiffs cross-move for a default judgment against the non-appearing defendants. “The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]). However, in the absence of prejudice to the non-moving defendants, who have failed to appear, this is a technical defect which may be disregarded (*see, Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]).

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “CPLR 3215 does

not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiffs failed to properly serve the State of New York. “Personal service upon the state shall be made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state” (CPLR 307[1]). Here, plaintiffs attempted to serve the State by service upon one Anne Sager, Administrative Specialist I (affidavits of service, NYSCEF Doc. Nos. 6, 9). As the affidavits do not identify her as the Attorney General or an Assistant Attorney General, service on the State is defective. With regard to the merits, the cross-motion must also be denied with respect to defendants Israel Rosenberg, SN Funding, and the Commissioner of the Department of Taxation and Finance. As set forth above, the complaint does not adequately allege that the original loan from SN Funding was usurious, and therefore the original loan may not be declared void (*Brest*, 300 AD2d at 133).

Accordingly, it is hereby

ORDERED that defendant Ailene Brown’s motion to dismiss the complaint against her is granted, and the fifth, sixth, and seventh causes of action are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant Ailene Brown dismissing the action against her, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the cross-motion seeking entry of a default judgment is denied.

This constitutes the decision and order of the court.



<u>2/16/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE