

Feng Li v Villegas

2023 NY Slip Op 30703(U)

March 2, 2023

Supreme Court, New York County

Docket Number: Index No. 656866/2021

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

-----X

FENG LI,

Plaintiff,

- v -

LOURDES VILLEGAS,

Defendant.

-----X

INDEX NO. 656866/2021

MOTION DATE 07/21/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, and 32

were read on this motion for SUMMARY JUDGMENT (& CROSS-MOTION).

Upon the foregoing documents, it is ORDERED that so much of the defendant's motion for summary judgment seeking dismissal of the complaint is granted. The court assumes familiarity with the facts and circumstances of this action as set forth in its prior decision and order dated June 27, 2022 (NYSCEF Doc. No. 9). As set forth therein, the promissory notes that are the asserted basis for this action are usurious on their face, and thus void and unenforceable (*id.* at 1). The time for plaintiff to appeal that decision and order has since expired, and it is now law of the case (*Chanice v Fed. Exp. Corp.*, 118 AD3d 634, 635 [1st Dept 2014] [law of the case "precludes parties or their privies from relitigating an issue that has already been decided"]). Accordingly, plaintiff cannot raise a triable issue of fact in opposition to the motion. The self-serving affidavits of plaintiff and certain nonparty witnesses raise arguments made for the first time in opposition to a motion for summary judgment and never pleaded in the complaint, which will not be considered (*e.g. Salyamov v Lyhovskiy*, 147 AD3d 450, 451 [1st Dept 2017]); and it is further

ORDERED that so much of the defendant's motion for summary judgment seeking judgment on defendant's counterclaims is granted in part. Regarding the third counterclaim seeking to permanently enjoin plaintiff, his employees, agents, and others under his control from seeking to alter or obtain payment under the notes, the relief sought is provided by General Obligations Law § 5-511(2). The statute provides that where the court determines that a usurious contract has been made or usurious instrument given, "the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled" (General Obligations Law § 5-511[2]). Here, the court has already found that the promissory notes are usurious, and thus will issue the requisite injunction.

The first, second, and fourth counterclaims, however, seek recovery of actual and consequential damages as a result of the usurious loan. Defendant's motion is not supported by any admissible evidence of what those damages are, or of her entitlement to recover them. In order to satisfy her initial burden, defendant must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Further, and regarding the second counterclaim for criminal usury, criminal usury may be raised as an affirmative defense, but may not be alleged as a claim to recover for payment of a usurious loan (*see Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 184 [1st Dept 2013]); and it is further

ORDERED that plaintiff, his agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiff, are permanently enjoined and restrained from doing or suffering to be done, directly or through any attorney, agent, servant,

employee or other person under the supervision or control of defendant or otherwise, any attempts to enforce the promissory notes attached to the complaint in this action as Exhibits 1 and 3, or recover funds thereunder; and it is further

ORDERED that plaintiff is directed to cancel the promissory notes and surrender them to defendant's counsel, Grant Pudalov, Esq., within 14 days of the filing of this decision and order; and it is further

ORDERED that plaintiff's cross-motion for leave to serve and amended complaint is denied. Although leave to amend is ordinarily freely given, a court must first examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept 2007]). An amendment to a complaint may not "be based on facts that would contradict the original theory" (*Brunetti v Musallam*, 59 AD3d 220, 223 [1st Dept 2009] [internal quotation marks and citations omitted]). The original theory of plaintiff's complaint was that he obtained what were otherwise valid promissory notes from the original lender (complaint, NYSCEF Doc. No. 1, ¶¶ 10, 15-16). The proposed amended complaint now alleges instead that defendant forced the original lender to draft promissory notes with terms that would render them unenforceable (proposed amended complaint, NYSCEF Doc. No. 20, ¶ 12). These two theories of liability are factually contradictory as one states that the notes are valid, and the other that they were procured by fraud or duress. Further, the proposed amendment is palpably devoid of merit because: the claims are impermissibly duplicative of the contradictory new breach of contract claim; the claims fail to allege a fiduciary duty between defendant and the original lender that would support a claim for breach thereof; and, with respect to the allegations of fraud, the claims are pled in part upon information and belief and without the requisite particularity (CPLR

3016[b]; *Verdi v Dinowitz*, 204 AD3d 627, 627 [1st Dept 2022] [“The proposed amendments were palpably insufficient and patently devoid of merit”]); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the action.

This constitutes the decision and order of the court.



<u>3/2/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>
		<input type="checkbox"/> DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			<input type="checkbox"/> OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE