

Discover Bank v Berry

2024 NY Slip Op 34692(U)

February 27, 2024

County Court, Tompkins County

Docket Number: Index No. 2023-0142

Judge: John Rowley

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DECISION AND ORDER

Maureen Reynolds, Tompkins County Clerk

STATE OF NEW YORK COUNTY COURT
COUNTY OF TOMPKINS

DISCOVER BANK,

Plaintiff/Appellant,

DECISION AND ORDER

vs.

Index No.: 2023-0142

MICHAEL BERRY/THOMAS G. QUICK/
MIRCEA PITICI,

Defendants/Respondents.

Before the Court are three consolidated appeals from decisions and orders issued by the Ithaca City Court (“City Court”) in three separate actions to collect unpaid credit card debt: (i) *Discover Bank v. Michael Berry* (Index No. 2023-0142), (ii) *Discover Bank v. Thomas G. Quick* (Index No. 2023-0166), and (iii) *Discover Bank v. Mircea Pitici* (Index No. 2023-0167).

PROCEDURAL HISTORY

The Berry Action

On August 24, 2021, Discover Bank (“Discover”), an FDIC-insurance state-chartered bank located in Delaware¹, commenced a lawsuit to collect unpaid credit card debt from Michael Berry seeking a judgment in the amount of \$5,494.42, representing the outstanding amount due and owing on the account. Despite service of process on Mr. Berry on October 15, 2021, Mr. Berry defaulted and Discover filed a motion for default judgment, pursuant to CPLR § 3215 and 22 NYCRR 202.27-a. In support of the motion for default judgment, Discover submitted:

- i. An affidavit of non-expiration of statute of limitations;
- ii. An affirmation of additional notice pursuant to CPLR § 3215(g)(3) and military status (with supporting exhibit);
- iii. An affidavit of facts by original creditor and supplemental affidavit of facts by original creditor;
- iv. An Account Itemization exhibit reflecting the date and amount of the last payment, the amounts of any post-charge-of interest and post-charge off fees and charges, less any post-charge-off credits or payments made by or on behalf of the defendant;
- v. The charge off statement (November 2018 billing statement) reflecting the date and amount of the charge-off balance (\$6,310.42), the defendant’s name, and the last four digits of the account number;

¹ In the first paragraph of each of the complaints filed in all three of the underlying matters, Discover explicitly pleads that it is a “state-chartered bank insured by the FDIC.”

- vi. June 2020 billing statement reflecting the balance on the account (\$5,494.42);
and
- vii. An invoice for service of process on the defendant.

Mr. Berry did not file a response opposing the motion.

By letter dated November 30, 2022, City Court advised counsel for Discover and Mr. Berry that an inquest would take place on February 9, 2023 and, if Mr. Berry wished to appear in person to cross-examine Discover's witnesses, notice must be given to the Court and counsel within ten days of receipt of said letter. Otherwise, Discover would be permitted to submit any additional proof of damages in writing. City Court also detailed the kind of information Discover should submit. City Court held an inquest on February 9, 2023. Neither party appeared but Discover did submit further documentation in support of its application.

On February 27, 2023, City Court issued a decision and order denying Discover's motion for default judgment and *sua sponte* dismissing the underlying action. Specifically, City Court found that Discover, which it erroneously stated is a national bank, charged Mr. Berry a criminally usurious rate of interest of approximately 28.248% per year (in excess of New York's criminal usury rate of 25%) and, consequently, forfeited the entire interest charged on the credit card on the causes of action for breach of contract and account stated. Additionally, City Court found that it was unable to ascertain how much of the amount sought was forfeited interest and how much consisted of purchases made by Mr. Berry and concluded that Discover had failed to establish the principal balance due. City Court dismissed the complaint in its entirety. At no time did City Court advise Discover that it would *sua sponte* raise the affirmative defense of usury or give Discover the opportunity to respond.

On or about April 14, 2023, Discover filed a Notice of Appeal from said decision and order.

The Quick Action

On January 25, 2021, Discover commenced a lawsuit to collect unpaid credit card debt from Thomas Quick seeking a judgment in the amount of \$4,776.91, representing the outstanding amount due and owing on the account. Despite service of process on Mr. Quick on February 24, 2021, Mr. Quick defaulted and Discover filed a motion for default judgment, pursuant to CPLR § 3215 and 22 NYCRR 202.27-a. In support of the motion for default judgment, Discover submitted:

- i. an affidavit of non-expiration of statute of limitations;
- ii. an affirmation of additional notice pursuant to CPLR § 3215(g)(3) and military status (with supporting exhibit);
- iii. an affidavit of facts by original creditor and supplemental affidavit of facts by original creditor;
- iv. an Account Itemization exhibit reflecting the date and amount of the last payment, the amounts of any post-charge-of interest and post-charge off fees

- and charges, less any post-charge-off credits or payments made by or on behalf of the defendant;
- v. the charge off statement (June 2020 billing statement) reflecting the date and amount of the charge-off balance (\$4,776.91), the defendant's name, and the last four digits of the account number;
 - vi. November 2019 billing statement reflecting the last payment made on the account; and
 - vii. an invoice for service of process on the defendant.

Mr. Quick did not file a response opposing the motion.

By letter dated December 5, 2022, City Court wrote to the parties to advise that an inquest would take place on February 23, 2023 and requested information concerning damages, just as it had done in the Berry matter. An inquest was held on February 23, 2023 and neither party appeared but Discover did submit further documentation in support of its application.

On March 1, 2023, City Court issued a decision and order that is substantially identical to the decision and order in the *Berry* matter. Just as it had done in the *Berry* matter, City Court *sua sponte* raised the affirmative defense of criminal usury and found that Discover charged Mr. Quick a criminally usurious rate of interest of approximately 33.432% per year (in excess of New York's criminal usury rate of 25%). City Court concluded that Discover forfeited the entire interest charged on the credit card on the causes of action for breach of contract and account stated and held that Discover charged \$2,506.81 in unlawful interest throughout the lifetime of the account, which it forfeited, resulting in a debt of \$2,270.10 (claimed amount of \$4,776.91 - \$2,506.81 in interest = \$2,270.10). Therefore, City Court issued a judgment for Discover in the amount of \$2,270.10. At no time did City Court advise Discover that it would *sua sponte* raise the affirmative defense of usury or give Discover the opportunity to respond.

On or about April 14, 2023, Discover filed a Notice of Appeal from said decision and order.

The Pitici Action

On July 16, 2019, Discover commenced a lawsuit to collect unpaid credit card debt from Mircea Pitici seeking a judgment in the amount of \$3,360.71, representing the outstanding amount due and owing on the account. Unlike Mr. Berry and Mr. Quick, Mr. Pitici served an answer in the form of a letter on or about August 27, 2019, which stated:

On August 12, 2019, I received by mail a letter and a complaint filed with the City Court of Ithaca by Seli[p] & Stylianou, based in Woodbury, NY. The documents claim that I owe a certain debt and ask me to pay it.

I am asking the plaintiff to fully validate the claim that I owe this debt. That is, I am asking them to provide a complete, detailed, and accurate paper record of the debt.

Notably, the answer did not deny any of the allegations in the complaint and did not assert any affirmative defenses. On or about March 22, 2023, Discover filed a motion for summary judgment, pursuant to CPLR R 3212. In support of the motion for summary judgment, Discover submitted:

- i. an attorney affirmation in support setting forth the procedural background and legal basis for the requested relief;
- ii. exhibits to the attorney affirmation, which include a copy of the pleadings, proof of service of the summons and complaint on the defendant and their non-military status, and correspondence with the defendant;
- iii. an affidavit of facts by a Litigation Support Coordinator for Discover Products, Inc.; and
- iv. exhibits to the affidavit of facts, which include the defendant's application of the account, the governing Cardmember Agreement, billing statements dating from May 2015 through April 2017, and copies of defendant's check payments to Discover.

Mr. Pitici did not file a response to the motion for summary judgment.

On April 20, 2023, City Court issued a decision and order granting Discover's motion for summary judgment, in part, and finding that Mr. Pitici was entitled to partial summary judgment on the issue of criminal usury. As it had done in the Berry and Quick matters, City Court *sua sponte* raised the affirmative defense of criminal usury and found that Discover charged Mr. Pitici a criminally usurious rate of interest of approximately 30.911% per year (in excess of New York's criminal usury rate of 25%) and, consequently, forfeited the entire interest charged on the credit card on the cause of action for breach of contract. City Court also found that it could not determine the actual amount owed by Mr. Pitici because the monthly credit card statements for December 2015 to April 2016 were not provided. Therefore, City Court granted the motion as to Mr. Pitici's liability, granted summary judgment to Mr. Pitici on the matter of criminal usury, and dismissed the complaint due to Discover's purported failure to prove damages. At no time did City Court advise Discover that it would *sua sponte* raise the affirmative defense of usury or give Discover the opportunity to respond.

On or about April 14, 2023, Discover filed a Notice of Appeal from said decision and order.

Application for Extension of Time

By order dated June 15, 2023, in the matter entitled *Discover Bank v. Michael Berry* (Index No. 2023-0142), this Court granted Discover permission to file a motion to consolidate the three related appeals and extended Discover's time to file its Notice of Argument and support brief in all three related appeals until thirty days after a decision on Discover's forthcoming motion to consolidate.

Motion to Consolidate

On or about July 19, 2023, Discover filed a motion to consolidate the three separate appeals, arguing that the decisions entered in each of the three appeals are nearly identical and must be vacated and reversed on appeal for the same reasons. Specifically, Discover argued that the decisions each begin by erroneously determining that Discover has not demonstrated entitlement to charge post-default interest, despite the fact that Discover submitted all the required proofs in order to establish its entitlement to judgment requested in each motion. Additionally, Discover argues that in each decision City Court *sue sponte* raised the affirmative defense of usury, despite the fact that not one defendant raised this defense. Moreover, City Court did not give Discover notice that it would raise the defense *sua sponte* or give Discover an opportunity to be heard before the decisions were rendered. Therefore, Discover appeals each decision and intends to present nearly identical arguments in support of its appeals. As such, Discover argues that consolidation is appropriate.

By decision and order dated September 28, 2023, this Court found that City Court's decisions entered in each of these three actions are nearly identical and the three actions share identical questions of law regarding the issue of City Court's raising of the affirmative defense of usury *sua sponte*, without providing Discover with prior notice and an opportunity to be heard on that issue. Therefore, in the interest of justice and judicial economy, and in the interest of avoiding the risk of inconsistent outcomes, this Court concluded that these three appeals were ripe for consolidation in accordance with CPLR § 602(a) and granted Discover's motion.

On or about November 2, 2023, Discover filed its notice of argument and supporting brief, along with an affidavit of service indicating service on the three defendants.

Arguments on Appeal

On appeal, Discover argues that City Court's decisions in the underlying matters must be vacated because they violate due process. Specifically, Discover asserts that City Court indisputably violated Discover's constitutional rights by erroneously ordering *sua sponte*, on-the-merits dismissals of the underlying actions. Instead of solely considering the arguments contained in Discover's unopposed motions, Discover states that City Court *sue sponte* invoked an affirmative defense of usury that was not raised by any of the defendants in the underlying actions with prejudice, without affording Discover notice of its intended course of action or an opportunity to be heard.

Additionally, Discover claims City Court's decisions in the underlying matter are wrong as a matter of law. Specifically, City Court erred in finding that Discover charged usurious rates of interest. As a state-chartered bank, Discover argues that it is permitted to charge interest consistent with Delaware law and City Court had no basis to apply the law of New York, as it is neither Discover's home state nor a host state. Despite conceding that it was unable to determine if there is a host state that performs the three specific non-ministerial roles with respect to accounts in the underlying actions, Discover says that City Court simply refused to apply the laws of Discover's home state and instead applied the laws of New York. Furthermore, the accounts are governed by a written agreement containing a Delaware governing law provision

and the cardmember agreements also contain Delaware choice of law provisions, which City Court was on notice of because they are in the record. Accordingly, Discover argues that it is permitted to charge interest consistent with Delaware law, which does not contain a cap on interest rates. Therefore, Discover's interest rate could not have violated any applicable doctrine of usury.

Notwithstanding, even if it were appropriate to apply New York law, Discover argues that it did not violate New York's usury laws. Under New York law, usury is an affirmative defense that is waived if not raised by a defendant and none of the defendants in the underlying actions asserted usury as an affirmative defense. Accordingly, the defense of usury was waived as a matter of law and City Court erred by raising it *sua sponte*. Discover also argues that the record is also insufficient to support a finding of usury because the accelerated judgments appealed from constitute summary judgment and the record below is devoid of factual evidence to carry the burden applicable to summary judgment of criminal usury since there was no usurious rate of interest explicitly provided in any of the documents before City Court. As the non-movant with respect to the usury challenge, Discover was entitled to receive the benefit of every favorable inference and City Court was required to view the evidence in the light most favorable to Discover. Without the benefit of briefing by either party, or a fact-finding hearing, Discover argues that City Court improperly attempted to weigh the limited facts before it to resolve questions of fact, which is especially problematic because City Court recited incorrect facts in its decision, such as its observation that Discover is a national bank. Finally, Discover states that City Court's decisions are contingent on the inclusion of late fees as interest, but there is significant case law in New York holding that late fees do not constitute interest and so should not be considered in any decision on usury. As such, the finding of usury was not only the result of a due process violation and application of the wrong State's law, but it was unsupported by the facts and law of New York State.

Lastly, Discover argues that City Court erred in concluding that Discover did not submit sufficient evidence to support its entitlement to damages. Discover argues that defendants in all three actions admitted the allegations against them by defaulting or failing to refute the assertions in the pleadings. Defaulting defendants, such as Mr. Berry and Mr. Quick, are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them. Similarly, Discover defendants who fail to deny any allegation in a complaint, such as Mr. Pitici, are deemed to admit those allegations, pursuant to CPLR § 3018. Furthermore, not one defendant in the underlying actions ever disputed (i) the existence of the governing agreement, (ii) their default and failure to pay under the agreement, or (iii) Discover's entitlement to damages. For that reason alone, Discover argues that its motions for judgments should have been granted. Moreover, Discover contends that it submitted all proofs required under CPLR R 3212, CPLR § 3215, and 22 NYCRR 202-27-a, as applicable.

None of the defendants submitted a response.

DISCUSSION

Procedural Due Process

Unless subject matter jurisdiction is at issue, a court should not raise an issue *sua sponte* when a party is prejudiced by its inability to respond (*Level 3 Commc 'ns, LLC v. Essex Cnty*, 129 A.D.3d 1255, 1256 [3rd Dept. 2015]). When a defendant fails to raise an affirmative defense, it is improper for a court to raise it *sua sponte* (*see Id.*; CPLR § 3018[b]; *Progressive Northeastern Insurance Co. v. North State Autobahn, Inc.*, 71 A.D.3d 657, 658 [2nd Dept. 2010]). It is well-established that usury, including criminal usury, is an affirmative defense that must be proven by clear and convincing evidence as to all its elements (*Hochman v. LaRea*, 14 A.D.3d 653, 654 [2nd Dept. 2005]). “A heavy burden rests upon the party seeking to impeach a transaction based upon usury... and usury will not be presumed” (*Id.* [Internal citations omitted]; *White v Benjamin*, 138 N.Y. 623, 625, 33 N.E. 1037 [1893]). “Usury is an affirmative defense which a defendant must either assert in an answer or as a ground to move to dismiss the complaint pursuant to CPLR [R] 3211. Otherwise, the defense is waived” (*Power Up Lending Group, Ltd. v. Cardinal Resources, Inc.*, 160 A.D.3d 674, 675 [2nd Dept. 2018]). Additionally, “a [lender] is entitled to a presumption that the parties’ arrangement was not usurious” (*Jimenez v. Acheson*, 42 AD3d 831, 832 [3d Dept. 2007]).

Grounds for dismissal of a complaint are set forth in CPLR § 3211[a]. Among these, the ground on which City Court appears to have rested its decision is § 3211[a][1], when a defense is founded upon documentary evidence (though here, City Court’s decisions rest on the failure to produce evidence). Appellate courts have consistently held that a court’s power to dismiss a complaint *sua sponte* is to be used sparingly, and only when extraordinary circumstances exist to warrant dismissal. *Deutsche Bank Natl. Trust Co. v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2nd Dept. 2020], *OneWest Bank, FSB v Fernandez*, 112 A.D.3d 681, 976 N.Y.S.2d 405 [2nd Dept. 2013][internal quotation marks omitted].

Here, City Court unilaterally raised the affirmative defense of usury *sua sponte* in all three of the underlying actions without notifying Discover that it would consider the doctrine of usury or giving Discover the opportunity to present its position relative to such. This denied Discover its basic right to due process (*see Chase Home Fin., LLC v. Plaut*, 171 A.D.3d 692, 694 [2nd Dept. 2019]; *see also* CPLR § 3216; *U.S. Bank N.A. v. Ahmed*, 137 A.D.3d 1106, 1108 [2nd Dept. 2016]). Because a defaulting defendant admits all traversable allegations (*McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 351-352, 169 NE 605, 606-607 [1930]), City Court effectively blind-sided Discover in the Berry and Quick actions by raising the issue without notice to the parties where both of those defendants defaulted. City Court similarly blind-sided Discover in the Pitici action because Mr. Pitici’s failure to deny any of the allegations in the complaint in his answer constituted an admission thereto (*see* CPLR § 3018[a]) and his failure to assert any affirmative defenses or move to dismiss the complaint on that ground pursuant to CPLR R 3211 constituted a waiver of such (*see Power Up Lending Group, Ltd.* at 675).

City Court's Application of New York's Usury Law

The Supremacy Clause of Article VI of the United States Constitution states, “The Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.” This means that “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield . . . even state regulation designed to protect vital state interests” (*Gade v. Nat’l Solid Waste Mgmt. Ass.*, 505 US 88, 108 [1992] [internal citations and quotations omitted]). The Supreme Court has held that state-law usury claims against a national bank are completely preempted by the National Bank Act (“NBA”) (*Beneficial Nat’l Bank v. Anderson*, 539 US 1, 8-10 [2003]). Section 27 of the Federal Deposit Insurance Act (“FDIA”), 12 USC § 1831d, governs usury claims asserted against state-chartered banks and it similarly completely preempts state-law usury claims against state-chartered, federally insured banks because (1) the NBA and FDIA are interpreted in *par materia*; (2) 12 USCS §§ 85 and 86 completely preempt state law usury claims against national banks; (3) NBA and FDIA contain virtually identical preemption language; and (4) Congress intended to provide competitive equality between national and state-chartered banks regarding the levying of interest rates (*see Discover Bank v. Vaden*, 489 F.3d 594, 603-607 [4th Cir. 2007], *rev’d on other grounds*, 556 U.S. 49 [2009]).

In its underlying decisions, City Court repeatedly refers to Discover as a “national bank,” which it is not. In fact, the first paragraph of the complaints in the underlying actions state that Discover is a state-chartered bank, which City Court appears to have ignored. Notwithstanding, like a national bank, an FDIC-insured state-chartered bank, like Discover, is entitled to export the interest rates and fees of the state in which the bank is located to borrowers of other states pursuant to 12 USC § 1831d (*see id.*). Discover is chartered in the State of Delaware. Therefore, the question becomes one of Delaware’s state banking law, and the maximum interest rate allowed to banks under Delaware law determines whether Discover has charged excessive interest in this case. Delaware’s commercial laws, governing Discover Bank, allow banks to charge late fees, interest, and compound interest according to the cardholder agreement (*see Del. Code Ann. Tit. 5, §§ 941(8), 943, 945, 950, 952*). Delaware law does not contain a cap on interest rates (*see Del. Code Ann. Tit. 5, § 943; Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 622 [3d Cir. 2009][“Delaware has no usury law.”]).

Accordingly, this Court finds that City Court’s application of New York law was in error and Discover’s interest rate could not have violated any applicable doctrine of usury. Even if New York State’s usury laws, which are codified in General Obligations Law § 5-501 (civil usury) and Penal Law § 190.40 (criminal usury), could be applied, City Court should have provided Discover with the opportunity to address the issue, rather than dismissing the complaints *sua sponte*.

Proof of Claim

Discover also appeals City Court’s conclusion that it did not submit sufficient evidence of the debts defendants owed. The documentation required to obtain a default judgment in a collections action in New York is set forth in 22 NYCRR § 202.27-a, 22 NYCRR § 210.362 and

CPLR §3215[b] and/or [f]. It includes: (1) proof of service of the summons and complaint; (2) an affidavit of a party setting forth proof of facts constituting the claim, the default and the amount due, (or a verified complaint setting forth such facts); (3) counsel's affirmation of non-expiration of the statute of limitations; (4) documentation, including a copy of the credit agreement, relevant business records of the creditor containing the name of defendant, the last four digits of the account number, the date and the amount of the charge-off balance, the date and amount of last payment, the amounts of any post-charge-off interest and post-charge-off fees and charges less post charge-off credits or payments made by defendant (CPLR § 3215[f], 22 NYCRR § 202.27-a). If the defendant is a natural person and the action involves non-payment of a contractual obligation, plaintiff must provide additional notice by mail twenty days prior to the entry of the judgment, though not in the case of a small claim (CPLR § 3215[g][3][i], [iii]). The affidavit of facts "need only allege enough facts to enable a court to determine that a viable cause of action exists" (*Woodson v. Mendon Lending Group*, 100 NY2d 62, 71 [2003]). When a case is submitted for inquest, the issue of liability has already been waived by the default (*Id.* at 71).

In seeking summary judgment, CPLR R 3212[b] requires the movant to submit (1) an affidavit, (2) a copy of the pleadings, and (3) other available proof. CPLR R 3212[b] further provides that "[t]he motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" and "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

Here, defendants in all three underlying actions admitted the allegations against them by defaulting (Mr. Berry and Mr. Quick) or failing to refute the assertions in the pleadings (Mr. Pitici). Defaulting defendants "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] [citing to *Rokina Opt. Co. v. Camera King*, 63 NY2d 728, 730 [1984]]). Similarly, defendants who fail to deny any allegation in a complaint, are deemed to admit those allegations (*see* CPLR 3018[a]). Moreover, the record shows that Discover submitted all the required proofs set forth in 22 NYCRR § 202.27-a, 22 NYCRR § 210.362, CPLR §3215[b] and/or [f], and CPLR R 3212[b].

Accordingly, City Court erred in denying the underlying motions for default judgments and motion for summary judgment and Discover was entitled to judgment in all three of these matters.

CONCLUSION


Given the power imbalance between banks and consumers, City Court was correct to examine Discover's applications in the underlying actions with scrutiny. The NBA and FDIA were designed to impart a special status on national banks and state-chartered, federally insured banks that enables them to subvert state consumer protection laws. However unsavory a policy a court may find that to be, the federal preemption doctrine requires state courts to follow federal law, regardless of the unfair advantage it bestows upon one party over another.

In light of the foregoing, the decisions and orders of the Ithaca City Court denying the underlying motions for default judgment and motion for summary judgment are reversed and remanded for calculation of judgments.

This is the decision and order of the Court made upon notice to all parties. A notice of appeal, if any, must be filed within thirty (30) days of entry.

SO ORDERED.

ENTER:

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Hon. John C. Rowley
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Dated: February 27, 2024
Ithaca, New York

Hon. John Rowley
Tompkins County Court Judge