

**JADR Consulting Group PTY Ltd v Ault Alliance,
Inc.**

2025 NY Slip Op 30344(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 650537/2024

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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JADR CONSULTING GROUP PTY LTD,	INDEX NO. <u>650537/2024</u>
Plaintiff,	MOTION DATE <u>01/31/2024</u>
- v -	MOTION SEQ. NO. <u>MS 001</u>
AULT ALLIANCE, INC., AULT & COMPANY, INC., AULT LENDING, LLC, BITNILE, INC., and MILTON C. AULT	DECISION + ORDER ON MOTION
Defendants.	
-----X	

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND)

In this action, plaintiff JADR Consulting Group PTY Ltd. (plaintiff) moves for summary judgment in lieu of complaint pursuant to CPLR 3213, seeking to recover \$5,545,086 plus interest, costs, expenses, and reasonable attorneys' fees allegedly owed under a promissory note and guaranteed by defendants Ault Alliance, Inc., f/k/a Bitnile Holdings, Inc. (AAI); Ault & Company, Inc. (A&C); Ault Lending, LLC (Lending); Bitnile, Inc. (Bitnile); and Milton C. Ault (together defendants). Defendants oppose plaintiff's motion and cross-move to dismiss with prejudice pursuant to CPLR 3211(a)(1) and (7), as well as for attorneys fees, all under the theory that the promissory note and its amendments violate the criminal usury statute. For the reasons below, plaintiff's motion is denied and defendants' cross-motion is granted.

Background

On December 16, 2022, plaintiff and defendant AAI (under its former name Bitnile Holdings, Inc.) entered a promissory note under which AAI promised to pay a principal amount of \$2,756,245.10 (the Initial Note) (NYSCEF # 4, Initial Note, at 1; NYSCEF # 3, Davis-Rice Aff ¶¶ 3, 13). However, plaintiff's sole director and principal, Justin Davis-Rice, avers that plaintiff, in fact, only gave AAI consideration valued at \$2,249,996 "after various adjustments" (NYSCEF # 3 ¶ 11). In any event, the Initial Note had a maturity date of March 16, 2023—a term of 77 days (see NYSCEF # 4 at *2). The interest rate was set at 16% per annum, while the default interest rate was set at 24% per annum or the maximum amount permitted by law (id. §§ 1.2, 2.2 [a]). Defendants A&C, Lending, Bitnile, and Ault

guaranteed the Initial Note (NYSCEF # 3 ¶ 13; *see* NYSCEF # 5, Guaranty Agreement, at Signature Pages).

The Initial Note was amended twice. The First Amendment added a new section 2.2(d) stating that upon an Event of Default, the *principal* amount to be repaid would increase by \$1,000,000 (NYSCEF # 3 ¶¶ 14, 21; NYSCEF # 6, First Amendment, § 5 [a]). The Second Amendment extended the Maturity Date to August 15, 2023, and provided that any default would automatically extend the date for another 30 days at plaintiff's discretion, with each extension adding \$250,000 to the principal (NYSCEF # 3 ¶¶ 16, 18; NYSCEF # 7, Second Amendment, § 3). For unspecified reasons, both amendments also increased the initial principal due even without default (*see* NYSCEF # 6 § 2 [increasing principal to \$3,637,982]; NYSCEF # 7 § 2 [increasing principal to \$5,061,566]). Plaintiff does not aver that defendants ever received consideration in those amounts.

Defendants defaulted by failing to fully repay on August 15, 2023 (NYSCEF # 3 ¶ 17). The Maturity Date has since been extended a total of six times under the Second Amendment's terms (*id.* ¶¶ 18-19). Together with the \$1,000,000 penalty from the First Amendment, a total of \$2,500,000 has purportedly been added to the principal post-default (*id.* ¶¶ 17-19, 21). Plaintiff avers that after accounting for various payments, the principal amount still outstanding is \$4,321,566 (*id.* ¶ 29). Meanwhile, plaintiff claims only \$223,520 in interest is currently due, for a total outstanding amount of \$4,545,086 (*see id.*).

Plaintiff now moves for summary judgment in lieu of complaint to recover the outstanding \$4,545,086 from defendants (NYSCEF # 2). However, plaintiff's Notice of Motion requests a sum of \$5,545,086 plus interest, exactly one million dollars more (*id.* ¶ 1). Moreover, plaintiff's brief in support of this motion claims that the outstanding amount is \$4,811,566 (NYSCEF # 9, Pltf's mol at 1). Whatever the amount, plaintiff argues that this is a straightforward case for recovery on an unconditional guaranty (*id.* at 8-10).

Defendants oppose the motion and cross-move to dismiss, claiming that Initial Note and Amendments are void as usurious (NYSCEF # 20, Defs' mol at 1-2). Defendants argue that because plaintiff avers defendants received only \$2,249,996 out of the \$2,756,245.10 initial principal, the unpaid \$506,249.10 difference should be treated as interest (*id.* at 8, citing *Hope v Contemporary Funding Grp.*, 128 AD2d 673, 673-674 [2d Dept 1987]). Defendants claim that when this \$506,259.10 is annualized and added to the 16% contractual interest rate, the actual interest rate is 126.26% — over six times the 25% criminal usury rate (*id.* at 8-10; *see also* Penal Law 190.40). Defendants conclude that the Initial Note, and by extension the Amendments, are therefore void (NYSCEF # 20 at 10-11, citing *Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 333 [2021]). Defendants alternatively argue that even if the Initial Note is not usurious, similar calculations show the Amendments are usurious (*id.* at 11-13). Defendants seek attorney fees for fighting these claims

(*id.* at 18-19). Finally, defendants alternatively argue that even if their cross-motion is denied, the court should still strike the usurious sections of the Initial Note and Amendments and/or deny plaintiff's motion (*id.* at 14-15, 19-21).

Plaintiff's sole reply is that usury laws do not apply to notes for \$2,500,000 or more (NYSCEF # 23, Pltf's Reply, at 2-5 [collecting cases]; *see also* General Obligations Law § 5-591 [6] [b] [usury laws do not apply to loans of \$2,500,000 or more]). Plaintiff argues that because the Initial Note has a face amount of \$2,756,245.10, it is exempt from the usury laws (NYSCEF # 23 at 2-5). Plaintiff otherwise does not challenge defendants' calculations.

In reply, defendants argue that per New York case law, the face amount of the loan does not matter (NYSCEF # 24, Defs Reply, at 3-5). What matters is the amounts actually paid (*id.*, citing *Band Realty Co. v N. Brewster, Inc.*, 37 NY2d 460, 462 [1975]; *Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013]; and *Concrete Capital, LLC v Olympic Prop. Partners, LLC*, 2018 NY Slip Op 30804[U], 9 [Sup Ct, NY County 2018] [Crane, J.]). Defendants argue that because plaintiff's own affirmation states that plaintiff only paid \$2,249,996, the Initial Note does not meet the \$2,500,000 cap and thus the usury laws still apply (*id.* at 4-5). Defendants also argue that plaintiff never agreed to advance \$2,500,000 or more, defeating the statutory argument (*id.*). Finally, defendants argue that plaintiff, by its silence, accepted defendants' alternative arguments that the usurious provisions should be struck (*id.* at 11-13).

Discussion

A party may seek summary judgment in lieu of complaint pursuant to CPLR 3213 to recover an amount based on an "instrument for the payment of money only" (*Weissman v Sinorm Deli*, 88 NY2d 437, 443-444 [1996]). In particular, a party is entitled to relief if "a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*id.*). "But the remedy is not available where there are other issues and considerations presented by the writing," such as where "the liabilities and obligations can only be ascertained by resort to evidence outside the instrument, or if more than simple proof of nonpayment or a de minimis deviation from the face of the document is involved" (*Kerin v Kaufman*, 296 AD2d 336, 337 [1st Dept 2002] [denying summary judgment in lieu of complaint]).

As an initial matter, plaintiff's motion is denied because it is not clear from the face of the pleadings how much is outstanding. Plaintiff's notice of motion requests \$5,545,086 plus interest and fees (NYSCEF # 2 ¶ 1), but the Davis-Rice affirmation repeatedly asserts that the amount due is \$4,545,086 (*see, e.g.*, NYSCEF # 3 ¶¶ 9, 15, 29). Moreover, plaintiff's brief in support of this motion asserts that the outstanding balance is \$4,811,566 (NYSCEF # 9, pltf's mol at 1). Given the different and contradictory amounts sought, plaintiff's motion for summary judgment in lieu of complaint is denied.

But even without these contradictory numbers, plaintiff's motion must also be denied because the Initial Note is clearly usurious on its face. Consequently, defendants' cross-motion must be granted.

Corporations may raise criminal usury as a defense to the enforcement of a loan (General Obligations Law § 5-521 [3] [prohibiting civil but not criminal usury]). "Criminal usury" is charging with knowledge "any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding [25% per year] or the equivalent rate for a longer or shorter period" (Penal Law § 190.40). However, usury laws do not apply if the loan is for \$2,500,000 or more (General Obligations Law § 5-501 [6] [b]). "To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013] [internal citation omitted]). "If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law" (*id.*). "To determine whether a transaction is usurious, courts look not to its form but to its substance or real character" (*id.* [internal citation omitted]).

Based on the above principles, there is effectively a two-step analysis to determine whether a transaction is usurious. The first step is to determine whether the note is for \$2,500,000 or more (*see* § 5-501 [6] [b]). If it is, the usury laws do not apply. If it is not, the second step is to calculate the note's actual interest rate to determine whether that rate exceeds the 25% cap (*see* Penal Law § 190.40).

The Initial Note on its face states that the principal is \$2,756,245.10, but plaintiff admits defendants only received \$2,249,996 in consideration. "It is settled law that the formula [for calculating interest rate] is based on the amount actually received," and the \$2.5 million cap is inapplicable for the "same reason" (*Concrete Capital, LLC v Olympic Prop. Partners, LLC*, 2018 NY Slip Op 30804[U], 9 [Sup Ct, NY County 2018] [Crane, J.], citing *Band Realty Co. v N. Brewster, Inc.*, 37 NY2d 460, 462 [1975], and *Blue Wolf Capital*, 105 AD3d at 183). Thus, because defendant actually received less than \$2,500,000, the usury laws may apply.

Plaintiff's cases to the contrary are unavailing. Plaintiff argues that courts look only at the principal amount stated in the loan agreement but fails to cite a single binding case for that proposition. Plaintiff's only two First Department cases do not involve an admission that the lender paid less than \$2,500,000 (*see* NYSCEF # 23 at 3-4, citing *AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 [1st Dept 2009] [\$3.25 million], and *72nd Ninth LLC v 753 Ninth Ave. Realty LLC*, 168 AD3d 597, 598 [1st Dept 2019] [\$4,600,000]).

Because the usury laws apply, the next step is to calculate the annual interest rate. Under the traditional method of calculating interest, courts first

calculate the total annual interest received by adding together a year's worth of interest at the contract's rate and the amount of the principal retained by the lender as a discount, and then divide that sum by the amount the debtor actually received and express the final amount as a percent (*see Band Realty Co. v N. Brewster, Inc.*, 37 NY2d 460, 462 [1975]; *Blue Wolf Capital*, 105 AD3d at 183-184). Any money retained by the lender that is not for the purpose of reimbursing expenses related to the loan is properly considered a discount to be added to the annual interest in the first part of the formula (*see Blue Wolf Capital*, 105 AD3d at 183; *Sandra's Jewel Box v 401 Hotel, L.P.*, 273 AD2d 1, 3 [1st Dept 2000]). If the loan term is less than a year, the interest rate is annualized (*Bakhash v Winston*, 134 AD3d 468, 469 [1st Dept 2015]).

Using the above principles, the interest rate clearly exceeds the usury rate. First, the difference between the principal amount of \$2,756,245 and the actual amount of \$2,249,996 in consideration that defendants received is \$506,249.10. Plaintiff does not aver that it retained that amount to reimburse expenses relating to the loan, and nothing in the Initial Note gives plaintiff the right to withhold any principal (*see Blue Wolf Capital*, 105 AD3d at 183; *see generally* NYSCEF # 4). The \$506,249.10 is therefore properly considered a discount for the purpose of calculating interest.

Next to be calculated is the amount of annual interest payments that plaintiff would receive under the note. Here, that amount is the sum of the 16% annual interest rate on the \$2,756,245.10 face principal, which comes to \$440,999.22, plus the \$506,249.10 discount retained by plaintiff, totaling \$947,248.32. Dividing \$947,248.32, the amount of annual interest, by \$2,249,996,¹ the net funds received, and multiplying by 100 to express the interest payments as a percentage of the net loan funds, the result is an interest rate of 42.1%, almost double the criminal usury rate.

Defendants use a slightly different calculation to reach a much higher interest rate but given that their rate still exceeds the usury rate, the difference is academic. Because the term of the Initial Note was for just 77 days, defendants first annualized the \$506,249.10 discount by multiply by 365/77 days (*see Bakhash*, 134 AD3d at 469 [annualize interest for loans less than a year]; *see also Concrete Capital*, 2018 NY Slip Op 30804[U], 8-9 [annualizing a discount on a 128-day loan into a full year's interest]). The result is \$2,399,752.23. Defendants then proceed as above: the \$2,399,752.23 annualized discount is added to \$440,999.22 (16% interest rate on the face principal of \$2,756,245.10), for a total of , for a total of \$2,840,751.45. That number is then divided by \$2,249,996 (the net amount

¹ This can also be calculated as the gross amount of the Initial Note (\$2,756,245.10) *minus* "the retained interest" (\$506,249.10) (*Blue Wolf Capital*, 105 AD3d at 183).

defendants received) and multiplied by 100 to convert the result into a percentage. The result is a 126.26% interest rate, over six times the 25% criminal usury rate.

In short, under either formula described above, the Initial Note is usurious on its face. The Initial Loan is therefore void *ab initio* (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 333 [2021] [“(L)oans proven to violate the criminal usury statute are subject to the same consequence as any other usurious loans: complete invalidity of the loan instrument”). By extension, both amendments are void, because a void agreement cannot be amended (*see Goldberger v Magid*, 213 AD3d 452, 452 [1st Dept 2023] [“the note was void ab initio and could not be reformed by reducing the interest rate from fifteen percent to nine percent”). The court therefore does not reach the parties alternative arguments.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiff JADR Consulting Group PTY Ltd.’s motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the cross-motion to dismiss and for attorneys fees by defendants Ault Alliance, Inc., f/k/a Bitnile Holdings Inc.; Ault & Company, Inc.; Ault Lending, LLC; Bitnile, Inc.; and Milton C. Ault is granted only to the extent that the action is dismissed with prejudice; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing accordingly in favor of defendants Ault Alliance, Inc., f/k/a Bitnile Holdings Inc.; Ault & Company, Inc.; Ault Lending, LLC; Bitnile, Inc.; and Milton C. Ault; and it is further

ORDERED that the defendants shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page and on the court’s website at the address www.nycourts.gov/supctmanh).

1/21/2025
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE