

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SABIT KAJTAZI,

Plaintiff,

DECISION & ORDER

-against-

INDEX NO.:
53068/2015

FRANK GOLIO and GINA MARCHESE,

Defendants.
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BLACKWOOD, A.J.S.C.

The following papers (e-filed documents 18-20) were read and considered, along with the trial testimony and items of evidence received by this court on February 22, 2018, in connection with this decision:

Papers

Summation Statement on Behalf of Plaintiff

Post Trial Memorandum of Law for Defendant

Upon reading the foregoing papers and trial testimony and exhibits, it is

ORDERED that the defendant’s application for the dismissal of all causes of action is granted; and it is further

ORDERED that the complaint is dismissed in its entirety.

On March 3, 2015, SABIT KAJTAZI ("plaintiff") filed a summons and verified complaint against FRANK GOLIO and GINA MARCHESE, ("defendants") alleging that Golio and Marchese owed him \$72,000. Specifically, the complaint alleges that the defendants

violated the terms of a Promissory Note entered into by all of the parties by failing to repay the loan despite plaintiff's demand for payment. The \$72,000.00 is the amount of the note, plus interest.

On March 24, 2015, defendant Marchese filed a verified answer with several affirmative defenses, as well as a cross-claim against defendant Golio. In the cross-claim, Marchese alleges that she paid \$50,000.00 to Golio in satisfaction of the Note and was told that as a result of her payment to him, Golio now assumed responsibility for repayment of the Note. Therefore, Marchese sought a judgment against Golio in the amount of \$50,000. Defendant Golio failed to answer or appear in any manner with respect to the verified complaint or the cross-claim. No motion for default judgment has been filed against defendant Golio.

Discovery was completed and a note of issue for a trial without a jury was filed on December 2, 2016. A non-jury trial was held before this court on February 22, 2018. Post trial memoranda were filed by both sides after the trial.

The evidence at trial established the following facts:

On March 26, 2008, Golio and Marchese borrowed \$50,000.00 from the plaintiff so that Marchese could help her brother open up a deli in a strip mall owned by Golio. The defendants signed a Promissory Note wherein they agreed to repay the plaintiff the sum of \$50,000.00, "together with interest . . . on the unpaid balance at the initial rate of 20% per annum, interest only shall be payable in equal monthly installments of \$833.33 each" (Plaintiff's Exhibit 1). The Note indicated that the entire unpaid balance of the principal and any interest were to be due one year from the date of the Note. The Note included the provision that the term could be extended for another year upon written agreement by all parties. The Note was non-negotiable, and had been prepared by Marchese's attorney, Kevin Russo. No other party, including the plaintiff, was

represented by counsel at the time the Note was executed.

The plaintiff received several payments on the Note. Specifically, on April 29, 2008, he received a check signed by Marchese in the amount of \$833.33. On March 18, 2009, the plaintiff received a check made out by Golio in the amount of \$3380.00; on June 16, 2009, the plaintiff received a check from Golio for \$833.00; and on January 19, 2009, the plaintiff received a check made out by Golio in the amount of \$800.00. Copies of each of these checks were admitted into evidence at trial by the plaintiff. Also admitted into evidence at trial by the defendant, were two Citibank receipts indicating that on June 3, 2008, and July 14, 2008, \$833.33 was deposited directly into the plaintiff's bank account. Marchese testified at trial that she made these direct deposits at the request of the plaintiff. Plaintiff denied ever requesting or receiving these payments.

Ultimately, Marchese's brother became ill and they sold the deli in 2009 for \$80,000.00. Marchese testified at trial that after the deli was sold, the plaintiff instructed her to give \$50,000.00 to Golio, and her obligation under the note would be satisfied. Marchese paid Golio \$50,000 and was issued a hold harmless receipt from Golio. Plaintiff testified that he never received this money from Golio and therefore, Marchese's obligation on the note has not been fulfilled, hence the current lawsuit.

The threshold issue for the court to determine is whether or not the Note, itself, is usurious and therefore, null and void as an instrument. Marchese argues that the Note violates New York usury statutes on its face by charging the borrowers 20% interest per annum and therefore, the action must be dismissed in its entirety. She argues that there is no need to look to any extrinsic evidence to demonstrate whether the plaintiff had the requisite intent to issue a loan with a usurious interest rate since the Note speaks for itself.

The plaintiff counters by arguing that if Marchese is able to avoid the responsibility of repaying the loan simply because “the rate of interest was perhaps more than permissible under New York Law”, she will be unjustly enriched (Plaintiff’s Summation Statement, p. 2). Furthermore, the plaintiff points out that the note was drafted by Marchese’s attorney, who set the terms and rate of interest. Neither of the defendants objected to those terms or the interest rate. The plaintiff was not represented by counsel during the negotiation of the Note, or at the closing, thereby suggesting that the plaintiff had no intent to secure a usurious loan. Thus, the defendant has failed to show by clear and convincing evidence that the loan was usurious and she must be required to repay the amount she borrowed, plus any outstanding interest.


The burden of proving that a transaction is usurious is on the borrower and “must be proved by clear evidence as to all its elements and will not be presumed” (Freitas v. Geddes Sav. and Loan Ass’n, 63 N.Y.2d 254, 261 [1984]). When proving that a transaction is usurious, clear and convincing evidence showing “an act unequivocally exacting a rate of interest in excess of that allowed by law, places a transaction within the plain intent of the usury statute” (id.). Moreover, intent is an essential element of usury, as it must be shown that the unlawful rate of interest was “knowingly taken” (Freitas, at 262). While intent is typically a question of fact to be determined by a fact-finder at trial, a lender’s usurious intent is “conclusively presumed” when the note shows an interest rate higher than the lawful rate on its face (id.). Since section 14-a(1) of the Banking Law of the State of New York states that “[t]he maximum rate of interest provided for in section 5-501 of the general obligations law shall be sixteen per centum per annum”, the court finds that the Promissory Note at issue is usurious on its face and no further analysis is necessary (Banking Law §14-a[1]). The fact that the Note was drafted by the borrower’s attorney is of no consequence since the Note expressly sets forth an interest rate

higher than that which is lawful in New York.

Once the court has determined that the loan is usurious, the transaction “is void and relieves the borrower of the obligation to repay principal and interest thereon” (Venables v. Sagona, 85 A.D.3d 904, 905 (2d Dept. 2011)). Therefore, Marchese is relieved of any obligation to repay the loan and the complaint must be dismissed in its entirety.

This constitutes the decision, and order of this Court.

Dated: White Plains, New York
July 19, 2018



HON. HELEN M. BLACKWOOD
Acting Justice of the Supreme Court

Via E-filing to the attorneys of record