Emigrant Bank Fine Art Fin., LLC v Kasmin Gallery Inc.
2019 NY Slip Op 30713(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 650372/2018
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

----------X

EMIGRANT BANK FINE ART FINANCE, LLC, EMIGRANTA CORPORATION,

Plaintiffs,

- v -

KASMIN GALLERY INC., PAUL KASMIN, PAUL KASMIN GALLERY, INC.,

Defendants.

INDEX NO. 650372/2018

MOTION DATE 01/25/2018, 05/03/2018

MOTION SEQ. NO. 001, 003

DECISION AND ORDER

----------X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 111, 114, 123, 125, 127
were read on this motion to/for ORDER OF SEIZURE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 109, 110, 113, 116, 117, 119, 126
were read on this motion to/for DISMISS.

This action arises from various loan and security agreements executed by lender-plaintiffs Emigrant Bank Fine Art Finance, LLC (Emigrant Bank), a financial institution that finances art-related businesses, and its agent, Emigranta Corp. (Emigranta), borrower-defendant Kasmin Gallery, Inc. (Gallery), and guarantor-defendants Paul Kasmin (Kasmin) (the Gallery's principal) and Paul Kasmin Gallery, Inc. (PKG) (a related entity).

Background and Relevant Agreements

Plaintiffs and defendants executed various loan and security agreements over the course of 2007 to 2017 financing, among other things, defendants' art acquisitions.

Several of those agreements are at issue on the motions now before the court—plaintiffs' motions to seize certain collateral artworks (Motion Sequence No. [Motion] 001) and dismiss defendants' counterclaims (Motion 003)—including:

- a $2 million term note, dated February 13, 2012 (2012 Loan) (NYSCEF Doc. No. [Doc] 7), allonges extending the maturity date of the 2012 Loan (Docs 8-9), and letter agreements imposing additional "Success Fees" for artworks purchased with the note funds (Docs 41-46);
- a $3 million revolving credit note, dated October 30, 2014 (2014 Loan), an allonge to the 2014 Loan increasing the line of credit to $3.5 million (Docs 47-48), and letter agreements applying success fees for artworks purchased with 2014 Loan funds (Docs 53-54);
- a series of security agreements, first executed in connection with a 2007 loan, encumbering all of the Gallery's assets and guaranteed by other defendants;
- a letter agreement, dated March 13, 2017 (Payoff Agreement), stating the terms and conditions by which defendants would repay $3+ million encompassing all "outstanding balances" for various loans (Payoff Sum), including the 2012 and 2014 Loans, in exchange for a release of all liens except for those securing unsold artworks for which plaintiffs reserved their interest/right to charge future success fees under letter agreements executed for the 2012 and 2014 Loans (Doc 4); and
- the Second Amended and Restated Security Agreement (2017 Restated Agreement), dated March 22, 2017 (Doc 6), executed in connection with the Payoff Agreement and delivery of the Payoff Sum, securing plaintiffs' right to future

success fees subject to various terms and conditions (*see* Doc 56 [2017 UCC statement with chart of secured artworks]).

In the amended complaint, plaintiffs seek damages, pursuant to the 2012 Loan, 2014 Loan, and 2017 Restated Agreement, for unpaid success fees that accrued after the 2017 Restated Agreement was executed, and relief related to defendants' breach/default under 2017 Restated Agreement provisions (i.e., failure to notify plaintiffs when secured artworks were sold). Plaintiffs also assert a replevin claim to take possession of the encumbered artworks and seek an injunction preventing defendants from further unauthorized use of the collateral artworks.

Defendants assert the following counterclaims (styled as affirmative defenses and counterclaims): (1) failure to perfect security interests in the collateral artworks; (2) the 2017 Restated Agreement is void for lack of consideration; (3) the 2017 Restated Agreement is void as coerced under economic duress; (4) the success fees are disguised interest that render the loan agreements criminally usurious and void; and (5) a request to enjoin plaintiffs from imposing usurious success fees in future loan agreements.

In Motion Sequence Number (Motion) 001 Plaintiffs seek, pursuant to CPLR 7102 (c), a provisional order of seizure of the collateral artworks, and, in Motion 003, they move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss defendants' counterclaims. Oral argument on these motions was held on July 16, 2018, and the transcript of that proceeding is incorporated to this decision for all purposes.[1]

[1] Plaintiffs previously moved, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the counterclaims in defendants' original answer (Motion 002); that motion was voluntarily withdrawn, but the papers submitted in connection with that motion are referenced throughout the papers submitted in Motion 003 (*see* Doc 120 [withdrawing Motion 002 per parties' consent after the amended answer was interposed]; Docs 60-120 [Motion 002 papers]); in fact, Motion

Motion 001: Plaintiffs' motion to seize collateral

Plaintiffs contend an order of seizure is appropriate because: (1) they have established likelihood of success on their replevin claim as defendants defaulted on the 2017 Restated Agreement by failing to pay success fees, and the agreements contractually provide a repossession remedy upon default; and (2) plaintiffs are not aware of any valid defense to the replevin claim.

In opposition to Motion 001, defendants submit an attorney's affirmation responding that the criminal usury defense will prevail (Doc 24 ¶¶ 5-9); alternatively, seizure is not appropriate if there is a factual question as to whether the success fees are criminally usurious or if the 2017 Restated Agreement was procured under economic duress (*id.* ¶ 13; *see also* Doc 21 [aff of Park, Gallery's treasurer and director of finance and operations, asserting basis of duress]). Defendants further argue that Motion 001 is procedurally defective under CPLR 7102 (d) (1) and (d) (4) as procedurally missing information necessary for seizing the property (Doc 21).

Motion 003: Plaintiffs' motion to dismiss the counterclaims

Plaintiffs contend that the usury counterclaims must be dismissed because: (1) the success fees are not calculable interest for usury purposes and the fixed (as opposed to contingent) charges did not exceed 25%; (2) even if success fees are calculated as interest, the annualized rates did not exceed 25%; and (3) the 2014 Loan for $3 million is not susceptible to the criminal usury defense under the General Obligations Law and Penal Law.

---

003 is technically procedurally defective as none of the operative documents, or even the amended pleading plaintiffs seek to dismiss, are submitted to NYSCEF under Motion 003.

Plaintiffs further contend counterclaim two (lack of consideration) must be dismissed as the consideration for the 2017 Restated Agreement was the release of broader liens, and defendants fail to adequately plead counterclaim three (economic duress).

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [citation omitted]); however, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under 3211 (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]).

1. Criminal usury

Civil usury is not available to corporations and, in any event, may be asserted by individuals for only loans with principal values up to $250,000. The criminal usury defense may be interposed by an entity or its guarantor as an affirmative defense for loans bearing interest rates greater than 25% of the principal amount per annum, provided that the principal amount did not exceed $2.5 million (*see* General Obligations Law [GOL] § 5-501 [1], [6] [b]; Banking Law § 14-a [1]; Penal Law § 190.40; *AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 [1st Dept 2009]). Corporations and their

guarantors may invoke a criminal usury defense only to offset claims relating to nonpayment of a loan (*see Fred Schutzman Co. v Park Slope Advanced Med., PLLC*, 128 AD3d 1007, 1008 [2d Dept 2015]); it cannot be "employed as a means to effect recovery by the corporate borrower" (*Donenfeld v Brilliant Tech. Corp.*, 20 Misc 3d 1139(A) [Sup Ct, NY County 2008]).

Preliminarily, the criminal usury defense does not apply to claims relating to nonpayment of defendants' obligations under the $3 million 2014 (General Obligations Law § 5-501 [6] [b]). Additionally, the criminal usury defense applies only to loans or forbearances that are absolutely repayable: the 2017 Restated Agreement is not a loan or forbearance and is not, therefore, susceptible to the defense (*see Rubenstein v Small*, 273 AD 102, 102 [1st Dept 1947] ["Unless a principal sum advanced is repayable absolutely, the transaction is not a loan."]).

Thus, the only criminal usury issues before the court at this juncture concern whether the criminal usury defense can survive this motion to dismiss to the extent the defense is asserted as an offset to plaintiffs' nonpayment claims arising from the $2 million 2012 Loan, the only loan for which the statutory defense can be invoked.

A transaction challenged as criminally usurious must be "considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (*Lester v Levick,* 50 AD2d 860, 862-863 [2d Dept 1975] [Christ, J., dissenting], *revd. on dissenting opn.* 41 NY2d 940 [1977]). Whether a fee imposed by a lender constitutes disguised interest meant to elude the statutory maximum rate of interest is a question of fact (*Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895 [2d Dept 2006]).

Here, the 2012 Loan, as originally executed, exchanged a $2 million note for interest at the rate of the greater of 4.75% or 1.5% over prime per annum, whichever is greater, a 1% closing fee, and certain other charges; the Gallery "promised" to repay all outstanding principal amounts, fees, and interest on the original maturity date (one year later) (Doc 61). The 2012 Loan states that execution of a collateral success fee letter agreement (First 2012 SF Letter) is a condition precedent to obtaining the note. The First 2012 SF Letter, executed simultaneously with the note in February 2012, provided for additional "success fees" equal to the greater of either $200,000 or 20% of the Gallery's gross profits from sales of specific works (identified in an attached schedule) (Doc 19). Gross profits were to be calculated as the Gallery's sale price less "the amounts paid for such Works" using the 2012 Loan funds (*see id.*).

The First 2012 SF Letter had a fixed deadline for total repayment of those success fees, two years from the date of the letter; however, when the first allonge to the 2012 Loan was executed, extending the maturity date, a letter agreement, dated January 30, 2013, stated that all future success fees earned under the 2012 Loan would be governed by the supplemental success fee letter (Second SF Letter), also dated January 30, 2013 (Docs 44-45). The Second SF Letter provided for success fees calculated as the greater of 20% of gross profits from sales of scheduled artworks during the second term period or a minimum success fee sum of $135,000. Rather than impose a deadline by which success fees must accrue, the Second SF Letter provided for an additional "catch-up success fee" charge to be paid on the new maturity date and calculated as the amount below $135,000, if any, that success fees (at the 20% of gross profits rate) generated by sales in the term period (January 30, 2013 to February 28,

2014) totaled. The catch-up success fee would be paid by defendants to plaintiffs on the maturity date and applied as a credit against future success fees earned under to the Second SF Letter (Doc 45).

When the 2012 Loan maturity date was extended a second time to July 31, 2014, the Second SF Letter was amended and replaced by a letter agreement, dated February 27, 2014 (February 2014 Letter), under which plaintiffs would earn success fees equal to the greater of 20% of gross profits for sales of certain artworks or $350,000. If the total success fees generated from sales (calculated as 20% of gross profits) from February 27, 2014 to July 31, 2014 did not equal or exceed $350,000, that defendants would pay the difference (as a new catch-up success fee) to plaintiffs on the maturity date (July 31, 2014), and that amount would be applied as a credit against future success fees earned under the February 2014 Letter (Doc 46). Thus, success fees under the 2012 Loan and February 2014 Letter would be satisfied only once all works in the attached schedule were sold and 20% of gross profits, if any, were paid.

The final maturity date for the 2012 Loan was July 31, 2014. Defendants paid catch-up success fees to plaintiffs under the Second SF Letter and February 2014 Letter, but the record does not indicate that any payments for the 2012 Loan or related fees were made between the July 31, 2014 maturity date and the date on which the Payoff Sum—encompassing several outstanding loan balances—in March 2017. Nothing in the record establishes that plaintiffs declared a default under the 2012 Loan.

A few months later, in October 2014, the parties executed the 2014 Loan and a new success fee letter agreement for artworks purchased with the 2014 Loan revolving credit funds (October 2014 Letter).

The record demonstrates that the principal balance remaining for the 2012 Loan was not repaid in full until March 2017. The Payoff Agreement calculated the outstanding balance for all existing loans and provided that the remaining balance for the 2012 Loan was, as of March 2017, approximately $1.1 million; however, that sum was labeled only "outstanding balance" and did not specify what amounts were owed for principal, as opposed to interest or any variety of fees. The 2012 Loan balance was extinguished with other loan balances when the Payoff Sum was delivered.

While the "outstanding balances" for the 2012 Loan (and 2014 Loan) were repaid, the Payoff Agreement and 2017 Restated Agreement (together, 2017 Debt Agreements) preserve plaintiffs' security and interest in future success fees to be earned, when the artworks are eventually sold, under success fee letters originally executed with the 2012 Loan (February 2014 Letter) and the 2014 Loan (October 2014 Letter) (*see* Docs 3, 21, 28).

Usurious intent—that the lender had a general intent to take more than the lawful rate of interest, but not necessarily to violate Penal Law 190.40—is an essential element of a usury defense (*Freitas v Geddes Sav. and Loan Ass'n*, 63 NY2d 254, 262 [1984]). Where loan documents reflect an unlawful rate of interest on their face, usurious intent is inferred. Usurious intent is an issue of fact where, as here, the loan documents have a stated interest rate below the lawful limit, but payment of other fees arising from or collateral to the loan, calculated together with the interest, may result in rates per annum exceeding the lawful limit (*id.* at 262-263). Here, the lawful limit is the statutory 25% rate per annum, annualized across the life of the transaction. The

determination whether fees constitute disguised interest must consider all of the circumstances surrounding the transaction (*id.*).

The record on this CPLR 3211 motion is insufficient to eliminate those facts necessary to form the basis of defendants' criminal usury defense, as a matter of law, with respect to the 2012 Loan. Viewing the evidence in the light most favorable to defendants, the documents submitted by plaintiffs are not adequate to eliminate the usury defense with respect to the 2012 Loan and the fees/charges imposed throughout the course of that transaction. Plaintiffs argue that the documentary evidence establishes that all the fees paid for the 2012 Loan—even if the challenged success fees are included in the calculation of interest for usury purposes, did not exceed the maximum lawful interest rate per annum. The documents, however, do not sufficiently demonstrate what, if any, fees of any kind were incurred for the 2012 Loan in the period from the maturity date, July 31, 2014, through March 2017. This gap in the record would require the court to impermissibly speculate, or assume, facts entirely absent from the documents submitted here.

Further, the documents do not identify facts surrounding the composition of the Payoff Agreement calculation, what costs, fees, interest, or remaining principal the calculation encompasses, and the precise amounts paid for those categories for the 2012 Loan; similarly, other sums in the Payoff Agreement, such as a catch-up success fee balance, are not identified as relating to any particular loan.

In the absence of these and other facts regarding the 2012 Loan and the correlated February 2014 Letter imposing success fees for certain artworks, the court cannot find that all necessary facts forming the basis of defendants' criminal usury

defense have been eliminated by the documentary evidence or determine—as a matter of law—that a lawful rate of interest per annum was taken for the 2012 Loan, with or without inclusion of success fees in the calculation.

While the court rejects defendants' arguments that the 2017 Restated Agreement is, itself, a criminally usurious transaction—since the 2017 Restated Agreement is not a loan to begin with—plaintiffs have also failed to eliminate factual issues pertaining to the effect upon the 2012 Loan that was caused by execution of the 2017 Debt Agreements. For instance, the 2017 Debt Agreements alone do not adequately establish either that delivery of the Payoff Sum and execution of the 2017 Debt Agreements terminated the 2012 Loan and, instead, incorporated the February 2014 Letter for success fees into a new instrument simply consolidating/restructuring preexisting success fee obligations. Alternatively, plaintiffs' documents fail to establish that the 2012 Loan was not terminated upon payment of the Payoff Sum and execution of the 2017 Debt Agreements, which, instead, limited the parties' obligations and rights under the 2012 Loan to those concerning only future success fees under the February 2014 Letter (*see* Doc 3).

In any event, the documents before the court on this CPLR 3211 motion do not eliminate, as a matter of law, all necessary factual issues upon which the criminal usury defense, with respect to only the 2012 Loan, is based (*see AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]).

The usury counterclaim/affirmative defense is otherwise dismissed as to the remaining agreements at issue here; the 2014 Loan and 2017 Restated Agreement are not, as a matter of law, loans for which the statutory defense can be invoked.

2. Economic duress and consideration

Plaintiffs further move to dismiss the duress and consideration counterclaims contained in the amended pleading. Defendants' counterclaims/affirmative defenses state that plaintiffs refused to permit the Gallery to pay off the principal balance for the loans and release their "blanket liens" upon defendants' assets unless defendants entered into the 2017 Debt Agreements amending and restating two letter agreements under which plaintiffs would continue to earn success fees equal to 20% of gross profits for certain sales of artworks. Plaintiffs contend that dismissal of the duress claim is necessary because defendants do not sufficiently plead extraordinary circumstances to satisfy economic duress in the context of a commercial transaction between sophisticated entities and defendants failed to raise a claim of duress or seek rescission of the 2017 Restated Agreement until one year after the 2017 Restated Agreement was executed. Plaintiffs further contend the duress counterclaim must be dismissed because the 2015 Security Agreement provided that plaintiffs had no obligation to release any of the blanket liens until all obligations had been paid in full, including success fee obligations, demonstrating that the 2017 Debt Agreements are valid, negotiated contracts by which plaintiffs released all but their narrow liens on the collateral artwork subject to future success fees when plaintiffs could have simply retained their existing liens on all assets until future success fee obligations had been satisfied; therefore, plaintiffs accommodated defendants by trimming the blanket liens in exchange for a the Payoff Sum and the new 2017 Restated Agreement.

The 2015 Security Agreement, encumbering all assets until all loan obligations have been satisfied, including the success fee obligations, demonstrates defendants'

assent, a further time, to payment of success fees for sales not yet accrued, such as those contemplated in the February 2014 and October 2014 Letters. The record establishes that, after the Payoff Sum was paid and the 2017 Debt Agreements executed, defendants offered to settle the future success fee obligations for a lump sum of $80,000, but plaintiffs rejected that offer and opted to retain the right to future success fees as secured by the secured artworks. Unlike above, where the nature and effect of the Payoff Sum on the existing earlier loan agreements impacts the criminal usury inquiry, it does not make a difference here whether the 2012 and 2014 Loans were terminated, and the future success fees were reinstated by incorporation of letter agreements into the 2017 Debt Agreements, or whether the 2012 and 2014 Loans were narrowed but not terminated, such that the lingering obligations were those relating to only future success fees from unsold works..

Plaintiffs' documents establish a right to collect future success fees under the 2017 Debt Agreements, the consideration for which was releasing, upon satisfaction of some but not all existing payments (those aside from the future success fees), the blanket liens they had the right to retain (even after payment of existing balances). That the blanket liens encompassed the artworks subject to future success fees does not make the release of broader liens invalid consideration. The 2017 Debt Agreements are further not void for having been executed under economic duress as the documents submitted here contradict that counterclaim and defendants' support their duress claim with only conclusory, self-serving statements that are insufficient to defeat this prong of plaintiffs' Motion 003. Additionally, neither the arguments made, nor law relied upon, by defendants as to economic duress are compelling. That counterclaim is dismissed.

As to the lack of consideration counterclaim, the court agrees with plaintiffs that, here, the relinquishment of certain expansive rights and obligations under the earlier agreements—specifically, the liens against all assets, which were released and replaced with narrow liens against only the artworks subject to plaintiffs' retained future success fee interests—constitutes valid consideration for the 2017 Restated Agreement (*e.g. Evergreen Mar. Corp. v Welgrow Intl. Inc.*, 942 F Supp 201, 209 [SDNY 1996]). Accordingly, the counterclaim for lack of consideration is dismissed.

3. Plaintiffs' Motion 001: seizure of the collateral artworks

Defendants contend that their defenses of usury, economic duress, and lack of consideration are valid and preclude granting plaintiffs' motion to seize the collateral artworks. For the reasons stated above, the criminal usury defense is not dismissed and, accordingly, Motion 001 to seize the collateral property is denied.

The procedural deficiencies raised by defendants with regard to Motion 001 are not addressed as moot.

Accordingly, it is

ORDERED that the motion of Plaintiffs EMIGRANT BANK FINE ART FINANCE, LLC, and EMIGRANTA CORPORATION for an order awarding seizure (Motion Sequence No. 001) is denied; and it is further

ORDERED that the motion of Plaintiffs to dismiss the counterclaims of Defendants KASMIN GALLERY INC., PAUL KASMIN, and PAUL KASMIN GALLERY, INC. is granted in part and the second counterclaim and third counterclaim are dismissed; and it is further

ORDERED that the parties will appear in Part 48 at 11:00 am/~~pm~~ on 4/16/19 for a conference to schedule expedited deadlines for the completion of all remaining discovery deadlines; and it is further

ORDERED that counsel shall meet and confer and discuss alternate dispute resolution/mediation options, available both privately and through the court, with the parties prior to the forthcoming conference in Part 48.

3/18/2019
DATE

HON. ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE