

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 32

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MOHAMED I. HACK,

DECISION and ORDER

Plaintiff,

Index No.7848/2009

-- against --

RASHEED CARTER, et al.,

MSN: 13

Defendants.
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The following papers numbered were read on this motion: Papers Numbered

Notices of Motion, Affirm., Exhibits.....	1
Affirmations in Opposition.....	2
Affirmations in Reply.....	3
Letter from Fredrick J. Richman, dated June 24, 2009.....	4

CHARLES J. MARKEY, J.:

Lawyers generally have to wear many hats, whether as advisor, draftsman, or courtroom warrior. In the administration of those myriad functions and duties, they are assumed to be acting loyally and ethically for one client or a group of clients whose interests are not conflicted. In the present case, the alleged draftsmanship by a lawyer of a promissory note for the borrower lending money to that lawyer's existing clients has wreaked havoc.

Plaintiff Mohamed Hack ("Hack") was persuaded to lend \$100,000 to a group of four men, Ameer Nasruddin ("Nasruddin"), Azeez Nashurdeen ("Nashurdeen"), Basheir Mohamed ("Mohamed"), and Rasheed Carter ("Carter"). The last two of those four persons, Mohamed and Carter, had been friends of Hack for over 10 years. The promissory note (the "Note") was dated February 9, 2006 and was due to be paid on February 16, 2007. It required interest to be paid to Hack at "a rate of return between eighteen (18) and twenty two (22) percent on the sum of \$100,000.00." No further detail was included in the note to specify the exact amount of the interest to be paid.

Hack, allegedly a teacher, secured a home equity loan to get the \$100,000 to lend to the four defendants. The defendants, furthermore, allegedly enticed Hack to use the services of their lawyer, Edon H. Warslie, Esq. ("Warslie"), with an office in South Ozone Park, in Queens County, New York, to prepare the Note. Warslie notarized the five signatures.

The Note has the plaintiff and each of the four defendants signing their name and providing a residential address for each of the four defendants. The reference to an enterprise/business is fleeting in the Note. The first paragraph concludes that Nasruddin, Nashurdeen, Mohamed, and Carter "are hereinafter referred to as 'The Partners.'" The remaining

three paragraphs of the Note begin with “The Partners . . .” - - specifically, “The Partners agree,” “The Partners agree,” and “The Partners reserve . . .” In the significant paragraph wherein “The Partners agree to pay [Hack] a rate of return . . .” for the only reference to an institution/business/enterprise, someone added “owners of ANR Associates.” This penned-in addition was initialed by Nasruddin, Nashurdeen, Mohamed, and Carter. The Note failed to contain a signature line for defendant ANR Associates, LLC (“ANR”).

The signature lines of each of the four individual defendants failed to specify whether they are signing in their representative or individual capacities. The Note’s reference of an interest rate of between 18% to 22%, although certainly exceeding the statutory lawful rate of 16% provided in N.Y. General Obligations Law section 5-501, did not specify what rate of return is to be used. Only in the motion papers, plaintiff adds that the rate of interest was to be determined outside the four corners of the instrument by the rate at which he would have to pay his bank for the home equity loan he took to secure the money that he used to lend to the defendants.

Upon the foregoing papers, plaintiff Hack seeks to recover his money by the quick route of making a motion for summary judgment in lieu of complaint, a procedure specifically authorized by CPLR 3213 for a recovery based on an instrument for the sum of money, such as the present Note. Of the \$100,000 loaned, thus far, allegedly only \$5,000.00 has been repaid to Hack.

The individual defendants, citing the usurious rate of interest exceeding 16% [General Obligations Law section 5-501; Banking Law section 14-a] - - regardless of whether it is 18% or 22%, argue that the entire loan is void, and they are not required to pay anything. The same counsel representing the individual defendants in this litigation also represents ANR. ANR maintains it is exempt from liability under the Note since it never signed it and that none of the four “Partners” signed on behalf of ANR in a representative capacity.

The involvement of attorney Edon H. Warslie in the underlying transaction of the subject Note is not at all clear. Hack and his counsel in this action, maintain in their reply papers in support of his present motion for summary judgment under CPLR 3213, that Warslie had represented the four individuals and the business defendants in prior or other legal representations. The four individual defendants, all of whom submitted opposition affidavits, did not mention Warslie, and Warslie, on this motion, submitted no affidavit to explain the extent of his involvement in the preparation or execution of the Note, although he notarized the signatures of the plaintiff and the four individual defendants. As mentioned, Warslie’s alleged involvement in the subject transaction was not discussed until the plaintiff’s reply, so that neither Warslie or defendants had any meaningful opportunity to discuss these matters.

The plaintiff’s motion for summary judgment in lieu of complaint must be denied. Although the plaintiff has presented a sympathetic case, there are several triable issues warranting discovery and, indeed, [the taking of Warslie’s examination before trial \(“EBT”\)](#),

through the parties availing themselves of CPLR article 31's discovery mechanisms.

As an initial matter, even the minimum interest required under the note of 18% is usurious. *See, e.g., O'Donovan v. Galinski*, 62 AD3d 769 [2d Dept. 2009]. ANR would be barred from asserting a defense of usury under N.Y. Limited Liability Corporation Law section 1104, in the same manner that corporations are also prohibited from asserting the defense of usury under N.Y. General Obligations Law section 5-521. In addition, the individual guarantors of a corporate obligation are also precluded from asserting such a defense (*see, Webar, Inc. v. Capra*, 212 AD2d 594 [2nd Dept. 1995]).

However, it is not altogether clear to the Court that ANR was a party to the Note since none of the four defendants signed in a representative capacity. The repeated reference to the four defendants as “The Partners” might have been a simple expedient in referring to the four defendants collectively. Even the Note’s penned-in inclusion of the words “owners of ANR Associates” could be explained away as an appositive, namely, a parenthetical means of supplying additional identification.

Plaintiff’s motion under CPLR 3213 reads as though it were a garden variety, open-and-shut case of summary judgment under CPLR 3213. Quite the contrary, triable issues abound in this case, defying why plaintiff sought resort to the “quick fix” expedient of CPLR 3213, unless as a clever litigation tactical device to “smoke out” the defendants’ positions in advance of discovery. The Court discerns at least 12 triable issues of fact to await full discovery and resolution at trial. The dozen triable issues include:

1. Whether the entity defendant ANR was at all obligated under the note despite the inclusion of the words “Partners” and “owners of ANR” in the agreement, and whether the use of the word “Partners” was simply meant to be a short-hand description of the four individual defendants collectively;
2. Whether the intention was to name the individual defendants as the principal debtors or whether their liability accrued secondarily, only after the default of the corporation. *See, Soparge, S.A. v. Rosenblatt*, 36 AD2d 174 [1st Dept. 1971];
3. The circumstances and paperwork associated with the alleged home equity loan taken out by Hack, and whether, under that loan, he was going to be charged between 18% to 22% interest;
4. Whether the idea of paying to Hack a rate of interest between 18% and 22% on the loan of \$100,000 originated with the defendants;
5. How did Hack pay the \$100,000 to the defendants, by check, cash, or otherwise? Where is the negotiable instrument evidencing such a loan, and who was the payee on such instrument, if any?

6. Who prepared the subject Note and any prior drafts of it? Whether or not the defendants' attorney Edon H. Warslie, Esq., who notarized the agreement, prepared it, as maintained by the plaintiff in reply papers;
7. By whom was attorney Warslie retained and by whom was he paid for any participation in the alleged preparation and execution of the Note;
8. The relationship of Warslie, if any, to any of the parties before the present transaction involving the Note, and whether he indeed represented all or any of the four individual defendants or ANR before he met Hack. See similar facts of competing interests between the clients in the well-reasoned decision and similar case in *Pasechnik v. Baklek Consulting Corp.*, 2008 WL 2229672, 2008 NY Slip Op 51068 [U] [Sup Ct Kings County 2008];
9. There are troubling, disturbing, and triable issues of fact concerning the circumstances, engagement, and motivations of Mr. Warslie, as counsel. If Warslie had indeed been retained by Hack, but had represented the defendants previously, whether or not Warslie disclose his conflict of interest to Hack before undertaking the representation;
10. Even if Warslie made no clear disclosure to Hack about any alleged prior representation of either ANR or any or all of the four individual defendants, whether or not Hack knew that Warslie had represented or was representing ANR, Nasruddin, Nashurdeen, Mohamed, and Carter, in any legal matter, before Hack allegedly agreed to let Warslie allegedly draft the Note. See, *Scantek Med. Inc. v. Sabella*, 583 F. Supp. 2d 477 [S.D.N.Y. 2008]. Also, even if Hack had any prior knowledge of Warslie's alleged representation of the defendants in this or other legal matters, whether such knowledge is legally relevant if Warslie failed specifically to disclose an irreconcilable conflict of interest. See, *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F. Supp. 468 [D.C.C. 19997] [under Disciplinary Rule 5-105 of the Code of Professional Responsibility, unless client consents after full disclosure, the lawyer's duty of undivided loyalty is breached where attorney represents clients with irreconcilably conflicting interests];
11. Whether the facts will disclose devious, conflicted, sloppy, or unethical draftsmanship by Warslie in the Note's preparation. If, acting as defendants' counsel, Warslie, in allegedly preparing the promissory note, deliberately and intentionally designed it so as to permit defendants to wriggle out of liability, the defendants would be barred from raising any defenses by reason of fraud and estoppel principles. The Note in the present case is so infested with landmines that one can conceivably and reasonably conclude that it was structured and worded so as to help all the defendants, both individual and corporate, to escape from any liability. The Note contains an impermissible rate of interest [that is, if the Note were signed by the defendants in their individual capacities] and has an astonishing and impressionistic-style lack of clarity of whether the individual debtors are primarily or secondarily liable. If Warslie had prepared the present Note by intentionally inserting so many gaps for defendants to escape legal liability thereon, motivated by his other or prior representations of them, the defendants should or would be estopped from raising any defenses. See, *Pasechnik v. Baklek Consulting Corp.*, *supra*; and

12. Whether the defendants made any payments under the Note and, if so, how much, and whether such payments have any legal effect on the defenses they now assert.

Although not exactly on point to the present situation of a conflict of interest between the principals to the Note, *Matter of Allen*, 308 AD2d 143 [4th Dept. 2003], the Referee found that respondent lawyers engaged in representation involving a conflict of interest when respondent Allen prepared promissory notes for loans made by a client to a company in which respondents were shareholders. See also the good discussion by the Supreme Court of Nebraska, that state's high court, in *Detter v. Schreiber*, 259 Neb. 381, 610 N.W.2d 13 [2000] [attorney, who was called upon to do the legal work for closely held corporation regarding a lease and a shareholder agreement, had a conflict of interest which prevented him from defending one shareholder in action brought by the other shareholder over two promissory notes; even though attorney and plaintiff-shareholder may have met only one time, plaintiff-shareholder believed attorney was representing him at that time, and preparation of shareholder agreement would have required attorney to work with both shareholders and to ascertain their financial and personal interests].

As noted by the court in *Detter, supra*, 259 Neb. 381, Canon 5 of the Code of Professional Responsibility provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical consideration 5-18, furthermore, states:

A lawyer employed or retained by a corporation or similar entity owes his or her allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him or her in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Ethical consideration 5-14, moreover, states:

Maintaining the independence of professional judgment required of a lawyer precludes the lawyer's acceptance or continuation of employment that will adversely affect his or her judgment on behalf of or dilute loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

____ Accordingly, the present motion under CPLR 3213 is denied in all respects. The case poses many troubling factual, legal, and ethical issues.

In light of the present decision, denying plaintiff's motion for summary judgment in lieu of complaint, under the express terms of CPLR 3213, the Court deems the parties' motion papers as the complaint and the answer. See, *Schulz v. Barrows*, 94 NY2d 624 [2000]; *Dyck-O'Neal, Inc. v. Thomson*, 56 AD3d 1262 [4th Dept. 2008]; *Kehoe v. Abate*, 62 AD3d 1178 [3rd Dept. 2009]; see also, *Schulz v. Barrows*, 263 AD2d 565 [3rd Dept. 1999]; *Fine v. Di Stanti*, 79 AD2d 673 [2d Dept. 1980] [court, upon conversion of the motion papers as pleadings, allowed the defendant to amend answer with related counterclaim].

This Court further directs, sua sponte, that attorney Warslie, within 20 days of the date of this order, make and send complete copies of his file on the entire transaction of the Note, including any retainer statements and photocopies of any payments he received for the representation, to counsel for all the parties, whose appearances are noted herein.

The parties shall also immediately schedule a preliminary conference with Referee Elizabeth Yablon at the Jamaica courthouse. The schedule of discovery shall include Warslie's EBT, upon plaintiff following the CPLR's procedures for a deposition of a non-party witness. Warslie's EBT shall be held only after he has supplied the documents to all counsel, as directed by the undersigned. Aside from Referee's Yablon's conference, the Court directs that the parties and any non-party witnesses cooperate in discovery so as to obviate the need for further judicial intervention.

The foregoing constitutes the decision, order, and opinion of the Court.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York

July 21, 2009

Appearances:

For the plaintiff: Gildin, Zelenitz & Shapiro, P.C., by David A. Shapiro & Rachel E. Gallagher, Esqs., 138-44 Queens Boulevard, 2d Floor, Briarwood, N.Y. 11435

For the defendants: Solomon Richman P.C., by Fredrick J. Richman, Esq., 3000 Marcus Ave., Lake Success, NY 11042