



Supreme Court, Appellate Division, Second Department,
New York.

Carl SIMONI, appellant,
v.

TIME-LINE, LTD., et al., respondents.

May 22, 2000.

In an action to recover payment on six promissory notes, brought by motion for summary judgment in lieu of complaint, the Supreme Court, Suffolk County, Doyle, J., denied the motion, and plaintiff appealed. The Supreme Court, Appellate Division, held that: (1) plaintiff established defendants' liability on the promissory notes, and (2) defense of usury was not available to defendants.

Reversed and remitted.

West Headnotes

[1] Bills and Notes 527(1)

[56k527\(1\) Most Cited Cases](#)

Plaintiff established defendants' liability on six promissory notes by proving the execution of the six notes and the defendants' failure to make payments thereon; defendants' conclusory assertion that partial payments had been made toward the outstanding debts was insufficient to preclude imposition of liability, and in any event, plaintiff established that those payments had been made on a pre-existing debt which predated and was wholly unrelated to the six notes at issue.

[2] Usury 83

[398k83 Most Cited Cases](#)

Defense of usury is generally not available to a corporate defendant. [McKinney's General Obligations Law § 5-521](#).

[3] Usury 82

[398k82 Most Cited Cases](#)

Defense of usury is not available to an individual guarantor of a corporate obligation.

**142 Moritt, Hock & Hamroff, LLP, Garden City, N.Y. (William P. Laino of counsel), for appellant.

[WILLIAM D. FRIEDMANN](#), J.P., [LEO F. MCGINITY](#),
[DANIEL F. LUCIANO](#) and [SANDRA J. FEUERSTEIN](#), JJ.

MEMORANDUM BY THE COURT.

In an action to recover payment *537 on six promissory

notes, brought by motion for summary judgment in lieu of complaint **143 pursuant to [CPLR 3213](#), the plaintiff appeals from an order of the Supreme Court, Suffolk County (Doyle, J.), entered January 14, 1999, which denied his motion.

ORDERED that the order is reversed, on the law, with costs, the motion is granted, and the matter is remitted to the Supreme Court, Suffolk County, for entry of a judgment in the principal sum of \$60,270.33, plus interest, and for a hearing with respect to the amount of attorneys' fees to be awarded.

[1] The plaintiff seeks payment on six promissory notes in the total principal sum of \$60,270.33, plus interest and attorneys' fees. In support of his motion for summary judgment in lieu of complaint pursuant to [CPLR 3213](#), the plaintiff made a prima facie showing that he was entitled to judgment as a matter of law by proving the execution of the six notes and the defendants' failure to make payments thereon (see, [J.L.B. Equities v. Mind Over Money](#), 261 A.D.2d 510, 691 N.Y.S.2d 65; [Elmsford-Interstate Bldg. Material Corp. v. Elm Ridge Mgt.](#), 243 A.D.2d 675, 664 N.Y.S.2d 576). Thus, the burden shifted to the defendants to establish, by admissible evidence, the existence of a triable issue of fact in order to avoid enforcement of the notes (see, [J.L.B. Equities v. Mind Over Money](#), supra; [Bennell Hanover Assocs. v. Neilson](#), 215 A.D.2d 710, 711, 627 N.Y.S.2d 439).

The affidavit of the defendant Al Anish, submitted in opposition to the plaintiff's motion, which did not deny the validity of the subject notes or the defendants' default, and which contained a conclusory assertion that partial payments had been made toward the outstanding debts, was insufficient to defeat the plaintiff's motion (see, [Elmsford-Interstate Bldg. Material Corp. v. Elm Ridge Mgt.](#), supra; [Naugatuck Sav. Bank v. Gross](#), 214 A.D.2d 549, 625 N.Y.S.2d 572). Moreover, in reply to Anish's conclusory assertion regarding partial payment, the plaintiff established that these payments had been made on a pre-existing debt which predated and was wholly unrelated to the six notes which are the subject of the instant action.

[2][3] There is no merit to the defendants' claim that the first of the six promissory notes was usurious. Except for a limited exception not applicable in the instant case, the defense of usury is not available to a corporate defendant (see, [General Obligations Law § 5-521](#); [Schneider v. Phelps](#), 41 N.Y.2d 238, 242, 391 N.Y.S.2d 568, 359 N.E.2d 1361; [Essex v. Newman](#), 237 A.D.2d 486, 655 N.Y.S.2d 595; [Weisz, P.C. Retirement Plan v. NCHD Assocs.](#), 237 A.D.2d 276, 655 N.Y.S.2d 381), and is not available to an individual guarantor of the corporate obligation (see, [Schneider v. Phelps](#), supra).

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(Cite as: **272 A.D.2d 537, 708 N.Y.S.2d 142**)

Although the plaintiff is entitled to summary judgment for *538 the total principal sum of the six promissory notes, the amount of attorneys' fees due thereunder is not a sum certain. Therefore, the matter must be remitted to the Supreme Court, Suffolk County, for a hearing on that issue (see, [Borg v. Belair Ridge Dev. Corp.](#), 270 A.D.2d 377, 705 N.Y.S.2d 260; [Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp.](#), 187 A.D.2d 634, 590 N.Y.S.2d 519).

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