SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. MARVIN E. SEGAL,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

EUGENE ELOVIC,

Plaintiff(s),

INDEX NO.: 926/02
MOTION DATE: 02/22/02
MOTION NOS.: 01, 02

- against -

SHALOM E. LAMM,

Defendant(s).

The following papers read on this motion and cross-motion:

Notice of Motion 1
Notice of Cross-Motion 2
Supporting Affidavit 3
Affirmation 4
Memorandum of Law: Plaintiff's 5
Memorandum of Law: Defendant's 6
Reply Memorandum of Law: Plaintiff's 7
Reply Memorandum of Law: Defendant's 8

The motion brought by the Plaintiff, in the above-captioned action, for an Order of this Court, pursuant to CPLR Rule 3212 and Section 3213, and the cross-motion of the Defendant for an Order of this Court, pursuant to Rule 3211 (a) (1), (a) (3) and (a) (7) of the CPLR, are determined as set forth herein below.

Based upon all the papers submitted for this Court's consideration, the Court makes the following findings of fact:

1. In 1998, **EUGENE ELOVIC**, the Plaintiff herein was the holder of a series of promissory notes made by **AMERICAN LANDMARK HOMES CORPORATION**, and affiliated companies, certain of which were guaranteed by **SHALOM E. LAMM**, the Defendant herein;

2. By a written agreement, dated June 5, 1998, between the parties herein, **EUGENE ELOVIC**, consented to **SHALOM E. LAMM'S** assumption of the obligation of the aforesaid notes with an aggregate amount of $3,588,483.00;

3. Pursuant to the terms of the aforesaid agreement, **SHALOM E. LAMM** personally executed two (2) personal promissory notes dated June 8, 1998 payable to **EUGENE ELOVIC**;

4. One of the said promissory notes was in the principal amount of $2,000,000.00 which required a payment of the principal sum of $2,000,000.00, together with interest thereon at the rate of 16% per annum, compounded yearly, payable thirty (30) months from the date of the said note;

5. The amount of interest which accrued during the term of the aforesaid promissory note was $906,496.00;

6. The other of the said promissory notes was in the principal amount

of $1,588,483.00, together with interest thereon at the rate of 16% per annum, compounded yearly, payable thirty (30) months from the date of the said note;

7. The amount of interest which accrued during the term of the aforesaid promissory note was $719,976.00;

8. As a condition to **EUGENE ELOVIC'S** consent to **SHALOM E. LAMM'S** assumption of the obligation of the herein above described promissory notes of **AMERICAN LANDMARK HOMES CORPORATION**, and affiliated companies, the parties' herein above described agreement provided for **EUGENE ELOVIC** to obtain an interest in an entity known as **LION ALH HOLDINGS, LLC,** in which **SHALOM E. LAMM** owned an interest and was a member of the said **LLC**. The obtained interest in **LION ALH HOLDINGS, LLC**, was effected by **EUGENE ELOVIC'S** converting his partnership interest in an entity known as **FLORIDA ISLAND PARTNERS** into an interest in **LION ALH HOLDINGS, LLC.**;

9. Pursuant to the aforesaid agreement, **EUGENE ELOVIC** would receive $300,000.00 which represented the return of his herein above described exchanged interest in **LION ALH HOLDINGS, LLC**, plus interest thereon at 20% per annum measured from June 5, 1998 to the time of a certain capital event of the **AMERICAN LANDMARK HOMES CORPORATION**, and affiliated

companies. The earliest anticipated time of the said capital event is July 31, 2002;

10. The amount of interest which will occur on the herein above described exchanged interest in **LION ALH HOLDINGS, LLC**, between June 5, 1998 and July 31, 2002 will be $249,205.00;

11. Pursuant to the parties herein above described June 5, 1998 agreement, **SHALOM E. LAMM**, was required to obtain a term life insurance policy in the face amount of not less than $4,000,000.00 with **WOLF & FUHRMAN**, as a purported creditor, the beneficiary of said policy, although **SHALOM E. LAMM** was not in debt to the said law firm;

12. To date **SHALOM E. LAMM** has incurred $12,178.00 to maintain the herein above described life insurance policy for the benefit of the Plaintiff herein;

13. At all times relevant to the parties' aforesaid agreement, **EUGENE ELOVIC**, was represented by his nephew, **ELIOT WOLF, ESQ.**, of **WOLF & FUHRMAN, ESQS.**;

14. Additionally, **SHALOM E. LAMM** was required to pay **ELIOT WOLF, ESQ.**, a finder's or broker's fee for the consummation of the herein above described agreement, between the parties herein, of $500,000.00 in the event that **SHALOM E. LAMM** received more than $10,000,000.00 for his interests in

either **AMERICAN LANDMARK HOMES CORPORATION** and affiliated companies or **LION ALH HOLDINGS, LLC**, and 5% of any sums he received in excess of $10,500,000.00;

15. If the Court were to add the amounts described in this Court's findings of fact numbered "9," "10," "12" and a "finder's fee" of at least $500,000.00 as set forth in "14" to the interest payments required to be paid under the two (2) promissory notes as set forth in "5" and "7", the effective interest rate under each of the said two (2) promissory notes would be 29.961% calculated as follows:

Principal:	$3,588,483.00
Interest on Principal (2.5 Yrs.):	$1,626,472.00
Additional Consideration:	$1,061,383.00
Total Payments (Including Additional Consideration):	$6,276,338.00
Effective Simple Interest Rate Per Annum:	29.961%

Pro-rata Allocation

Principal:	$2,000,000.00	$1,588,483.00
Interest on Principal (2.5 Yrs.):	$ 906,495.00	$ 719,977.00
Additional Consideration:	$ 591,550.00	$ 469,833.00
Total Payments (Including Additional Consideration):	$3,498,045.00	$2,778,293.00
Effective Simple Interest Rate Per Annum:	29.961%	29.961%

16. The herein above described promissory notes matured on December 8, 2000; and

17. On December 18, 2000, **SHALOM E. LAMM** personally executed a personal promissory note payable to **EUGENE ELOVIC** in the amount of $4,828,644.00 which provided in pertinent part:

> "This Note amends, restates in their entirety and replaces two promissory notes dated June 8, 1998 (the "Prior Notes") in original principal amounts aggregating $3,588,483. The amount of this Note represents $3,207,041 of principal (the "Principal Amount") remaining under the Prior Notes plus $1,621,603 of accrued and unpaid interest (the "Existing Interest") through the date hereof under the Prior Notes. Of the Existing Interest, $393,068 (the "Current Portion") has accrued from June 8, 2000 through the date hereof and $1,228,535 (the "Prior Portion") accrued on or before June 8, 2000."

New York Penal Law Section 190.40, entitled **Criminal Usury** in the Second Degree provides:

> "A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum

per annum or the equivalent rate for a longer or shorter period."

New York General Obligations Law Section 5-501, entitled **Rate of Interest**; usury forbidden provides in pertinent part:

"1. The rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money . . . shall be . . . unless a different rate is prescribed in section fourteen-a of the banking law.

2. No person or corporation shall, directly or indirectly, charge, take or receive any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding the rate above prescribed . . . . The amount charged, taken or received as interest shall include any and all amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender in consideration for making the loan or forbearance . . . .

* * *

6. a. No law regulating the maximum rate of interest which may be charged, taken or received, except section 190.40 . . . of the penal law, shall apply to any loan or forbearance in the amount of two hundred fifty thousand dollars or more, ...

b. No law regulating the maximum rate of interest which may be charged, taken or

> received, including section 190.40 . . . of the penal law, shall apply to any loan or forbearance in the amount of two million five hundred thousand dollars or more."

New York General Obligations Law Section 5-511, entitled **usurious contracts void** provides in pertinent part:

> "1. All . . . notes . . ., all other contracts or securities whatsoever, whereupon or whereby there shall be reserved or taken, . . ., any greater sum, or greater value, for the loan or forbearance of any money, . . ., than is prescribed in section 5-501, shall be void . . . ."

Accordingly, because the parties' two (2) June 8, 1998 promissory notes were in the principal amounts of $2,000,000.00 and $1,588,483.00, the said notes are each under the "two million five hundred thousand dollars" threshold of General Obligations Law Section 5-501 (6) (b) and therefore Penal Law Section 190.40 is applicable.

". . .(T)he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853; Zuckerman v. City of New York, 49 NY2d 557, 562; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404).

Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York Univ. Med. Center, supra, at p. 853). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v. City of New York, supra, at p 562). Alvarez v. Prospect Hospital, 68 NY2d 320, 324.

The decisive consideration upon a motion for summary judgment is the existence of issues of fact. Werfel v. Zivnostenska Banka, 287 N.Y. 91; Ugarizza v. Schmieder, 46 NY2d 471. 'Issue finding, rather than issue-determination, is the key to the procedure.' Esteve v. Avad, 271 A.D. 725. The court is not authorized to try the issues; its function is merely to determine whether any issue exists. Sillman v. Twentieth Century Fox-Film Corp., supra; Cross v. Cross, 112 AD2d 62. The motion cannot be granted unless it is clear that the movant has made out a case by the undisputed material facts presented on the record by affidavit or other proof. Barrett v. Jacobs, 255 N.Y. 520; Piccolo v. DeCarlo, 90 AD2d 609. If material facts are in dispute or different inferences may reasonably be drawn from the facts themselves undisputed, the motion for summary judgment must be denied. Supran v. Michelfeld, 97 AD2d 755. On a motion for summary judgment the facts are to be

construed in a light most favorable to the non-moving party and summary judgment should be denied where there is any significant doubt whether material issues of fact exist or if there is even arguably such an issue. Bulger v. Tri-Town Agency, Inc., 148 AD2d 44, app. Dism. 75 NY2d 808. Upon a motion of such character, the credibility of the affiants is for the trier of the facts. Bernstein v. Kritzer, 224 A.D. 387; Air Flow Taxi Corp. v. C.I.T. Corp., 258 A.D. 857.

In the case of Estate of Jackson, 120 AD2d 309, appeal denied 69 NY2d 608, the law applicable to the facts herein was stated at Page 313:

> "While it is true that the usurious nature of a contract or obligation is to be determined as of the time it is entered into, and an obligation void at its inception for usury continues void forever, it is also true that if the parties to a usurious contract or obligation agree to abandon the void agreement and execute a new obligation for the amount of the actual debt, free from usury, and bearing only legal interest, then the second agreement purges the first of its usurious taint and makes the second obligation valid and enforceable."

Based upon this Court's herein above set forth findings of fact, the Court further finds and determines that material issues of fact exist as to whether or not the December 18, 2000, promissory note between the parties herein was a device to combine the unpaid balances of the parties' two (2) June 8, 1998 separate promissory

notes in the principal amounts of $2,000,000.00 and $1,588,483.00 and whether the said June 8, 1998 notes were themselves usurious.

In determining that material issues of fact exist as to whether the parties' two (2) June 8, 1998 promissory notes were usurious, the Court has considered on the following precedents:

– Re: the "finder's fee" described in "14" and "15" See, Doyle v. Sommer, 264 AD2d 860;

– Re: the life insurance premiums paid by the Defendant described in "11" and "12" See, Otten v. Fruend, 150 AD2d 434;

– Re: the return of the Plaintiff's investment in the amount of $300,000 described in "8" See, Moore v. Plaza Commercial Corp., 9 AD2d 223; and

–Re: the interest on the Plaintiff's $300,000 investment described in "9" and "10" See, Salter v. Havivi, 30 Misc 2d 251.

Accordingly, the motion of the Plaintiff seeking an Order of this Court granting summary judgment in lieu of complaint, based upon the parties' December 18, 2000 promissory note, is denied and the cross-motion of the Defendant for an Order of this Court dismissing the Plaintiff's summons with notice and motion for summary judgment is denied.

Therefore, the moving papers of the Plaintiff and the answering papers of the Defendant shall be deemed a complaint and answer. See, CPLR Section 3213

and Nikezic v. Balaz, 184 AD2d 684.

Dated: March 12, 2002

MARVIN E. SEGAL, J.S.C.

ELOVIC.SFO.