

Dinizio and Cook, Inc. v Duck Creek Marina at Three Mile Harbor Ltd.
2002 NY Slip Op 30071(U)
January 3, 2002
Supreme Court, Suffolk County
Docket Number:
Judge: Alfred Weiner
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

COPY

MEMORANDUM

INDEX NO. 25436-94

SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART XXXII, SUFFOLK COUNTY

PRESENT: HON. MARY M. WERNER
 JUSTICE OF THE SUPREME COURT

CASE DISP SJ

-----X
 DINIZIO AND COOK, INC.,
 DOUGLAS DINIZIO AND WALTER COOK,

Plaintiffs,

- against -

SMITH, FINKELSTEIN,
 LUNDBERG, ISLER AND
 YAKABOSKI, LLP
 Attorneys for Plaintiffs
 By: Frank A. Isler, Esq.
 456 Griffing Avenue
 Post Office Box 389
 Riverhead, New York 11901

DUCK CREEK MARINA AT
 THREE MILE HARBOR LTD., JOE DRAGOTTA,
 MICHAEL FASANO as Executors under the Last
 Will and Testament of FRANK DRAGOTTA, and
 ROBERT GRAU,

Defendants.

-----X
 ESSEKS, HEFTER &
 ANGEL, ESQS.
 Attorneys for Defendants
 By: Stephen R. Angel, Esq.
 and Anthony C. Pasca, Esq.
 108 East Main Street
 Riverhead, New York 11901

By short form order dated September 4, 2002 this court granted defendants' motion to dismiss plaintiffs' action at the end of plaintiffs's case for failure to prove a prima facie case. Thereafter a non-jury trial of defendants' counterclaims was conducted by this court. On October 15, 2002 counsel submitted post-trial memoranda. The matter was fully submitted on October 22, 2002 with the submission of responsive letters from counsel. The following constitutes the court's findings of fact and conclusions of law.

On May 15, 1991, defendant, Duck Creek Marina at Three Mile Harbor, LTD, ("Duck Creek") through its principals, defendants Frank Dragotta, now deceased (and appearing in this action by his executor Michael Fasano) and Robert Grau sold its boat marina in East Hampton, New York to plaintiff Dinizio and Cook, Inc. ("Dinizio & Cook") for the purchase price of \$2.8 million dollars. The marina consisted of 6.2 acres of waterfront property, a restaurant and a 100 slip marina. Maidstone Harbor Marina, Inc. ("Maidstone") a New York cooperative corporation was organized by Dinizio & Cook, Inc.

to operate and maintain the boat slips as well as the pool, restaurant and related facilities on what has been referred to as the "upland".

In connection with the sale of the marina, Duck Creek loaned plaintiff Dinizio & Cook the total sum of \$1.8 million dollars. In exchange, Dinizio & Cook executed a \$1.75 million dollar note which would mature on May 15, 1994, a \$50,000 note which would mature on May 15, 1993 and two separate security agreements whereby the above loans were secured with Dinizio & Cook's shares in the cooperative marina. In addition, Duck Creek was given a 60% interest in the 99 year renewable lease on the upland property which includes the restaurant.

The \$1.75 million dollar note provided for repayment of \$425,000 on May 15, 1992, \$450,000 on May 15, 1993 and \$875,000 on May 15, 1994. The \$50,000 note provided for a principal payment of \$25,000 plus interest on May 15, 1992 with the balance of principal and interest due on May 15, 1993.

On November 17, 1992, the parties executed a Modification Agreement ("Modification Agreement") to the \$1.75 million dollar note (Exhibit 43) extending the time to repay the principal, reducing the yearly payments and providing for interest in the event of non-payment of the full amounts. On May 26, 1993, an amendment to this Modification Agreement (Exhibit 44) ("First Amendment") was signed by the same parties reducing again the yearly payment for 1993 and increasing the last payment in 1997.

On February 1, 1994, a Second Amendment (Exhibit 47) ("Second Amendment") to the Modification Agreement was signed reducing the payments and extending repayment through 1998. In addition, the Second Amendment provided that Dinizio & Cook were to sell Dragotta's slip # 3 for \$70,000 dollars and Dragotta and Grau's slip # 25 for \$50,000 by March 30, 1994. Failure to sell such slips according to these terms rendered the Second Amendment null and void. A handwritten addendum to the Second Amendment provides that Dinizio & Cook were to rent Rhonda Cunha's slip for a minimum of \$3700 a year for three years. A third undated amendment ("Third Amendment") was subsequently signed, (Exhibit 48) which reduced the principal amount due on May 15, 1994 to \$75,000, reduced the 1997 payment and added a 1998 payment. The Third Amendment also extended the date by which Dinizio & Cook could sell slip #25 and slip # 3 to May 15, 1994 and reduced to \$3500 the amount for which Dinizio & Cook was to rent the Cunha slip. Again, failure to sell slips #3 and #25 according to these terms rendered the Third Amendment null and void.

It is not disputed that slips #3 and #25 were not sold. However, evidence was received that this court finds credible that Dinizio & Cook obtained buyers ready, willing and able to purchase slips #3 and #25 by the May 15, 1994 deadline set forth in the Third Amendment and that but for the refusal of defendants to accept such offers the slips would have been sold. In equity this Court will not therefore penalize plaintiffs and abrogate these amendments because the sale did not actually take place. "He who prevents a thing from being done may not avail himself of the non-performance which he has, himself, occasioned, for the law says to him, in effect; 'This is your own act, and therefore, you are not damnified'" (Nassau Trust Company v Montrose Concrete Products Corp., 56 NY2d 175, 185, 451 NYS2d 663 [1982] [quoting Cardozo, J. concurring in Imperator Realty v. Tull, 228 NY 4471).

This court therefore finds that the money owed by plaintiffs to defendants, as set forth below, is to be computed as per the undated Third Amendment to the Modification Agreement which was executed in or around and between February 1, 1994, and May 15, 1994 and that the required sale of slip #3 and #25 as a condition was met. The Third Amendment, which required a payment of \$75,000 on May 15, 1994, reads in pertinent part:

"... in the event that the borrowers have not paid the sum of \$1,313,500.00 by May 15, 1995, then they shall pay to the lender interest at the rate of 8 percent per annum on 60 percent of the difference between the amount actually paid and the sum of \$1,313,500.00."

Dinizio & Cook made their last payment on the \$1.75 million dollar note in April 1994. When they failed to pay the whole amount due on May 15, 1994, defendants directed their lawyer, Sherwood Gordon, to send Dinizio & Cook a letter informing plaintiffs of the default, calling for payment of the monies due and payable on May 15, 1994 no later than October 25, 1994 failure of which would result in acceleration of the outstanding balance of all monies due. This letter does not specify the amount said to be due on May 15, 1994, but according to the testimony of Robert Grau, this acceleration letter was based on plaintiffs' failure to pay the sum of \$262,700 due under the Modification and First Amendment and not based on plaintiffs' failure to pay the entire \$75,000 due under the Third Amendment.

Plaintiffs then commenced this action in 1994 seeking: damages for unjust enrichment, reformation of the written agreements, an accounting and a permanent injunction. Defendants counterclaimed for inter alia a judgment on the notes and foreclosure of the security agreements. Plaintiffs served a Verified Reply that contained no affirmative defenses. As stated above, plaintiffs' complaint was dismissed at the conclusion of their case. The defendants are entitled to judgment on their counterclaims as follows:

FIRST COUNTERCLAIM

In their First Counterclaim, defendants, claiming that the Second Amendment and Third Amendment are null and void due to Dinizio & Cook's failure to sell slips # 3 and # 25, seek judgment in the principal amount of \$1,152,750.00 plus interest on the \$1.75 million note from May 15, 1994 according to the terms of the Modification and First Amendment.

Defendants have deinonstrated their entitlement to judgment on the First Counterclaim by proving the existence of the note and the non-payment according to its terms (see Cardella v. Giancola, 297 A.D.2d 618, 747 N.Y.S.2d 31 [2d Dept. 20021]). However, as stated above interest is to be computed according to the Third Amendment and the court grants defendants' motion to conform the pleadings to the proof.

Plaintiffs failed to rebut any of defendants's evidence regarding the existence of the note or the non-payment thereof. To the extent that plaintiffs claims a defense based upon waiver, estoppel, bad faith, fraud, or oppressive conduct, the same is rejected as plaintiffs failed to set forth the same as an affirmative defense (CPLR 3018[b]). In any event, the cases cited by

plaintiffs refer to mortgage foreclosure actions and not an action at law on a note. There is no dispute that plaintiffs executed the note, the note is now mature, and the monies due thereon have not been paid. Therefore the Court gives judgment to the defendants on the First Counterclaim in the amount of \$1,152,750.00 with interest to be calculated according to the Third Amendment from May 15, 1995 to May 1998 and at the legal rate thereafter plus attorneys fees.

THIRD COUNTERCLAIM

In their Third Counterclaim defendants seek judgment on the unpaid principal due on the \$50,000 note (Exhibit #41). This note provides for principal payments of \$25,000 on May 15, 1992 and May 15, 1993 together with interest at 12% per annum. Dinizio & Cook made one principal payment of \$10,500.00 on July 24, 1991 and interest was paid through August 13, 1991. Defendants demonstrated their entitlement to judgment on the Third Counterclaim by proving the existence of the note and the non-payment according to its terms (see Cardella v. Giancola, supra). Plaintiffs failed to rebut any of this evidence. Accordingly, defendants are entitled to judgment on their third counterclaim in the amount of \$39,500 plus interest at 12% from August 14, 1991 plus attorneys fees.

SECOND AND FOURTH COUNTERCLAIMS

Defendants seek foreclosure on its security interest in the 44 boat slips as per the Security Agreements (Exhibits I and J). Pursuant to the Uniform Commercial Code, a secured party after a default may "reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest * * * by any available judicial procedure" (UCC 9-601[a]). These rights are "cumulative and may be exercised simultaneously" (UCC 9 -601 [c]).

In their Fourth Counterclaim, defendants seeks to foreclose on the Security Agreement relative to the \$50,000 note (Exhibit J). The Security Agreement provides that the secured party, (defendants) may sell the collateral in the event of a default. Since defendants proved that plaintiffs have defaulted on the \$50,000 note, and since plaintiff have failed to offer any evidence or defense in opposition to defendants' fourth counterclaim, the court finds that defendant is entitled to judgment foreclosing the security agreements together with attorneys fees. Said foreclosure shall be conducted pursuant to the Lien Law Article 9 with the procedure, to the extent applicable, conducted pursuant to the RPAPL.

In the Second Counterclaim, defendants seek to foreclose on the Security Agreement relative to the \$1.75 million dollar note (Exhibit I). Again, this Security Agreement provides that the defendants, as the secured party, may sell the collateral in the event of a default.

None of the arguments raised by plaintiffs is sufficient to defeat defendants right to foreclose. Plaintiffs Reply contained no affirmative defenses. "A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as * * * fraud * * * . The application of this subdivision shall not be confined to the instances enumerated." (CPLR 3018[b]). Plaintiffs' defenses of waiver and estoppel were not pleaded and therefore are waived (see Apex Two, In v.

Terwilliger, 211 A.D.2d 856, 621 N.Y.S.2d 197 [3d Dept. 1995]. Moreover, plaintiffs' other arguments regarding the amount defendants claimed was due and whether the parties abandoned the acceleration clause in the note are now irrelevant since the note has now matured by its own terms.

Again, the Security Agreement provides that the secured party, (defendants) may sell the collateral in the event of a default. Since defendants proved that plaintiffs are in default of the \$1.75 million note, which has now matured, the court finds that defendant is entitled to judgment foreclosing this security agreement together with attorneys fees. Said foreclosure shall be conducted pursuant to the Lien Law Article 9 with the procedure, to the extent applicable, conducted pursuant to the RPAPL.

FIFTH COUNTERCLAIM

In their Fifth Counterclaim defendants seek judgment for the 60% interest in the income derived from the "upland" lease for the period from 1994 to date pursuant to an Assignment of Lease. Evidence reveals plaintiffs rented the restaurant from 1994 to 2002 and received substantial rental income (Exhibit 59). Plaintiffs failed to pay defendants the percentage due under the Assignment of Lease. The court accepts plaintiffs' exhibit 59 as accurately reflecting the rental income for this period and further accepts defendants' calculation of the amount due which is in effect 60% of the net income for this period. Accordingly, defendants are entitled to judgment in the amount of \$122,650 on the Fifth Cause of Action.

The court rejects plaintiffs' argument that they are relieved from payment of this obligation by the September 22, 1995 order of the Hon. Peter Fox Cohalan. Justice Cohalan, granted a preliminary injunction preventing the diversion of rents "with regard to the marina development or restaurant" to the defendants. This rental money was used to pay a mortgage given by the North Fork Bank, which was solely plaintiffs' debt. The fact that money to be used to pay an obligation to defendants was temporarily diverted, at the request of plaintiffs, to North Fork Bank, in no way discharges the obligation to defendants. However, the court rejects defendants' request for \$32,358.75. in past interest. While the court finds plaintiffs were not absolved of the debt by Justice Cohalan's September 1995 order, an award of interest where, plaintiffs, in effect were directed for a period of seven years to apply the rental income to the North Fork Bank loan, would constitute an unjust penalty. The preliminary injunction is hereby vacated and interest on the debt shall accrue commencing on the date of filing of this order.

SIXTH COUNTERCLAIM

In their sixth counterclaim, defendants seek judgment for the amount of rent collected on the boat slips #3, owned by Rhonda Cunha not a party to this action, on #4 owned by Robert Grau and on #25 owned by Robert Grau and the Estate of Frank Dragotta.

These boat slips were acquired from Dinizio & Cook at the May 15, 1991 closing. Slips 3 and 4 were acquired pursuant to the contract of sale. Slip 3 was conveyed to Frank Dragotta and Rhonda Cunha with right of survivorship, and since Dragotta's death has been owned exclusively

by Cunha. Slip 4 was acquired by Robert and Rosmarie Grau. Dragotta and Grau purchased slip 25 separately for \$25,000. From 1991 to date these slips have been rented to third parties by Dinizio & Cook's management company. While Grau and Dragotta received rental income for slip 25 for the years 1991, 1992 and 1993, all rental proceeds for slips 2 and 4 were waived by Grau and Dragotta until 1994 so that plaintiffs could apply the same to the North Fork Bank debt as well as the operating expenses of the marina.

The court finds that defendants are entitled to judgment for the rental proceeds for slips # 3 and # 4 from 1995 to present plus interest and for slip # 25 from 1994 to the present plus interest. Pursuant to a stipulation entered on the record, the court allowed judgment to be entered in favor of Rhonda Cunha, as successor in interest to Frank Dragotta. While concededly defendants were willing to waive the rental proceeds until 1994 for slips #3 and #4, plaintiffs provide no evidence that defendants intended to gift the proceeds to them in perpetuity. While plaintiffs seem to complain that defendants did not notify plaintiffs in writing of their intention to terminate the oral agreement allowing plaintiffs to use the rental proceeds, defendants' verified answer with counterclaims served in January 1995 is sufficient to put plaintiffs on notice that defendants were no longer waiving the rental income. Accordingly, defendants are entitled to judgment on their sixth counterclaim for net rental proceeds for slips # 3 and #4 from 1995 to present. The court accepts that defendants never waived the rental income for slip # 25. Accordingly, defendants are entitled to judgment on their sixth counterclaim for net rental proceeds for slip #25 from 1994 to present. Except as limited above, the court accepts defendants' calculation of damages as set forth in Exhibit Y.

More specifically Rhonda Cunha, as successor in interest to Frank Dragotta is entitled to judgment for the net rental proceeds for slip #3 as follows:

1995: \$3152.04 plus interest at the statutory rate from January 1, 1996;
 1996: \$3287.02 plus interest at the statutory rate from January 1, 1997;
 1997: \$3287.04 plus interest at the statutory rate from January 1, 1998;
 1998: \$3287.04 plus interest at the statutory rate from January 1, 1999;
 1999: \$4164.52 plus interest at the statutory rate from January 1, 2000;
 2000: \$4829.30 plus interest at the statutory rate from January 1, 2001;
 2001: \$4514.21 plus interest at the statutory rate from January 1, 2002;
 2002: \$5327.33 plus interest at the statutory rate from January 1, 2003

Defendant Grau is entitled to judgment for the net rental proceeds for slip #4 as follows:

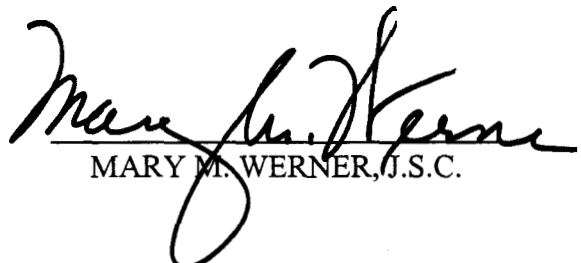
1995: \$4232.02 plus interest at the statutory rate from January 1, 1996;
 1996: \$4232.02 plus interest at the statutory rate from January 1, 1997;
 1997: \$3759.54 plus interest at the statutory rate from January 1, 1998;
 1998: \$3759.54 plus interest at the statutory rate from January 1, 1999;
 1999: \$3219.52 plus interest at the statutory rate from January 1, 2000;
 2000: \$3119.30 plus interest at the statutory rate from January 1, 2001;
 2001: \$3276.71 plus interest at the statutory rate from January 1, 2002;
 2002: \$4089.83 plus interest at the statutory rate from January 1, 2003

Defendants Grau and Fasano as Executor are entitled to judgment for the net rental proceeds for slip #25 as follows:

1994: \$2885.04 plus interest at the statutory rate from January 1, 1995;
1995: \$2265.04 plus interest at the statutory rate from January 1, 1996;
1996: \$2265.04 plus interest at the statutory rate from January 1, 1997;
1997: \$2265.04 plus interest at the statutory rate from January 1, 1998;
1998: \$2265.04 plus interest at the statutory rate from January 1, 1999;
1999: \$2849.24 plus interest at the statutory rate from January 1, 2000;
2000: \$2781.24 plus interest at the statutory rate from January 1, 2001;
2001: \$310 1.35 plus interest at the statutory rate from January 1, 2002;
2002: \$3659.01 plus interest at the statutory rate from January 1, 2003.

Defendants are entitled to attorneys fees to be determined at a hearing to be held on February 6, 2003 at 11:00 am. Defendants shall settle a judgment for February 6, 2003 on 10 days notice leaving blank the amount for attorneys fees.

Dated: 1/3/02


MARY M. WERNER, J.S.C.