

**Wilmington Trust Co. v Strauss**

2007 NY Slip Op 31071(U)

May 3, 2007

Supreme Court, New York County

Docket Number: 0601192/2003

Judge: Bernard J. Fried

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT

**BERNARD J. FRIED**  
J.S.C.

PART 60

Wilmington Trust  
vs  
STRAUSS, Michael  
Seq. 019

**FBEM**  
**FBF**

NOTION DATE \_\_\_\_\_

NOTION SEQ. NO. \_\_\_\_\_

NOTION CAL. NO. \_\_\_\_\_

601192/2003

The \_\_\_\_\_ Motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

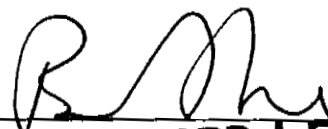
MAY 04 2007

NEW YORK  
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 5/3/07



**BERNARD J. FRIED** J.S.C.  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X

WILMINGTON TRUST COMPANY, as Issuer Trustee  
of FMAC LOAN RECEIVABLE TRUST 1997-C, FMAC  
LOAN RECEIVABLE TRUST 1998-A, FMAC LOAN  
RECEIVABLE TRUST 1998-B, FMAC LOAN RECEIVABLE  
TRUST 1998-C, and GMAC COMMERCIAL MORTGAGE  
CORPORATION, as Servicer of FMAC Loan  
Receivable Trust 1997-C, FMAC Loan Receivable  
Trust 1998-A, FMAC Loan Receivable Trust  
1998-B, and FMAC Loan Receivable Trust 1998-C,

**Index Number**  
**601192-2003**

Plaintiffs,

-against-

MICHAEL L. STRAUSS,

Defendant.

**FILED**

MAY 04 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**APPEARANCES:**

**For Plaintiffs**  
Arnold & Porter LLP  
Attorneys at Law  
399 Park Avenue  
New York, New York 10022  
(H. Peter Haveles, Jr.)

**For Defendant**  
Orans, Elsen & Lupert LLP  
Attorneys at Law  
875 Third Avenue  
New York, New York 10022  
(Leslie Lupert, Thomas Brown)

**FRIED, J:**

On October 30, 2006, I issued a decision which, among other things, granted plaintiffs' motion for summary judgment on Count Two of their complaint against defendant (Prior Decision).<sup>1</sup> Specifically, Count Two relates to defendant's obligation under the Second Guaranty, pursuant to which he personally guaranteed repayment of \$1.8 million of the \$2.6

\_\_\_\_\_

<sup>1</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Prior Decision.

million Special Servicing Advance made to Westwind in conjunction with the Restructuring Agreement. Plaintiffs have filed a motion (sequence number 19) for an order, pursuant to CPLR 603 and 5012, to sever Count Two and to enter judgment thereon, with prejudgment interest.

Defendant opposes the motion, arguing that if he were to succeed on appeal with respect to the Second Guaranty, any severance or related judgment would have to be undone, which would result in a waste of judicial resources and a disruption of his financial situation. He also argues that the issues for the First Guaranty (Count One) and the Second Guaranty (Count Two) are intertwined, and severance of the claims is thus unwarranted. He further argues that no prejudgment interest should be awarded to plaintiffs, because the Second Guaranty purportedly capped his obligation thereunder at \$1.8 million.

Defendant's arguments are unpersuasive. With respect to claims severance, the Court of Appeals has set forth a test to determine whether a claim should be severed: "[i]s it possible to divide the claims or causes of action so that an effective judgment can be rendered as to part, without mutilation of the whole?" *Lowe v Lowe*, 265 NY 107, 203 (1934). As more fully discussed in the Prior Decision, the various issues for the First Guaranty and the Second Guaranty are separate and distinct. Thus, any appellate review of the issues for the Second Guaranty would have little or no bearing upon the issues for the First Guaranty that are to be adjudicated ~~by this court~~ at the pending trial. Further, New York courts have generally severed claims where summary judgment has been granted with respect to certain, but not all, claims in a litigation. *Eccleston v New York City Health and Hospital Corp.*, 279 AD2d 447 (2d Dept 2001); *Chase Manhattan Bank v Syosset Dev. Corp.*, 32 AD2d 745 (1<sup>st</sup> Dept 1969).

Hence, pursuant to *Lowe* and the progeny cases, as well as the discretionary power granted to the courts under CPLR 603 and 5012, severing Count Two from the remainder of this action, and entering judgment thereon, is appropriate in light of the facts and circumstance of this case. Moreover, defendant's argument that the entry of judgment would cause him financial difficulty and impede his ability to fund the ongoing litigation is not a defense to plaintiffs' motion, particularly when he has failed to provide competent evidence showing his financial condition.

With respect to prejudgment interest, while the Second Guaranty provides that defendant's obligation thereunder should not exceed \$1.8 million, his assertion that no interest should be awarded to plaintiffs on a breach of contract claim after he has defaulted on his contractual obligations is flawed. The Second Guaranty does not preclude an award of interest as part of the post-breach remedies, and the courts have held that, under CPLR 5001, "a plaintiff who prevails on a claim for breach of contract is entitled to prejudgment interest as a matter of right." *U.S. Naval Institute v Charter Communications, Inc.*, 936 F.2d 692, 698 (2d Cir. 1991); CPLR 5001 (a) ("Interest shall be recovered upon a sum awarded because of a breach of performance of a contract"). Hence, plaintiffs are entitled to prejudgment interest at the rate specified in the Second Guaranty (4.75%), with interest accruing from May 8, 2002, the date when they made a written demand upon defendant for payment under the Second Guaranty.

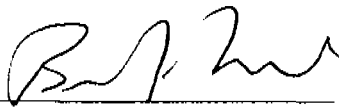
Accordingly, it is

ORDERED that plaintiffs' motion (sequence number 19) is hereby granted, and Count Two of plaintiffs' complaint is severed from the remainder of this action; and it is further

ORDERED that the Clerk of the Court is hereby directed to enter judgment in favor of plaintiffs with respect to Count Two in the amount of \$1.8 million (defendant's liability under the Second Guaranty), with interest thereon as calculated by the Clerk at the rate of 4.75%, commencing from May 8, 2002.

Dated: 5/3/07

ENTER:



J.S.C.

**BERNARD J. FRIED**  
J.S.C.

**FILED**  
MAY 04 2007  
NEW YORK  
COUNTY CLERK'S OFFICE