

State Resources Corp. v D&M Jewels, Inc.

2008 NY Slip Op 30245(U)

January 25, 2008

Supreme Court, New York County

Docket Number: 0116094/2006

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED Justice PART 60

STATE RESOURCES CORP., Plaintiff, - v - D&M JEWELS, INC. and MEHRAN PEYKAR, Defendants. INDEX NO. 116094/2006 MOTION DATE MOTION SEQ. NO. 003 MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... Answering Affidavits -- Exhibits Replying Affidavits

PAPERS NUMBERED

FILED

JAN 29 2008

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

By order dated August 30, 2007, Plaintiff's unopposed motion for judgment pursuant to C.P.L.R. § 3215 (Motion Seq. # 001), was granted on default as to liability. The issue of damages was referred to a Special Referee to hear and report with recommendations.

The matter was assigned to Special Referee Nicholas Doyle, who held a hearing on Oct. 16, 2007. The law firm of Rosner Nocera & Ragonc, LLP, by Elaine Lau, Esq., appeared on behalf of Plaintiff States Resources Corp. ("SRC"). The Defendants, D&M Jewels, Inc. ("D&M") and Mehran Peykar ("Peykar"), failed to appear and are deemed in default. Plaintiff now moves unopposed, pursuant to C.P.L.R. § 4403 and 22 N.Y. Comp. Codes, R. & Reg. 202.44, to confirm the Oct. 16, 2007 report of Special Referee Doyle.

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

Special Referee Doyle's Report shows that, pursuant to 22 N.Y.R.R. § 208.32, he accepted the affidavits of both Cory Butler, SRC's Account Officer, and Elaine Lau, Esq., the attorney for Plaintiff, in lieu of testimony.

In his affidavit, Mr. Butler stated that he is an Account Officer of SRC, and as such, that he is familiar with the events giving rise to this action, as well as with the files maintained by SRC in the ordinary course of business.

Mr. Butler averred that Plaintiff's assignor, Wachovia Bank, N.A. ("Wachovia"), had extended a line of credit to Defendant D&M in the sum of \$125,000. This debt was evidenced by a promissory note dated July 9, 2004 (the "Note"), which provided for interest to accrue at Wachovia's Prima Rate plus 1.75% (the "Interest Rate"), and further provided that in the event of default, all remaining obligations were to bear interest at Wachovia's Prime Rate plus 3% (the "Default Rate"). Defendant Peykar provided a Guaranty, dated July 9, 2004, which personally and unconditionally guaranteed the timely performance of all obligations of D&M under the Note.

Mr. Butler further averred that D&M made two advancements against the line of credit, the first in the amount of \$106,006.37, and the second in the amount of \$18,000.00, which brought the principal balance due under the Note to \$124,006.37. D&M has made no payments on this amount.

Furthermore, Mr. Butler said, the total accrued interest due and owing on the Note as of Oct. 8, 2007 was \$19,642.96, which incorporates the interest accrued at both the Interest Rate and the Default Rate. The Default Rate has been applied since April 1, 2007, and as of Oct. 8, 2007, the *per diem* interest accrual was \$43.057. Annexed to Mr. Butler's affidavit was documentary evidence supporting his statements.

Mr. Butler also stated that the Note provided for the payment of collection costs, including attorneys' fees, in the event of default. As to attorneys' fees, Ms. Lau's affidavit contains sworn statements regarding the services provided by the law firm of Rosner Nocera & Ragone, LLP. These included, *inter alia*, legal analysis, development of strategy, and attempted settlement negotiations. According to her affidavit and the attached documentary evidence, the total amount of fees for services rendered in connection with this action was \$4,446.00, plus disbursements of \$993.26.

Special Referee Doyle thus concluded that Plaintiff is entitled to damages including \$124,006.37 for the unpaid principal balance, plus interest of \$19,944.32 as of Oct. 16, 2007, and *per diem* interest of \$43.057, to be calculated from Oct. 16, 2007 until the date of entry of judgment. Furthermore, Special Referee Doyle concluded that Plaintiff is entitled to reasonable attorneys' fees in the sum of \$4,446.00, plus disbursements of \$993.26. He therefore recommends that I order judgment to be entered in favor of Plaintiff as against both Defendants, jointly and severally, in the amount of \$143,950.69, plus *per diem* interest, and \$5,439.26, plus interest at the statutory rate.

The report of a referee should be confirmed if its findings are supported by the record. *Baker v. Kohler*, 28 A.D.3d 375, 375-76 (1st Dep't 2006). C.P.L.R. § 4403 also permits a court to "make new findings with or without taking additional testimony." *Barrett v. Stone*, 236 A.D.2d 323, 323-24 (1st Dep't 1997).

Because I conclude that the referee's findings are supported by the record, I confirm the Oct. 16, 2007 report of Special Referee Doyle.

Accordingly, it is

ORDERED that Plaintiff's motion, pursuant to C.P.L.R. § 4403, to confirm the Oct. 16, 2007 report of Special Referee Doyle is granted; and it is further

ORDERED that in accordance with the recommendations of Special Referee Doyle, the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendants D&M Jewels, Inc. and Mehran Peykar, jointly and severally, in the amount of \$143,950.69, together with *per diem* interest of \$43.057, to be calculated by the Clerk from Oct. 17, 2007 until entry of judgment, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against both Defendants, jointly and severally, in the amount of \$5,439.26, for costs and expenses incurred in this litigation, together with interest to be calculated by the Clerk from the date of entry of judgment at the statutory rate.

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/25/08

[Signature]

HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE