Bridgeview Capital Solutions, LLC v Eiger
2008 NY Slip Op 32447(U)
September 2, 2008
Supreme Court, New York County
Docket Number: 0600061/2007
Judge: Eileen Bransten
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SCANNED ON 9/8/2008

[* 1]

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

PRESENT: EILEEN BRANSTEN, *Justice* PART 3

Bridgeview Capital Solutions, LLC,

- v -

Joseph Elger and Haim Zitman

INDEX NO. 600081/07

MOTION DATE 8/12/08

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

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

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED SEP 08 2008 COUNTY CLERK'S OFFICE NEW YORK

Dated: 9-2-08

HON. EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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BRIDGEVIEW CAPITAL SOLUTIONS, LLC,

Plaintiff,

-against-

JOSEPH EIGER and HAIM ZITMAN,

Defendants.

---X

Index No. 600061/07
Motion Date: 8-12-08
Motion Seq. No.: 02

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3211(a)(1) and (5), defendant Haim Zitman ("Zitman") moves to dismiss the complaint based on documentary evidence and passage of the statute of limitations. Plaintiff Bridgeview Capital Solutions, LLC ("Bridgeview") opposes the motion.

Background

On October 12, 1999, Zitman and co-defendant Joseph Eiger ("Eiger"), as individuals and officers of Sunlite Casual Furniture, Inc. ("Sunlite") and Paragould Realty LLC ("Paragould"), borrowed $5 million in the form of five $1 million-dollar loans from B & I Lending, Inc. ("B&I"), Bridgeview's predecessor in interest. Eiger and Zitman executed promissory notes ("Notes") in consideration for each loan, and the parties documented the loans in an agreement ("Loan Agreement"). The loans were secured by property located in Greene County, Arkansas that was owned by Sunlite and Paragould.

Bridgeview alleges that neither defendants nor Sunlite or Paragould made a loan payment that was due on March 24, 2001 (Complaint ¶ 10). In September 2002, Bridgeview foreclosed on and purchased the Arkansas property for $4,767,226.45, leaving a balance of $140,409.24 due under the Notes.[1] In this action, commenced January 8, 2007, Plaintiff brings a claim against Eiger and Zitman for $147,409.24, the balance allegedly due under the Notes, plus interest, costs and attorneys' fees (Plaintiff's Opp. Mem. of Law, p. 2).

Zitman now moves to dismiss the complaint as against him only, arguing that Bridgeview commenced this action after the statute of limitations of both New York and Arkansas expired. Zitman also argues that: (1) Bridgeview's foreclosure and purchase of the Arkansas property completely satisfies any amount due on the loans; (2) Bridgeview did not provide him with the notice required by the Notes and the Loan Agreement before exercising its default remedies, including the right to accelerate the balance; and (3) to the extent that Bridgeview seeks a deficiency judgment[2] against him, the action is barred whether the law

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[1] Though the complaint seeks $4,992,924.48 from defendants, Bridgeview in its opposition concedes that its $4,767,226.45 purchase of the Arkansas property after foreclosure constitutes a partial payment of the debt (Plaintiff's Opp. Mem. of Law, pp. 1-2). Plaintiff claims that the foreclosure, however, does not relieve defendants of the obligation to pay the $140,409.24 balance on the Notes, plus interest, costs and attorneys' fees.

[2] A deficiency judgment is "a judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due" (Black's Law Dictionary 847 [7th Ed 1999]).

of New York or Arkansas applies because the foreclosure judgment does not preserve plaintiff's right to obtain a deficiency judgment. Zitman also seeks reimbursement for expenses and attorneys' fees under 22 NYCRR 130-1.1 because of Bridgeview's allegedly frivolous conduct in maintaining this action.

Bridgeview opposes dismissal as against Zitman, contending, among other things, that Georgia law applies because the parties agreed in the Notes that Georgia law would govern their relationship and that the action is based on a contract theory and does not seek a deficiency judgment, therefore Georgia's breach of contract statute of limitations applies. Bridgeview claims that it is entitled to recover its reasonable attorneys' fees and all costs and other expenses associated with this litigation from Zitman individually pursuant to the Loan Agreement.

Analysis

Statute of Limitations

New York courts typically honor parties' choice of law as long as the selected state has sufficient contacts to the transaction and there is no fraud or public policy threat (*eg*, *Katz v Berisford Intl. PLC*, 2000 WL 959721, *8 [SDNY 2000]; *Finucane v Interior Const. Corp.*, 264 AD2d 618, 620 [1st Dept 1999]). "Sufficient contacts" have been found when the selected state is also the state in which a business entity that is a party to the action is

organized (*see A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 379 [1957] [Oregon law controlled the construction of the agreement "since the parties intended it to be applicable" and it had a reasonable relation to the case where defendant was an Oregon corporation doing business in New York]).

However, "New York courts . . . apply contractual choice of law clauses only to substantive issues" (*Education Resources Inst., Inc. v Piazza*, 17 AD3d 513, 513 [2d Dept 2005]). "The law of the forum normally determines for itself whether a given question is one of substance or procedure" (*Tanges v Heidelberg North Am., Inc.*, 93 NY2d 48, 54 [1999]). "In New York, Statutes of Limitation are generally considered procedural because they are viewed as pertaining to the remedy rather than the right" (*Tanges*, 93 NY2d at 54-55).

The statute of limitations for deficiency actions in New York is 90 days (RPAPL § 1371 [2]). This 90-day limitation may be applied to foreclosures on property located in New York and out-of-state (*Union Realty Partners, Ltd. v Menicucci*, 270 AD2d 339, 339-40 [2d Dept 2000] [applying RPAPL § 1371(2) to a breach of contract action seeking to collect the remaining indebtedness after foreclosure on a New Jersey property that was given as security]; *see* Levy, *Lenders Face Hurdles to Recover on Debt*, NYLJ, June 17, 2002, at S1, col 1). Even when an action is cast as one for breach of contract, if it is based on a note that was secured by foreclosed property and seeks the outstanding amount due, the court will treat

the action as one for a deficiency judgment and apply RPAPL § 1371's statute of limitations (*Union Realty Partners*, 270 AD2D at 339).

Bridgeview foreclosed on the Arkansas property in September 2002 and commenced this action years later in January 2007 (Zitman Aff., Ex. E). Bridgeview's argument that it is not seeking a deficiency judgment, but rather, just the balance on the Notes based on a contract theory is unavailing (*see Union Realty Partners*, 270 AD2D at 339). As Bridgeview brought this action over four years after the foreclosure, it is untimely.[3]

The motion to dismiss is therefore granted based on passage of the statute of limitations, and Zitman's remaining arguments need not be addressed.

Sanctions

Zitman seeks reimbursement for expenses and attorneys' fees under 22 NYCRR 130-1.1 (a)(1) because of plaintiff's allegedly frivolous conduct in maintaining this action.

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[3] Zitman's argument that Arkansas law applies yields the same result. Section 18-50-112 of the Arkansas Code states, in pertinent part, "[a]t any time *within twelve months* after a sale . . . a money judgment may be sought for the balance due upon the obligation for which a mortgage . . . was given as security" (A.C.A. Section 18-50-112) (emphasis added). As explained above, Bridgeview commenced this action over four years after the foreclosure. Therefore, whether the court applies the law of New York or Arkansas, this action is barred by each respective state's statute of limitations.

In opposition, Bridgeview contends that pursuant to the Loan Agreement, it is entitled to recover its reasonable attorneys' fees and all costs and other expenses associated with this litigation from defendant individually.

Under New York law, "the court, in its discretion, may impose financial sanctions upon any party or attorney who appears in a civil action or proceeding who engages in frivolous conduct" (22 NYCRR Section 130-1.1[a]). Conduct

> "is frivolous if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false"

(22 NYCRR Section 130-1.1 [c]). To determine whether to award sanctions, the court will "look at the broad pattern of conduct by the offending attorneys or parties" (*Robertson v United Equities, Inc.*, 20 Misc 3d 1112(A), 2008 NY Slip Op 51327[U], *5 [Sup Ct, Kings County 2008]). Sanctions will be awarded if the party against whom sanctions are sought knew or had been alerted to the meritless nature of the action (*see eg*, *Yenom Corp. v 155 Wooster Street, Inc.*, 33 AD3d 67, 73-75 [1st Dept 2006] [concluding that plaintiff's appeal from the cancellation of the notice of pendancy was frivolous because plaintiff knew or should have known that the notice of pendancy would never be reinstated]; *Adams v Banc of Am. Sec. LLC*, 7 Misc 3d 1023(A), *8 [Sup Ct, NY County 2005] ["Counsel failed to

articulate why he sought to enjoin these three defendants based upon an agreement to which none of them were parties. Counsel's conduct can be characterized as frivolous, pursuant to 22 NYCRR 130-1.1, in that, as against cross movants, the motion was completely without merit in law, and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law . . ."]).

The September 2002 foreclosure sale of the Arkansas property reduced the amount owed to Bridgeview by over $4.5 million. Significantly, however, the complaint makes no mention of the foreclosure sale. Moreover, after Zitman was served with the complaint in this action, he informed counsel for Bridgeview that the $4,992,924.48 sought did not reflect the $4,767,226.45 obtained from the sale of the Arkansas property (Zitman Aff., Ex. H). Based on his communications with plaintiff's counsel, Zitman furnished the report of sale, anticipating further discussion from plaintiff's counsel regarding the pursuit of the action (Zitman Aff., Ex. H). Without further discussion, however, Bridgeview sought a default judgment against Zitman and Eiger for failure to answer.[4]

Though in its opposition Bridgeview concedes that its damages should be reduced from almost $5 million to less than $150,000, stating, "the damages grieved in the complaint

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[4] This Court (Moskowitz, J.) denied the motion for a default judgment on August 16, 2007.

can be reduced to reflect *the actual amount defendants are liable for* . . . which is $147,409.24, plus interest, costs and expenses of this action," Bridgeview has provided no explanation for why it did not request the actual amount of defendants' liability at the outset in its pleading (*see* Plaintiff's Opp. Mem. of Law, p.2) (emphasis added).

Under these circumstances, Bridgeview's counsel's conduct may be characterized as frivolous–the pursuit of over $4.5 million from Zitman was completely without merit in law. Thus, Zitman's request for sanctions is granted to the extent of awarding Zitman's expenses and attorneys' fees in defending against this action.

On the other hand, Bridgeview's request for fees and expenses is denied.

Section 8.26 of the Loan Agreement states,

> "Company Borrower and Guarantor will pay promptly to Lender without demand, reasonable attorneys fees and all costs and other expenses paid or incurred by Lender in collecting or compromising the Term Loan or in enforcing or exercising its rights or remedies created by, connected with or provided in this Agreement or any other agreement or instrument required by Lender in connection with the Term Loan, whether or not suit is filed"

(Zitman Aff., Ex. C at p. 35). The Loan Agreement defines "Company Borrower" as Sunlite and Paragould and defines "Guarantor" as Paragould–nowhere does it personally obligate Zitman for fees and expenses. Plaintiff's motion seeking Zitman to pay its fees and expenses is thus denied.

Accordingly, it is

ORDERED that Haim Zitman's motion to dismiss plaintiff's complaint is granted and the complaint is hereby severed and dismissed as against defendant Haim Zitman, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the issue of the amount of Haim Zitman's reasonable attorneys' fees and expenses is severed for an assessment after a hearing at which evidence will be presented (unless the issue is resolved by the parties in advance of the designated date) in Part 3 on October 15, 2008 at 11:00 a.m.; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 2, 2008
New York, NY

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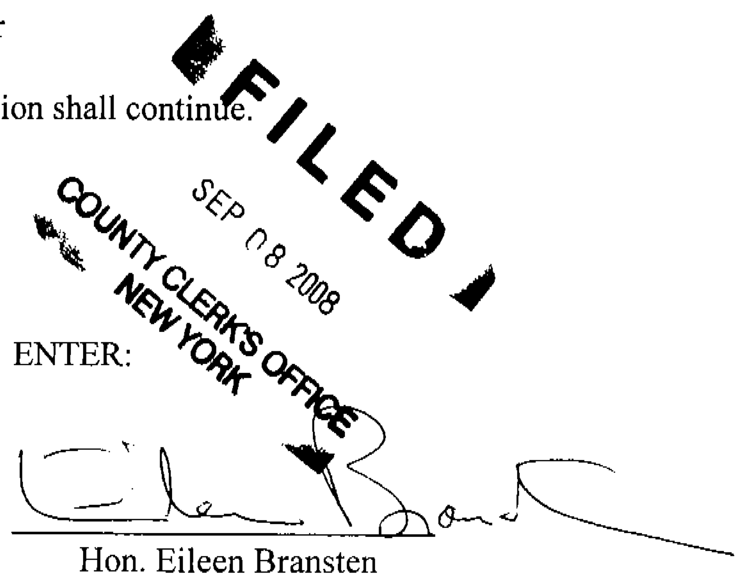

Hon. Eileen Bransten