

General Credit Corp. v Guidice
2009 NY Slip Op 32418(U)
October 15, 2009
Supreme Court, New York County
Docket Number: 601418/2008
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 602379/2002

GENERAL CREDIT

VS.

MICHAEL GUIDICE

SEQUENCE NUMBER : 014

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

MOTION DATE 6-5-09

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1-2

No app

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
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 9/15/09

[Signature]
JUSTICE SHIRLEY WERNER KORNREICH

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 54

----- X
GENERAL CREDIT CORPORATION, G.S. CAPITAL
CORPORATION, CARLY HOLDING, INC., and
GENERAL ARMORED CAR CORPORATION,

Plaintiffs,

-against-

MICHAEL GUIDICE, GREGORY E. RONAN,
GODDARD, RONAN & DINEEN, L.L.P., and
"JOHN AND JANE DOES" NO. 1-10,

Defendants.
----- X

Index No.: 601418/2008

DECISION
and ORDER

FILED
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER J.:

Plaintiffs move: 1) to confirm and modify the report of Special Referee Nicholas Doyle (Referee Doyle), dated April 29, 2009 (Report), issued after an inquest on all causes of action except the fourth; and 2) to correct an order contained in a December 15, 2008 transcript of the Hon. Herman Cahn,¹ deciding a motion to confirm the report of Special Referee Sue Ann Huang, dated November 20, 2008, as follows: to direct a) entry of judgment on the fourth cause of action in favor of plaintiff General Credit Corporation (GCC) *only* in the amount of \$852,294.84 against Gregory E. Ronan (Ronan) and Goddard, Ronan and Dineen, L.L.P. (GRD); and b) entry of judgment for additional damages for contempt in favor of *all plaintiffs* in the amount of \$647 against Ronan. Defendants defaulted on the motion and at both referee hearings.

The motion to correct the transcript is granted on default. The motion to confirm and modify the Doyle Report is granted in part and denied in part for the reasons that follow.

¹ Justice Cahn retired prior to submission of the motion.

The causes of action in the amended complaint that were referred for an inquest before Referee Doyle were: 1) breach of fiduciary against Ronan as director of GCC; 2) breach of fiduciary duty by Ronan and GRD as attorneys; 3) malpractice against Ronan and GRD; 4) fraud against Ronan, GRD and Guidici; and 5) accounting against Ronan, GRD and Guidici.

Referee Doyle recommended: 1) entry of judgment for compensatory damages in favor of GCC against all defendants, jointly and severally, in the sum of \$154,257.82; 2) entry of judgment for punitive damages in favor of GCC against Ronan and GRD in the amount of \$1,542,578.20, ten times the compensatory award; and 3) entry of judgment for punitive damages in favor of GCC against Michael Guidice (Guidice) in the amount of \$462,773.46, three times the compensatory award.

GCC challenges the award on the ground that Referee Doyle did not assess damages on a fraud claim against Guidice for failing to secure a \$1,000,000.00 loan. The only claim in the amended complaint against Guidice was that he aided and abetted the other defendants' fraud. GCC presented testimony at the hearing that it would have earned \$300,000 from its check clearing business had Guidice obtained the promised loan. In addition, GCC argues that the punitive damages against Guidice should be increased to include three times the lost \$300,000 profit. Referee Doyle's Report did not discuss this item of damages.

Referee Doyle correctly omitted to award fraud damages against Guidice for lost profits GCC would have earned on the loan. Compensatory damages for fraud are limited to provable out-of-pocket losses. *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 (1996). Profits that would have been realized in the absence of the fraud are barred. *Id.*; *Geary v Hunton & Williams*, 257 AD2d 482 (1st Dept 1999); *Alpert v Shea Gould Climenko & Casey*, 160 AD2d

67, 72 (1st Dept 1990). Referee Doyle also appropriately limited the award to GCC's out-of-pocket expenses. Hence, it was appropriate not to include a multiple of the lost profits in the punitive damages award.

The court, however, *sua sponte* modifies the award of punitive damages as against Ronan and vacates it as to GRD. With respect to Ronan, punitive damages was based partially upon hearsay evidence that Ronan enticed other investors to invest in GCC and then converted the money, including that of a widow of a man who died in the 9/11 terrorist attacks. This could not serve as a basis for an award of punitive damages. Punitive damages must be proved by clear and convincing evidence or a preponderance of the evidence. *Rosenberg, Minc & Armstrong v Mallilo & Grossman*, 39 A.D.3d 335 (1st Dept 2007)(clear and convincing or preponderance); *Spinnell v Seldon*, 41 AD3d 170 (1st Dept 2007)(clear and convincing evidence found to support award); *Munoz v Puretz*, 301 AD2d 382, 385 (1st Dept 2003)(clear, unequivocal and convincing evidence required).²

Nonetheless, the court agrees that punitive damages should be imposed upon Ronan. Punitive damages may be recovered to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard of another's rights. *Prozeralik v. Capital Cities Communs.*, 82 NY2d 466, 480 (1993); *Munoz v Puretz*, 301 AD2d 382, 385 (1st Dept 2003)(punitive damages recoverable for "egregious and willful conduct" that is "morally culpable, or is actuated by evil and reprehensible motives").

The record established that Ronan used his conflicted confidential positions, as a director

² Other Appellate Divisions have ruled that the standard is clear and convincing, not preponderance of the evidence, but the Court of Appeals has not resolved the issue. See, *Randi A.J. v Long Island Surgical Center*, 46 AD3d 74, 86 (2d Dept 2007) and cases cited therein.

of GCC and attorney for Guidice and GCC, to wrest control of the corporation and cause it to enter into adverse financial transactions that benefitted Ronan and Guidice. The amended complaint alleged that Ronan prepared agreements that gave Guidice control of GCC's board; caused GCC to obtain loans from an entity Ronan controlled and another entity, at interest rates above twenty percent; caused GCC to place \$450,000 in collateral with a bank in anticipation of a \$1,000,000 loan that Guidice was to, but never did, secure; and caused GCC to sign loan and financing agreements to which Guidice was a party. Further, Guidice allegedly seized control of all GCC bank accounts, changed the locks on its offices, fired its employees, contacted its creditors, interfered with its banking relationships and prevented GCC from accessing funds it needed to operate. At the hearing, GCC presented a witness, Jack Koffman, who testified that GCC had to file for bankruptcy, two or three months after Guidice failed to get the loan, due to lack of working capital and mismanagement. Mr. Koffman also testified that Guidice unsuccessfully sued to preserve his position as Chief Executive Officer of GCC. Exhibits to the amended complaint contain documents, allegedly prepared by Ronan, that made Guidice Chief Financial Officer of GCC; put Ronan, Guidice and his wife on its board; granted Guidice stock options; caused GCC's former Chief Operating Officer, Irwin Zellmaier, to resign; and caused him to grant Guidice proxy rights to vote his shares. This evidence was a sufficient to award punitive damages against both Ronan and Guidice. Both were fiduciaries of GCC. However, while punitive damages are warranted against Ronan, there is no evidence that his firm collaborated with him.

The First Department has upheld punitive damages award of ten times compensatory damages against an attorney who misappropriated clients from his former firm by means of

impersonation. *Rosenberg, Minc & Armstrong v Mallilo & Grossman*, 8 Misc3d 394, 404 (Sup Ct, NY Co, 2005), *aff'd* 39 AD3d 335 (1st Dept 2007)(ten times compensatory damages awarded given the relatively small compensatory award and the egregious nature of attorney's misconduct).³ Hence, this court finds that a multiple of ten times the damages is in line with other decisions for punitive damages against an attorney where, as here, the compensatory damages are not great, but the misconduct was particularly egregious. However, in the same case, the jury's award of punitive damages against the attorney's firm was vacated due to its lack of involvement in the misappropriation. *Id.* Here, other than the disgorgement of fees paid to GRD, which was not part of the reference to Referee Doyle, there is no evidence of the firm's involvement in Ronan's conduct, although it could be vicariously liable for compensatory damages caused by Ronan. With respect to Guidice, the court upholds the lesser multiplier of three, as found by Referee Doyle, as Guidice was an aider and abetter, according to the complaint, rather the primary tortfeasor. A higher award against Ronan is justified because of the legal ethics he violated and the importance of deterring attorneys from abusing their position, which erodes confidence in the legal system. Accordingly, it is

ORDERED that the motion to confirm in part and modify in part, the report of Special Referee Nicholas Doyle, dated April 29, 2009, is granted on default solely to the extent that: 1) the court *sua sponte* modifies the reasoning for awarding punitive damages as set forth in this

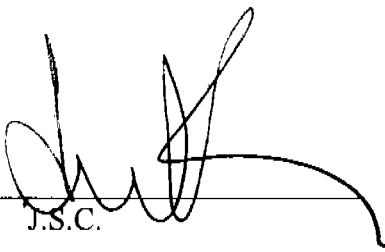
³ The United States Supreme Court has held that single-digit multipliers of compensatory damages are more likely to comport with due process, while still achieving the goals of deterrence and retribution for awarding punitive damages, but that awards above single-digit multipliers do not run afoul of due process considerations where "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 426 (2003).

opinion and vacates the award of punitive damages against Goddard, Ronan & Dineen; and 2) confirms the amount of compensatory damages awarded in favor of General Credit Corporation against all defendants, jointly and severally, and the amount of punitive damages awarded in favor of General Credit Corporation against Michael Guidice and Gregory E. Ronan; and in all other respects the motion is denied; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion to modify the December 15, 2008 order in the transcript of Justice Herman Cahn, which confirmed the report of Special Referee Sue Ann Huang, dated November 20, 2008, is granted on default in all respects and the Clerk is directed to enter judgment on the fourth cause of action in the amended complaint in favor of plaintiff General Credit Corporation (GCC) *only* in the amount of \$852,294.84 against Gregory E. Ronan and Goddard, Ronan and Dineen, L.L.P., jointly and severally, and to enter judgment for additional damages for contempt in favor of *all plaintiffs* in the amount of \$647 against Gregory E. Ronan.

Dated: October 15, 2009

ENTER:



J.S.C.

JUSTICE SHIRLEY WERNER KORNREICH

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OCT 20 2009
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NEW YORK