

Magna Equities II, LLC v Writ Media Group, Inc

2020 NY Slip Op 31427(U)

April 24, 2020

Supreme Court, New York County

Docket Number: 653808/2016

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

-----X

MAGNA EQUITIES II, LLC et al.,
Plaintiffs,

- v -

WRIT MEDIA GROUP, INC, et al.
Defendants.

-----X

INDEX NO. 653808/2016
MOTION DATE
MOTION SEQ. NO. 008
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 227-313, 325-327, 332- 348, and 371-372

were read on this motion to/for CONFIRM REFEREE REPORT &

This court granted a default by a Decision and Order dated October 10, 2017 (NYSCEF Doc. No. 123). On October 23, 2017, the court further ordered that an inquest be conducted by a Special Referee to hear and recommend the damages due to plaintiff (NYSCEF Doc. No. 127). The recommendation of the Special Referee was filed on September 6, 2019 (NYSCEF Doc. No. 224). Plaintiffs move to confirm the report and defendants cross-move to reject it and to renew their prior motion to vacate the default.

While defendants disagree with the report of the Special Referee in many ways, they focus on the liquidated damages portion of the decision, arguing the award is improper because it grants disproportionate damages exceeding \$8 million when the claim is based on a loan of \$85,750, and contend that the damages for non-delivery do not exceed \$344,130.29 (Opp, NYSCEF Doc. No. 327, at 10-11). They argue the daily penalties and multipliers are punitive and it was an error to enforce those provisions. Further, no evidence was provided to support an award against defendant Signature (id. at 15). Signature was not the transfer agent when Magna issued the notices of conversion at issue here (id.). Defendants also argue Signature cannot be held liable for conversion, since the shares were never issued and Signature cannot have converted something that never existed, or under the UCC, because Signature cannot be held

liable for transferring something which did not exist (*id.* at 16-17). Further, Magna abandoned its claim for damages based on the failure to issue stock (*id.* at 17).

Defendants also argue the recommendations of the Special Referee should be discarded because Magna should not be considered the prevailing party (*id.* at 18). The costs and fees sought by Magna are disproportionate to the damages sought and the result of ill-advised and improper tactics. In fact, defendants argue that, when the court finds the liquidated damages clause unenforceable, Writ should be deemed the prevailing party. Finally, as an award of attorneys' fees is based on the promissory notes, Signature, which was not a party to the notes, cannot be held liable for attorneys' fees (*id.* at 20).

Plaintiffs rebut that defendants defaulted, which precludes arguments about liability, or damages should be zero, as noted by the Special Referee. Plaintiffs contend that the Special Referee evaluated all of the witnesses and facts, as noted in the report and recommendation, and rejected the defendants' proposed damages calculation (Reply, NYSCEF Doc. No. 348 at 10). As to defendants' arguments regarding the liquidated damages portion of the award, the defendants bear the burden of showing those damages are a penalty (*id.* at 11). The damages were not easily ascertainable when the parties entered into the notes, as the Special Referee noted, and the value of the shares was significantly uncertain. Further, as far as defendants argue the liquidated damages are disproportionate to the underlying debt, defendants brought no evidence to support that claim, and the cases they rely upon are distinguishable and their arguments considered and rejected by the Special Referee, who noted both sides were sophisticated and well represented and the case law required giving their negotiated contract terms deference (*id.* at 13).

Plaintiffs also argue they were properly determined to be the prevailing party, as defendants defaulted, so defendants cannot now contest liability. Further, the Special Referee made appropriate deductions from the attorneys' fees sought (*id.* at 16-17). Finally, as far as defendants made arguments about Signature's liability, Signature defaulted, so it cannot contest liability, and it was proper for the Special Referee to hold it jointly and severally liable for damages (*id.* at 18).

It is well-established that the report of a referee shall be confirmed whenever the findings contained therein are substantially supported by the record (*see e.g. Poster v Poster*, 4 AD3d 145

[1st Dept 2004]; *DiIorio v Gibson & Cushman of New York, Inc.*, 204 AD2d 167 [1st Dept 1994]). Defendants defaulted and cannot contest liability. The Special Referee noted the liquidated damages provision was never described by the parties as a penalty in the Notes. There was no evidence submitted at the inquest that suggested they thought of it as such. Further, the Special Referee noted, the liquidated damages would have been de minimis, had they been paid in a timely fashion. Defendants' choices resulted in the damages piling up.

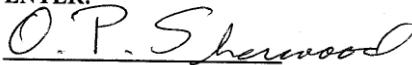
This court finds no reason to disturb the Referee's conclusion that plaintiffs be awarded contractual damages calculated according to the same method used during the referral hearing (amounting to \$881,172.86 as of April 18, 2018), liquidated damages calculated according to the same method used during the referral hearing (\$3,954,000.00 as of April 18, 2018), \$247,720.81 in attorney's fees and \$4,048.84 in costs.

As to the portion of the defendants' cross-motion which seeks to renew their prior cross-motion to vacate the default (Motion Sequence No. 003), defendants contend that the seriousness of their attorney's condition had not previously been shared with the court and that defendants were not aware of the stroke or the default until after it had been granted and the cross-motion to vacate had been denied. Defendants describe the stroke as "debilitating" and state "they only learned of the extent of Kogan's illness after defendants retained new counsel on or about November 28, 2017", and the extent of the illness, combined with the law office failure, is sufficient cause to vacate (Opp at 7).

A motion for leave to renew must be based on evidence establishing "new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221 [e] [2]), as well as "reasonable justification" for not offering these facts previously (CPLR § 2221 [e] [3]; *CLP Leasing Co. v Nessen*, 27 AD3d 291, 292 [1st Dept 2006]). Although, upon a motion for renewal seeking consideration of previously available but unsubmitted evidence, the Movant is generally required to proffer a reasonable excuse for its failure to submit such evidence (*see, Burgos v City of New York*, 294 AD2d 177 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corp.*, 281 AD2d 252 [1st Dept 2001]), emerging precedent in the First Department is that a motion to renew can be granted in the exercise of the court's discretion, even where new evidence was readily available to the moving party on the earlier motion and the only excuse proffered for the failure to furnish such evidence to the court is inadvertence or ignorance or

even when no excuse is offered (*see, Trinidad v Lantiqua*, 2 AD3d 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]). “Nevertheless, “[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation”” (*Allstate Ins. Co. v Liberty Mut. Ins. Co.*, 58 AD3d 727, 728 [2d Dept 2009], quoting *Elder v Elder*, 21 AD3d 1055 [2d Dept 2005]). Here, defendants acknowledge discovering the extent of Kogan’s illness in November of 2017, and “[w]ith the assistance of new counsel, the decision was made to proceed with the case and defer immediately burdening the Court with a motion to renew It was hoped that the motion would be unnecessary because . . . it was reasonably anticipated that the case would settle for an appropriate amount. Unfortunately, it has not worked out that way” (Steinberg aff, NYSCEF Doc. No. 237, para. 46-47). Defendants made a strategic decision not to make this motion when they allegedly discovered new information, and made this cross-motion only when the action did not proceed as desired, in an attempt to get another bite at the apple. Their dilatory conduct is fatal to their motion (*see Matter of Schwartz v New York City Tr. Auth.*, 104 AD2d 370, 373 [2d Dept 1984]).

Accordingly, to the extent it seeks to confirm the Referee’s Report & Recommendation, the motion is granted. The cross-motion to reject the Report & Recommendation and to vacate the default is denied. Plaintiff is hereby ordered to settle judgment on 10 days’ notice to defendants.

ENTER:

 J.S.C.

O. PETER SHERWOOD

Date: April 24, 2020.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input checked="" type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	DENIED
		<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT

APPLICATION:

CHECK IF APPROPRIATE: