Yerushalmy v Resles
2020 NY Slip Op 32925(U)
September 3, 2020
Supreme Court, New York County
Docket Number: 654016/2016
Judge: Marcy Friedman

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

----------X

ORENYERUSHALMY,

Plaintiff,

- v -

OFER RESLES,

Defendant.

----------X

INDEX NO. 654016/2016

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127 were read on this motion to/for SUMMARY JUDGMENT

This action arises from the failure of defendant Ofer Resles to make payments owed to plaintiff Oren Yerushalmy pursuant to a Settlement Agreement entered into by the parties as of August 21, 2013. (See Complaint, ¶ 6 [NYSCEF Doc. No. 25].) The Settlement Agreement resolved claims asserted by Yerushalmy against Resles in three New York actions as well as claims under three Israeli judgments awarded to Yerushalmy against Resles in Israeli arbitration proceedings. (See id., ¶¶ 1-3.)

Plaintiff's complaint pleads two causes of action. The first, for breach of contract, alleges that defendant breached the Settlement Agreement by failing to make payment of the compromise settlement amount of $2,000,000, and that plaintiff is accordingly entitled to collect $5,113,703, the full amount of the judgments that were the subject of the Settlement Agreement, or, at a minimum, the $2,000,000. (Id., ¶¶ 48-57.) The second cause of action seeks "conversion of the Israeli judgments to New York judgments." (Id., ¶¶ 39-47.) Defendant's answer pleads a first counterclaim for breach of the implied covenant of good faith and fair dealing, alleging that

Yerushalmy "act[ed] in bad faith by [ ] interfering with Resles' performance under the Settlement Agreement. . . ." (Answer, ¶ 107.) In particular, the counterclaim alleges that Yerushalmy took control of an option to sell a penthouse that Resles could have exercised in order to raise the funds necessary to satisfy the Settlement Payment; that Yerushalmy never intended to exercise the Option; and that he took it over in order to prevent Resles from satisfying his payment obligations so that Yerushalmy could pursue the full Claimed Amount. (See Answer ¶¶ 90-103, 104-113 [NYSCEF Doc. No. 33].)

Plaintiff argues that, as a result of defendant's breaches of the Settlement Agreement, plaintiff "is entitled to declare the Agreement null and void and may seek his rights and remedies" to recover the amount owed prior to the Settlement Agreement. (Pl.'s Memo. In Supp., at 15 [NYSCEF Doc. No. 85].) Defendant argues that plaintiff may not seek rescission of the Settlement Agreement because he "made an election to enforce the Settlement Agreement" by demanding the right under the Settlement Agreement to market and sell the penthouse. (D.'s Memo. In Opp., at 12 [NYSCEF Doc. No. 125].) Defendant also argues that plaintiff breached the implied covenant of good faith and fair dealing by acting in bad faith in connection with the option to sell the penthouse (id., at 19-22), and that plaintiff cannot recover because he "failed to reasonably mitigate his damages." (Id., at 18.)

Background

The Settlement Agreement specified that the "total outstanding aggregate balance of [Yerushalmy's] Claims" (i.e., the claims in the New York actions and under the Israeli judgments), including principal and interest, was $5,113,703 as of the date of the Settlement Agreement. This amount was defined as the "Claimed Amount." (Settlement Agreement, Recitals, C [NYSCEF Doc. No. 91].) The Settlement Agreement provided that "[i]n settlement

of all of the Claims, Resles shall pay to Yerushalmy, the sum of TWO MILLION and 00/100 DOLLARS, ($2,000,000.00) (the 'Settlement Payment')," with interest of five percent per annum. (Id., § 1.1 [a].) The Settlement Payment was payable in four equal installments of $500,000, due on August 14, 2014, 2015, 2016, and 2017, with a fifth installment for the balance due on August 14, 2018. (Id., § 1.1 [a] [i] - [v].) The Settlement Agreement afforded Resles the option to defer the first payment for a maximum of 12 months to August 14, 2015. (Id., § 1.1 [b].)

With respect to remedies upon default, the Settlement Agreement categorically stated that, upon Resles' failure to make any payment after the prescribed cure period, the Settlement Payment shall be "null and void," and Yerushalmy shall have the right to seek the entire Claimed Amount less any payments made. (Id., § 1.1 [c].) Settlement Agreement § 1.1 (c) thus provided:

> "If any payment required to be made by Resles in accordance with the terms hereof is not made within ninety (90) days of its due date, then in such event Yerushalmy shall have all the rights and remedies set forth in Article V hereof without any additional notice from Yerushalmy of the default and without any additional right to cure. Except as otherwise set forth herein, in the event of a default by Resles for failure to timely make any of the payments set forth herein, beyond the expiration of any applicable cure period, the settlement of the Claims for the Settlement Payment shall be null and void and Yerushalmy shall be entitled to seek his rights and remedies with respect to the remaining Claimed Amount as the case may be in case of reduction in accordance with the language in 1.1(d) hereof."[1]

[1] The reference to Article V appears to be in error, as that Article provides that Yerushalmy and Resles shall be responsible for the expenses incurred by each of them in the negotiation and preparation of the Settlement Agreement and the "consummation of the transaction described [t]herein."

Settlement Agreement § 1.1 (d) provides that upon a default by Resles in making any of the installment payments required by § 1.1 (a) beyond the expiration of the cure period, "Resles shall be entitled to a credit against the Claimed Amount for any payments made in accordance with Section 1.1(a)" on the terms set forth in § 1.1 (d).

In addition, as recited in the Settlement Agreement, SNY Capital Group Inc. (SNY), a company affiliated with Resles, owned an option to sell a penthouse rented by SNY. (Id., § 1.2 [a] [i], [iv].) The Settlement Agreement granted SNY the right to exercise the Option on condition that the net proceeds of the sale "first be paid to Yerushalmy and applied to the total Settlement Amount." (Id., § 1.2 [a] [i].) The Settlement Agreement further granted Yerushalmy the right, upon a default by Resles in payment beyond the expiration of any cure period, to cause SNY to exercise the Option in order to raise the funds necessary to satisfy the Settlement Payment. (Id., § 1.2 [d] [i].) Settlement Agreement § 1.2 (d) (i) provides, in relevant part:

> "Upon a default by Resles hereunder beyond the expiration of any applicable cure period, the Option Letter (hereinafter defined)[2] shall, upon receipt of written demand therefor from Yerushalmy, be released from escrow to Yerushalmy and in such event Yerushalmy will be permitted to market and sell PHF to a bona fide third party; provided, however, that any third party shall be required to deliver a deposit of ten percent (10%) of the purchase price upon the execution of the contract and such transaction will provide that said third party will not be afforded a mortgage contingency in an amount greater than fifty percent (50%) of the purchase price ('Qualified Third Party'). Following a default by Resles beyond the expiration of any applicable cure period, SNY hereby gives and grants to Yerushalmy, the right to take any action in connection with the exercise of the Option and sale of PHF as Yerushalmy deems reasonably appropriate. . . ."

The provisions of the Settlement Agreement regarding the Option also required Yerushalmy, if he "desire[d] to accept any offer" of sale, to afford Resles the opportunity to meet the terms of the offer. (Settlement Agreement, § 1.2 [d] [ii].) The Settlement Agreement further provided:

> "Only upon Resles' refusal or waiver of his right to exercise the Yerushalmy Offer, or immediately and automatically upon the

[2] Settlement Agreement § 2.2 (i) defined the Option Letter as "[a] letter from SNY to Townhouse Management exercising the Option. . . ." The Option Letter prepared for purposes of the Settlement Agreement was a letter addressed by SNY to the owner of the penthouse stating that "we are hereby exercising our option to purchase the Apartment," and that the down payment was being delivered. (NYSCEF Doc. No. 122.)

> expiration of the Resles Refusal period, and only upon Yerushalmy's receipt from a Qualified Third Party of the deposit that is at least equal to the deposit that SNY is required to deliver in accordance with the terms of the Lease in order to exercise the Option, but in no event less than ten percent (10%) of the purchase price set forth in the Yerushalmy Offer, Yerushalmy shall cause SNY to exercise the Option by sending the Option Letter to the landlord under the Lease, together with any deposit that may be required by the Lease (which deposit shall be Yerushalmy's obligation) and Yerushalmy shall be entitled to sell or flip the purchase agreement for PHF in accordance with the terms hereof . . . ."

(Settlement Agreement, §1.2 [d] [ii].) In the event of the sale of the penthouse pursuant to Yerushalmy's direction to SNY to exercise the Option, the net proceeds of the sale were to be distributed as follows:

> "first, an additional $1,000,000 to Yerushalmy for his additional work, in connection with the Yerushalmy Sale;
> second, to the balance of Settlement Payment then due and owing; and
> thereafter, the balance, if any, to SNY or SNY's designee, pursuant to instructions to be provided by SNY.
>
> Notwithstanding anything herein to the contrary, upon the payment to Yerushalmy of the sums set forth in Section 1.2(d)(iii) the Claimed Amount and the Settlement Payment shall be deemed satisfied. . . ."

(Id., § 1.2 [d] [iii].)

In sum, the Settlement Agreement afforded Yerushalmy two remedies from which to choose upon Resles' failure to make any payment after the prescribed cure period. The first remedy authorized Yerushalmy to treat "the settlement of the Claims for the Settlement Payment" as "null and void," and "to seek his rights and remedies with respect to the remaining Claimed Amount. . . ." (Settlement Agreement, § 1.1 [c].) The second remedy was to cause SNY to exercise the Option to purchase the penthouse so as to permit Yerushalmy "to market

and sell [the penthouse] to a bona fide third party. . . .” and to satisfy the Settlement Payment. (Id., § 1.2 [d] [i].)

It is undisputed that Resles initially deferred the first payment due under the Settlement Agreement to August 14, 2015 and then failed to make any payment of the Settlement Amount. (Joint Statement of Material Facts, ¶¶ 23-25 [NYSCEF Doc. No. 111].) It is further undisputed that Yerushalmy made a written demand, dated January 12, 2016, for the Option Letter (NYSCEF Doc. No. 92), and that Resles did not provide the Option Letter at that time. (See D.’s Memo. In Opp., at 21-22.) Yerushalmy then made a second written demand for the Option Letter, dated April 18, 2016 (NYSCEF Doc. No. 93). The Option Letter was not provided until May 2016. (D.’s Memo. In Opp., at 22.) Yerushalmy claims that Resles caused the loss of the Option by withholding the Option Letter for five months after the first demand. (Pl.’s Memo. In Reply, at 5 [NYSCEF Doc. No. 126].) Resles does not explain the delay, but claims that Yerushalmy did not need the letter to begin marketing the penthouse. (D.’s Memo. In Opp., at 21.) Resles also claims that Yerushalmy relied exclusively upon him to negotiate with brokers on Yerushalmy’s behalf, and that, despite Resles’ requests to Yerushalmy that he assist in speaking to brokers and arranging the terms of engagement, Yerushalmy failed to do so. (Resles Aff., ¶¶ 39, 40 [NYSCEF Doc. No. 114].) Yerushalmy engaged a broker on August 15, 2016. (Joint Statement of Material Facts, ¶ 31.) The Option expired, unexercised, on August 31, 2016. (Id., ¶ 32.)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49

NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) "[I]ssue-finding, rather than issue-determination, is key." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010].)

It is further settled that a court must read a contract as a whole and construe it in a manner that gives meaning to each provision "so as not to render any provision 'meaningless or without force or effect.'" (Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc., 30 NY3d 572, 581 [2017].)

As a threshold matter, the court holds that Yerushalmy's right to seek the Claimed Amount is a remedy for breach under the Settlement Agreement. Yerushalmy asserts that "upon [Resles'] many breaches and non-payments, Plaintiff is entitled to declare the Agreement null and void and may seek his rights and remedies with respect to the Claimed Amount." (P.'s Memo. In Supp., at 15.) This argument ignores that Settlement Agreement § 1.1 (c) provides that in the event of Resles' default, "the settlement of the Claims for the Settlement Payment shall be null and void and Yerushalmy shall be entitled to seek his rights and remedies with respect to the remaining Claimed Amount. . . ." (emphasis supplied.) The Settlement Agreement does not give Yerushalmy the right to declare the entire Settlement Agreement null and void. Rather, it permits him, upon Resles' default, to seek the Claimed Amount ($5,113,703), as opposed to the lower Settlement Payment ($2,000,000).

Election of Remedies

The court rejects Resles' contention that Yerushalmy is barred from seeking the Claimed Amount, on the ground that Yerushalmy's demand for the Option Letter was an "election of remedies" and, in particular, an election to pursue the Settlement Payment. (D.'s Memo. In Opp., at 1, 11-17.) Under Settlement Agreement § 1.2 (d) (ii), Yerushalmy had the right, but not the obligation, to direct SNY to exercise of the Option in order to raise the funds necessary to satisfy the Settlement Payment. Pursuant to the terms of Settlement Agreement § 1.2 (d) (i), Yerushalmy initiated the process by which he would have had the right to direct SNY to exercise the Option. He did not, however, ultimately exercise that right. Resles cites no legal authority that the mere request by Yerushalmy for the Option Letter—a preliminary step in directing the exercise of the Option—could serve to effect an election of remedies. Moreover, Resles does not, and cannot, point to any provision of the Settlement Agreement that required Yerushalmy to avail himself of the Option remedy. The court concludes that the Settlement Agreement afforded Yerushalmy the discretion to decide whether to exercise the right to direct SNY to exercise the Option and to accept the Settlement Payment, pursuant to Settlement Agreement § 1.2 (d), or to pursue the Claimed Amount, pursuant to the Settlement Agreement § 1.1 (c).[3]

The court rejects Resles' further contention that Yerushalmy elected the remedy of enforcement of the Settlement Agreement at the time he initiated this litigation by filing two separate motions for summary judgment in lieu of complaint—the first (Index No. 654016/16 [NYSCEF Doc. No. 2]) in which, according to Resles, "Yerushalmy sought to enforce the terms of the Settlement Agreement and sought recovery on [i.e., of] the Settlement Amount" (D.'s

[3] As Resles acknowledges, the penthouse was in effect "collateral" for Resles' obligation to make the Settlement Payment. (See D.'s Memo. In Opp., at 4, 15.) Under the alternatives provided by the Settlement Agreement, Resles could avail himself of the protection of the collateral and accept the lower Settlement Payment, or risk the difficulties of enforcement of a judgment pursuant to CPLR Article 52 and pursue the larger Claimed Amount.

Memo. In Opp., at 9, 12); and the second (Index No. 656096/16, Notice of Motion [NYSCEF Doc. No. 2]) in which Yerushalmy sought conversion of the Israeli judgments into New York judgments.

In the first motion for summary judgment in lieu of complaint, Yerushalmy in fact moved for judgment not for the $2,000,000 Settlement Amount but for $5,113,703—the full amount of the Claimed Payment. (654016/16, Notice of Motion [NYSCEF Doc. No. 2].) In seeking this amount, Yerushalmy at one point asserted that in the event of Resles' default in making any timely payment "the Agreement would be deemed null and void, and Yerushalmy would be entitled to recover the full $5,113,703." (654016/16, Memo. In Supp., at 3 [NYSCEF Doc. No. 6].) He repeatedly, however, also took the position that the Settlement Agreement is an instrument for the payment of money only and that he is entitled to the $5,113,703 under that Agreement. (See id., at 5; Memo. In Reply, at 5 [NYSCEF Doc. No. 20].) At the oral argument of the motions for summary judgment in lieu of complaint, his counsel categorically stated that "[t]he settlement agreement specifically gives us the right to do either. It says you pursue the 2 million on the settlement or you can go and seek the 5.1 judgment amount as mentioned before . . . [¶] My point of bringing this up is we have never said we were rescinding anything, and I don't want the Court to be unclear as to the process." (654016/16, May 1, 2017 Transcript, at 16 NYSCEF Doc. No. 34].)[4]

[4] Contrary to Resles' contention, Yerushalmy did not seek only the Settlement Payment in the first motion for summary judgment in lieu of complaint. As noted above, he expressly moved for judgment for the $5,113,703 Claimed Amount. He did state at one point in his reply on the first motion for summary judgment in lieu of complaint: "This motion seeks recovery only of the $2 million debt—based on a NY Judgment—that is the subject of the Agreement." (Memo. In Reply, at 3 [NYSCEF Doc. No. 20].) This statement is inconsistent with his repeated claim that the Settlement Agreement was an instrument for the payment of money only, which entitled him to recovery of the full $5,113,703. Moreover, elsewhere in the reply, Yerushalmy argued that "[e]ven assuming, arguendo, that Yerushalmy was not automatically entitled to the full Claimed Amount under the Agreement, it is undisputed that he is, at the very least, entitled to $2,000,000 based on defendant's breach of the Agreement's explicit terms. (654016/16, P.'s Memo. In Reply, at 5 [NYSCEF Doc. No. 20].) Even then, he did not limit his

Moreover, as held above, Yerushalmy's right to seek the Claimed Amount is a remedy afforded him under the Settlement Agreement. He is therefore pursuing the remedy that Resles argues he has elected—enforcement of the Settlement Agreement.

Breach of the Implied Covenant Counterclaim

The court further holds that Resles fails at this juncture to raise a triable issue of fact on his counterclaim that Yerushalmy breached the implied covenant of good faith and fair dealing. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." (511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002], citing Smith v General Acc. Ins. Co., 91 NY2d 648, 652-653 [1998] [other internal citations omitted].) "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" (Id., at 153, quoting Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995].) "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included." (511 West 232nd Owners Corp., 98 NY2d at 153 [internal quotation marks and citations omitted].) Resles' counterclaim for breach of the implied covenant is at issue here because, in seeking the Claimed Amount, Resles pursues a remedy for breach of the Settlement Agreement.

By decision and order on the record on May 1, 2017, the transcript of which was so ordered on June 22, 2017, this court denied plaintiff's motions for summary judgment in lieu of complaint and converted the motions to a plenary action, directing service of the instant complaint. The decision reasoned: "Defendant has asserted a defense under the settlement

claim to the $2,000,000 but, rather, reserved his right to pursue the remaining amount of the Claimed Amount "[c]onsistent with the terms of the Agreement." (Id., at 5, n 1.)

agreement as to whether plaintiff frustrated satisfaction of the settlement payment by exercising the option to market the penthouse and then allegedly failing to do so. An issue thus exists as to what rights plaintiff retains to enforce his claims against defendant." (Transcript, at 28-29 [NYSCEF Doc. No. 34].) The Appellate Decision affirmed this decision. (159 AD3d 552 [1st Dept 2018].) The Court noted that the motion for summary judgment sought to convert Israeli judgments; that these judgments were included among the claims that were settled; and that this court had found "an issue of fact as to whether plaintiff properly exercised the option and therefore as to the rights he retained to enforce his claims." (Id.) The Court then held: "We find that since the Israeli judgments are included in the settlement agreement, and an issue of fact exists as to plaintiff's right under the agreement to enforce his claims, the motion court correctly denied the motion addressed to the judgments." (Id., at 552-553.)

In a subsequent decision on the record on February 8, 2018, the transcript of which was so ordered on April 19, 2018, this court denied Yerushalmy's motion to dismiss Resles' first counterclaim for breach of the covenant of good faith and fair dealing. The decision reasoned that the prior decision determining the motions for summary judgment in lieu of complaint held that "a triable issue existed as to what rights plaintiff retained under the settlement agreement between the parties, including whether plaintiff frustrated payment of the Settlement Payment provided for in paragraph 1.2 iii of the settlement agreement. [¶] The allegations underlying this defense are also at issue in the counterclaim for breach of the implied covenant. The motion to dismiss that counterclaim will accordingly be denied." (Transcript, at 20 [NYSCEF Doc. No. 68].)

On this post-discovery motion by Yerushalmy for summary judgment on the complaint, the court holds, in contrast, that Resles fails to raise a triable issue of fact on his counterclaim for

breach of the implied covenant. As noted above (supra, at 2), this counterclaim alleges that Yerushalmy took control of an option to sell the penthouse that he never intended to exercise, in order to prevent Resles from raising the funds to satisfy his payment obligation under the Settlement Agreement and to enable Yerushalmy to pursue the full Claimed Amount rather than the lesser Settlement Payment.

Resles' claim that Yerushalmy acted in bad faith by taking control of the Option rests largely on his claim that Yerushalmy delayed in marketing the penthouse. This claim rests, in turn, on the assertion that although Yerushalmy made a demand by letter dated January 12, 2016 (NYSCEF Doc. No. 92) for the Option Letter, he did not arrange for a broker to market the penthouse until August 15, 2016, just two weeks before the option to purchase the penthouse expired on August 31, 2016. (Resles Aff. In Opp., ¶¶ 45-46.) Resles does not dispute that he did not produce the Option Letter in response to the January 2016 demand; that Yerushalmy made a second demand for the Option Letter dated April 18, 2016 (NYSCEF Doc. No. 93); and that it was not until May 2016 that Resles finally produced the Option Letter. Rather, Resles contends that Yerushalmy did not need the Option Letter to market the penthouse. (D.'s Memo. In Opp., at 9, 21-22.)

This argument ignores the express term of § 1.2 (d) (i) of the Settlement Agreement, which provides: "Upon a default by Resles hereunder beyond the expiration of any applicable cure period, the Option Letter (hereinafter defined) shall, upon receipt of written demand therefor from Yerushalmy, be released from escrow to Yerushalmy and in such event Yerushalmy will be permitted to market and sell PHF to a bona fide third party. . . ." (emphasis supplied).

In contending that Yerushalmy impermissibly delayed in marketing the penthouse apartment, Resles also argues that Yerushalmy relied on Resles to negotiate with brokers on his behalf, but denied Resles' demands that Yerushalmy speak with the brokers directly and asked Resles to make unreasonable demands on the brokers with respect to the timing of contracting and the amount of the commission. (Resles Aff., ¶¶ 40-41.) Resles' vague citations to the emails between him and Yerushalmy and to Yerushalmy's deposition testimony do not support Resles' contentions. (See id.) Resles does not identify any specific unreasonable demand or any instance in which Yerushalmy's request hampered his efforts to engage a broker on Yerushalmy's behalf. Moreover, while Resles complains that Yerushalmy allowed the Option to expire, Resles fails to explain why he did not seek an extension of the Option—a possible "event" contemplated by Settlement Agreement § 1.2 (e).

The court has considered Resles' remaining contentions regarding the implied covenant counterclaim and finds them to be without merit.

Duty to Mitigate

The court is also unpersuaded by Resles' contention that Yerushalmy had a duty to mitigate his damages (See D.'s Memo. In Opp., at 17-19.) Resles cites no authority that such a duty applies to breach of a settlement agreement.

Domestication of Israeli Judgments

The court accordingly turns to the branch of Yerushalmy's motion for summary judgment domesticating the Israeli judgments. Yerushalmy expressly "seeks the domestication of the Israeli Judgments, in the amount of $5,113,703.00, plus interest from the date of the Settlement Agreement." (P.'s Memo. In Supp., at 21; P.'s Memo. In Reply, at 13.) The court is unpersuaded by Yerushalmy's contention that the Israeli judgments must be domesticated in

order to enforce his right to recovery of the Claimed Amount pursuant to the Settlement Agreement. Recital C of the Settlement Agreement limits the Claimed Amount to $5,113,703. It is noted that even if the Israeli judgments were to be domesticated, they would therefore be enforceable only up to the Claimed Amount. Yerushalmy will accordingly be awarded judgment in the Claimed Amount of $5,113,703, plus interest as set forth below.

Interest

CPLR 5001 (a) provides for the award of prejudgment interest as a matter of right "upon a sum awarded because of a breach of performance of a contract." CPLR 5001 (b) provides that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed . . . ." As Yerushalmy's right to seek the Claimed Amount is a remedy for breach under the Settlement Agreement, interest must be awarded from the date of breach. Yerushalmy's request for interest from the date of the Settlement Agreement (P.'s Memo. In Supp., at 21) is clearly not a request for interest from the earliest date the cause of action existed—that is, from the date of the breach. It is undisputed that Resles exercised his option to defer his first payment under the Settlement Agreement, and therefore that the first breach occurred upon his failure to make the August 14, 2015 payment. As Settlement Agreement § 1.1 (c) provides for a 90-day cure period, the earliest ascertainable date Yerushalmy's cause of action existed is 90 days after Resles failed to make the August 14, 2015 payment, which is November 12, 2015. Yerushalmy will accordingly be awarded interest at the statutory rate from November 12, 2015.[5]

It is accordingly hereby ORDERED that plaintiff Oren Yerushalmy's motion for summary judgment is granted to the following extent:

[5] As Yerushalmy makes no request on this motion for attorney's fees, such fees will not be considered.

It is ORDERED that judgment is granted in favor of plaintiff Oren Yerushalmy and against defendant Ofer Resles in the sum of $5,113,703, with interest at the statutory rate from November 12, 2015 until the date of entry of judgment, and thereafter interest at the statutory rate, together with costs and disbursements as taxed by the Clerk; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that plaintiff Oren Yerushalmy's second cause of action for conversion of the Israeli judgments to New York judgments is dismissed with prejudice; and it is further

ORDERED that defendant Ofer Resles' counterclaim for breach of the implied covenant of good faith and fair dealing is dismissed with prejudice.

This constitutes the decision and order of the court.

9/3/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE