SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8

255 BUTLER ASSOCIATES LLC,

Plaintiff, Decision and order

- against - Index No. 511560/15

255 BUTLER, LLC, ARIEL AKKAD, NATHAN AKKAD, SOLOMON AKKAD and BENJAMIN AKKAD,

Defendants, March 1, 2023

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #34

The defendants have moved pursuant to CPLR §2221 seeking to reargue a portion of a decision and order dated December 5, 2022 which awarded judgement to the plaintiff following a bench trial. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The facts and conclusions of law are adequately presented in the prior decision and need not be repeated.

The defendants argue that while the court rejected all of defendant's defenses on the grounds they were all causation defenses and were barred by the decision of the Appellate Division striking the answer, there were two defenses which were not causation defenses which the court failed to consider. Those defenses are the fact the plaintiff did not sufficiently establish the necessary funding to prepare for the WeWork sublease and the fact the plaintiff failed to sufficiently establish the Wework sublease would have been effectuated under

the WeWork escrow agreement. The defendants argue these issues, which they term "damages defenses" are distinct from causation defenses and that plaintiff was required to prove these issues by a reasonable degree of "certainty" (see, Affidavit in Support, ¶5 [NYSCEF Doc. No. 1135]). The defendants argue that "resolution of both of these Issues in favor of Tenant was-even after the Strike Decision-necessary to support a money judgment in Tenant's favor" (see, id., ¶4 [NYSCEF Doc. No. 1135]). The defendant's argue these two issues are different than the other causation issues which the defendants could not litigate because these two issues provide the factual underpinnings whether the plaintiff presented competent evidence to a reasonable degree of certainty that the WeWork lease would have happened. The defendants stress the distinction between the two sets of issues is critical since the issues raised in the prior motion were all based upon defendants conduct while the two discrete issues raised here do not involve defendant's conduct at all. Consequently, without establishing these two predicate factual necessities the plaintiff's expert Mark Dunec had no basis upon which to conclude the plaintiff suffered any damages. Therefore, the motion for reargument should be granted and upon such reargument the court's decision should be changed accordingly.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

In the prior decision the court stressed that causation and any causal link between defendant's conduct and damages sustained could not be raised at trial. Consequently, the court noted that "the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiffs" (Jihun Kim v. S & M Cateres Inc., 136 AD3d 755, 24 NYS3d 743 [2d Dept., 2016]). The damages defenses presented here do not relate to the extent of damages sustained but whether, in fact, damages were sustained at all. However, upon an inquest following a default, the court is only required to engage in two inquiries, namely, "determining the proper rule for calculating damages on such a claim, and assessing plaintiff's evidence supporting the damages to be determined under this rule" (see, Credit Lyonnais Securities (USA) v. Alcantara, 183 F3d 151 [2d Cir. 1999]). It is improper to require the plaintiff to demonstrate its entitlement to damages since the plaintiff's entitlement to damages has been secured by the default imposed upon the defendants. Consequently, the only issue to which the defendant's may present any evidence is the extent of the damages.

Indeed, the damages defenses presented are really causation issues. Essentially, the defendants argue they cannot be liable for any damages because, even if the committed improper behavior in some way, they did not cause any of the damages sustained by the plaintiff. Rather, they assert, the plaintiff lacked the ability to effectuate the WeWork lease and in turn the plaintiff himself, or circumstances, or the realities of the deal are the true causes of damages sustained. That argument is nothing more than another way of arguing the defendants did not cause any damages sustained. The uniqueness of these damages defenses are that they do not concern the defendant's conduct in any active and improper manner. While that may be true they do not in any way undermine the factual conclusions already reached, which cannot be litigated, that the defendants, and only the defendants, caused the damages sustained. The case of LD Acquisition Company 9 LLC v. TSH Trade Group LLC, 211 AD3d 928, _NYS3d_ [2d Dept., 2022] is instructive. In that case the plaintiff sued the defendant alleging the defendant interfered with plaintiff's easement rights. The defendant defaulted and an inquest on damages was held. The referee held that "the plaintiff failed to establish its entitlement to any damages because it did not establish that the breach of the parties' agreement was the cause of its purported damages" (id). The Appellate Division reversed that determination holding that "the

inquest court erred in considering the question of whether the defendants caused the damages sustained by the plaintiff" (id). Further, concerning some uncertainty regarding lost profits the court held, citing earlier authority, that "when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A [party] violating [a] contract should not be permitted entirely to escape liability because the amount of the damages which [the party] has caused is uncertain" (id).

Consequently, the defendants are not permitted to present any evidence tending to defeat the plaintiff's causes of action (Whittemore v. Yeo, 117 AD3d 544, 986 NYS2d 69 [1st Dept., 2014]). It does not matter if the evidence is in the form of the defendant attempting to deny his actions caused the damage or attempting to assert some other intervening factor really caused the damage. In either case the upshot of such evidence is to escape liability on the grounds the defendants did not "cause" the damages sustained. As noted, the defendants are precluded from making such arguments.

Indeed, consider the implications of defendant's contentions. According to the defendants a defaulting party would not be permitted to argue they did not cause the damages (see, Castaldini v. Walsh, 186 AD3d 1193, 127 NYS2d 917 [2d

Dept., 2020]), however, they would be permitted to present evidence the damages were caused in some other manner, perhaps by the plaintiff himself or in some other fashion. Those arguments, if accepted, would permit a defaulted defendant to introduce evidence at a damages hearing to defeat the plaintiff's causes of action (see, Suburban Graphics Supply Corporation v. Nagle, 5 AD3d 663, 774 NYS2d 160 [2d Dept., 2004]). As noted repeatedly, a defaulted defendant has no right to argue causation in any manner.

Further, the argument these damages defenses relate to damages and not causation elides the distinction between damages and causation. Thus, in order for an expert to establish lost profits "first, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty" (Kenford Company Inc., v. County of Erie, 67 NY2d 257, 502 NYS2d 131 [1986]). The first prong has been satisfied by the legal conclusion, in the form of a default, that defendants have "caused" the breach. Allowing evidence to be presented in this regard, that some other reason is the cause of the breach, would effectively permit the defendants to once again argue causation. For this very reason, any causation, even those disguised as damages are not permitted where a defendant has defaulted.

Therefore, in every case that has discussed the issue the

defaulted defendant has been permitted to raise issues only concerning "the extent of the damages" (Cerullo LLC v. John D. Rocco Sales Company LLC, 208 AD3d 551, 171 NYS3d 832 [2d Dept., 2022], Gomez v. Big Line Inc., 2020 WL 6742803 [S.D.N.Y. 2020]) and not whether any damages have been sustained in the first place. To entertain such arguments would result in an impermissible attack on causation. In fact, the defendants cite to no cases to support their arguments. Indeed, the only case cited by the defendants in support of this specific argument Bua v. Purcell & Ingrao P.C., 99 AD3d 843, 952 NYS2d 592 [2d Dept., 2012] is not relevant to the questions presented here at all. In that case a defendant brought a motion to dismiss a complaint alleging legal malpractice. The plaintiff had hired the defendants to represent him in the sale of property. The buyer's attorney sought to terminate the contract on the grounds the buyer could not obtain financing. The defendants, attorneys for the seller, informed the seller the buyer sought to cancel the contract and sought a return of the down payment and the seller agreed. However, seven months later the buyer sought to revive the contract and when the seller refused the buyer commenced an action for specific performance and filed a notice of pendency. The seller prevailed in that action and then commenced an action against his attorneys for failing to unequivocally terminate the contract precipitating the specific performance action. In

deciding the motion to dismiss, the court noted that the plaintiff/seller was required to plead ascertainable damages that resulted from an attorney's malpractice and that "conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action" (id). The court then explained that the damaged alleged "consist of expenses incurred in connection with the action for specific performance, potential profits that were not realized because of the effect of the notice of pendency, and costs and lost profits incurred by virtue of the buyer's refusal to vacate the property. The crux of the plaintiff's contention is that the buyer would not have chosen to commence the action for specific performance and would have voluntarily vacated the premises if the defendants had taken the additional enumerated steps to accomplish the termination of the contract of sale. The plaintiff's contention rests on speculation as to how the buyer would have responded to these requests. In addition, the damages cited by the plaintiff all stem from the buyer's independent decision to remain on the premises and commence the action for specific performance. It again requires speculation to conclude that the buyer would have refrained from taking these actions if the additional steps were attempted. Accordingly, the plaintiff's contention that the alleged malpractice resulted in legally cognizable damages is conclusory

and speculative inasmuch as it is premised on decisions that were within the sole discretion of the buyer" (id).

That case does not control the facts of this case because in this case there is no speculation or conjecture that the defendants caused the damages sustained. The speculation raised concerning the damages defenses are nothing more than a veiled attempt to reargue, once again, causation.

In any event, even if such distinction between causation issues and damages issues were plausible and the defendants would be permitted to raise such damages defenses at an inquest they have still failed to present any basis to reconsider the previous determination.

The defendants base their argument upon the fact the plaintiff has failed to establish damages by a reasonable degree of certainty due to the plaintiff's inability to obtain financing or to secure the WeWork lease from escrow. Thus, the defendants insist that Mr. Dunec's testimony was not reasonably certain because these damages issues were never proven with any certainty. To be sure, Mr. Dunec's expert testimony was based upon the reasonable certainty of his conclusions regarding the damages sustained. Mr. Dunec explained the methods he used to arrive at those conclusions and the court credited his testimony. The damages defenses raised here were mere factual issues that, according to the defendants, were necessary pre-conditions

allowing Mr. Dunec to then offer his expert testimony. However, even if true, those damages defenses did not require or demand the use of any expert testimony. Whether the plaintiff satisfied any evidentiary burden establishing he maintained the ability to finance the project and would have secured the lease from escrow are matters that required consideration by the trier of fact, they were not matters the expert was required or expected to support. Those matters did not require any special expert testimony (see, Kulak v. Nationwide Mutual Insurance Company, 40 NY2d 140, 386 NYS2d 87 [1976]) holding that absent inability or incompetence "the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper" (id). Therefore, the standard applied to the damages defenses is not the "certainty" that is required of expert testimony but rather a mere preponderance of the evidence which is the standard of proof in a civil action.

Thus, an examination of the trial testimony is necessary.

It is true that Mr. Dunec did not offer any opinion about these two damages defenses and asserted they were beyond his area of expertise (see, Trial Transcript, June 29, 2022, pages 36-39). As noted, those matters did not require any expert testimony. In any event, James Wacht testified on behalf of the plaintiff. On cross-examination he was asked whether the plaintiff, Sam Boymelgreen had the wherewithal to finance the WeWork lease.

Specifically, he was asked "so what Mr. Boymelgreen had to have been counting on for this deal to make sense ultimately, was that in two years time, there was going to be a take-out lender, who was comfortable with the overall and was going to take out the construction lender and extend permanent financing, right?" (see, Trial Transcript, June 27, 2022, page 12). That question was followed up with another question: "There's no certainty any of those things would happen, right?" (see, Trial Transcript, June 27, 2022, page 13). Mr. Wacht responded "I would say it's pretty certain" (id) and maintained that opinion in numerous follow-up questions.

Further, Josh Sommer, a former employee of WeWork testified about the lease in general and specifically concerning the signed WeWork lease that was placed in escrow pending the landlord's approval. Mr. Sommer was asked "were you aware of any impediments that would have prevented the deal from closing?" (see, Trial Transcript, February 24, 2022, page 29) and he responded "just the SNDA" (id). Mr. Sommer was further asked "do you know why that -- why the lease never made it out of escrow?" (id, page 32) and he responded "from what I recall, it was because the Akkads and Sam never came to an agreement with the SNDA" (id). On page 42 he testified "so when the deal went into escrow, in my opinion, it was done" (id).

Moreover, Mr. Boymelgreen testified about many of the issues in this case. Concerning the escrow agreement he was asked whether he expected to complete the deal with WeWork. He testified "Yes. And the reason is because, again, I expected to get the SNDA from the Akkads, and as soon as the SNDA was in place, they were going to give me the letter of credit, as they told me. The base building work, which we had negotiated throughout the lease process, when we had a few minor items left to complete, and they were nothing compared to the -- it was basically done, whatever was there to complete was, you know, we just said okay, let's put those -- you know, let's put those for when we can take this out of escrow when you have the SNDA, we'll just wrap that up. And the loans, I had letters of intent from lenders, and it just meant that once I had the SNDA, I needed to go through that two-month process to close that out. These lenders were very eager" (see, Trial Transcript, February 3, 2022, page 33). Although the testimony concerning the eagerness of the lenders was stuck, the court permitted Mr. Boymelgreen to testify that the lenders were interested in the WeWork deal "because they told me directly and because they sent me terms to get moving on it and because later on, when it was dragging because of this litigation, they were calling me back saying come on, what's going on, let's do this" (id., at page 34).

The testimony noted, as well as additional testimony contained in the record supports the conclusion by a preponderance of the evidence presented that there were no impediments to the WeWork lease and that if not for the landlord's conduct the deal with WeWork would have been finalized.

The defendants argue that the unsatisfied conditions of the escrow agreement itself must govern the facts of this case and since the conditions were never satisfied no testimony stating otherwise can change that reality. However, the only reason the conditions remained unsatisfied was due to defendant's improper conduct, for which they are precluded from asserting any defenses. Concerning the plaintiff's ability to obtain financing the defendants assert that "it was Tenant's burden to demonstrate that it was able to obtain the necessary funds (which is part and parcel of its obligation to demonstrate damages with "reasonable certainty")" (see, Affidavit in Support, ¶28 [NYSCEF Doc. No. 1135]). However, as noted, the plaintiff did not have to establish the ability to obtain financing by anything other than a preponderance of the evidence. Therefore, even if these arguments are considered, the resolution of them depends on whether the plaintiff has established sufficient facts by a preponderance of the evidence.

It is well settled that the burden of persuasion is civil cases is a preponderance of the evidence (Jarrett v. Madifari, 67 AD2d 396, 415 NYS2d 644 [1st Dept., 1979]). This means the plaintiff has demonstrated a more likely or probable account of what has occurred (Nissho-Iwai Co., Ltd. v. M/T Stolt Lion, 719 F2d 34 [2d Cir. 1983]). The plaintiff has surely demonstrated, by the introduction of credible testimony, that but for the actions of the defendant, the plaintiff would have been able to conclude the deal with WeWork. In any event, it cannot be said as a matter of law that such a determination could not have been made by a fair interpretation of the evidence presented (Diaz v. Parsons Properties Inc., 309 AD2d 892, 766 NYS2d 102 [2d Dept., 2003]).

Therefore, based on the foregoing, the defendants have failed to present any argument requiring a re-examination of the prior decision. Consequently, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: March 1, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC