DS 17 W. 24th St. Note Purchaser, LLC v Hag Guyun Lee

2023 NY Slip Op 30771(U)

March 15, 2023

Supreme Court, New York County

Docket Number: Index No. 651470/2020

Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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DS 17 WEST 24TH STREET NOTE PURCHASER, LLC,

Plaintiff,

- v -

HAG GUYUN LEE, EBEN ASCEL CORP.

Defendants.

INDEX NO. 651470/2020

MOTION DATE 03/04/2020

MOTION SEQ. NO. 001

DECISION/ORDER AFTER INQUEST

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 55, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT (DAMAGES AFTER INQUEST).

Plaintiff DS 17 West 24th Street Note Purchaser, LLC's ("Plaintiff") moves for an award of money damages against Defendants Hag Gyun Lee (sued herein as Hag Gyuen Lee) ("Lee") and Eben Ascel Corp. ("Ascel" and collectively "Defendants") based upon personal guarantees ("Guarantees" [NYSCEF 6 and 7]) Defendants entered with Plaintiff's predecessor. The Court granted summary judgment in lieu of complaint (CPLR 3213) as to liability in favor of Plaintiff (NYSCEF 53) and the parties jointly requested a damages inquest on the papers (NYSCEF 63).

Plaintiff seeks damages in the amount of $4,050,322.00 plus interest from April 27, 2021 at the contractually prescribed rate of twenty-four percent (24%) per annum. Plaintiff also seeks costs as well as legal fees at a discounted hourly rate plus a five percent (5%) "contingency success" fee pursuant to a retainer agreement (NYSCEF 65 [Affidavit of Michael Shah], NYSCEF 82 [Reply Affirmation of Jonathan Schwartzman]).

Defendants oppose and argue that: (1) Plaintiff should be equitably estopped from recovering the amount sought because it "improperly inflated" the payoff amount of the Note before this litigation commenced; (2) the contractual default interest rate is "unconscionable;" and (3) the five percent (5%) "contingency success component" of the retainer agreement between Plaintiff and its counsel is not "reasonable" as required by Paragraph 4 of the underlying Note. Defendants do not challenge the authenticity of the Guarantees, raise specific challenges to Plaintiff's calculations, or contest the number of hours worked by Plaintiff's counsel

Based upon the papers submitted, the Court finds that Plaintiff is not equitably estopped from recovery. However, the Court agrees that the "contingency success component" of the retainer is not enforceable against Defendants, who are liable only for "reasonable" attorney's fees under the Note. Additionally, the Court finds that prejudgment interest should be awarded at the contractual default rate (24%) from the date of the breach (October 2, 2019) through the date that summary judgment on liability was entered, December 9, 2020, and then at the statutory rate (9%) thereafter through the date of judgment.

In sum, for the reasons described below, the Court finds that Plaintiff's damages are $2,930,768 plus interest from October 2, 2019 through December 9, 2020 at the contractual default rate of twenty-four percent (24%) per annum; post-decision interest at the statutory rate of nine percent (9%) per annum from December 10, 2020 until the entry of final judgment; and reasonable attorney's fees and costs in the amount of $38,683.00.

BACKGROUND

This case involves Plaintiff's efforts to enforce Defendants' Guarantees of a $7,300,000 loan to non-party Prime Hotel Management LLC ("Borrower") (NYSCEF 3 [Note concerning 17

West 24th Street]). The Note provides that "interest from the date of default or maturity. . .shall be twenty four percent (24%) per annum or the maximum rate allowed by law, whichever is lower. . ." Borrower defaulted on the loan as of July 1, 2016 (NYSCEF 55 [Tr. 11-13]).

In 2018, prior to the commencement of this action, Borrower filed for Chapter 11 bankruptcy protection (*In re Prime Hotel Management LLC,* Bankr. S.D.N.Y. Case No. 18-10221 [the "Bankruptcy"]). Plaintiff filed a Proof of Claim in the Bankruptcy for $11,983,857 {NYSCEF 72) to which Borrower objected (NYSCEF 79). An order confirming Borrower's reorganization was entered on December 18, 2018 (Bankruptcy ECF 77 [NYSCEF 75]). The order provides that any "satisfaction and release shall not release any claims against Hag Gyun Lee and Eben Ascel Corp. as guarantors" (*Id.* at 5). It is undisputed that the relevant property – 17 West 24th Street – was thereafter sold at auction for $9,250,000 (Memorandum in Opposition at 5 [NYSCEF 80]).

Plaintiff commenced this action on March 4, 2020 by motion for summary judgment in lieu of a complaint pursuant to CPLR 3213 to recover on the Guarantees (NYSCEF 1 and 2). Plaintiff's motion sought $6,394,075.84 plus interest at a rate of twenty-four percent (24%) per annum under the terms of the Note in addition to costs and fees, including reasonable attorney's fees to be established at a hearing (Plaintiffs' Moving Memorandum at 5 [NYSCEF 5]). Plaintiff's motion, including damages calculations, were supported by a spreadsheet attached as Exhibit 6 to the Affidavit of Plaintiff's member, Michael Shah (NYSCEF 11), which purports to calculate principal, interest, penalties, and other amounts owed monthly in addition to amounts for real estate taxes and accrued legal fees.

During oral argument (NYSCEF 55) on December 9, 2020, Defendants opposed on the grounds that, among other things, that they did not owe an assessed late fee, real estate taxes, and

other categories of damages (Tr. 18:19:15-19:13). The Court directed that Defendants "have to raise a genuine issue of fact as to the correct number" to contest the amounts sought by Plaintiff (Tr. 22:6-15). The Court rejected Defendants' argument that Plaintiff's claims were waived or otherwise compromised in connection with the Bankruptcy (Tr. 23:10-18, 29:23-19).

Following oral argument, the Court entered an order (NYSCEF 53) granting Plaintiff's motion for summary judgment in lieu of complaint as to liability against Defendants. The Court made clear at the end of oral argument that it was "uncomfortable as to entering a judgment for a specific amount" when there were still "substantive arguments" with respect to damages and that Defendants bore the burden to examine Plaintiff's calculations "line by line. . .to whittle some of those down" (NYSCEF 55 [Tr. 27:11-14]). The Court strongly recommended that parties pursue mediation of damages issues (NYSCEF 55 [Tr. 30:23-31:17]).

Defendants filed a Verified Answer on January 12, 2021 asserting eleven affirmative defenses (NYSCEF 54). On February 9, 2021, the Court entered a Preliminary Conference Order (NYSCEF 59) directing expedited discovery limited to the issue of damages to be completed by March 31, 2021.

On March 31, 2021, new counsel for Defendants wrote to request referral to the Commercial Division ADR Program (NYSCEF 60). On April 1, 2021, counsel for Plaintiff wrote to oppose referral to ADR because, notwithstanding the parties' efforts, a significant impasse with respect to damages remained (NYSCEF 61). On April 9, 2021, the Court entered the parties' stipulation as an order scheduling briefing on the issue of damages, including a "Memorandum of Damages, with supporting documents" (NYSCEF 63).

On April 30, 2021, Plaintiff submitted an updated affidavit of its manager, Michael Shah (NYSCEF 66 ["Shah Inquest Aff."]), as well as the affirmation of its counsel, Jonathan B.

Schwartzman (NYSCEF 67 ["Schwartzman Aff."]) including relevant exhibits. However, Plaintiff did not submit a memorandum of law in support of their inquest application.

In its inquest application, Plaintiff seeks a judgment in the amount of $2,930,768.00, plus interest at the contractual rate of 24% from October 2, 2019 for a total of $4,050,322.00 as of April 27, 2021 (Schwartzman Aff. ¶4; Shah Inquest Aff. ¶¶12-14). Plaintiffs again submit – and Defendants do not dispute the veracity of – Lee's Unconditional Guaranty (Schwartzman Aff. Ex. 1); Ascel's Unconditional Guaranty (Schwartzman Aff. Ex. 2); the Note pertaining to 17 West 24th Street, New York, New York (Schwartzman Aff. Ex. 3); and the Assignment of Loan Documents (including the Guaranties) to Plaintiff (Schwartzman Aff. Ex. 4).

To avoid certain disputes raised by Defendants in opposition to the motion for summary judgment, Plaintiffs credited ten (10) months of interest due to delays occasioned by the Bankruptcy ($1,544,974) and the assessed late fees ($736,914.00) (Shah Inquest Aff. ¶¶12-13). Plaintiff also seeks attorneys' fees and costs in the amount of $18,393.00 plus five percent (5%) of the judgment pursuant to a blended-fee retainer agreement with counsel and as supported by monthly invoices (Schwartzman Aff. ¶¶8-9 and Ex. 11). Alternatively, in reply, counsel requests $38,683 in attorneys' fees, costs and expenses based on a full hourly rate should the Court find the contingency provision of the retainer unreasonable (Schwartzman Reply Aff. ¶28).

Defendants do not dispute that as of October 2, 2019, the outstanding principal owed was $7,300,000 (Affidavit of Hag Gyun Lee ¶28 [NYSCEF 78]). Instead, Defendants raise two arguments in opposition. First, that Plaintiff's claims should be barred or reduced on equitable grounds based on Plaintiff's alleged bad faith in seeking an "inflated" payoff amount thus precluding a payoff (Opposition Brief at 1-5 [NYSCEF 80]) and second, the pertinent

"contingency success component" contained in Plaintiffs' counsel's retainer is unenforceable against Defendants (*Id.* at 6-8).

DISCUSSION

The inquest mutually requested by the parties (NYSCEF 63) may be completed on the papers (22 NYCRR 202.46[b]). The first prong of Defendants' equitable argument is easily dispensed with because there was no tender, let alone an unconditional tender, of any payment and Plaintiff is therefore not equitably estopped from seeking damages and interest (*Cohen v Transcontinental Ins. Co.*, 262 AD2d 189, 190 [1st Dept 1999]). For instance, in *Koch v. Greenberg,* the primary case cited by Defendants, the defendant tendered a check seeking to refund the purchase price of the offending product without any conditions (14 F Supp 3d 247, 263 [SDNY 2014], *affd*, 626 Fed Appx 335 [2d Cir 2015]). No such tender exists here – only a dispute as to the amount owed. Specifically, Defendants assert that "the payoff statement provided by Plaintiff on November 27, 2017 did not reflect the proper amount to which Plaintiff was lawfully entitled to be paid to satisfy the Note and, instead, was improperly inflated" (Defendants' Brief at 5 [NYSCEF 80]). Defendants did not, however, tender any payment they claimed to be the correct amount.

The second component of Defendant's equity argument is also unavailing. The primary case cited by Defendants for the proposition that the Court can equitably reduce contractual interest denied that relief because no "wrongful conduct" was found (*4 B's Realty 1530 CR39, LLC v Toscano*, 818 F Supp 2d 654, 660 [EDNY 2011]). New York courts have enforced contractual interest rates "considerably higher than the 9% rate applied to judgments" in the mortgage foreclosure context (*Mar. Mgt., Inc. v Seco Mgt., Inc.,* 176 AD2d 252, 254 [2d Dept 1991], *affd,* 80 NY2d 886 [1992]).

Defendants have "failed to present any evidence rebutting" Plaintiff's assertions as to damages and the Court awards pre-decision interest at the contractually agreed default rate (*Korea Resolution and Collection Corp. v Hyuk Kee Yoo,* 170 AD3d 485, 486 [1st Dept 2019] [enforcing Korean judgment at the rate of 24%]). Defendants have offered no reason why damages cannot be ascertained from the papers alone consistent with the stipulated order (*Glasser v Am. Homes of Clifton Park Div. of Am. Homes, Inc.*, 144 AD2d 890, 891 [3d Dept 1988] *citing* 22 NYCRR 202.46).

In the context of a mortgage foreclosure, "the recovery of interest is within the court's discretion. . . governed by the particular facts in each case" (*Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002] [collecting cases] [reducing post-report interest rate). For instance, where "unusual circumstances" are present, the Court may reduce "post-summary-judgment interest" (*Yagamo Acquisitions, LLC v Baco Dev. 102 St. Inc.*, 278 AD2d 134, 134 [1st Dept 2000]). In this case, for a variety of reasons, there was an extended delay between the decision on liability and the conclusion of the inquest on damages. In those circumstances, the Court finds it would not be appropriate to apply the high contractual default rate of interest during that period of delay. Instead, the Court holds that interest shall be calculated at the contractual rate of twenty-four percent (24%) only from October 2, 2019 through December 9, 2020 and thereafter at the statutory rate of nine percent (9%).

Plaintiffs also seek an award of attorneys' fees. The Note underlying the Guarantees provides for the recovery of "reasonable attorney's fees and costs. . ." (NYSCEF 8). The retainer agreement in issue provides as follows:

> The contingency success component of our fee for the legal services to be provided under this agreement will be FIVE PERCENT (5%) of any recovery whether by settlement, arbitration hearing, settlement conference, or trial. This fee will be earned by our firm

> whether such recovery is accomplished by motion, compromise, meditation, arbitration hearing, settlement, settlement conference, inquest, trial, appeal or other resolution of the action, and is a material consideration for the reduction in our hourly rate.

(NYSCEF 77).

Defendants do not contest the number of hours billed by counsel for Plaintiffs or the hourly rates set forth in the Plaintiffs submissions. Defendants do contest, however, the contingency portion of the retainer agreement which would result in an award of attorneys' fees of at least $200,000. In reply, counsel for Plaintiffs requests that should the Court determine that the contingency portion of the retainer agreement is not recoverable as damages, that costs and fees be awarded in the amount of $38,683.00 representing the uncontested hourly charges at counsel's non-discounted rates plus actual costs incurred. The Court finds, on this record, that $38,683.00 is a reasonable award of costs and fees based upon the time sheets and other documents submitted by Plaintiff and its counsel (*1050 Tenants Corp. v Lapidus*, 52 AD3d 248 [1st Dept 2008]).

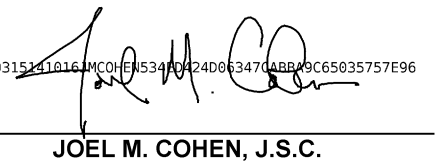
* * * *

Accordingly, it is

ORDERED that Plaintiff is awarded damages in the amount of $2,930,768 plus: (i) prejudgment interest from October 2, 2019 through December 9, 2020 at a rate of twenty-four percent (24%); (ii) prejudgment interest at the statutory rate of nine percent (9%) from December 10, 2020 until the entry of final judgment; and (iii) reasonable attorney's fees and costs in the amount of $38,683.00; and it is further

ORDERED that the Plaintiff is directed to submit a proposed judgment consistent with the foregoing.

This constitutes the decision and order of the Court.



3/15/2023
DATE

JOEL M. COHEN, 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