

X-Caliber Funding LLC v Fisher

2024 NY Slip Op 33381(U)

September 24, 2024

Supreme Court, New York County

Docket Number: Index No. 652975/2023

Judge: Melissa A. Crane

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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. MELISSA A. CRANE PART 60M

Justice

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X-CALIBER FUNDING LLC,

Plaintiff,

- v -

ALEXANDRA M. FISHER, DAVID A. SMITH, JONATHAN R. LEVEY, ALEXANDRA M. FISHER LIVING TRUST DATED 06/01/2004, DAVID A. SMITH REVOCABLE TRUST AGREEMENT DATED 02/24/2003, COLONNADE SENIOR INVESTORS, LLC

Defendant.

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INDEX NO. 652975/2023

MOTION DATE 12/05/2023

MOTION SEQ. NO. 001

DECISION AFTER INQUEST

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 103, 104, 105, 112, 113, 114

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

In Motion Sequence 1 ("MS 1"), plaintiff X-Caliber Funding LLC moved for summary judgment in lieu of complaint on its breach of contract claim against the defendants. The court granted MS 1 in favor of the plaintiff on the issue of liability only. The court scheduled an inquest to determine amounts due for principal and interest, as well as plaintiff's costs and expenses (MS 1 decision and order [NYSCEF Doc. No. 77]; 12/5/23 Tr. [NYSCEF Doc. No. 72]). On 6/18/24, the inquest was conducted on papers, on consent (see Docs 86 [first inquest scheduling order], 111 [second inquest scheduling order]).

It is undisputed that defendants owed \$24,241,684.39 in unpaid principal debt as of February 6, 2023 (see e.g. Forbearance Agreement, § 2 [c]). The forbearance agreement states that the loans matured on September 6, 2022. The nonparty borrower defaulted on the loans and

defendants breached the related guaranty by failing to pay the outstanding amounts owed on that maturity date (*see e.g.* Doc 96 [forbearance agreement]; *see also* Doc 77 [granting, in part, the CPLR 3213 motion (MS 01) on the issue of liability]).

Background

In connection with a 2013 mortgage, the lender loaned \$10,100,000 to borrower. Eventually, through loan modifications and other transactions, the lender had loaned \$26 million to the borrower. The original loan was gradually increased to \$25 million (the “ARC Note”) and borrower also obtained a separate loan for \$1 million (the “1M Note”). Plaintiff acquired the loans from the original lender under a mortgage Assignment and Assumption Agreement in 2021. Also in 2021, plaintiff, borrower, and the guarantors entered into (3) the Omnibus Amendment to Loan Documents (the “Omnibus Amendment”).

The Omnibus Amendment states:

“Borrower shall pay interest and, to the extent required hereunder, principal, in an amount equal to the Monthly Payment Amount which shall be payable in monthly installments on each Payment Date until the Maturity Date, at which time all Obligations, including, without limitation, all accrued but unpaid interest, together with the principal sum evidenced by the Notes, the Exit Fee (which shall be paid to X-Caliber Funding LLC), if any, late charges, if any, and interest at the Default Rate, if any, shall be payable in full. If any payment due hereunder is due on a date that is not a Business Day, then such payment shall be due on the first Business Day succeeding such date that is not Business Day. The Obligations shall be due and payable in full on the Maturity Date. All amounts due under the Notes shall be payable without set off, counterclaim or any other deduction whatsoever”

(Doc 93, § 2 [o]).

Under the amended and restated guaranty, the defendants-guarantors “unconditionally and irrevocably guarantee[d] to Lender the punctual payment when due, and not merely the collectability, whether by lapse of time, by acceleration of maturity, or otherwise, and at all times

thereafter the payment of the Guaranteed Obligations” (Doc 4, ¶ 1). “ ‘Guaranteed Obligations’ shall mean all obligations and liabilities of Borrower under the Loan Documents” (*id.*).

Plaintiff’s vice president, Jeffrey Deines, asserts:

The total debt due and owing to Plaintiff under the “Guaranty” and “Loan Documents” (hereinafter defined), as of April 25, 2024, equals \$30,465,799.25 (the “Total Debt Amount”). The Total Debt Amount consists of: (i) the unpaid principal balance due and owing under the Loan Documents, in the amount of \$24,241,684.39 (the “UPB”), which amount Defendants concede is due and owing; (ii) accrued Default Interest in the amount of \$1,726,127.76; (iii) accrued Non-Default Interest in the amount of \$2,374,420.61; (iv) Late Charges in the amount of \$1,216,821.52; (v) an Exit Fee in the amount of \$72,725.05; (vi) Protective Advances in the amount of \$547,472.19; (vi) Attorneys’ Fees in the amount of \$733,541.82; and (vi) Per Diem Interest for twenty-five (25) days, in the cumulative amount of \$198,698.00. For each day from April 25, 2024 (the date that the Total Debt Amount was calculated) through and including the date that the Court issues a decision on the damages to be awarded to Plaintiff, the Total Debt Amount should be increased by per diem interest at the Default Rate, in the amount of \$7,947.92 per day (which amount is reflected on the Debt Calculation Statement annexed as Exhibit A).

(Doc 88, para 5).

Defendants assert that “Plaintiff’s application for money damages, including the principal balance, interest, and penalties, contain significant errors and overreaches” (Doc 112, defs’ inquest opp, paras 26-32).

Discussion

1. *Plaintiff’s Damages Under the Guaranty, Notes, and the Loan Documents*

a. Principal

Defendants do not contest that they owed plaintiff \$24,241,684.39 for unpaid principal as of February 6, 2023 (*see e.g.* Forbearance Agreement, § 2 [c]).

b. Exit Fees

The Omnibus Amendment includes the following provision concerning exit fees:

“Upon any repayment or prepayment of the outstanding principal balance of the Loan . . . , Borrower shall pay to X-Caliber Funding LLC on the date of such repayment or prepayment an amount equal to 0.30% of the amount being repaid or prepaid (the "Exit Fee"). Upon the final repayment of the Obligations or any acceleration of the Loan, Borrower shall pay to X-Caliber Funding LLC on account of the Exit Fee, the amount by which the Exit Fee payable on the Outstanding Principal Balance as of the date hereof exceeds the total amount of Exit Fees theretofore paid by Borrower. The Exit Fee hereunder shall be deemed to be earned by X-Caliber Funding LLC upon the execution of this Amendment. Lender acknowledges and agrees that the Exit Fee shall be paid to X-Caliber Funding LLC”

(Doc 9, § 2 [s]).

Under the Omnibus Agreement, plaintiff earned the exit fee of .3 % of the unpaid principal balance for the ARC Note and the 1M note. Thus, plaintiff correctly added an exit fee of \$69,836.18 for the ARC Note and a \$2,888.87 exit fee for the 1M note.

c. Late Charges

Plaintiff contends that it is entitled to late charges pursuant to a debt modification agreement (DMA) dated September 30, 2015. The 2015 DMA modified the original \$10.1 million loan (the “prior obligation”) (Doc 95). The DMA amended the loan repayment terms and set a new maturity date of 5/31/18 (*id.*). The borrower agreed to repay the amended loan by making 31 monthly payments of \$61,519.10, then making one “balloon” payment repaying all outstanding principal (the 32nd scheduled payment) (*id.*, section 4 [B]). Section 4 (C) (2) of the DMA states: “If a payment is more than 15 days late, [borrower] will be charged 6.000 percent of the Amount of Payment. [Borrower] will pay this late charge promptly but only once for each late payment.”

The 1M note also provides for charges: “If a payment is more than 15 days late, Borrower will be charged 5.000% of the unpaid portion of the regularly scheduled payment” (Doc 92 at 1). The Omnibus Amendment states that “Borrower shall pay” all outstanding “Obligations,” including “late charges,” on the maturity date. Section 5 (d) of the Forbearance Agreement states:

“upon the occurrence of a Termination Event, Lender may, in its sole discretion and without the requirement of any demand, presentment, protest, or notice of any kind, (i) charge interest at the Default Rate; (ii) **charge late fees in accordance with the Loan Document for the Specified Event of Default and any other Events of Default**”

Plaintiff therefore correctly added a 5% late fee to the ARC note balance and a 6% late fee to the 1M note balance.

d. Protective Advances

X-Caliber is entitled to \$547,472.19 for protective advances (Doc. 94 [Mortgage]) § 8.3). X-Caliber has established, and the defendants do not contest, that the lender made protective advances totaling \$547,472.19 (Doc. 97 [Protective Advance Payments]; Doc. 88 [Deines aff]).

e. Ordinary and Default Interest

The principal amount owed under the ARC Note was \$25 million, and interest accrued on that sum at 5.5% per annum. Under the 1M note, the principal amount owed was \$1 million and interest accrued at 4.25% per annum. Under the Omnibus Amendment, The Omnibus amendment explains

“Interest on the Outstanding Principal Balance shall be calculated by multiplying (i) the actual number of days in the period for which the calculation is being made by (ii) a daily rate based on a three hundred sixty (360) day year (that is, the applicable Interest Rate (as set forth in the applicable Notes) or the Default Rate, as then applicable, expressed as an annual rate divided by 360) by (iii) the Outstanding Principal Balance. All calculations by Lender of the Interest Rate and the interest payments due under this Amendment shall be conclusive absent manifest error”

(Doc 93, § 2 [p]).

Section 2 (c) states that default interest for the “Obligations” is “a rate per annum equal to (a) the Interest Rate plus (b) four percent (4%)” (Doc. 93, § B(2)(c) [Omnibus Amendment]). Under Section 2 (h), “Obligations” “means the Outstanding Principal Balance, all interest accrued and unpaid thereon, any Exit Fees, and all other sums due to Lender in respect of the Loan or under

any of the Loan Documents.” Thus, the Omnibus Amendment authorizes compounded interest because the “Default Rate” of interest runs on all “Obligations,” including the accrued ordinary interest (*cf. B King Chick LLC v Org. for Defense of Four Freedoms for Ukraine, Inc.*, 227 AD3d 536, 537 [1st Dept 2024]).

f. Damages Calculations

Plaintiff’s submissions establish that, as of April 25, 2024, defendants owed the following amounts for unpaid principal, ordinary interest, default interest, exit fees, late charges, and protective advances:

- \$24,241,684.39 for unpaid principal;
- \$1,216,821.52 for unpaid late charges;
- \$72,725.05 for unpaid exit fees;
- \$547,472.19 for unpaid protective advances;
- \$2,374,420.61 for unpaid ordinary interest; and
- \$1,726,127.76 for unpaid default interest.

Plaintiff has also established that it is entitled to pre-judgment interest at the per diem rate of \$7,947.92 from 4/26/24 until the date of this decision and order (*see* Doc 88 [Deines aff]; Doc 89 [interest calculation spreadsheet]; Doc 97 [protective advances]).

Accordingly, plaintiff is awarded \$30,179,251.52 for the unpaid obligations and interest, together with pre-judgment interest at the contractual default rate.

2. Plaintiff’s Attorneys’ Fees

X-Caliber is also entitled to recover its reasonable enforcement-related expenses. The Guaranty requires defendants to reimburse X-Caliber for expenses, including reasonable attorneys’ fees (Doc. 90, § D [10]).

X-Caliber seeks its reasonable attorneys' fees for both this CPLR 3213 proceeding and its previous motion for summary judgment in lieu of complaint (the "First Action"), bearing Index No. 654613/2022. The First Action was denied because the timing requirements of CPLR 3213 were not satisfied (*see* Doc 67 in 654613/2022).

In total, plaintiff seeks \$733,541.82 in attorneys' fees and costs for both actions (Doc. 88 ¶ 41). X-Caliber's submissions include time entries and invoices from Reed Smith, LLP (Doc. 99 [Reed Smith Time Entries]) and Blank Rome, LLP (Doc. 104 [Blank Rome Invoice]). Defendants challenge (a) plaintiffs' fees for the First Action; (b) counsels' time entries; and (c) fees for non-attorney work and costs.

An award of reasonable attorneys' fees is within the sound discretion of the court (*see Diakrousis v Malanga*, 61 AD3d 469 [1st Dept 2009]). When evaluating the reasonableness of attorneys' fees, the court examines several factors, "including the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel...reducing the amount requested to eliminate work that was duplicative or was unnecessarily performed by an attorney, rather than a secretary or paralegal" (*JK Two LLC v Garber*, 171 AD3d 496, 496 [1st Dept 2019]; *S.T.A. Parking Corp. v Lancer Ins. Co.*, 128 AD3d 479, 480 [1st Dept 2015]). The burden of proving the reasonableness of the requested fees is on the requesting party (*EVUNP Holdings LLC v Frydman*, 154 AD3d 558, 559 [1st Dept 2017]).

The court may reduce fees that are excessive (*see Solow Management Corp. v Tanger*, 43 AD3d 691 [1st Dept 2007]). The court may also reduce fees where the amount requested lacks proof (*Josefsson v Keller*, 141 AD2d 700 [1st Dept 1988]). The court may also reduce a fee award where there is block billing (*see Matter of Silverstein v Goodman*, 113 AD3d 539, 540 [1st Dept 2014]; *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 840 [2d Dept 2016] [25% reduction

of fee award “due to the use of block billing, including vague and nonspecific billing entries, and the nature of th[e] lawsuit”). Specifically, courts permit a reduction of fees when the use of block billing makes it “makes it exceedingly difficult for the court to identify whether the amount of time spent on a particular task is reasonable” (*546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 123 [1st Dept 2012]).

The court has reviewed plaintiff’s submissions and the parties’ arguments concerning the attorneys’ fees and costs. Both law firms’ invoices include significant entries with block billing and instances of duplicative work. In addition, the court declines to award plaintiff its attorneys’ fees relating to plaintiff’s earlier, defective summary judgment in lieu of complaint motion (*see* Index No. 654613/2022, Doc 67). Thus, the court reduces the award for attorneys’ fees and costs by 45% [\$40,388.81]. Blank Rome’s total attorneys’ fees and costs, \$89,752.92, (*see* Doc 103 [Ottaviano aff], Doc 104 [BR invoices]), is reduced by \$40,388.81 to \$49,364.11. Reed Smith’s total legal fees and costs, \$678,113.41 (Doc 98 [Meisel aff], Doc 99 [RS invoices]), is reduced by 45% to \$305,151.04. In addition, the court declines to award plaintiff the \$28,798.41 that Reed Smith billed for unsupported costs, including “inter alia, lodging, travel (. . . for the settlement meeting . . .), and due diligence related research” (Doc 98 [Meisel aff], para 5 and n3). Thus, the award for Reed Smith’s fees and costs is further reduced for a total of \$276,352.63.

CONCLUSION

Plaintiff is awarded \$30,179,251.52 for the unpaid obligations and default interest under the Guaranty and the loan documents, together with pre-judgment interest at the contractual default rate [\$7,947.92 per diem] from April 26, 2024 until the date of this decision.

Plaintiff is also awarded \$325,716.74 for its reasonable enforcement-related attorneys’ fees and costs.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$30,179,251.52, together with pre-judgment interest at the contractual default rate of \$7,947.92 per diem from April 26, 2024 until the date of this decision after inquest, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

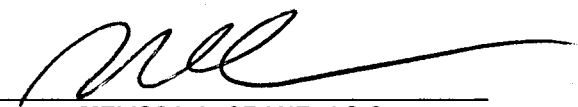
ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$325,716.74 with interest at the statutory rate from the date of this decision after inquest, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to mark this case disposed; and it is further

ORDERED that there shall be no further motion practice without a pre-motion conference.

9/24/2024

DATE



MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE