

Pisane v Feig
2015 NY Slip Op 30853(U)
May 19, 2015
Supreme Court, Kings County
Docket Number: 502916/14
Judge: Carolyn E. Demarest
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At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of May, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X
NEIL PISANE,
Plaintiff,
- against -

**DECISION
AND
ORDER**

Index No.502916/14

STEVEN FEIG,
Defendant.

-----X

The following papers read on this motion:

NYSCEF Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	20-35 39-58
Opposing Affidavits (Affirmations)	
Reply Affidavits(Affirmations)	60
Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	36,59

Plaintiff moves, pursuant to CPLR 3212, for summary judgment in lieu of complaint.
Defendant cross-moves for summary judgment dismissing the action.

BACKGROUND

This action stems from a dispute between two business partners that owned S&N Chemical Co., Inc., aka Cleanse Tec, which manufactured and sold soap and cleaning products. Plaintiff brought a proceeding for dissolution of the corporation (*Pisane v Feig*, Index No. 12246/11) (“Dissolution Proceeding”) which was previously before this Court. Following the arbitration under the terms of the Shareholder Agreement, in the context of the Dissolution Proceeding, this court confirmed the arbitration award by order of September 14, 2012 (“Arbitration Decision”) and, pursuant to the Shareholder Agreement, granted additional attorney’s fees to the defendant for the costs incurred in defending against plaintiff’s motion to vacate the Award and in obtaining confirmation of the Award (*Pisane v Feig*, Sup Ct, Kings

County, September 14, 2012, Demarest, J, Index No. 12246/11). Subsequent to the Arbitration Decision, a dispute arose between the parties regarding payment of the Award of attorney's fees and, on June 21, 2013, a decision was issued addressing the dispute (*Pisane v Feig*, 41 Misc 3d 216 [Sup Ct, Kings County 2013]) ("Set Off Decision").

The arbitrator had valued the plaintiff's shares at \$639,000 and directed the parties to close on the defendant's purchase of the shares. The arbitrator also directed plaintiff to pay defendant \$152,310.23 in attorney's fees.¹ Although the Shareholder Agreement provided for the creation of 120 separate notes to be paid monthly over the course of a ten year period, at the arbitrator's direction, the parties stipulated to enter into one promissory note for the principal balance of \$575,100 ("Note"). The Note included a spread sheet which listed the amortized amount owed by defendant to plaintiff each month. The monthly payment owed by the defendant ranged from \$6,949.13 in May of 2012, to \$4,810.47 in April 2022.

On October 16, 2012, defendant entered a judgment for \$158,633.36, against plaintiff, for the attorney's fee award. The defendant notified the plaintiff that he had credited the judgment against each monthly payment, beginning on November 1, 2012, thus effectively satisfying the first 30 months of payments owed to the plaintiff. However, on December 19, 2012, plaintiff's counsel informed defendant that, pursuant to Section 151 of the New York Debtor and Creditor Law, he exercised his right to set off defendant's judgment against the principal on the Note and had subtracted the \$158,633.36 attorney's fee judgment from the initial principal on the Note, thereby reducing the monthly payments to be made over the 10-year period. In January of 2013, plaintiff issued a notice of default to the defendant when the defendant did not make a payment due on January 1, 2013. In February 2013, defendant moved to clarify the Arbitration Decision and the plaintiff, by Order to Show Cause, similarly moved with respect to this set off issue.

In the Set Off Decision, this Court held:

As neither party has submitted legal precedent establishing a method for offsetting a specific judgment against an unmatured debt that requires payments over an extended period of time, and the court is not aware of any authority on an established method of making such calculation, this court finds that the plaintiff's method for calculating the set off, effective December 19, 2012, upon issuance of the credit invoice to defendant, is the more equitable and appropriate formula pursuant to

¹ The shareholder agreement included a provision that allowed for recovery of attorney's fees to the prevailing party in a dispute between the parties.

DCL 151. . . . [U]nder DCL 151, the right to elect to set off belongs to the debtor, which is the plaintiff in the immediate situation presented. While an irrational or inequitable proposal would not be endorsed by the court, some deference is to be accorded the debtor's preference.

This court finds the more equitable set off procedure, consistent with the arbitrator's intent, the Shareholder Agreement and DCL 151, is that advocated by plaintiff (*Pisane*, 41 Misc 3d at 223-224).

At the conclusion of the decision, the court directed how the parties were to recalculate the payments due on the Note, taking into consideration the plaintiff's set off and an additional award of attorney's fees from this Court's order of February 15, 2013. The Set Off Decision further held:

Defendant shall resume making monthly payments, consistent with the modified payment schedule, beginning with the payment due August 1, 2013, which, unless previously paid, shall include payments that became due between November 1, 2012, and July 31, 2013, together with the 2% late payment charge, as provided under the Note.

Counsel are directed to seek any necessary further clarification by letter to the Court, which will arrange for a conference call to address. No additional motions may be made without leave of the Court (*Pisane*, 41 Misc 3d at 225).

On July 24, 2013, defendant's counsel, Peter A. Mahler, Esq. ("Mahler"), provided plaintiff's counsel, Ralph E. Preite, Esq. ("Preite"), with spreadsheets containing proposed recalculations of the payments on the Note, including the 2% late fees on payments that became due between November 1, 2012 and July 31, 2013. Mahler calculated the 2% late fees on the monthly amounts due on the Note between November 2012 and July 2013, and calculated \$4,999.24 in total late fees. On July 30, 2013, Preite sent correspondence to Mahler demanding the sum of \$399,517.72 in late payment fees.² By correspondence dated July 31, 2013, Mahler indicated that the \$399,517.72 computation of late fees was improper and provided a check for \$50,986.60 that was consistent with Mahler's computation, in addition to a separate check for the August 2013 payment on the Note for \$4,438.11. In correspondence dated August 9, 2013, Preite argued that, pursuant to the Note, the late fees are 2% of the "unpaid balance under the Note" pursuant to the Note. The Note states:

² In the July 30, 2013 correspondence submitted in support of the motion, no calculations for these late fees are included.

Events of Default. The occurrence of any one or more of the following events (the "Events of Default") prior to this Note being paid in full shall constitute an Event of Default hereunder:

(a) the failure by [defendant] to pay any amount due under this Note, and such failure shall continue unremedied for a period of sixty (60) days after written notice of default, provided that in the event of non-payment within fifteen (15) days of any applicable due date, the unpaid balance under the Note shall accrue a 2% late payment charge per month;

The Note further provides that, in the event of default, the payee may elect to "declare all of the amounts payable hereunder to be immediately due and payable." Payee Pisane has not elected to accelerate the entire debt reflected in the Note.

Plaintiff argues that 2% of the entire principle balance on the Note is the late payment to be charged each month. Further, plaintiff argues that, as defendant did not pay the initial late fees on the payment due on November 1, 2012, any payments that defendant did make were applied to previously incurred late fees thereby rendering the defendant in default on each payment since November 1, 2012. Plaintiff thus calculated the late fees between November 1, 2012 through February 28, 2014 in the amount of \$1,149,643.52. It is noted that the 2% late fees provision was not addressed by either attorney in the motion papers submitted prior to the Off Set Decision in the Dissolution Action.

As the Set Off Order directed the parties to contact the court in the event of a dispute regarding the calculations necessary based upon the Set Off Decision before making any further motions in the Dissolution Action, this Court conducted a telephone conference call with both counsel on October 31, 2013. During the conference call, this Court informed the parties that the result of plaintiff's computations was unconscionable, however, the attorneys could, if deemed necessary, make respective motions to address the issue and receive a ruling and no attorneys' fees would be awarded upon such motions. Instead of filing a motion in the Dissolution Proceeding, plaintiff commenced the present action, more than five months later, on April 3, 2014. The motion for summary judgment in lieu of complaint was amended and oral argument was adjourned multiple times, at the parties' request, but was finally heard on February 11, 2015. Decision was reserved at that time.

DISCUSSION

Plaintiff argues that he is entitled to summary judgment in lieu of a complaint, pursuant to CPLR 3213, as this action is based upon an instrument for the payment of money only, the Note

is clear and unambiguous, the defendant defaulted on the Note, and plaintiff is entitled to a judgment for the principal balance, accrued interest and late fees, less the sum of payments made by defendant. Plaintiff calculated the total amount owed to plaintiff to be \$1,455,417.60 as of February 28, 2014 based upon late fees assessed monthly upon the entire remaining principal balance. However, the current damages, as calculated using the plaintiff's method, would likely double that amount. Defendant estimated that, as of November 2014, the judgment would exceed \$2.5 million using this method.³

Defendant argues that the late fee provision only applied to the "unpaid" or overdue balance of a particular monthly payment, and not the entire principal balance of the Note that was to be paid over the course of ten years. Defendant argues that if the word "unpaid" did not reference only the monthly amounts due, then the word would be rendered meaningless, as referring solely to the "balance" would have been sufficient to reference the total balance of the Note. Defendant notes that, under the terms of the Shareholder Agreement and the Note, the late fee accrues fifteen days after "any applicable due date", thus evidencing the intent to impose the late fee only upon the amount of the payment then due and not upon sums not yet due. Further, defendant argues that if the court were to accept the plaintiff's methodology and find that the provision in the Note entitled plaintiff to a 2% monthly late fee on the total principal balance of the Note, this provision would be unconscionable, as a multi-million dollar late fee on a \$575,100 loan is disproportionate to the actual loss suffered by plaintiff, and, therefore, constitutes an unenforceable penalty. Defendant also argues that summary judgment in lieu of a complaint, pursuant to CPLR 3213, is improper in this action as defendant's liability for late fees is a result of the Set Off Decision, thereby requiring extrinsic proof, and is not an instrument for the payment of money only. Both parties seek the recovery of attorney's fees with respect to the present action.

³ It is noted that plaintiff submitted a 35 page memorandum titled Plaintiff's Reply to Defendant's Opposition to Summary Judgment, and Plaintiff's Further Support of Plaintiff's CPLR 3213 Motion, and Plaintiff's Opposition to Defendant's Cross-Motion ("Reply"). This submission was in violation of 22 NYCRR 202.70(g) which limits the reply memoranda to 15 pages. After decision was reserved, plaintiff submitted a 15 page reply memoranda to the plaintiff's motion and a 10 page memoranda in opposition to the cross-motion. This court rejected these submissions made subsequent to oral argument, noting that they varied from the original submission, and has only considered the first 15 pages of the original 35-page Reply.

The late fees issue should have been raised in a motion made in the Dissolution Proceeding, as the parties were directed to do, and the instant action should be dismissed in light of the pendency of another action. However, CPLR 3213 permits the court to grant summary judgment for the defendant where plaintiff's theory fails (*see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). Accordingly, in the interest of judicial economy, the court will address the merits of the parties' contentions.

"It is well settled that a 'written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 40 [2d Dept 2012], citing *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Etzion v Etzion*, 84 AD3d 1015, 1016 [2d Dept 2011]). "Where the terms of an agreement are unambiguous, interpretation is a question of law for the court" (*G3-Purves*, 101 AD3d at 40, citing *Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446, 447 [2d Dept 2006]). "[W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized'" (*G3-Purves*, 101 AD3d at 40, citing *Zuchowski v Zuchowski*, 85 AD3d 777, 778 [2d Dept 2011], *Herzfeld v Herzfeld*, 50 AD3d 851 [2d Dept 2008]).

The Court finds that the defendant's interpretation of the late fee provision in the Note, referring to the "unpaid balance under the Note", is correct. At the time the Set Off Decision was issued, directing payment of late fees on "payments that became due between November 1, 2012 and July 31, 2013", defendant had not made eight monthly payments, while the remaining monthly payments were not yet due to be paid. If the intent had been to calculate late fees based upon the entire remaining balance of the Note, the word "unpaid" in the Note would not be necessary. Therefore, accepting the plaintiff's interpretation would result in making the word "unpaid" superfluous, in contravention of well-settled contract interpretation principles (*see Kamchi v Weissman*, 125 AD3d 142, 155 [2d Dept 2014], citing *Two Guys from Harrison-N.Y. Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Givati v Air Techniques, Inc.*, 104 AD3d 644, 645 [2d Dept 2013]). Defendant's interpretation of the Note is also consistent with Article 20 of the Shareholder Agreement, upon which the Note was based, which refers to "notes" in the plural, and which provides for late fees of 2% on a late monthly payment of one of 120 separate notes. It is clear that the language upon which plaintiff relies, "unpaid balance", was originally

drafted in the expectation that the principal would be paid in 120 smaller notes, each of which would have an incremental principal value.

Moreover, “[c]ourts have held that ‘[l]iquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract’” (*Biggio v Puche*, 2013 NY Slip Op 31919[U][Sup Ct, New York County 2013], citing *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 423-424 [1977]; *Wirth & Hamid Fair Booking v Wirth*, 265 NY 214, 223 [1934]). “Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy. However, if ‘the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced’” (*Biggio*, 2013 NY Slip Op 31919[U], citing *Truck Rent-A-Center*, 41 NY2d at 424-425). The late fees provided under the Shareholder Agreement and incorporated into the Note constitute liquidated damages. If the Court were to accept the plaintiff’s interpretation of the late fees provision, such penalty would be unenforceable as the multi-million dollar damage award sought by plaintiff is unreasonable and disproportionate to the actual loss sustained by plaintiff as a result of defendant’s delay in making payments on the Note (*see Truck Rent-A-Center*, 41 NY2d at 424-425; *Biggio*, 2013 NY Slip Op 31919[U]). It is further noted that the 2% monthly late fee compounds to 24% per annum, which is just shy of the 25% penal usury rate, which would have been illegal and contrary to public policy (Penal Law § 190.40), particularly when added to the 4.5% interest provided under the terms of the Note. To permit recovery of a monthly 2% late fee upon the entire not-yet-due principal balance on the Note would clearly violate the usury statute and constitute an unenforceable penalty.

Notwithstanding this Court’s indication, in the conference call with counsel, that attorneys’ fees would not be awarded, both parties have requested attorneys’ fees, and, pursuant to Article 35 of the parties’ Shareholder Agreement, as the prevailing party on the motions, the defendant is entitled to recover attorney’s fees incurred in addressing the current late fees dispute.

CONCLUSION

It is **ORDERED** that the plaintiff’s motion for summary judgment is denied.

It is further **ORDERED** that the defendant’s cross-motion to dismiss this action, and for attorney’s fees and expenses, is granted.

It is **DECLARED** that defendant timely made all payments required by this Court’s June

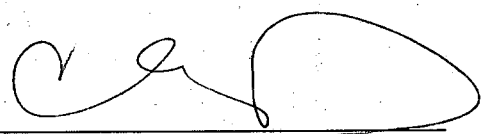
21, 2013 Decision and Order in the matter *Pisane v Feig*, Kings County Index No. 12246/11.

It is further **DECLARED** that defendant is not in default under the terms of the promissory note between the parties.

Defendant is directed to submit a calculation of attorney's fees and expenses incurred in addressing the instant late fees issue, supported by appropriate documentation, within 30 days of the entry of this Decision and Order. Plaintiff is directed to respond to defendant's attorney's fee demand within 15 days of the receipt of such demand.

This constitutes the Decision and Order of the court.

ENTER:



J.S.C.

HON. CAROLYN E. DEMAREST