

**Shelter Is. Opportunity Fund, LLC v Chow**

2013 NY Slip Op 32811(U)

October 22, 2013

Sup Ct, New York County

Docket Number: 653118/11

Judge: Melvin L. Schweitzer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

SHELTER ISLAND OPPORTUNITY FUND, LLC

INDEX NO. 653118/11

-v-
JAMES YING-SHIM CHOW, MD et al

MOTION DATE

MOTION SEQ. NO. 006

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by plaintiff for partial summary judgment against defendant Cornerstone Medical Group, Inc. on the first cause of action, against guarantors CMG Management Group, Inc., International Healthcare Alliance LLC, Nippon Clinic and Noguechi Nungin Dock LLC and NIM Management Corp on the third cause of action is GRANTED; and the action shall continue as to the second, and the fourth through eighth causes of action; and the issue of the amount of plaintiff's reasonable attorneys fees is referred and referred to a special referee to hear and report with recommendations, all as per the attached Decision and Order.

Ordered that plaintiff shall serve a copy of this Order with Notice of Entry, together with a completed Information Sheet on the Special Referee Clerk in the Motion Support Office Room 149, 60 Centre Street who is directed to place this matter on the calendar of the Special Referee Panel (Part 50.6) at the earliest convenient date.

Dated: October 22, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X  
 SHELTER ISLAND OPPORTUNITY FUND, LLC, :  
 :  
 Plaintiff, :  
 :  
 -against- :  
 :  
 JAMES YING SHIH CHOW, M.D., :  
 JAMES TACHIBANA, D.P.M., :  
 CORNERSTONE MEDICAL GROUP, INC., :  
 CMG MANAGEMENT GROUP, INC., :  
 INTERNATIONAL HEALTHCARE ALLIANCE, L.L.C., :  
 NIPPON CLINIC AND NOGUCHI NINGEN DOCK, :  
 L.L.C., a/k/a NIPPON CLINIC, IN NOGUCHI :  
 NINGEDOCK, L.L.C., NIM MANAGEMENT :  
 CORPORATION and NIHON MEDICAL GROUP, P.C., :  
 Defendants. :  
 -----X

Index No. 653118/11  
 DECISION AND ORDER  
 Motion Sequence No. 006

**MELVIN J. SCHWEITZER, J.:**

In this action for payment under a promissory note and guaranty, plaintiff, Shelter Island Opportunity Fund, LLC (Plaintiff or Shelter Island) moves, pursuant to CPLR 3212 for partial summary judgment on its first cause of action against the debtor, defendant Cornerstone Medical Group, Inc. (Cornerstone), and on its third cause of action against the guarantors CMG Management Group, Inc. (CMG), International Healthcare Alliance, L.L.C. (IHA), Nippon Clinic and Noguchi Ningen Dock, L.L.C. a/k/a Nippon Clinic, in Noguchi Ningedock, L.L.C. (Nippon), and NIM Management Corporation (NIM) (collectively the Guarantors), in the principal sum of \$2,181,882.83 plus interest, attorneys' fees and costs.

## Background

Pursuant to a secured term note (the Note), in February 2007, Shelter Island loaned Cornerstone \$3,067,308. By side letter, dated June 1, 2007, the parties amended the note to reduce the principal amount of the note to \$2,447,886.40 (Chen aff, exhibit C).

Pursuant to the Note, Cornerstone agreed, among other things, that it would be in default if it failed “to pay when due any installment of principal or interest as provided in this Term Note in accordance with this Term Note, and any such failure shall continue for a period of two (2) days following the date upon which notice of such non-payment is received” (Chen aff, exhibit A; ¶ 3.1).

Article III of the Note states that, in the event of default, Shelter Island can accelerate the Term Note and make all amounts due under the Term Note immediately due and payable and, “[i]n the event of such an acceleration, the amount due and owing to [Shelter Island] shall be 125% of the outstanding principal amount of this Term Note (plus accrued and unpaid interest and fees, if any) . . .” (Chen aff, exhibit A). Moreover, ¶ 3.10 of the Term Note states that, following the occurrence of an event of default, Cornerstone will pay additional interest on the Term Note in an amount equal to 1% per month (12% a year) (Chen aff, exhibit A).

In addition, on February 2, 2007, CMG, IHA, Nippon, and NIM executed a Subsidiary Guaranty (Guaranty) wherein they unconditionally guaranteed payment to Shelter Island of all amounts due and owing under the Note (Chen aff, exhibit B).

Shelter Island alleges that Cornerstone failed to repay the outstanding principal amount of \$1,745,506.26 (see Chen aff, exhibit H), plus accrued and unpaid interest, when it became due on July 31, 2009. Accordingly, on September 15, 2011, Shelter Island accelerated the Note and sent

Cornerstone a notice of default which demanded payment. Simultaneously, plaintiff advised the Guarantors of Cornerstone's default, and demanded payment from them. It is undisputed that, to date, neither Cornerstone nor the Guarantors have paid the amount allegedly due and owing.

The first cause of action in the complaint alleges that Cornerstone breached its obligations under the Note by failing to pay the outstanding principal amount plus accrued interest after default. The third cause of action alleges that the Guarantors breached the guaranty by failing to make payments according to its terms. The complaint demands payment by Cornerstone and/or the guarantors in the amount of \$2,181,882.83, which amount is 125% of the outstanding principal balance, plus accrued interest.

In support of summary judgment, plaintiff contends that it has established its prima facie case by presenting evidence of the Note and Guaranty and evidence that plaintiff and the guarantors' failed to make payments according to the terms of those documents. It argues that Cornerstone and the guarantors have failed to come forward with admissible evidence sufficient to overcome its prima facie showing.

In opposition to summary judgment on the first and third causes of action, Cornerstone and the Guarantors take the position that summary judgment must be denied because: (1) there is no evidence that Steven Sieratzki, Esq., the individual who executed the Note and Guaranty on behalf of Cornerstone and the Guarantors, was a properly authorized agent on behalf of those parties; (2) the repayment record attached as exhibit F to the Saltzstein affidavit is insufficient to establish the amount owed; (3) the liquidated damages clause in the Note is an unenforceable penalty because it is not a reasonable measure of plaintiff's actual loss; and (4) the entire

transaction was an illegal attempt by Shelter Island to become an equity owner of a medical practice.

### Discussion

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994])[it “is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . . [citations omitted]”].

Plaintiff has established its prima facie case for judgment on the Note and Guaranty by presenting the Note and the Guaranty together with proof of nonpayment (Saltzstein aff, exhibits A through E) (*see IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637, 637 [1st Dept 2011] [plaintiff established its prima facie case with proof of the Note, guaranty and default]). Defendants have failed to come forward with evidentiary facts sufficient to show the existence of a triable issue of fact requiring a trial (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept

2003]). Indeed, defendants' conclusory arguments in opposition to summary judgment are insufficient to overcome plaintiff's prima facie case establishing Cornerstone and the guarantors' liability for nonpayment.

Mr. Sieratzki's Authority. Dr. Chow's assertion that there is no evidence that Steven Sieratzki, Esq. was duly appointed as Cornerstone and the Guarantors' attorney in fact is belied by Dr. Chow's affidavit wherein he states that, "[o]n or about February 2nd, 2007, Mr. Sieratzki executed the loan, security and guarantee agreements with Shelter Island through a power of attorney given by me as principal officer of the corporate entities . . ." (Chen aff., exhibit D, ¶ 9).

The Repayment Record. As to the principal amount due under the Note, plaintiff has submitted an affidavit, wherein Stephen Saltzstein, the principal of plaintiff's managing member, swears on personal knowledge as to the circumstances of Cornerstone and the Guarantors' defaults. He avers that the repayment record submitted was kept in the regular course of business and that it accurately reflects the amount due and owing on the Note and Guaranty (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013] [affidavit of plaintiff's employee reciting circumstances of defendant's default based on first hand review of plaintiff's books and records is sufficient to establish prima facie entitlement to summary judgment]). In opposition, Cornerstone and the guarantors have failed to submit any evidence to rebut plaintiff's prima facie showing (*see Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006] [evidence in admissible form is necessary to defeat summary judgment]).

Legality of the Loan. Defendant cites no authority, nor could the court find any, to support defendant's conclusory and unsworn assertion that, it was illegal for Shelter Island to

loan money to Cornerstone for the purpose of permitting Cornerstone to expand its medical facilities, if, indeed, that was the purpose of the loan.

Liquidated Damages. Liquidated damages are “an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement.” (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]). “A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.” (*Id.* at 425).

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.” (*Id.*) “The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty” (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]).

Thus, Cornerstone and the Guarantors must demonstrate either that the damages flowing from the default were readily ascertainable at the time the parties entered into the Note and Guaranty, or that the liquidated damages clause is conspicuously disproportionate to these foreseeable losses. “[S]ummary judgment cannot be defeated merely by claiming that there is an issue of fact with respect to disproportionality” (*225 Fifth Ave. Retail, L.L.C. v 225 5th L.L.C.*, 24 Misc 3d 1224 (A), 2009 NY Slip Op 51607 (U), \*9 [Sup Ct, NY County 2009] *affd* 78 AD3d 440 [1st Dept 2009]).

In this case, Cornerstone and the Guarantors have failed to come forward with a scintilla of evidence to support their allegation that the liquidated damages provision in the Term Note is an unenforceable penalty. Although there is no evidence that the liquidated damages amount is



reasonably related to the actual damages, there is also no evidence that it is not. “The burden is on the party seeking to avoid the liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty and to demonstrate either that damages flowing from [the breach] were readily ascertainable . . . or that the [liquidated damages] fee is conspicuously disproportionate to these foreseeable losses” (*Ray v Ray*, 61 AD3d 442, 444 [1st Dept 2009] [quoting *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d at 380]). It is Cornerstone and the Guarantors, not plaintiff, who have failed to carry their burden.

Here, the amount of liquidated damages stated in the Term Note was the product of an arm’s length transaction between businessmen who were ably represented by counsel (Chow aff, ¶¶ 6,8 and 9). Cornerstone and the Guarantors knew of the possible consequences of their default when they entered into the contract. “Absent some element of fraud, exploitive overreaching or unconscionable conduct . . . there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties” (*Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 577 [1979]; *see also JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d at 380). Neither Cornerstone nor the Guarantors point to evidence that would justify relieving them of the consequences of their bargain and subsequent default. Thus, the parties having bargained for the liquidated damages clause, should be held to that bargain (*see e.g. Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d at 577).

Pursuant to section 4.9 of the Note and section 8 of the Guaranty, plaintiff is entitled to reasonable attorneys’ fees for the costs of collection under those instruments (*see G.M. Data Corp. v Potato Farms, LLC*, (95 AD3d 592, 594 [1st Dept 2012])).

Accordingly, it is

ORDERED that plaintiff, Shelter Island Opportunity Fund, LLC's motion for partial summary judgment in favor of plaintiff and against defendant Cornerstone Medical Group, Inc. is decided as follows:

Plaintiff is granted judgment on the first cause of action in the amount of \$2,181,882.83, together with interest at the rate of 12% per annum from the date of July 31, 2009 until the date of the decision of this motion, and thereafter at the statutory rate, as calculated by the Clerk in the amount of \$ \_\_\_\_\_, for a total amount of \$ \_\_\_\_\_, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first cause of action is severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff, Shelter Island Opportunity Fund, LLC's motion for partial summary judgment in favor of plaintiff and against defendants CMG Management Group, Inc., International Healthcare Alliance, L.L.C., Nippon Clinic and Noguchi Ningen Dock, L.L.C. a/k/a Nippon Clinic, in Noguchi Ningedock, L.L.C., and NIM Management Corporation as follows:

Plaintiff is granted judgment on the third cause of action in the amount of \$2,181,882.83, together with interest at the rate of 12% per annum from the date of July 31, 2009, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk in the amount of \$ \_\_\_\_\_, for a total amount of \$ \_\_\_\_\_, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; the third cause of action is severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the second and the fourth through eighth causes of action; and it is further

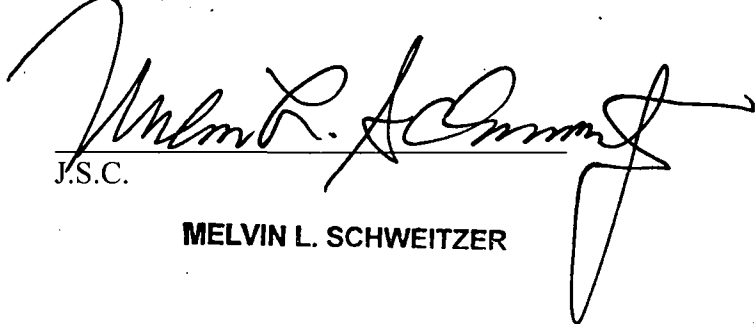
ORDERED that the issue of the amount of plaintiff's reasonable attorneys' fees is severed, and is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that the branch of the motion seeking attorneys' fees is held in abeyance, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Center Street, who is directed to place this matter on the calendar of the Special Referee's part (Part 50R) for the earliest convenient date.

Dated: October 22, 2013

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER