SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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VFS FINANCING, INC., Index No: 651434/2011

Plaintiff, **DECISION & ORDER**

-against-

INSURANCE SERVICES CORPORATION,
JAMES R. LOOMIS and THE LOOMIS COMPANY,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

On May 25, 2011, plaintiff VFS Financing, Inc. (VFS) commenced this action to enforce an aircraft loan it made to defendant Insurance Services Corporation and the guarantee of the loan by defendants James R. Loomis (Loomis) and The Loomis Company. The operative pleading, the Amended Complaint, was filed on November 4, 2011. In an order dated October 5, 2012 (Dkt. 93), the court dismissed defendants' defenses and counterclaims regarding the enforceability of certain sections of the loan documents, including the make-whole provision. *See* 2012 WL 4812585, *aff'd* 111 AD3d 505 (1st Dept Nov. 14, 2013). Summary judgment on liability was granted to VFS on April 25, 2013 (Dkt. 125), leaving only damages to be tried.

The main issue for trial was defendants' contention that VFS's refusal to allow the sale of the subject aircraft (the collateral) in July 2010 was unreasonable and, thus, a violation of the duty to mitigate. Ergo, defendants aver, the amount owed to VFS should be reduced to account for losses arising from such failure to mitigate (i.e., difference in sale price, maintenance costs, and legal costs).

A bench trial was held before me on October 10, October 11, and November 8, 2013. Three witnesses testified: (1) Beth Bonell, the employee of General Electric Capital Corp. (GE), VFS's parent company, who dealt with Loomis in connection with the underlying events; (2) Alan Perzigian, the GE employee consulted by Bonell to evaluate the proposed July 2010 sale of

the aircraft; and (3) Loomis. The parties' post-trial briefs were filed on December 6, 2013 (Dkt. 150 & 151). For the reasons that follow, the court finds that VFS's refusal to consent to the proposed July 2010 sale was not an unreasonable failure to mitigate.

I. Findings of Fact

The court will not discuss aspects of the subject loan that are not relevant to this decision (e.g. the "make-whole" provision, the enforceability of which has already been determined). The facts recited are based on the evidence the court finds credible.

The operative iteration of the Aircraft Security Agreement and Promissory Note were entered into on December 29, 2006. The loan was for approximately $7.2 million, payable in monthly installments of $63,642.05. For the first 3.5 years, defendants made every monthly payment in full. In June 2010, for the first time, defendants missed a monthly payment. The account was referred to Bonell, who began corresponding with Loomis about the default. Loomis told Bonell that defendants defaulted due to financial difficulties and that, at the insistence of defendants' creditors, defendants could no longer afford the aircraft and wished to sell it. The loan documents require VFS's permission to sell the aircraft, the only collateral for the loan. Loomis requested permission to list the aircraft for sale. Bonell consented. In July 2010, Loomis received an offer from non-party Baldor Electric Company (Baldor) to purchase the aircraft for $4.7 million. Bonell relayed the offer to Perzigian, an aircraft valuation expert, who determined that the fair market value of the aircraft was $4.3 million.

Bonell, however, was hesitant to allow the sale for numerous reasons. First, Bonell was skeptical of Loomis' claim that he could not continue making payments on the loan because Loomis refused to provide any documentation to substantiate defendants' alleged financial

difficulties. To wit, at the same time Loomis claimed financial distress, he told Bonell that his company just received $1 million of additional capital. Bonell's skepticism was understandably fueled by the knowledge that Loomis owned various other planes, boats, and homes (such as the $4 million home Loomis purchased during the pendency of this action). Second, since the sale of the aircraft would not pay off the entire loan (there would be a deficiency of over $1 million), Bonell was not willing to give up VFS's secured claim without obtaining new collateral for the deficiency, given Loomis' other valuable assets. Though, at trial, Loomis tried to downplay his myriad luxury assets – such as by telling the court that they cannot be used as collateral because they are financed – Loomis was not nearly as candid with Bonell in 2010. Not only did Loomis refuse to put up new collateral for the deficiency amount, he refused to even disclose his assets. Loomis' stonewalling was a red flag for Bonell, a professional with more than a decade of experience negotiating with delinquent borrowers.

In any event, Loomis formally requested Bonell's approval of the Baldor sale on July 28, 2010. A mere two days later, on July 30, 2010, Loomis informed VFS that he wished to keep the aircraft because he convinced his creditors to allow him to do so.

The court, therefore, concludes that Loomis never wanted to sell the aircraft. He was being forced to do so by his creditors. While Loomis was negotiating a sale to Baldor, he was simultaneously lobbying his creditors to allow him to keep the aircraft, which they permitted him to do on July 30, 2010. Moreover, the Baldor contract was not set to close until August 19, 2010, before which, as the parties all testified, the terms of the deal are subject to further negotiating. In other words, anyone could have walked away at any time. In light of the fact that

Loomis' creditors allowed him to keep the aircraft almost three weeks before closing, the court finds that – even if VFS approved the sale – the sale would not have taken place.

Regardless, as it turns out, Loomis was capable of making further loan payments. By the middle of August 2010, Loomis paid off the three months of missed payments (totaling $190,926.15). He then proceeded to make his next 8 monthly payments (September 2010 through April 2011). However, on May 3, 2011, defendants only remitted a partial payment of $45,027.77 (approximately $18,000 less than the monthly payment). Loomis again claimed financial difficulties, but, rather than assert a desire to sell the aircraft, Loomis proposed lowering the monthly payment and reducing the interest rate. VFS rejected Loomis' offer. VFS declared defendants to be in default and commenced this action. In December 2011, the aircraft was sold to another buyer for $3.91 million.

Defendants seek a credit for the $4.7 million offer from July 2010, and do not want to pay costs that would not have been incurred had the aircraft been sold then.[1] This result, defendants argue, is what they are entitled to due to VFS's bad faith failure to mitigate. For the reasons discussed below, this argument fails.

II. Conclusions of Law

"In a civil action such as this one, it is incumbent upon the [party asserting a counterclaim] to prove his entitlement to judgment by a fair preponderance of the credible, relevant, material and admissible evidence. It is the province and indeed, the obligation, of the trial court to assess and determine matters of credibility." *Parr v Ronkonkoma Realty Venture I LLC*, 18 Misc3d 1138(A), at *6 (Sup Ct, NY County 2008), citing *Wendy A. v John H.*, 65 NY2d 826 (1985); *Torem v 564 Cent. Ave. Rest., Inc.*, 133 AD2d 25 (1st Dept 1987).

[1] Despite using the aircraft in the interim.

It is well established that "[t]he law imposes upon a party subjected to injury from breach of contract[] the duty of making reasonable exertions to minimize the injury." *Holy Props. Ltd. v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 133 (1995), citing *Wilmot v State*, 32 NY2d 164, 168 (1973) ("the party seeking damages is under the duty to make a 'reasonable effort' to avoid consequences of the act complained of"). However, "the nonbreaching party is required to mitigate its own injuries, *not potential injury to the breaching party*." *Clark Oil Trading Co. v J. Aron & Co.*, 256 AD2d 196, 199 (1st Dept 1998) (emphasis added; citation omitted). "It [is] defendants' burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages." *LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107 (1st Dept 2007) (citations omitted). "Moreover, if plaintiff reasonably made such diligent efforts to mitigate, it does not matter if, in retrospect, another, better means of limiting the financial injury was possible." *Id.* at 108. Additionally, the duty to mitigate "does not extend so far as to require that the party expose itself to '*unreasonable risk or expense.*'" *Eskenazi v Mackoul*, 72 AD3d 1012, 1014 (2d Dept 2010) (emphasis in original), quoting *Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d 203, 213 (2d Dept 1980).

VFS acted reasonably in rejecting Loomis' request to sell the aircraft in July 2010. Any one of Bonell's explanations, on its own, would be sufficient to justify her decision. Taken together and in context, Bonell's stance appears all the more reasonable. From Bonell's perspective, Loomis was suspiciously claiming financial distress and requesting that VFS give up its secured portion of the debt (and its attendant leverage) before collecting on the unsecured portion. Bonell was unwilling to compromise VFS's security. Bonell's thinking is easy to

understand. Bonell was calling Loomis' bluff, betting that Loomis was capable of paying off the unsecured deficiency amount; she did not want to give up VFS's secured position in the meantime. Bonell's concerns are further amplified by Loomis' admission that his other unsecured creditors were calling the shots.[2] Bonell, as a rational lender, wanted the unsecured deficiency paid off before allowing the collateral to be sold. These considerations firmly place VFS within the bounds of reasonableness. VFS need not place defendants' and their creditors' economic interests above its own.

That being said, even if VFS acted unreasonably, the court would still not have awarded defendants a mitigation set-off because the trial evidence does not demonstrate that the aircraft would have been sold in light of Loomis' creditors' change of heart on July 30, 2010. The court does not find Loomis to be credible when he contends that he would have sold the aircraft if VFS consented; his contemporaneous statements suggest otherwise. Rather, no matter what VFS agreed to, the court believes that Loomis would have found a way to scuttle the sale to keep the aircraft.

Therefore, VFS is entitled to the full amount due under the loan documents. As this case is being referred to a Special Referee to hear and report on the amount of VFS's reasonable attorneys' fees, the court also refers the updated calculation of the amount due under the loan to the Referee as well. The Referee shall make the following calculations: (1) the outstanding principle and contract interest due (6.41%) as of May 1, 2011; (2) default interest (18%) from

[2] Bonell was likely afraid that if the aircraft was sold in July 2010, VFS's unsecured claim to the deficiency would be *pari passu* with the rest of Loomis' debts.

May 1, 2011 to the date of the Referee's report; (3) late charges;[3] and (4) VFS's reasonable attorneys' fees. Accordingly, it is

ORDERED and ADJUDGED that plaintiff VFS Financing, Inc. did not unreasonably fail to mitigate its damages, and the mitigation defense/counterclaim of Insurance Services Corporation, James R. Loomis, and The Loomis Company is dismissed; and it is further

ORDERED that the calculation of damages, including all reasonable attorneys' fees incurred by VFS in this action, is referred to a Special Referee to hear and report in accordance with this decision; and it is further

ORDERED that plaintiffs shall move to confirm or modify the Referee's report within 30 days of its entry on the NYSCEF system, and judgment in this action shall be entered after such motion is decided; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee.

Dated: January 22, 2014

ENTER:

J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

[3] VFS may collect late charges from the late 2010 payments (and obviously for all payments since May 2011), but may only collect default interest since May 2011.