| **Gade v Islam** |
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| 2017 NY Slip Op 31752(U) |
| August 15, 2017 |
| Supreme Court, New York County |
| Docket Number: 652831/11 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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SREENIVASA REDDY GADE, JAISRIKAR LLC, and JAISRIKAR2, INC.,

Plaintiffs,

- against -

MOHAMMED M. ISLAM, TRINGLE FOOD CORP., TRINGLE TWO FOOD CORP,

Defendants.

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Index no. 652831/11

Mot. seq. No. 012

**DECISION AND ORDER**

BARBARA JAFFE, J.:

Plaintiffs Gade, Jaisrikar LLC (LLC), and Jaisrikar2, Inc. (Inc.) move for an order: (1) entering judgment against defendants Islam, Tringle Food Corp. (Tringle), and Tringle Two Food Corp. (Tringle Two) consistent with the jury's verdict and judgment presented pursuant to the notice of settlement filed on August 8, 2016; and (2) permitting plaintiffs to amend the second amended complaint consistent with the proposed third amended complaint submitted to the court on July 31, 2016. (NYSCEF 456).

Defendants cross-move for orders: (1) pursuant to CPLR 4404(a), setting aside the verdict and dismiss the action; and (2) pursuant to General Business Law (GBL) § 394-a (2) and Uniform Commercial Code § 3-804, directing that plaintiffs provide defendants with a written undertaking. (NYSCEF 518).

## I. BACKGROUND

A jury trial was held before me on July 26, 28, 29, 2016, and August 1, 2016. At trial, plaintiffs testified about the events underlying the action as follows: Gade, together with three partners, owned as an investment two Dunkin' Donuts stores in Manhattan, one located on 125th

Street and the other on Madison Avenue. In 2007, they sought to divest themselves of ownership of the stores; defendant Islam agreed to purchase both stores. The parties agreed on a total purchase price of $1.1 million, $780,000 for the 125th Street location, and $320,000 for the Madison Avenue location. Subsequently, Islam agreed to pay a total of $1.3 million.

During the transitional period between contract and closing, the proposed sale of the franchise must be approved by Dunkin', and the purchaser must be trained in running the franchise. Plaintiffs testified that the parties had understood that defendants were to manage the stores over the two-year period before closing, during which defendants would retain any profits, and be liable for any losses. At the closing, assets were transferred, documents were executed, $200,000 of the purchase price was paid, and $100,000 was put in escrow. Islam promised, but failed, to pay the balance after closing. Defendants gave plaintiffs several promissory notes, none of which was satisfied.

Defendants denied having acquired the stores, and asserted that, thus, no closing occurred, and asserted that of the four partners who may have owned the stores, only one appeared at trial because the others were "probably paid." They also alleged that the "contracts" on which plaintiffs rely contain forged signatures, were not properly completed, and are thus unenforceable and incapable of performance. Defendants also claim ownership of the $100,000 held in escrow, assert that it should be released, and deny that they are liable on the promissory notes. They maintain that a demand for payment was never made, and that the notes should not have been admitted in evidence at the trial.

The jury rendered the following verdict:

1. Tringle Two breached a promissory note issued to LLC, dated November 14, 2007, causing damages of $600,000, plus applicable interest, as per the note.

2. Tringle Two breached a promissory note issued to Inc., dated November 14, 2007, causing damages of $350,000, plus applicable interest, as per the note.

3. Tringle Two breached a promissory note issued to Inc., dated November 27, 2007, causing damages of $350,000, plus applicable interest, as per the note.

4. Inc. and Tringle entered into a management/partnership agreement, dated November 14, 2007; Tringle did not breach this agreement.

5. Inc. and Tringle entered into a management/partnership agreement, dated November 14, 2007; Tringle did not breach this agreement.

6. LLC and Tringle Two entered into a management/partnership agreement, dated November 14, 2007; Tringle Two did not breach this agreement.

7. Inc. and Tringle entered into a contract of sale, dated December 2007; Tringle breached this agreement, causing damages of $630,000.

8. LLC and Tringle Two entered into an oral contract of sale; Tringle Two breached this agreement, causing damages of $270,000.

9. Islam did not falsely represent any fact to plaintiffs.

(NYSCEF 512).

## II. MOTION TO AMEND

### A. Contentions

Plaintiffs prevailed on five of the nine questions on the verdict sheet, three as to the promissory notes, and two as to the contracts of sale. The second amended complaint contains four causes of action that are relevant to these motions: (1) breach of contract by Tringle; (2) breach of contract by Tringle Two; (3) breach of contract by Islam; and (4) consumer fraud and common law fraud by Islam. It was filed on October 15, 2013, and defendants answered on or about November 24, 2013. (NYSCEF 114).

Plaintiffs seek to amend the second amended complaint to add, *inter alia*, the following allegations:

1. Before the November 14, 2007 closing, Tringle Two and Islam signed a note by which they promised to pay Jaisrikar, LLC, $600,000, as part of assurances that it would pay for, and properly manage, the stores (note 1);

2. Tringle Two failed to pay the $600,000 owed under note 1;

3. Before the November 14, 2007 closing, Tringle Two and Islam signed a note by which they promised to pay Jaisrikar 2, Inc. $350,000, as part of assurances that it would pay for, and properly manage, the stores (note 2);

4. Islam signed note 2, personally as well as on behalf of his company;

5. Tringle Two failed to pay the $300,000 owed under note 2;

6. Before the November 14, 2007 closing, Tringle Two and Islam signed a note by which they promised to pay Jaisrikar2, Inc. $350,000, as part of assurances that it would pay for, and properly manage, the stores (note 3); and

7. Tringle Two failed to pay the $350,000 owed under note 3.

Defendants argue that they would be prejudiced by the proposed amendment as to the promissory notes, and object to what they characterize as "new, but time-barred, causes of action." They claim there is no mention of promissory notes in the second amended complaint, and that permitting a post-trial amendment triggers their right to answer and interpose defenses. (NYSCEF 520).

Plaintiffs contend that in opposing the motion to amend, defendants ignore pleading requirements, and that they properly seek to conform the pleadings to the facts adduced at trial. (NYSCEF 531).

B. Discussion

Pursuant to CPLR 3025, a party may amend a pleading "at any time by leave of court before or after judgment to conform [the pleading] to the evidence." (CPLR 3025[b], [c]; *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]). Leave "shall be freely given upon such terms

as may be just," "even if the amendment substantially alters the theory of recovery." (*Id.* [internal quotation marks and citation omitted]). The sole factor for the court to consider is whether the opposing party will be prejudiced by the amendment, even where the motion to amend is made during or after trial. (*Murray v City of New York*, 43 NY2d 400, 405 [1977]; *Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992]).

Evidence pertaining to the notes was admitted in evidence at trial (*see* tr. at 52:14 - 53:18; 61:20 - 65:23 [Gade's testimony that note given as security to take over management of stores]; 77:15 - 92:8 [issues of authenticity and admissibility of notes and status as to repayment]; 150:12 - 25 [Gade's testimony that notes given as security; due diligence regarding notes]; 165:23 - 166:20 [cross examination regarding notes]; 356:8 - 357:7 [Islam's testimony regarding lack of payment on note]; 401:20 - 25 [Islam's testimony regarding notes]), along with copies of the notes (NYSCEF 462, 463). Thus, there is no prejudice in permitting the amendment. (*See M Entertainment, Inc. v Leydier*, 71 AD3d 517, 520 [1st Dept 2010] ["The document was received into evidence by the trial court. It was considered by the court in rendering its decision and is part of the record on appeal. Therefore, there can be no prejudice to (defendant) in permitting the amendment"]).

Moreover, defendants could not have been surprised by evidence of the notes. In motion sequence 009, plaintiffs argued that defendants were liable on the notes. (See *Parra v Ardmore Mgt. Co., Inc.*, 258 AD2d 267 [1st Dept 1999], *lv denied* 93 NY2d 805 [trial court did not err in granting motion to amend third-party complaint after verdict, as third-party defendant had sufficient notice before trial that claim may be asserted]; *Equitable Life Assur. Socy. of US v Nico Constr. Co., Inc.*, 245 AD2d 194, 195 [1st Dept 1997] [defendant cannot claim prejudice; evidence at trial made it aware that plaintiff intended to prove that contract for work existed]; *see*

*also Paradiso & DiMenna v DiMenna*, 232 AD2d 257, 257 [1st Dept 1996] ["Since defendant was on notice that this check writing practice was at the heart of this case, defendant was not prejudiced by the trial court's amendment of the pleadings to conform to proof adduced at trial of a conversion of funds pursuant to that practice"]).

In *Lanpont v Savvas Cab Corp.*, the trial court denied a motion made on the eve of trial to amend an answer to assert the defense of the exclusivity of workers' compensation, thereby precluding that defense from being presented at the trial. (244 AD2d 208 [1st Dept 1997]). On appeal, the Court reversed and required a remand to the trial court to consider the new defense. As *Lanpont* neither pertains to a motion to amend a complaint, nor stands for the proposition that amending a complaint requires a new answer, it is inapposite, especially as the defense at issue was to be decided by the trial judge rather than the jury.

## III. MOTION TO SET ASIDE

### A. Contentions

Defendants argue that: (1) the evidence at trial does not support the verdicts rendered in plaintiffs' favor, in that there was no showing of valid contracts; and (2) the allegations as to the promissory notes are not contained in the pleadings, and should not have been included as part of the verdict. (NYSCEF 520).

Plaintiffs argue that the jury properly found that there was a contract between (a) Inc. and Tringle, and (b) LLC and Tringle Two, and that plaintiffs fulfilled their obligations under the contracts. (NYSCEF 531).

### B. Discussion

Pursuant to CPLR 4404(a):

> After a trial of a cause of action . . . upon the motion of any party . . . the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . .

A party's entitlement to judgment as a matter of law depends on whether the evidence "so preponderates" in favor of the movant that the verdict "could not have been reached on any fair interpretation of the evidence." (*Killon v Parrotta*, 28 NY3d 101, 108 [2016] [internal quotation marks and citation omitted]; *Laham v Bin Chambi*, 34 AD3d 374, 374 [1st Dept 2006]). It must be found that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]; *Vaccaro v County of Suffolk*, 137 AD3d 1011 [2d Dept 2016]). If the verdict is set aside as a matter of law, the remedy is a judgment in the movant's favor. (*Cohen*, 45 NY2d at 498).

"Whether a particular factual determination is against the weight of the evidence is itself a factual question" that "involves what is in large part a discretionary balancing of many factors." (*Cohen*, 45 NY2d at 499). The court's discretion is informed by the deference given the jury's resolution of disputed factual issues and inconsistencies in witnesses' testimony (*Bykowsky v Eskenazi*, 72 AD3d 590 [1st Dept 2010], *lv denied* 16 NY3d 701 [2011]; *Desposito v City of New York*, 55 AD3d 659 [2d Dept 2008]), and by the entitlement of the party opposing the motion to "every inference which may properly be drawn from the facts presented," and "the facts must be considered in a light more favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *KBL, LLP v Community Counseling & Mediation Servs.*, 123 AD3d 488, 489 [1st Dept 2014]). Nonetheless, "[t]he critical inquiry is whether the verdict rested on a fair interpretation of the evidence." (*KBL, LLP,* 123 AD3d at 489 [internal quotes omitted]). Where

a verdict is against the weight of the evidence, the remedy is a new trial (*Cohen*, 45 NY2d at 498; *Nicastro v Park*, 113 AD2d 129 [2d Dept 1985]).

Generally, "in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict," and "the court may not employ its discretion simply because it disagrees with a verdict, as this would unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty." (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004] [internal quotation marks and citation omitted]).

In answer to question seven of the verdict sheet, the jury found that there was a contract of sale between Inc. and Tringle, dated December 2007, with resulting damages sustained by Inc. in the amount of $630,000. In its answer to question eight, the jury found the existence of an oral contract of sale between LLC and Tringle Two, with resulting damages sustained by LLC in the amount of $270,000. In support of the argument that these verdicts are not supported by the weight of the evidence, defendants assert that:

1. Plaintiffs admitted only one contract, and did not fulfill the condition that they deliver a bill of sale.

2. Contrary to the allegations in the complaint, there was no evidence at trial of any closing transaction of either contract for the purchase of either store.

3. There is no contract for the sale of the Madison Avenue store.

4. Plaintiffs signed a letter stating that defendants have "no balance due" (NYSCEF 523; tr. at 139:21-23; 140:6-7).

5. Gade denied having sent a demand for payment for the sale of the businesses or the notes (tr. at 145:18-25; 152).

6. Gade admitted that he was in trouble with his home mortgage loan and the "GE loan," neither of which is defendants' obligation (NYSCEF 524);

7. Gade never demanded payment pursuant to the terms of the contracts of sale.

8. Plaintiffs failed to establish any breach by defendants of an obligation owed to them.

These assertions, even taken collectively, do not demonstrate the absence of a basis for the jury verdict, as the evidence is at least equally supportive of the verdict. Plaintiffs rely on the following trial evidence:

1. Islam admitted to having signed several contracts to purchase the two stores, including (a) the contract of sale, dated December 2007, between LLC and Tringle[1] (Horn Aff., Exh. 1); (b) the transitional management/partnership agreement between LLC and Tringle, dated November 14, 2007 (*id.*, exh. 2); (c) the transitional management/partnership agreement between officers of LLC (Gade) and Tringle (Islam), dated November 14, 2007 (*id.*, exh. 3); (d) the transitional management/partnership agreement between Gade and Islam, as an officer of Tringle Food Corp., dated November 14, 2007 (*id.*, exh. 4); (e) the contract between Inc. and Tringle, dated June 19, 2008 (*id.*, exh. 15); and (f) the contract between LLC and Tringle Two, dated June 19, 2008 (*id.*, exh. 16).

2. Islam made partial down payments for the stores (*id.*, exh. 12 [copies of four checks, each in the amount of $50,000]).

3. Islam signed "Franchise Request" forms, indicating that that the total purchase price was $1.1 million (*id.*, exh. 13 [request to Dunkin' Donuts]).

4. Islam signed several transfer documents, all pertaining to the Dunkin' Donuts purchases such as: (a) "Notification of Sale, Transfer or Assignment in Bulk" (*id.*, exh. 20); (b) "Assignment and Assumption Agreement" (*id.*, exhs. 21 and 22); and (c) "Franchise Agreements" (*id.*, exhd. 23-24).

5. In his discovery responses, Islam admitted that he had "enter[ed] into an agreement to purchase both stores" (*id.*, exh. 27, item 4).

6. Islam admitted during his deposition that there was a closing at which the stores were transferred (*id.*, exh. 38, tr. 119:6 - 25).

7. The parties stipulated at trial that "the Dunkin' Donuts' contract of sale and related documents were submitted to Dunkin' Donuts'" (NYSCEF 528, exh. H, tr. 214:20-214:26).

[1] This contract, and others cited by plaintiffs, erroneously refer to Tringle Food Corp. as "Triangle Food Corp."

Based on the foregoing, it cannot be said "that the verdict could not have been reached on any fair interpretation of the evidence." (*Laham v Bin Chambi*, 34 AD3d at 374). Moreover, as much of the evidence at trial consisted of testimony, any credibility issues arising therefrom were resolved by the jury, and its resolution of such "issues is entitled to deference." (*Laham v Bin Chambi*, 34 AD3d at 375).

## IV. INTEREST

The notes provide for interest at the rate of seven percent. In their proposed judgment, plaintiffs seek interest at that rate from November 14, 2007, until judgment, and the statutory rate of nine percent thereafter.

Only two of the three notes are dated November 14, 2007; the third is dated November 27, 2007, as per the jury verdict. Moreover, the notes do not provide for the rate of interest upon default.

Pursuant to CPLR 5001(a), a creditor may recover prejudgment interest on unpaid interest and principal payments awarded "from the date each payment became due under the terms of the promissory note to the date liability is established." (*Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]). "When a claim is predicated on a breach of contract, the applicable rate of prejudgment interest varies depending on the nature and terms of the contract." (*NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). "Most agreements associated with indebtedness provide a 'contract rate' of interest that determines the value of the loan and that rate is used to calculate interest on principal prior to loan maturity or a default in performance." (*Id.*).

Here, the applicable rate is seven percent, and it applies to the period prior to default. And, as the parties did not provide for the interest rate that governs after default, New York's statutory rate applies as the default rate. (*Id.*). Therefore, the statutory rate of nine percent applies, but it accrues on the date of default under the notes, not the dates that the notes were executed. (*See Chipetine v McEvoy*, 238 AD2d 536, 536 [2d Dept 1997] [trial court improperly computed amount of interest due on promissory note after default; as note did not provide that interest be paid at specified rate until principal fully paid, court should have awarded only statutory interest rate of nine percent after date of defendant's default]).

As the parties do not address the date of default under the notes, nor did the jury decide this issue, the amount of interest owed, including, but not limited to, the date of default, is referred to a special referee.

## V. UNDERTAKING

As an alternative to dismissing the complaint, defendants argue that plaintiffs should be directed to deliver an undertaking pursuant to Uniform Commercial Code § 3-804 and General Business Law § 394-a (2).

Uniform Commercial Code § 3-804 provides:

> The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court shall require security, in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant, his heirs, personal representatives, successors and assigns against loss, including costs and expenses, by reason of further claims on the instrument, but this provision does not apply where an action is prosecuted or defended by the state or by a public officer in its behalf.

General Business Law § 394-a similarly provides:

> 1. Where, upon the trial of an action, it appears that a negotiable instrument within article three of the uniform commercial code, upon which the action or a counterclaim interposed in the action is founded, was lost while it belonged to the party claiming the amount due thereupon, he may prove the contents thereof by parol or other secondary evidence and may recover or set off the amount due thereupon as if it was produced.
>
> 2. For that purpose, he must give to the adverse party a written undertaking, in a sum fixed by the judge or the referee, not less than twice the amount of the note or bill, with at least two sureties, approved by the judge or the referee, to the effect that he will indemnify the adverse party, his heirs and personal representatives, against any claim by any other person, on account of the note or bill, and against all costs and expenses, by reason of such a claim.

Notwithstanding the use of the word "shall" in Uniform Commercial Code § 3-804, opinion is divided as to whether the posting of an undertaking is mandatory. In the Official Comments to the statute, an undertaking is deemed discretionary:

> If the claimant testifies falsely, or if the instrument subsequently turns up in the hands of a holder in due course, the obligor may be subjected to double liability. The court is therefore authorized to require security indemnifying the obligor against loss by reason of such possibilities. There may be cases in which so much time has elapsed, or there is so little possible doubt as to the destruction of the instrument and its ownership that there is no good reason to require the security. The requirement is therefore not an absolute one, and the matter is left to the discretion of the court.

(Uniform Commercial Code § 3-804 Official Comments).

Decisions in which courts found an undertaking to be discretionary include *Newbury Place Reo III, LLC v Sulton*, 48 Misc 3d 1206(A), 2015 NY Slip Op 50985(U), *4 (Sup Ct, Kings County 2015) (requirement not absolute; matter left to court's discretion), *487 Clinton Ave. Corp. v Chase Manhattan Bank*, 63 Misc 2d 715, 717-718 (Sup Ct, Kings County 1970) (court rejects mandatory interpretation of statute, and grants plaintiffs' request to use interest bearing account as security), and *Kwon v Yun*, 606 F Supp 2d 344, 369-370 (SD NY 2009) (requirement of undertaking discretionary).

Although the Appellate Division, First Department, in *Sills v Waheed Enters.*, held that the plaintiff "should have been required to post security to indemnify appellant from any future actions on these lost instruments (UCC 3-804)," it did not discuss whether an undertaking is mandatory in all circumstances. (253 AD2d 351, 352 [1st Dept 1998], *lv denied* 93 NY2d 808 [1999]).

However, in *Matter of Diaz v Manufacturers Hanover Trust Co.*, the court concluded that it may not order payment on a lost negotiable instrument without requiring the payee to post an undertaking and that the undertaking is thus mandatory. (92 Misc 2d 802, 805-806 [Sup Ct, Queens County 1977]). And in *Beswick v Weiss*, construing General Business Law § 394-a, the Court affirmed the lower court's order directing the defendant to pay on a note conditioned on the plaintiff obtaining an undertaking, observing that the undertaking "effectively protected defendant from the risk of double liability should the lost instrument reappear." (126 AD2d 854, 855-856 [3d Dept 1987]).

Here, the notes were issued in 2007, this action has been pending since 2011, and there is little likelihood of a future claim. The facts here are similar to those addressed in *Kwon v Yun*, although there, the plaintiff did not dispute that he borrowed the money, received the funds, and failed to repay:

> While the question is a close one, the Court concludes that, on balance, there is no reasonable ground for requiring security here. This litigation has been pending for more than four years. No other party has asserted any claim based on the Notes, and – aside from plaintiff's claim that the Notes were distributed to a member of Metedeconk – there is no evidence that the Notes have been negotiated or transferred to any other party.

(606 F Supp 2d at 369).

## VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion by plaintiffs Sreenivasa Reddy Gade, Jaisrikar LLC, and Jaisrikar2, Inc. is granted to the extent of (1) permitting plaintiffs to amend the second amended complaint consistent with the proposed third amended complaint submitted to the court on July 31, 2016; and (2) granting them judgment, although entry of judgment is stayed pending a calculation of the interest due as set forth below; it is further

ORDERED, that the issue of pre-judgment and post-judgment interest, including, but not limited to the date of default, is hereby referred to a Special Referee to hear and report; it is further

ORDERED, that counsel for plaintiffs shall, within 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 General Clerk's Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; it is further

ORDERED, that upon receipt of the Special Referee's report, plaintiffs shall submit for my signature a copy of the report along with a proposed order and judgment; and it is further

ORDERED, that defendants' cross motion for orders (1) setting aside the verdict; and (2) directing that plaintiffs provide defendants with a written undertaking is denied.

ENTER:

Barbara Jaffe, JSC

DATED: August 15, 2017
New York, New York