

Dasho Import & Export, LLC v Garlic Place 1 W. Cafe Plus Corp.
2017 NY Slip Op 32078(U)
September 25, 2017
Supreme Court, New York County
Docket Number: 651633/2017
Judge:
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL REFEREE PART 87R

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DASHO IMPORT & EXPORT, LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 651633/2017

GARLIC PLACE 1 WEST CAFÉ PLUS CORP.
and DANIELE TINEO,

Defendants.

-----X
SPECIAL REFEREE JOSEPH P. BURKE:

By Order dated January 30, 2017 (the "January 30 Order", NYSCEF Doc. No. 12), Justice Debra A. James granted plaintiff's motion for default judgment as against both defendants, and referred the issue of the amount of damages to be assessed as against defendants to a Special Referee to hear and determine. The matter was assigned to on May 2, 2017.

All parties appeared with counsel. Although defendants defaulted in appearing before Justice James, I permitted them to participate in the hearing by cross-examining plaintiff's witness and making objections.

Plaintiff's sole witness was Demisse Dasho (Dasho, Tr. 5). Dasho is the principal of plaintiff Dasho Import & Export, LLC (Dasho I&E). On September 10, 2015, a document was executed by defendant Dianele Tineo (Tineo) on behalf of defendant Garlic Place 1 West Café Plus Corp. (Garlic Place). The document is titled as a Promissory Note (Promissory Note, Exh. 1). The

Promissory Note states that Tineo and Dasho were in the process of becoming business partners in Garlic Place, and that Tineo agreed to sell 51% of Garlic Place to Dasho in return of \$30,000. At Tineo's request, Dasho paid \$13,000 in advance of the closing. If "the anticipated partnership agreement" between Dasho I&E and Garlic Place was not completed within fifteen (15) days of signing the Promissory Note, then Garlic Place agreed to repay the \$13,000 advance, plus an additional fee of \$2,000. If that amount was not paid back within sixteen (16) days of the Promissory Note's signing, then Garlic Press agreed to pay a \$10 daily late charge, 15% interest, and to pay all collection fees including legal fees (see Promissory Note). The Promissory Note also provides that, in case of default, Tineo is personally liable to Dasho I&E for all amounts due.

Dasho paid the \$13,000 advance, but Tineo did not transfer 51% of Garlic Press to Dasho and did not repay the \$13,000 or pay the \$2,000 fee within sixteen days (Tr. 8). On cross-examination, Dasho testified that he was prepared to complete the transaction and called Tineo to arrange the closing, but Tineo did not answer the phone (Tr. 17 - 18). The closing to transfer 51% of Garlic Press to him never took place.

Defendant's counsel argued in closing that the Promissory Note is unenforceable because it was not signed by plaintiff. He further argued that plaintiff breached the Promissory Note because it did not pay the balance of \$30,000 due under it, and accordingly, he should not be permitted to

enforce the terms of the Promissory Note requiring defendants to pay back the \$13,000 advance. Finally, he argued that the terms of the Promissory Note are unconscionable and usurious (Tr. 22 – 23). These arguments are unavailing because Justice James already found that defendants are liable, and she did not refer any issue to the Special Referee with respect to liability or to enforceability of the Promissory Note.

In his closing argument, plaintiff's attorney stated that in addition to seeking the return of the \$13,000 plus the \$10 per day fee and interest, plaintiff also sought to recover \$800 in attorney fees incurred to draft a partnership agreement, plus \$3,500 of attorney fees charged by the attorney in this action, plus \$715 in court filing fees (Tr. 24). The attorney's fees and costs are not recoverable because no evidence was proffered in support of this claim (although plaintiff may still get taxable costs and disbursement pursuant to CPLR 8101).

Counsel argued that plaintiff was entitled to interest under the Promissory Note from September 15, 2015 to the date of the May 22, 2017 hearing in the amount of \$3,221.51 (Tr. 24), and to recover \$6,030 in late fees, representing 603 days since the breach at \$10 per day (*id.*).

Defendants did not offer any contrary calculation of damages.

The calculation of damages is as follows:

The Promissory Note obligated the parties to close fifteen days after the signing of the note on September 10, 2015. If the partnership

agreement (by which the Court discerns the parties meant that Tineo would transfer 51% of Garlic Place to plaintiff, from both the text of the Promissory Note and from Dasho's credible testimony) was not completed within fifteen days, then Garlic Press became obligated to return the \$13,000 plus an additional \$2,000 fee for breaking their contractual agreement (Promissory Note). That payment was due sixteen days after the signing of the Promissory Note, i.e., on September 26, 2015.

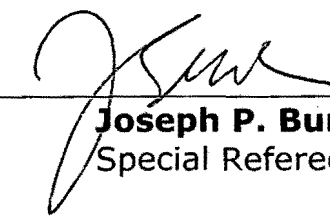
The Court can take judicial notice of the number of days from September 26, 2015 to the date of the May 22, 2017 hearing. It is 604 days. Plaintiff is entitled to recover \$6,040 in late fees for this period ($604 \times \$10$). Plaintiff is entitled to recover the \$13,000 advanced to Tineo, plus the \$2,000 fee, totaling \$15,000. As of September 26, 2015, plaintiff was entitled to recover interest on that amount at the rate of fifteen (15) percent per annum. For the year September 26, 2015 to September 26, 2016, interest was \$2,250 ($\$15,000 \times .15$). For the period of September 26, 2016 to the date of the May 22, 2017 hearing, plaintiff was entitled to an additional \$1,466.08 ($\$15,000 \times .15 / 365$ [per diem interest] $\times 238$ days). Total interest is \$3,716.08 ($\$2,250 + \$1,466.08$) as of the date of the hearing.

In sum, plaintiff is entitled to judgment from defendants in the amount of \$24,756.08 ($\$15,000 + \$3,716.08$ interest + \$6,040 daily late fee). Accordingly, it hereby is

ORDERED that plaintiff DASHO IMPORT & EXPORT, LLC is entitled to judgment as against defendants GARLIC PLACE 1 WEST CAFÉ PLUS CORP. and DANIELE TINEO, jointly and severally, in the amount of \$24,756.08, plus interest at the statutory rate from May 22, 2017 to the date of entry of judgment, and thereafter to interest at the statutory rate, together with costs and disbursements as taxed by the Clerk, and the Clerk shall enter judgment accordingly.

Dated: September 25, 2017

ENTER:


JOSEPH BURKE
Joseph P. Burke
Special Referee
SPECIAL REFEREE