

Chiampou Travis Besaw & Kershner, LLP v Pullano
2019 NY Slip Op 34060(U)
November 19, 2019
Supreme Court, Erie County
Docket Number: 805848-2017
Judge: Deborah Chimes
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**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

**CHIAMPOU TRAVIS BESAW & KERSHNER, LLP
and 45 BRYANT WOODS, LLC,**

Petitioners,

-vs-

DECISION
Index No. 805848-2017

GERALD F. PULLANO,

Respondent.

BACKGROUND

Petitioners, Chiam pou, Travis, Besaw and Kershner, LLP and 45 Bryant Woods, LLC, (collectively, CTBK), commenced an action seeking a declaratory judgement that the methodology they used to calculate payments made to respondent, Gerald Pullano, under a promissory note and pursuant to a partnership agreement was correct; and a declaration relative to the transfer of interest in real property known as 45 Bryant Woods. Respondent interposed an Answer with counter-claims seeking a determination that petitioners erred in calculating the full value of respondent's partnership interest; a determination that petitioners were in default on payment of the note; that respondent is entitled to enforce the acceleration clause in the note; and a determination that respondent is not obligated to relinquish his interest in 45 Bryant Woods. All issues were resolved by prior proceedings, with the exception of whether respondent was precluded from enforcing the acceleration clause because such action would be unconscionable.

A bench trial was conducted on September 11, 2019. The parties submitted post-trial memorandums on October 16, 2019.

FINDINGS OF FACT

CTBK is an accounting firm. This controversy arose out of respondent's withdrawal and departure as a partner from CTBK. Respondent withdrew as partner of CTBK on June 22, 2015, effective December 31, 2015. The parties entered into a separation agreement wherein CTBK agreed to buy out respondent's interest in the business and signed a 10-year promissory note. Pursuant to the note, the first quarterly payment was due on February 28, 2016. On February 25, 2016, CTBK sent respondent the first quarterly check in the amount of \$32,999.69, along with an executed promissory note dated December 31, 2015 and an amortization schedule showing equal payments over the 10-year payment period. In a letter dated April 8, 2016, respondent informed petitioners that the promissory note did not have the acceleration clause required under the partnership agreement and that the note did not accurately reflect the calculation of payments as specified under the partnership agreement. The payment, respondent wrote, should have been "equal installments of principal, together with unpaid interest," but instead reflected "equal combined installments of principal and interest." In that same letter a request was made for immediate payment of the outstanding balance of the initial installment and a revised amortization schedule. In a letter dated April 11, 2016, CTBK advised respondent's attorney that it disagreed with the respondent's interpretation of the amortization of the promissory note. It appears from an exchange of e-mails dated in September 2016, that the parties discussed possible resolution to the disagreement over the amortization of the promissory note. On February 4, 2017, respondent sent CTBK a "Notice of Default and Acceleration" seeking immediate

payment of the entire principal balance plus interest. On February 18, 2017, CTBK noted its disagreement over being in default. The parties remained in disagreement and CTBK filed a petition on May 8, 2017. Throughout the litigation, petitioners continued to make payments under the amortization schedule in the amount they believed to be correct. The issue of the manner in which amortization was to be calculated was the subject of a prior motion, wherein on November 26, 2018, this Court decided in favor of respondent's calculation and found petitioners to be in default. Said decision was made part of an order dated January 17, 2019. On November 28, 2018, petitioners made payment in the amount of the shortage.

DECISION

It is clear from the correspondence exchanged, that the parties had a bona fide dispute over the way in which interest was to be paid on the note. Though the parties attempted to convince the other of their interpretation, they could not agree and the petitioners sought the Court's intervention regarding the issue. Additionally, respondent by way of a cross-claim, challenged the petitioners' evaluation of the "full value" of his interest in the business and claimed it was "erroneously calculated" and in "bad faith." Respondent sought the Court's interpretation on this issue as well.

This Court, in a prior decision, found the petitioners' calculation of full value correct and though respondent's interpretation was found erroneous, the Court did and does not impute bad faith against the respondent for defending his position on the issue. Similarly, in a prior decision, this Court found petitioners' amortization of interest to be erroneous and likewise did and does not impute bad faith against the petitioners for defending their position on that issue. Petitioners, within three days of the Court's ruling, forwarded a check for the "calculated

shortage." It is also noted that throughout the litigation, petitioners continued to make payment under their interpretation of the promissory note. Notwithstanding the continued payment and the payment to cure, the respondent seeks enforcement of the acceleration clause.

It is the rare case that denies enforcement of an agreement providing for the acceleration of the entire debt upon the default of the obligor. "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 Management Corporation, 46 NY 2d 573, 577 (1979). However, "equity may relieve against the effect of a good faith mistake, promptly cured by the party in default with no prejudice to the creditor to prevent unconscionable overreaching." (internal citations omitted). Id. at 577.

The circumstances of this case make it one of those rare cases where the acceleration clause should not be enforced. Here petitioners, while exercising their right to litigate the interpretation of a contractual clause, continued to make payments under its interpretation until the Court found the petitioners method of calculation erroneous. Upon learning of the error, petitioners promptly paid respondent the shortage with interest. Further, with the immediate payment of the shortage and the continuation of payments, respondent was not prejudiced. To enforce the acceleration clause under these facts would be unconscionable.

Respondent also seeks payment of attorney fees, costs and expenses pursuant to Section 5(a) of the promissory note. Costs and expenses, including attorney fees, are awarded to respondent.

CONCLUSION

The Court finds petitioners acted in good faith when seeking the Court's interpretation of the promissory note and to enforce the acceleration clause would be unconscionable under the circumstances of this case. Costs and expenses, including attorney fees incurred in the collection under the Promissory Note, are granted to respondent.

Counsel for petitioners is to prepare and submit an Order, attaching the Court's decision.

DATED: Buffalo, New York
November 19, 2019


HON. DEBORAH A. CHIMES, J.S.C.