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802 ABSECON BOULEVARD., Plaintiff, v. FAIRVIEW INVESTMENT FUND II, LP, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. C-49-17

OPINION

Argued: November 14, 2018
Decided: January 16, 2019

Appearances: Jason T. Shafron, (Shafron Law Group, attorneys) for plaintiff

Joseph R. Valle, Jr., (Riemer & Braunstein LLP, attorneys) for defendant

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter was originally before the Court for a Motion for Assessment of Damages filed by Defendant/Plaintiff-in-Counterclaim, Fairview Investment Fund II, LP (hereinafter "Fairview") by and through its counsel, Joseph R. Valle, Jr., Esq., of the law firm Riemer & Braunstein LLP. Subsequent to Defendants submission of a proposed form of order following Judge Robert P. Contillo's July 24, 2018 decision, Plaintiffs 802 Absecon Boulevard/Absecon, LLC; 102 JFK Way/Willingboro, LLC; 1843 Burlington Mr. Holly Rd./Westhampton, LLC; Browning Lane/Brooklawn, LLC; 1390 R. Marlton Pike/Cherry Hill, LLC; 1200 Route 73 North/Pennsauken, LLC, 1409 Laurel Road/Lindenwold, LLC; 2229 2nd Street North/Millville, LLC; 8401 River Road

Associates, LLC; and 485 Route 46 E/Little Falls, LLC (hereinafter, collectively "Plaintiffs"), by and through counsel Jason T. Shafron, Esq., objected.

BACKGROUND

At the heart of this matter is a breach of contract claim, arising from a number of promissory notes, mortgages, and a subsequent letter agreement between the parties. Plaintiffs' efforts to satisfy the terms of the notes were ultimately unsuccessful, and the notes matured on May 1, 2016. In a letter agreement dated May 16, 2016, GE Capital Franchise Finance Corp. – predecessor by assignment to Defendant Fairview – notified Plaintiffs of the maturity of the notes and corresponding default for nonpayment. As of May 16, 2016, the loan had an outstanding balance of $3,494.317.17.

Thereafter, on or about October 26, 2016, GE Capital Franchise Finance Corp and Plaintiffs entered into a letter agreement, which stated Plaintiffs would be entitled to receive a total discount of $627,797.51 off the remaining balance then due under the notes *only if* each of five (5) conditions precedent set forth in the letter agreement were satisfied in the Lender's sole discretion. Of the five (5) conditions precedent, Plaintiffs were only able to satisfy four (4) by the December 15, 2016 deadline.

As a result, on December 12, 2017, the Honorable Robert P. Contillo ruled that the Letter Agreement could not be enforced and it was subsequently declared null and void because of Plaintiffs inability to comply with the five required conditions.

On July 24, 2018, the Court held that Defendant could collect default interest in the amount of 9.69% "from December 16, 2016 on the principal then outstanding. Moreover, Defendant is further entitled to default interest from September 28, 2017 to January 2018, with the $3.6 million dollar payment being deducted from the outstanding principal balance, and the default interest being

calculated from that amount." See July 24, 2018 Opinion at pp. 20-22. The Court also held that Defendant is entitled to attorney's fees in the amount of $151,189.06, but could not collect any "late fees" or any additional interest it initially argued for. See id. at pp. 23.

Pursuant to the Court's July 24, 2018 Decision, Defendant was to submit a proposed order that complied with the award of damages stemming from the Decision. Defendant's proposed order sought an additional $1,237,698.33 in interest, default interest, late fees, and penalties, to which Plaintiff objected to as not conforming to the Court's July 24, 2018 Decision. Instead, Plaintiff opined that based on moneys already paid, coupled with the Court's Order that Defendant was not entitled to any late fees; it was actually owed $25,201.30 from Defendant.

Subsequently, on August 22, 2018, as a result of the large discrepancy, this Court requested the mathematical breakdown of each parties' calculation of the amount of money paid and owed to Defendant consistent with the Court's July 24, 2018 Opinion. In or about early September of 2018, the parties made their initial submissions to the Court outlining the amount owed. Plaintiff, utilizing a 9.69% interest rate, submitted a total final judgment amount of $154,279.38. Defendant's submission, which utilized the 18% interest rate along with the other calculations currently at issue, proposed a total final judgment amount of $1,020,847.06.

These submissions were then supplemented in even greater detail upon further order of the Court on October 5, 2018. The most notable change in the supplemental submissions, among others, was Defendant's removal of the additional late fees charged by Fairview Investment Fund's predecessor, G.E. Capital in the amount of $190,623.75 consistent with the July 24, 2018 Decision. Thus, following the submission of the supplemental calculations, Defendant's proposed total final judgment as of the time of the instant argument was $752,278.96. The Court heard oral argument on the matter on November 14, 2018.

LEGAL STANDARD

New Jersey courts strictly scrutinize contract provisions that provide for the payment of specific damages upon breach. Wasserman's Inc. v. Middletown, 137 N.J. 238, 248 (1994). The need for such scrutiny arises from the possibility that "a default provision providing for an unreasonable increase in the contract interest rate is unenforceable as a penalty." Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. LP, 159 N.J. 484, 501 (1999). In determining the reasonableness of a negotiated liquidated damages clause, "[t]he overall single test of validity is whether the clause is reasonable under the totality of the circumstances." Id. at 495. "[A] stipulated damage clause must constitute a reasonable forecast of the provable injury resulting from breach; otherwise, the clause will be unenforceable as a penalty and the non-breaching party will be limited to conventional damage measures." Wasserman's Inc., 137 N.J. at 249.

In Metlife, the New Jersey Supreme Court explained, "[l]iquidated damages provisions in a commercial contract between sophisticated parties are presumptively reasonable and the party challenging the clause bears the burden of proving its unreasonableness." Metlife, 159 N.J. at 495-96.

When determining the reasonableness of liquidated damages provisions, including default interest rates, the Court should consider several non-dispositive factors, such as "the difficulty in assessing damages, intention of the parties, the actual damages sustained and the bargaining power of the parties." The Court may also consider "what is permitted by statute and what constitutes common practice in a competitive industry." Id. at 497-99. "No one factor is determinative whether a clause is reasonable; rather, a reviewing court must look at the totality of the circumstances." Id.

ANALYSIS

The issue presented before the Court is whether or not the 18% default interest rate under the terms of the underlying promissory notes is enforceable as a reasonable post-maturity interest rate pursuant to the July 24, 2018 Decision. Specifically, the parties have framed the issue as whether or not the ruling on the reasonableness of the interest rate took into account the 10.31% increase allegedly agreed to by the parties.

The July 24, 2018 Opinion

Defendant leans heavily on the fact that the Court's Decision expressly provided that "[The Court] would not rewrite the parties' contracts." See July 24, 2018 Opinion at p. 23. Yet, the additional 2% increase in the interest rate at default is the only default interest rate that was argued in this case at any time, and thus it is clear that when stating it would not rewrite the contract, the Court referred only to the 2% increase.

Therefore, when reviewing the language of the decision, the Court finds that it only took into account the 7.69% to 9.69% increase when evaluating the reasonableness under the totality of the circumstances test. Page 20 of the Court's decision reflects the Court's narrow focus of the issue:

> The increased default rate is clearly reasonable under the totality of the circumstances. *The allotted increase is from 7.69% to 9.69%, a two (2) percent increase*. Plaintiffs do not present the Court with any evidence that *a two percent increase* is unreasonable under these circumstances, but merely recite the figures for the Court to consider. *Indeed, Plaintiffs point the Court to a case in which an 8.58% increase was struck down as unreasonable*. (internal citations omitted). Furthermore, in Metlife, the Supreme Court upheld a three percent increase in the interest rate as reasonable. . . . *In light of the fact that the default interest rate increase is less than that reviewed in Metlife*, coupled with Plaintiffs failure to demonstrate the unreasonableness of the increase, the Court will uphold the default interest rate as reasonable.
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> July 24, 2018 Opinion at p. 20-21 (emphasis added).

The language of the Court's July 24, 2018 Opinion is abundantly clear that when conducting the Metlife analysis in the instant matter, he only reviewed the reasonableness of the two percent increase. The Court unambiguously refers to a 2% increase not once, but twice. Next, he refers to the interest rate at issue as being "less than" the three percent increase upheld in Metlife, despite the fact that Defendant is now pushing for a 10.31% increase, which is obviously *greater* than the 5% increase in Metlife. Lastly, the Court explicitly notes the "unreasonableness" of an 8.58% increase, which surely would not follow if he were making findings in support of a 10.31% increase rate.

Perhaps most notably, in its twenty-nine (29) page opinion, neither the terms "18%" nor "10.31%" - the amount of increase from 7.69 to 18 – are even *mentioned*. The closest the Court comes to this reference is the single comment on an 18.34% "late fee" – calculated based on $190,623.75 of late fees – which the Court went on to explicitly rule as "above . . . the threshold the parties negotiated for." See id. at p. 23. Thus, contrary to Defendant's contentions, it is clear that the Court never even considered the 18% interest rate when issuing its opinion.

The Court is not inclined to go so far as to agree with Plaintiff's assertion that Defendant's submissions to the Court constitute "bad faith" and a "conscious effort" to conceal information regarding the amount of damages and how they were calculated. However, the Court does note the significance of the fact that Defendant never once claimed that it was seeking to assess or collect interest at 18% prior to the instant application. Moreover, it is difficult to fathom how Defendant can demonstrate the validity and reasonableness of the 18% interest rate having not even explicitly argued for it in front of the Court. Having done so now, this Court is inclined to address the merits of a 10.31% increase in the interest rate at default under Metlife.

Metlife analysis of the 18% interest rate

Following the analysis set forth in Metlife, this Court cannot find a 10.31% increase from 7.69% to 18% to be reasonable. The Court noted in the July 24, 2018 Decision that under New Jersey law, an increase of 8.58% is both "unconscionable and unenforceable." See Spiotta v. Wilson, 72 N.J. Super. 572, 579 (App. Div. 1962). This Court lays out its reasoning below.

First, the Court does not find that Defendant's proposed default interest rate constitutes a reasonable forecast of injury caused by Plaintiffs' breach. See Wasserman's v. Inc. v. Middletown, 137 N.J. 238, 249 (1994). Despite the fact that Defendant will have received approximately $398,382.03 in excess of the principal balance at which the Loan was purchased, Defendant's proposed order, under an 18% default interest rate, seeks an additional $1,037,298.86. Such an astronomical windfall in Defendant's favor is unwarranted based on the lack of any real support that this number constitutes a "reasonable forecast" of injury caused by Plaintiffs' breach. That result is simply unconscionable and inequitable.

Defendant has also failed to present any evidence as to whether or not such a steep increase in interest is common practice in the industry. Although not required under Metlife, the Metlife court noted the significance of what is permitted by statute and what constitutes common practice in a competitive industry in situations where it is difficult to assess damages attributable to a specific late payment. Defendant has merely leaned on the repeated assertion that this transaction consisted of sophisticated parties who should have known what they were getting into.

Lastly, Defendant has failed to put forth any evidence that could accurately measure the actual damages sustained. Although none of the Metlife factors themselves are dispositive, it is within the sound discretion of the trial court to determine the reasonableness of the clause under the totality of the circumstances. See Metlife, 159 N.J. at 495. Here, it is clear that Defendant has not

provided significant proof to persuade this Court that an 18% interest rate under the totality of these circumstances is reasonable.

Calculation of Total Outstanding Balance Pursuant to the Court's July 24, 2018 Decision

The Court finds the following interpretation of the Court's July 24, 2018 Decision applies:

From May 16, 2016 through October 31, 2016, the interest on the Loan should have accrued at a 7.69% interest rate on the then outstanding balance of $3,494.317.17. During this timeframe, the interest accumulated would have totaled $123,279.51.

From October 31, 2016 through November 30, 2016, the interest on the Loan should have continued to accrue at a 7.69% interest rate on the then outstanding balance of $3,369,317.17 – which had been reduced by $125,000.00 after the payment Plaintiffs made on November 1, 2016 toward the principal balance of the loan. Thus, during this timeframe, the interest accumulated would have totaled $21,226.70.

From November 30, 2016 through December 15, 2016, the interest rate should have continued to accrue at a 7.69% interest rate on the then outstanding balance of $3,244,317.17 – which had been further reduced by another $125,000.00 payment Plaintiffs made on December 1, 2016 toward the principal balance of the loan. Thus, during this timeframe, the interest would have totaled $10,219.60.

As discussed above, pursuant to the Letter Agreement and the Court's December 2017 summary judgment ruling, Plaintiffs were unable to comply with the five conditions precedent to pay off the remaining balance, and the interest rate on the loan increased by an additional 2% from 7.69% to 9.69% - an increase Judge Contillo held to be reasonable under MetLife. In accordance with the Court's July 24, 2018 Decision, from December 16, 2016 through September 28, 2017, the

interest on the loan should have accrued at a 9.69% interest rate on the then outstanding principal balance of $3,244,317.17, thus totaling $246,746.54 during that timeframe.

On September 28, 2017, the total outstanding balance on the Loan thus should have totaled $3,645,789.52, which is calculated based on the then $3,244,317.17 in principal, plus the $401,472.35 in interest noted in the preceding paragraphs. Further, pursuant to the July 24, 2018 Decision, Defendant is entitled to $176,290.36 in attorney's fees and costs. On that day, Plaintiffs paid Defendant $3,667,800.50. When that payment is subtracted from the total amount due pursuant to the July 24, 2018 judgment, the remaining judgment outstanding totals $154,279.38. No interest would have accrued past the September 28, 2017 payment because the outstanding principal was fully satisfied on that day, with the remaining $154,279.38 being attributable solely to remaining attorney's fees and costs.

CONCLUSION

The Court's July 24, 2018 decision explicitly notes that: (1) Plaintiffs argued that the "most Defendant could recover under the Loan was a total interest rate of 9.69%" and (2) that the "allotted increase is from 7.69% to 9.69%," a two (2) percent increase. It was not until now that Defendant, for the first time, expressly argues that it seeks interest at 18%. In doing so, Defendant has failed to argue that it has suffered any specific damages aside from attorneys' fees, and has not indicated to this Court in any manner how such a steep increase in interest constitutes a reasonable forecast of provable injury at the time the parties contracted.

For the foregoing reasons, Defendant's Motion for Assessment of Damages is hereby granted in part and denied in part. Final Judgment in the total amount of $154,279.38 is to be entered in Defendant's favor as to Counts I through VII of its Counterclaims against Plaintiffs and the

Plaintiffs' Complaint is hereby dismissed with prejudice as against Defendant Fairview. An Order accompanies this Decision.