

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER

PART IAS MOTION 61EFM

Justice

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GOLD CIRCLE FINANCE LLC

INDEX NO. 652987/2015

Plaintiff,

-against-

GC SANDTON ACQUISITION, LLC,

Defendant.

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GC SANDTON ACQUISITION, LLC

INDEX NO. 652664/2017

Plaintiff,

-against-

GOLD CIRCLE FILMS LLC,

Defendant.

**DECISION AND ORDER
AFTER TRIAL**

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OSTRAGER, J.:

These actions were consolidated for trial and the trial was conducted on June 3 and 4, 2019 after cross-motions for summary judgment were denied for the reasons stated on the transcript of proceedings of May 8, 2019. (See NYSCEF Doc. Nos. 263 and 264 in the 2017 Action). The dispute essentially involves the rights of GC Sandton Acquisition, LLC (“Sandton”) with respect to a loan to Gold Circle Finance LLC (“Gold Circle Finance”) that defaulted at maturity on November 27, 2011 which Sandton purchased from the original lenders, CIT and U.S. Bank National Association (“USB”), after a maturity default. Prior to the maturity default, Gold Circle made multiple curable defaults on the loan which the lenders chose to try and work out with the Gold Circle entities.

Gold Circle Finance is a shell company that acts as the finance arm for its parent Gold Circle Films LLC (“Gold Circle Films”) which guaranteed the Loan. Gold Circle Finance and Gold Circle Films have the same officers, operate out of the same office, and utilize the same telephone numbers, email addresses, and fax number. The companies are, in the words of Paul Brooks, the CEO of both entities, indistinguishable. Gold Circle Films is in the business of producing and distributing motion picture films and has produced several highly successful motion pictures for theatrical release and for distribution on other revenue generating platforms.

The loan at issue has a long and tortuous history. In or around November 2006 CIT entered into a Loan and Security Agreement through which CIT agreed to make revolving loans to Gold Circle Finance in an aggregate amount not to exceed \$9.5 million. Thereafter, in January 2008, CIT, as administrative agent for lenders CIT and USB, entered into a First Amended and Restated Loan Agreement (the “Loan Agreement”) pursuant to which the Lenders agreed to loan Gold Circle Finance an aggregate amount not to exceed \$45 million. A \$25 million note was also executed on January 31, 2008.

The Loans were secured by first priority security interests on substantially all of Gold Circle Films’ rights in certain films. And, because Gold Circle Finance was a shell company with no assets, the Lenders operated on the premise that they had a guarantee from Gold Circle Films. Notwithstanding the arrearages on the loans, on April 3, 2009 the Lenders entered into three separate agreements with Gold Circle Films and Gold Circle Finance. Specifically, the Lenders and the Gold Circle parties executed the following documents: 1) Third Amended and Restated Subordination Agreement; 2) Subordination Agreement dated as of April 3, 2011; and 3) Fifth Amended and Restated Accommodation Security Agreement. The net operative effect

of the three agreements was to confirm that the Lenders had a first priority security interest in any revenue generated by certain identified motion pictures produced by Gold Circle Films, reaffirm the borrowers' indebtedness, and confirm that Gold Circle Films had agreed to pay the Lenders "upon the maturity date of the loan, all outstanding principal and accrued and unpaid interest owing under the Loan and Security Agreement". The three agreements were all signed by Paul Brooks, the CEO of Gold Circle Films.

Subsequent to April 2011, Gold Circle Films was unable to repay its indebtedness, although the Lenders did receive certain payments from the films in which the Lenders had a security interest. The Gold Circle entities tried to forestall the consequences of a maturity default by exploring the option of selling Gold Circle Films' library of films, which included approximately 20 films that were not the subject of the April 3, 2011 agreements. As the inevitable maturity default date approached, the Lenders apparently became disenchanted with Gold Circle Films and, in particular, with the COO of both Gold Circle entities, Scott Niemeyer. Mr. Niemeyer was the Gold Circle parties' principal witness at trial, and the Court found him to be less than entirely credible. Ultimately, the Lenders agreed to sell the loans to Sandton, presumably at a distressed price. As a post-maturity default diligence memo written by Sandton's principal witness, Robert Rice, noted:

Loan has matured and is underwater. All cash flow flows directly to lender from Universal and Lions Gate.

CIT wants loan off its books by year end, and foreclosure will not allow it. Borrower is hinting at lengthy foreclosure to force CIT to offer "walk-away" payment.

The key to this deal is the poor lender/borrower relationship. CIT distrusts borrower, Salem Partners [the company that was attempting to market the Gold Circle library] and the company-led sales process. CIT prefers to control the process by exiting through a loan sale quickly.

* * *

Scott Niemeyer is a controversial character with a history of tough and self-serving business deals.

Significantly, Suraj Gohill, the person at CIT in charge of the Gold Circle Films' credit, testified as follows by deposition at pages 103-104:

Q. So if you believe that there was a guarantee and we're two months away from the maturity date –

A. Uh-huh.

Q. -- why did you not just hold the loan and go after Gold Circle Films? Why did you sell – Why were you looking to sell the loan?

A. Well, the guarantee is only as good as you think that you – not that you can collect on it but that they have an ability to collect on it, and at that point in time it was our view that Gold Circle Films as a parent company and operating company was very bare so there wasn't really anything to collect under the said guarantee in our opinion.

Q. Did you have that same opinion in 2009, April of 2009?

A. No.

Q. So you thought that Gold Circle Films was able to provide a guarantee in 2009 but two years later you felt – or two-and-a-half years later you felt they can't make good on the guarantee?

A. That they didn't have the ability – that from two years prior their financial ability to – to honor said guarantee had been significantly hindered.

In short, the case is not nearly so complicated as the Gold Circle parties wish to make it. Manifestly, no lender would lend tens of millions of dollars to a subsidiary shell corporation without a guarantee from a revenue producing parent, in this case Gold Circle Films. There is a guarantee in this case and it is contained in the language quoted in the third paragraph of this opinion. The only question is whether Sandton allowed the statute of limitations to run on this guarantee. It did not. The maturity date of the guaranteed loan was November 27, 2011, and the

only maturity date default notice that was sent to the Gold Circle parties was the January 18, 2012 notice (Gold Circle Trial Ex. 24) stating that:

The Maturity Date under the Loan Agreement occurred on November 27, 2011, and on such date the aggregate principal amount of all Advances and other Obligations outstanding as of the Maturity Date, together with accrued interest and all other Obligations due and payable in respect of the Loan (“Outstanding Obligations”) became due and payable in full.

Sandton commenced its action on the guarantee in May 2017 within the six-year period of the statute of limitations. The maturity default triggered the running of the statute of limitations as a maturity default is non-curable. All previous defaults were curable and the only notice of default that was sent on the guaranteed loan was after the maturity default. No notice was sent prior to November 27, 2011 accelerating the maturity date of the Loan by reason of the curable defaults.

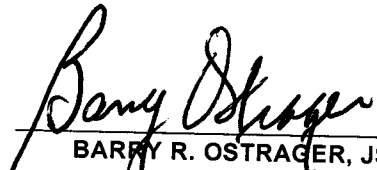
The final question is the amount of the principal and interest that Sandton is entitled to collect. In its 2015 complaint, Gold Circle Finance asserted that as of August 2015, Gold Circle Finance owed Sandton either (i) \$8,490,632.65 (based on simple interest) or (ii) \$13,708,231.76 (based on compound interest). The unrebutted principal and interest calculations attached to the affidavit of Robert Rice (which constituted his direct testimony subject to live cross-examination) calculated principal and interest calculations (affording Sandton the benefit of cash flows Sandton received from Universal and Lion’s Gate which were properly deducted from unpaid interest) using simple interest and also using compound interest.

The Court finds that Sandton has failed to carry its burden of establishing that interest on the loan should be calculated with compound interest, as opposed to simple interest. Consequently, as reflected in Exhibit D to the Rice affidavit of March 26, 2019, the principal and interest due to Sandton from Gold Circle Films is \$14,112,679.63 (*see* NYSCEF Doc. No.

161 in the 2015 Action). This sum gives credence to Gold Circle's claim that Sandton included \$668,675 in "excessive" and "unsubstantiated" fees as set forth in the Niemeyer affidavit.

The Court therefore directs that judgment be entered in favor of GC Sandton Acquisition, LLC against Gold Circle Films LLC and Gold Circle Finance LLC, jointly and severally, in the sum of \$14,112,679.63, together with simple interest at the contractually prescribed rate of 11.5% per annum from March 1, 2019 forward based on Sandton's First Counterclaim in the 2015 Action and Sandton's First Cause of Action in the 2017 Action. All other claims of the parties in both actions are dismissed or denied.

DATE: 6/6/2019



BARRY R. OSTRAGER, JSC
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