

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

CADLEROCK JOINT VENTURE, L.P.,

Plaintiff,

DECISION AND ORDER

v.

Index #2003/12091

KLEEN BRITE LABORATORIES, INC.,
KATHERINE F. MANNO, as the
executrix of the ESTATE OF
D. JAMES MANNO, deceased, JMT
PROPERTIES, INC., KLEEN BRITE
PROPERTIES, INC., K-B TRANSPORT,
INC., and JAMES M. MANNO,

Defendant.

Plaintiff moves for limited reargument of the Decision and Order dated December 1, 2006. The motion is granted.

Firststar, as a secured creditor under Article 9 of the UCC, had no duty to mitigate losses under the Financing Agreement and therefore the common law duty to mitigate cannot reduce or possibly eliminate a secured creditor's entitlement to a deficiency judgment. UCC §9-501; Business Systems Leasing Inc. v. Foothills Automotive Plaza, Inc., 886 F.2d 284, 287-88 (1989); Acushnet Federal Credit Union v. Roderick, 26 Mass. App. 604, 608-09, 530 N.E.2d 1243, 1246 (1988). In any event, under the UCC, the duty to mitigate damages "is generally a limitation on consequential damages" and Cadlerock does not seek consequential damages here. Bank of New York v. Amico Oil Co., 35 F.3d 643, 659-60 (2d Cir. 1994). Accordingly, the court overlooked the

clear rule under the UCC that Firststar's decision to liquidate Kleenbrite instead of funding Kleenbrite's losing operations with a new financing agreement is insulated from attack under the common law doctrine of mitigation. UCC §9-501; §9-503; and §9-504. North Carolina National Bank v. Sharpe, 35 N.C. App. 404, 406, 241 S.E.2d 360, 361 (1978).

I also agree that the duty to mitigate is coterminous with the standard of commercial reasonableness under Article 9. UCC §9-504; §9-507. See Beckman Cotton Co. v. First Nat'l Bank of Atlanta, 666 F.2d 181, 183-84 (5th Cir. 19982) Cf., Agron, Gill & Duffus, Inc. v. Benson, 920 F.2d 1173, 1177 (4th Cir. 1990); American National Bank & Trust Co. of Chicago v. Weyerhaeuser Co., 692 F.2d 455, 468 (7th Cir. 1982).

These principles were also incorporated into Article 13 of the Financing Agreement which gave Firststar the unconditional right to accelerate upon default and avail itself of any remedies available under UCC §9-501 or otherwise.

Finally, upon reargument plaintiff is entitled to summary judgment on the Eighth Cause of Action concerning the Sunleaf Premises. D. James Manno's Guarantee effectively precluded him from transferring his equitable interest in the Sunleaf Premises without receiving fair consideration. The decision on the Eighth Cause of Action conflicted with the decision on the Fifth Cause of Action, as plaintiff contends on this motion for reargument,

and accordingly summary judgment is granted on the Eighth Cause of Action directing a transfer of the Sunleaf Premises to the Estate of D. James Manno.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January __, 2007
Rochester, New York