

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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FINANCIAL PACIFIC LEASING, LLC, AS ASSIGNEE
OF DIRECT CAPITAL CORPORATION,

Plaintiff,

Index No.: 24359/07
Motion Date: 4/9/08
Motion Cal. No.: 24

-against-

P&M AUTOMOTIVE INC., MANUAL RIVAS A/K/A
A/K/A MANNY RIVAS A/K/A MUEL RIVAS A/K/A
MANUAL PAPILLA A/K/A MANNY RANIOS AND
MANZUETO HUERTO, INDIVIDUALLY,

Defendants.

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The following papers numbered 1 to 11 read on this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor as against defendants **P&M AUTOMOTIVE INC.** (hereinafter, "P&M"), **MANUAL RIVAS A/K/A MANNY RIVAS A/K/A MUEL RIVAS A/K/A MANUAL PAPILLA A/K/A MANNY RANIOS** (hereinafter, "Rivas") and dismissing said defendants' answer and each of the affirmative defenses contained therein and for an order pursuant to CPLR 3215 granting a default judgment in plaintiff's favor as against defendant **MANZUETO HUERTO** (hereinafter, "Huerto") .

PAPERS
NUMBERED
1 - 4

Notice of Motion-Affirmation-Exhibits.....

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor as against defendants P&M and Rivas and dismissing said defendants' answer and each of the affirmative defenses contained therein on the grounds that there are no triable issues of fact and for an order pursuant to CPLR 3215 granting a default judgment in plaintiff's favor as against defendant Guarantor Huerto, is granted in its entirety, for the following reasons:

This action involves Plaintiff seeking to recover the liquidated sum of Forty Thousand Two Hundred Seventy Four dollars and Twenty Three cents (\$40,274.23) under a commercial equipment lease agreement, dated August 30, 2004, (hereinafter, the "Lease") and on the guarantees (the "Guarantees") of Guarantor Rivas and Guarantor Huerto pursuant to the breach of the Lease. Plaintiff alleges that several demands for payment were made without defendant responding and therefore Plaintiff instituted this action against the Defendants, to recover the amount owed, plus interest thereon and reasonable attorneys' fees pursuant to the terms of the

Lease and Guarantees.

Plaintiff has moved for summary judgment in its favor and has submitted, *inter alia*, copies of the lease agreement and the guarantees signed by Rivas and Huerto, and an affidavit of Don E. Bailey, plaintiff's Loss Recovery Agent. This evidence shows that on or about August 30, 2004, P&M executed a written equipment lease agreement numbered, "004-0316783-901" with Direct Capital Corporation (hereinafter, "Direct Capital"), whereby P&M leased equipment from Direct Capital and agreed to remit monthly payments in the sum of \$1,141.14 (exclusive of taxes) for sixty (60) consecutive months. On or about August 30, 2004, the Lease was subsequently assigned to the Plaintiff and Plaintiff was the financier of the equipment leased to P&M and has financially extended itself so that P&M could have the use and benefit of equipment which it did not otherwise wish to purchase on its own behalf. Consequently, Plaintiff claims to have not breached the Lease and to have fully performed all obligations thereunder in a commercially reasonable manner. Plaintiff claims that the Defendants dealt with Financial Pacific's assignor in a commercial setting, dealing at arm's length with relative equality of bargaining power.

Pursuant to the terms of the Lease paragraph numbered "25", the Lease constituted the entire agreement between Lessor and Lessee. No provisions of this Lease were to be modified or rescinded unless in writing signed by a representative of Lessor. Waiver by Lessor of any provision thereof in one instance, would not constitute a waiver as to any other instance.

Subsequently, the Corporate Defendant accepted the equipment which was in represented to be in full conformity with the Lease. The Lease further provided in Paragraph numbered "3" and "23" as follows:

"3. Statutory Finance Lease. Lessee agrees and acknowledges that it is the intent of both parties to this Lease that it qualify as a statutory finance lease under Article 2A of the Uniform Commercial Code as adopted in New Hampshire. Lessee acknowledges and agrees that Lessee has selected both: 1) the Equipment; and 2) the supplier from whom Lessor is to purchase the Equipment. Lessee acknowledges that Lessor has not participated in any way in Lessee's selection of the Equipment or of the supplier, and Lessor has not selected, manufactured, or supplied the Equipment. Lessee is advised that it may have rights under the contract evidencing the Lessor's purchase of the Equipment from the supplier chosen by the Lessee and that Lessee should contact the supplier of the Equipment for a description of any such rights".

"23. Default and Remedies. If Lessee does not pay any Lease payment or other sum due Lessor or its assignees when due or if Lessee breaks any promises in this Lease agreement or any other agreement with Lessor or its assignees, Lessee will be in default. If any part of a payment is late, Lessee agrees to pay as liquidated damages for loss of bargain and not as a penalty a late charge of fifteen (15%) percent of the payment which is late or if less, the maximum charge allowed by law. If Lessee is ever in default, Lessor may retain Lessee's security deposit at Lessors option, terminate or cancel this Lease and require that Lessee pay one or more of the following: 1) the unpaid balance of this Lease (discounted at 4%); 2. all past due and current lease payments; 3) all lease charges; 4) the amount of any purchase option and if none is specified, 20% of the original Equipment cost which represents Lessors anticipated residual value in the Equipment; or the fair market value of the equipment; 5) and return the Equipment to Lessor at a location designated by Lessor, Lessor may recover interest on any unpaid balance at the rate of 15% per annum. Lessor may also use any of the remedies available under Article 2A of the Uniform Commercial Code as enacted in the State of New Hampshire or any other law. If Lessor refers this Lease to an attorney for collection, Lessee agrees to pay Lessors attorneys' fees, actual court costs, and any other expenses associated with the collection efforts, including but not limited to long distance telephone charges and travel costs. If Lessor takes possession of the Equipment, Lessee agrees to pay all the costs of repossession. Lessee agrees that Lessor will not be responsible to pay Lessee for any consequential or incidental damages for any default by Lessor under this Lease. Lessee agrees that any delay or failure to enforce Lessors rights under this Lease does not prevent Lessor from enforcing any rights at a later time. It is further agreed that Lessee's rights and remedies are governed exclusively by this Lease and Lessee waives its rights under Article 2A (508-522) of the Uniform

Commercial Code. If Lessee is in default, Lessor, with or without notice to Lessee, shall have the right to exercise any one or more of the following remedies, concurrently or separately, and without any election of remedies being deemed to have been made. Lessor may enter upon Lessee's premises and without any court order or other process of law may repossess and remove the Equipment or render the Equipment unusable without removal, either with or without notice to Lessee. Lessee hereby waives any trespass or right of action for damages by reason of such entry, removal or disabling. Any such repossession shall not constitute a termination of this Lease unless Lessor notifies Lessee in writing. Lessor may re-lease the Equipment with or without notice to Lessee, to any third party, upon such terms and conditions as Lessor alone shall determine, or may sell the Equipment, without notice to Lessee at private or public sale, at which sale Lessor may be the purchaser, Lessor may sue for an recover from Lessee the sum of all unpaid rents and other payments due under this Lease then accrued, all accelerated future payments due under this Lease as of the date of default plus Lessor's estimate at the time this Lease was entered into of Lessor's residual interest in the Equipment, less the net proceeds of disposition, if any, of the Equipment".

In his affidavit, Don E. Bailey, sworn to on February 5, 2008, states that P&M stopped making payments pursuant to the lease on or about June 1, 2007. Based upon this default, Plaintiff claims it is entitled to collect from the Corporate Defendant the liquidated sum of \$40,274.23, with interest thereon from June 1, 2007, plus late charges, reasonable attorneys' fees, costs and expenses of this action.

Plaintiff also claims it is entitled to collect from the Guarantors the above amounts. This is based upon the August 31, 2004, execution by the Guarantors Rivas and Huerto, of their respective guaranties of the obligations of the Corporate Defendant. The Guaranty sets forth that:

"As additional inducement for us to enter into the Agreement, the undersigned ("you"), jointly and severally, unconditionally personally guarantees that the customer will make all payments and

meet all obligations required under this Agreement and any supplements fully and promptly. You agree that we may make other arrangements including compromise or settlement with the customer and you waive all defenses and notice of those changes and will remain responsible for the payment and obligations of this Agreement. We do not have to notify you if the customer is in default. If the customer defaults, you will immediately pay in accordance with the default provision of the Agreement all sums due under the terms of the Agreement and will perform all obligations of the Agreement. If it is necessary for us to proceed legally to enforce this guaranty, you expressly consent to the jurisdiction of the court set out in paragraph 6 and agree to pay all costs, including attorneys fees incurred in enforcement of this guaranty. It is not necessary for us to proceed first against the customer before enforcing this guaranty. By signing this guaranty, you authorize us to obtain credit bureau reports for credit and collection purposes. By signing below, I wish to continue to receive updates from Direct Capital Corp. regarding my corporate account. Please send information to the fax and/or email address given for the account".

According to plaintiff the Guarantors have never revoked, denied or disputed the existence or validity of the Guarantees. As such, plaintiff claims that the Guarantors are liable to Plaintiff in the liquidated sum of \$40,274.23 with interest thereon from June 1, 2007, the date of the default, plus late charges, reasonable attorneys' fees, costs and expenses of this action.

Defendants P&M and Rivas have opposed this motion, claiming that Plaintiff has not met its burden in establishing entitlement to summary judgment. Specifically, Defendants claim that there is a lack of privity between Plaintiff and Defendants and that Plaintiff lacks standing due to the assignment of the lease being signed one day before the lease agreement. According to Defendants this voids the assignment to Plaintiff. Defendant Rivas also claims that he did not intend to be a Guarantor because he was not aware of the guarantee language contained in the document he signed. Defendants also claim that the liquidated damages clause of the Lease is unconscionable as it seeks an amount that is akin to a penalty. Finally, P&M claims Plaintiff failed to mitigate its damages by accepting the equipment.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be

used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." It is well settled that a party is entitled to summary judgment for breach of contract upon establishing proof of a contract, performance by one party, breach by the other party, and damages. *See, MBNA American Bank N.A. v Brenner*, 239 AD2d 566 (2d Dept 1997.) The evidence presented by the plaintiff established, prima facie, its entitlement to summary judgment on its causes of action. *See, Funding Partners v RIT Auto*, 288 A.D.2d 431 (2d Dept 2001)

In opposition, the defendants have failed to present any evidence sufficient to raise a triable issue of fact as to their liability. The fact that the Corporate Defendant did not allegedly sign the Lease until August 31, 2004 does not change the effect of the Assignment, which clearly and unequivocally assigns the right to receive payment under the Lease to the Plaintiff. The Assignment is clear that all rights and remedies under and respecting "that certain Lease Agreement" between Plaintiff's assignor and the Corporate Defendant were assigned to the Plaintiff. In *Leon v. Martinez*, 84 NY2d 83 (1994), the court held that "an assignment may properly relate to a future or conditional right which is adequately identified". Here, the right to rental payments under the Lease is clear. The assignment identifies the parties to the assignment as well as the parties to the Lease. The assignment clearly states that it is an assignment of rights to receive payments due and to become due. Furthermore, not only did the Defendants consent to any assignment of the Lease, but they also acted under the Lease and assignment by making payments to the Plaintiff.

The Court also rejects Rivas' claim that he had no intent to act as a guarantor. He signed his name under the section of the Lease which was entitled "GUARANTY" and furthermore, the phrase "Print name of Guarantor" was clear and unambiguous. Above this phrase was Rivas's own name, pre-printed on the Lease. As stated in *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 Ad2d 268 (1st Dept. 2001) app. Dism., 98 NYS2d 763 (2002) where Plaintiff was granted summary judgment based on a signed personal guaranty, the defendant "was under the obligation to exercise ordinary diligence to ascertain the terms of the document he signed...a personal guaranty of his company's debt." Here,

Rivas is no different. It is black letter law in New York that "if the signer of an agreement could have read it in its entirety, to not have read it was gross negligence." Gillman v. Chase Manhattan Bank, N.A., 135 A.D.2d 488, *appeal granted*, 72 N.Y.2d 803 *aff'd* 537 N.Y.S.2d 787, 73 N.Y.2d 1, 534 N.E.2d 824 (2nd Dept., 1987) [emphasis added]. *See also*, Chemical Bank v. Geronimo Auto Parts Corp., 639 N.Y.S.2d 340 (1st Dept., 1996). Similarly, Rivas is presumed to have read and understood the document which he signed, and cannot avoid liability by claiming that he failed to read the guarantee. Marine Midland Bank, N. A. v. Dino & Artie's Automatic Transmis, 168 A.D.2d 610 (2d Dept 1990.)

Moreover, the terms of the Guaranty are unambiguous and clearly set forth that Rivas made an absolute and continuing guaranty of all payments and all obligations under this Agreement. Further, the Agreement specifically provides that it can only be revoked by a writing, and, therefore, until properly revoked, defendant Rivas continued to remain legally obligated as a guarantor. Norstar Bank of Long Island v. Prompt Process Service, Inc., 117 A.D.2d 589 (2d Dept 1986.) Therefore, Rivas is liable for the obligations currently due and owing to Plaintiff from P&M.

Furthermore, the Court finds no material facts which would indicate that the Lease or Guarantee agreement were unconscionable. Pursuant to the terms of the Lease, the Corporate Defendant agreed to remit monthly payments of \$1,141.14 (exclusive of taxes) for sixty (60) consecutive months. The test under Section 2-302 subsection (1) of the Uniform Commercial Code for unconscionability is whether or not the contract is "so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Here, contrary to Rivas' intimations, the Lease does not account for "minor and insignificant breach(es)" since the Defendants are in default for failure to pay; clearly a material breach of a significant term of the agreement. Furthermore, there is no indication that the circumstances existing at the time the Lease was executed were one-sided or that Defendants were in any way forced to do business with Plaintiff's assignor. Rather, the evidence shows that Defendants chose to accept the terms of the Lease, which included this clause, "Lessee agrees to pay as liquidated damages for loss of bargain and not as a penalty a late charge of 15% of the payment which is late or if less, the maximum charge allowed by law. Since the late charge is defined by the boundaries of the law, there is no unconscionability.

Furthermore, Defendants' argument that Plaintiff failed to mitigate its damages by not accepting the equipment is misplaced. Under the Lease, Plaintiff does not have to take the equipment back if there is no value to it. Plaintiff had the right to recover all payments due to the Plaintiff for the unexpired lease term and all other payments then accrued. Thus, P&M is still liable for the Lease balance regardless of whether or not it returned the Equipment to the

Plaintiff, which it did not. In fact, the Defendants have shown no evidence that they offered to return the equipment to the Plaintiff. Plaintiff is therefore entitled to collect total rent for the then remaining lease term of the original lease agreement and any incidental damages allowed under the UCC.

Based on the above, Defendants have failed to raise an issue of fact as to whether they are liable under the Agreements and Plaintiff is entitled to Judgment in its favor and the Defendants affirmative defenses are dismissed. Orix Credit Alliance v. New York Bell Bagel, 222 A.D.2d 566 (2d Dept 1995.) Judgment shall be in the amount of the liquidated sum of \$40,274.23, plus interest at the rate of 9% per annum, from the date of default, June 1, 2007.

The branch of the motion seeking a default judgment pursuant to CPLR 3215 in plaintiff's favor as against defendant **MANZUETO HUERTO** for the liquidated sum of \$40,274.23, plus interest at the rate of 9% per annum from the date of default, June 1, 2007, is granted, without opposition.

Dated: April 15, 2008

ORIN R. KITZES, J.S.C.