

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**  
Justice

IAS PART 16

\_\_\_\_\_  
CANAWILL, INC.,

INDEX NO. 29650/2001

Plaintiff,

MOTION

- against -

DATE 3/30/04

NASTASI, WHITE, INC.,

MOTION

CAL. NO. 9

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Defendant.

The following papers numbered 1 to 11 read on this motion by plaintiff to renew and for summary judgment.

|   | <u>PAPERS<br/>NUMBERED</u> |
|---|----------------------------|
| Notice of Motion/Affid(s)-Exhibits.....     | 1 - 4                      |
| Affid(s) in Opp.-Exhibits.....              | 5 - 7                      |
| Supplemental Affid(s) in Opp.-Exhibits..... | 8 - 10                     |
| Replying Affidavits-Exhibits.....           | 11 - 12                    |

Upon the foregoing papers it is decided that this motion is determined as follows:

The defendant's procedural opposition to this motion based upon the plaintiff's alleged non-compliance CPLR §2221[e][3] is without merit as this court denied the plaintiff's prior motion "without prejudice to a new motion".

Substantively, this action concerns a premium finance agreement wherein the defendant borrowed approximately 1.4 million dollars to fund the premiums on four policies of insurance. The defendant does not dispute it defaulted in payment under the agreement, but takes issue with the sums allegedly advanced to the insurance companies, as well as finance and delinquency charges sought to be levied by the plaintiff.

As the issues raised by the defendant affect damages and not the plaintiff's right to repayment under the agreement, the defendant is entitled to summary judgment on the issue of the defendant's default under the agreement (See, AFCO Credit Corp. v Boropark Twelfth Ave. Realty Corp., 187 AD2d 634; Union Station Restaurant, Inc. v North American Co., 59 AD2d 270, 275).

The defendant's argument that plaintiff has not adduced sufficient

proof that the sum financed by the plaintiff was not forwarded to the insurers in species and amounts to nothing more than "suspicion or surmise" (American Motorists Ins. Co. v Salvatore, 102 AD2d 342). It is well established that "[a] shadowy semblance of an issue is not enough to defeat [a] motion [for summary judgment]" (S. J. Capelin Associates, Inc. v Globe Mfg. Corp., 34 NY2d 338 [internal quotation marks and citations omitted]).

With regard to the finance charges, the agreement provided that "after cancellation" of the insurance policy the plaintiff could levy a finance charge of 14% of the total sum financed over a period commencing with the effective date of the policy until the last installment date, which in the present case was eleven months. The defendant asserts that since the plaintiff failed to adduce sufficient proof of compliance with section 576 of the Banking Law, which prescribes the method for cancellation of an insurance policy by a premium finance agency, the plaintiff has not established prima facie compliance with the condition precedent to entitle it to the finance charge.

The defendant's reliance on Banking Law §576 in this context is misplaced. The purpose of this statute is to provide the insured "clear and timely notice prior to cancellation" of the policy so as to permit the insured to take the appropriate action to prevent cancellation or obtain other coverage (See, Country Wide Ins. Co. v Meadows, 63 AD2d 951). Indeed, in all the reported cases reviewed by the court involving cancellation under section 576, including the two cited for authority by the plaintiff, the issue raised was whether cancellation was appropriately made so as to negate a claim of loss made against the policy.

In light of this purpose, proof of compliance with the statute simply does not constitute a condition precedent to the plaintiff's entitlement to the agreed upon finance charge in the event of a default. The affidavit of the plaintiff's representative that the policy was cancelled, a fact that was acknowledged by the defendant's counsel in paragraph ten of his supplemental affirmation in opposition, is sufficient on this point.

The defendant is correct that the plaintiff is not entitled to all the delinquency charges alleged. Under the agreement, the plaintiff is entitled to a delinquency charge "upon default in payment of any installment five days or more". The agreement also provided that "[i]f an Event of Default occurs and after giving notice as required by law, all amounts due under this agreement become immediately due and payable". Here, the plaintiff assessed a delinquency charges when the May 1, 2001 payment was made late and when the June 1, 2001 payment was not received. However, before any other installments became due, the plaintiff, by notice dated June 20, 2001, "demand[ed] payment of the entire balance due" pursuant to the aforementioned terms of the agreement. Thus, as the plaintiff, by accelerating the loan, opted to forgo further installment payments in favor of an immediate payment, no

further delinquency charges could be assessed.

Accordingly, based on the foregoing the plaintiff is entitled to a judgment against the defendant in the amount of \$477,948.47, reflecting the amount financed [\$1,389,891.42] plus the contractual finance charge calculated to March 1, 2002 [\$178,369.39] and two delinquency charges [\$13,081.24] less returned unearned premiums [\$1,103,393.56]. Additionally, the plaintiff is entitled to legal interest against the defendant from March 2, 2002 until the date of entry of judgment as well as attorney's fees.

The determination of the amount of counsel fees is set down for a hearing in Part 16 of this court on **July 13, 2004 at 2:00 p.m.** (See, Simoni v Time-Line, Ltd., 272 AD2d 537).

Dated: May 28, 2004

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**Peter J. Kelly, J.S.C.**