

**PNCEF, LLC v Oz Gen. Contr. Co., Inc.**

2010 NY Slip Op 32648(U)

September 15, 2010

Supreme Court, Nassau County

Docket Number: 507/10

Judge: Thomas Feinman

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
PNCEF, LLC d/b/a PNC EQUIPMENT FINANCE  
f/k/a NATIONAL CITY COMMERCIAL  
CAPITAL COMPANY, LLC,

Plaintiff,

- against -

OZ GENERAL CONTRACTING CO., INC. and  
MIKE OVADIA,

Defendants.

\_\_\_\_\_  
OZ GENERAL CONTRACTING CO., INC. and  
MIKE OVADIA,

Third-Party Plaintiffs,

- against -

TIMESAVERS, INC.,

Third-Party Defendant.

TRIAL/IAS, PART 15  
NASSAU COUNTY

INDEX NO. 507/10

MOTION SUBMISSION  
DATE: 8/2/10

MOTION SEQUENCE  
NOS. 1, 2, 3

The following papers read on this motion:

- Orders to Show Cause and Affidavits.....   X
- Notice of Motion and Affidavits.....   X
- Affirmation in Opposition.....   X
- Reply Affirmation.....   X

### RELIEF REQUESTED

The plaintiff, PNCEF, LLC d/b/a PNC Equipment Finance f/k/a National City Commercial Capital Company, Inc., (hereinafter collectively referred to as "PNC"), moves by way of Order to Show Cause for an order authorizing the issuance of an Order of Seizure pursuant to Article 71 of the CPLR, directing the Sheriff of any County of the State of New York to seize from the defendants the specific collateral described in the application herein and if the property is not delivered to the Sheriff, to break open, enter and search for the property in the place where it may be and hold the same. The plaintiff submits a Memorandum of Law in support of its motion. The defendants, Oz General Contracting Co., Inc. and Mike Ovadia, (hereinafter collectively referred to as "OZ"), submit opposition. The plaintiff submits a reply affirmation.

Thereafter the defendants/third-party plaintiffs, OZ, move by way of Order to Show Cause for an order (1) temporarily enjoining and restraining the plaintiff, and all persons known and acting on its behalf, from removing certain equipment from OZ in the event this Court grants plaintiff's prior motion for an order of seizure, (2) granting the defendants a preliminary injunction enjoining the plaintiff from recovering the equipment should this Court grant plaintiff's prior motion for an order or seizure. The defendants/third-party plaintiffs submit a Memorandum of Law in support of its motion, by way of order to show cause.

Thereafter, the plaintiff moves for an order granting the plaintiff summary judgment on the grounds that there are no genuine factual disputes, or in the alternative, an order compelling the defendants to respond to plaintiff's combined demands. The plaintiff submits a Memorandum of Law in support of plaintiff's motion. The defendants/third-party plaintiffs submit opposition and a Memorandum of Law in support of its opposition. The plaintiff submits a reply affirmation. The third-party defendant, Timesavers, Inc., submits an affirmation in response to defendants/third-party plaintiffs' opposition.

### BACKGROUND

The defendant contracting company, OZ, entered into a lease agreement with PNC, (hereinafter referred to as "First Lease"), whereby OZ leased certain equipment as listed in Schedule A, (hereinafter referred to as "First Equipment"). As per certain Prepayment Letters, in the event that OZ does not execute a Certificate of Acceptance, for any reason including but not limited to any non-performance of breach on behalf of the vendor, OZ will, upon demand, pay to plaintiff any and all amounts paid to the vendor on OZ's behalf. Additionally, the Prepayment Letters provide that OZ will pay interest from the date of the Prepayment until the Lease commencement date at one percent (1%) per month.

The plaintiff maintains that the First Equipment has been delivered to OZ, no Certificate of Acceptance was executed by OZ, and OZ has failed to pay plaintiff the advances made under the Prepayment Letters. Plaintiff also maintains that OZ has failed to reject the First Equipment, and OZ is in default under the First Lease.

The plaintiff submits that the defendant/third-party plaintiffs, OZ, entered into a second lease agreement, (hereinafter referred to as "Second Lease"), whereby OZ leased certain equipment listed in Schedule A thereto, (hereinafter referred to as "Second Equipment"). The plaintiff maintains that OZ executed a Certificate of Acceptance for the Second Equipment, however, defaulted under the Second Lease by virtue of OZ's breach of the Prepayment Letters.

The plaintiff provides that pursuant to the First and Second Lease, as OZ is in default, the plaintiff is entitled, upon defendant's default, to accelerate the full amount due, to immediate possession of all the collateral, and immediate and permanent title and possession of the leased equipment. The plaintiff also provides that the defendant, Mike Ovadia, is liable pursuant to the Guaranty Agreement.

The defendants/third-party plaintiffs, OZ, provides that under the First and Second Lease, OZ authorized the plaintiff to withdraw funds from a bank account that belonged to the defendant and make payments under the Leases, an arrangement that worked well until problems arose with the operation of the Timesavers Model, a Rotary Brush Sander, equipment listed in Schedule A, First Equipment. OZ's president, Uzi Ovadia, avers that the Timesavers Model did not leave clean edges and smooth planes leaving unintended gouges and scratches on the wood pieces. Mr. Ovadia avers that the parties agreed that plaintiff would withdraw payments from OZ's bank account, but would withdraw payments on a *pro rata* basis eliminating payment in the Timesavers Model. OZ maintains that it informed plaintiff that the Timesavers Model was defective, and plaintiff, in response chose to accelerate the full payments rather than resolve the matter.

Plaintiff's Vice President, Lisa Marie Moore, in reply, avers that any "imagined agreement" between plaintiffs and defendants to not be charged interim rent for the Timesavers Model is belied by invoices forwarded by the plaintiffs to the defendants and the signed Prepayment Letters. In further support of plaintiff's motion, the plaintiff refers to the Prepayment Letters. The defendants/third-party plaintiffs, OZ, by way of Order to Show Cause, seek a preliminary injunction enjoining plaintiff from recovering equipment from OZ. Thereafter, the plaintiff moves for summary judgment.

### DISCUSSION

The plaintiff provides that OZ failed to make any payments under the Leases for one year, and OZ's allegation that the Timesavers Model is defective is no defense in the face of OZ's obligations pursuant to the subject transaction documents. The Prepayment Letter pertaining to the Timesavers equipment provides, unequivocally, that in the event that OZ does not execute a Certificate of Acceptance of the equipment "for any reason including, but not limited to, any non-performance of breach on the part of the Vendor [Timesavers], it will **upon demand** pay to Lessor any and all amounts that have been paid to Vendor on its behalf" (emphasis added). The subject Lease provides that OZ "has an UNCONDITIONAL OBLIGATION to make all payments due under this Lease, it cannot withhold, set off or reduce such payments for any reason". The subject Lease also provides a disclaimer of warranties in which OZ leased the equipment "as is". The provisions and warranties thereto, known as hell or highwater clauses and disclaimer of warranties are routinely enforced in commercial leases. (*National City Commercial Capital Co., LLC v. Becker Real Estate Services, Inc.*, 24 Misc3d 912; and *Wells Fargo Bank Northwest, N.A., Taca Intern Airlines, S.A.*, 247 F.Supp.2d 352).

It has been held that these type of statutory “hell or highwater” clauses make a lessee’s obligations under a finance lease irrevocable upon acceptance of the goods, despite what happens to the goods afterwards. (*National City Commercial Capital Co., LLC v. Becker, supra*, citing *General Electric Corp. v. National Tractor Trailer School*, 175 Misc2d 20). The defendant’s allegations regarding any allegedly defective condition of the equipment in *National City Commercial Capital Co., LLC v. Becker, supra*, was found to be without merit and was not a defense to the plaintiff’s action.

Likewise, *sub judice*, the defendant’s arguments regarding the alleged defective condition of the equipment is without merit and is not a defense to the instant action. The defendants/third-party plaintiffs, OZ, concede that they have not made payments on the Timesavers Model. OZ, in opposition to the motion for summary judgment, has failed to raise a triable issue of fact to warrant the denial of this summary judgment motion.

#### CONCLUSION

Upon the foregoing, it is hereby

ORDERED that plaintiff’s motion, by way of Order to Show Cause, is granted, and it is hereby further

ORDERED that the defendants’ motion, by way of Order to Show Cause, is denied in its entirety, and it is hereby further

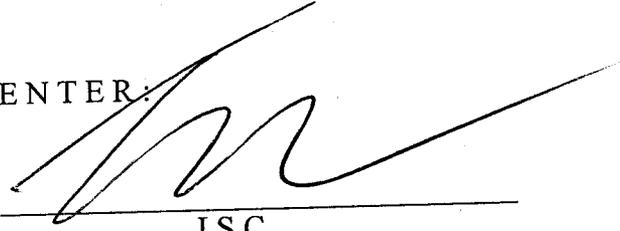
ORDERED that the plaintiff’s motion for summary judgment is granted, and therefore the plaintiff is entitled to an interlocutory judgment against the defendants/third-party plaintiffs in the amount of One Hundred Eighty-Two Thousand Three Hundred Seventy-Two and 41/100 Dollars, (\$182,372.41), and attorney fees in the amount of Twelve Thousand Five Hundred Thirty-Nine and 98/100 Dollars, (\$12,539.98), and plaintiff is entitled to immediate and permanent possession and title to the equipment subject to both leases, and its is hereby further

ORDERED that plaintiff shall Settle Judgment on Notice with respect to the amount of One Hundred Eighty-Two Thousand Three Hundred Seventy-Two and 41/100 Dollars, (\$182,372.41), and attorneys fees in the amount of Twelve Thousand Five Hundred Thirty-Nine and 98/100 Dollars, (\$12,539.98), and it is hereby further

ORDERED that plaintiff shall Settle Judgment on Notice with respect to immediate and permanent possession and title to the equipment subject to both leases, and it is hereby further

ORDERED that the third-party action is hereby severed from the main action and shall continue, and it is hereby further

ORDERED that the parties in the third-party action shall appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 20<sup>th</sup> day of October, 2010, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

ENTER:   
\_\_\_\_\_  
J.S.C.

Dated: September 15, 2010

cc: Peretore & Peretore, P.C.  
Agin, Siegel, Reiner & Bouklas, LLP  
Mazur Carp Rubin & Schulman P.C.

**ENTERED**  
**SEP 22 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**