

**Advanta Leasing Services v Laurel Way Spur
Petroleum Corp.**

2002 NY Slip Op 30003(U)

November 25, 2002

Supreme Court, Suffolk County

Docket Number: _510028/6872

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
IAS PART XXIV, SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

CALENDAR DATE: October 30, 2002

MNEMONIC: MD

ADVANTA LEASING SERVICES, A DIVISION :
OF ADVANTA BUSINESS SERVICES, CORP., :

Plaintiff,

-against-

LAUREL WAY SPUR PETROLEUM CORP. and :
THOMAS N. ANSHUTZ a/k/a THOMAS N. :
ANSHUTZ, JR.,

Defendants.

PLTF'S/PET'S ATTY:

PLATZER, SERGOLD, KARLIN, LEVINE
150 E. 52nd St.
New York, NY 10022

DEFT'S/RESP'S ATTY:

ENGLAND & ENGLAND
2556 Middle Country Rd.
Centereach, NY 11720

Upon the following papers numbered 1 to 18 read on this motion
for summary judgment

Notice of Motion/Order to Show Cause and supporting papers 1-9,
Notice of Cross Motion and supporting papers _____; Answering
Affidavits and supporting papers 10-14; Replying Affidavits
and supporting papers 15-18; Other _____; (and after
hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the plaintiff, Advanta Leasing
Services, for summary judgment pursuant to CPLR §3212 on its complaint
seeking a money judgment for breach of a equipment lease agreement is
hereby denied in its entirety.

Plaintiff instituted this action for monies allegedly owed
under a written equipment lease agreement # 039-5519720-001 dated
November 3, 2000 between the plaintiff and the corporate defendant,
Laurel Way Petroleum Corp. and guaranteed by the individual named
defendant. Plaintiff claims that under the lease agreement the
defendants were to make 60 monthly payments for the lease of an ATM
machine which defendant defaulted on leaving a liquidated sum due and
owing of \$25,327.47. Plaintiff also claims to be "merely a financier"
of the equipment leased. The defendant, Thomas N. Anshutz, admits to
the lease agreement for an ATM machine through an entity known as the
Credit Card Center but claims the machine was defective and constantly
out of order requiring repair. Defendants also claim that through
negotiations with Credit Card Center he was to receive certain rebates
or credits as a monthly residual payment from the Card Center towards
the cost of the lease which reduced the monthly lease payments which
were not made or received by him.

Plaintiff now moves for summary judgment on its complaint pursuant to CPLR §3212 arguing that pursuant to the lease agreement it is owed a liquidated sum of monies. Defendants oppose the motion. For the following reasons, the plaintiff's motion for summary judgment pursuant to CPLR 53212 on its complaint seeking a money judgment for breach of a equipment lease agreement is hereby denied in its entirety.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, the defendants provide evidentiary material indicating that the ATM machine contracted for was damaged and under repair and out of service on many occasions and that the lease agreement with the Credit Card Company called for certain rebates to be credited or received which would have reduced the monthly payments under the lease which were not given. Plaintiff suggests it bears no responsibility for a violation of the terms of the lease agreement between

defendants and Credit Card Company because it is a "mere financier" but that argument is unavailing. It is clear that issues of fact are readily apparent with regard to Credit Card Company's responsibilities to provide a working machine in good order and the rebates as called for in its agreement with the defendant. The defendants should not be responsible for payments on defective leased equipment.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. VanNoy v. Corinth Central School District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Here, there are readily identifiable facts which require resolution by the trier of fact and warrant a denial of plaintiff's application for summary disposition. Accordingly, plaintiff's motion for summary judgment pursuant to CPLR 53212 on its complaint is hereby denied in its entirety.

The foregoing constitutes the decision of this Court.

Date: NOV 25 2002



J.S.C.