

Citicorp Leasing, Inc. v U.S. Auto Leasing, Inc.

2005 NY Slip Op 30438(U)

June 8, 2005

Supreme Court, New York County

Docket Number: 603254/04

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:
Justice

PART 49

Index Number : 603254/2004

CITICORP LEASING, INC.,

vs

U.S. ATUO LEASING, INC.,

Sequence Number : 2

DISMISS DEFENSE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

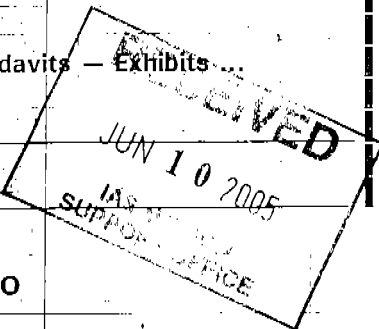
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion



PAPERS NUMBERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ACTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

Dated: 6/8/05

Her Col
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Handwritten signature/initials

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
CITICORP LEASING, INC.,

Plaintiff,

-against-

Index No.: 603254/04

U.S. AUTO LEASING, INC.,
U.S. AUTO EXCHANGE GROUP, LTD.,
1095 COMMONWEALTH AVENUE CORP.,
and BAHIG F. BISHAY,

Defendants.
-----X

HERMAN CAHN, J.:

Plaintiff Citicorp Leasing, Inc. (CLI) brings this action for breach of a Loan and Security Agreement entered into with defendant U.S. Auto Leasing, Inc., and to recover possession of the automobiles that were put up as collateral for the loans. Defendant Bahig Bishay is the only appearing defendant in this action; he is sued for breach of a personal guaranty of the loans to U.S. Auto and for conversion of the collateral pledged to secure the loans.

Motion sequence numbers 002 and 004 are hereby consolidated for disposition.

In motion 002, plaintiff CLI moves for the following relief: (1) to dismiss the appearing defendants' counterclaims and affirmative defenses; (2) to strike the corporate defendants' pleading on the ground that they have not appeared by an attorney admitted to practice in this jurisdiction; and (3) to strike the defendants' jury demand. In response to this motion, Bishay, purporting to act on behalf of himself and U.S. Auto and 1095 Commonwealth Avenue Corp., cross-moves to dismiss the complaint. As discussed below, the service of amended pleadings and subsequent orders of the Court have mooted part of the relief sought in motion 002.

In motion 004, CLI seeks an order directing defendants to deliver to CLI all motor vehicles that constitute the collateral and to permit CLI to sell the vehicles and apply the proceeds to U.S. Auto Leasing's debt. CLI also moves to strike Bishay's answer to the amended complaint on the ground that the verification is improper, or, in the alternative, for summary judgment. In addition, CLI requests that its prior motion to dismiss (motion 002) be deemed to apply to Bishay's answer to the amended complaint.

Familiarity with the Court's memorandum decision dated January 10, 2005, granting, in part, an earlier motion by CLI for preliminary injunctive relief, is presumed. By that decision, the Court enjoined the defendants from disbursing the proceeds of the collateral, and directed the defendants to maintain all proceeds, including lease payments, in an escrow account with a commercial bank in New York City. Shortly after the issuance of that memorandum decision, by letter dated January 31, 2005, Bishay, acting as President of an entity identified as U.S. Capital Corp., wrote to CLI demanding \$407,685 be paid to it within 21 days plus \$1,050.00 for each day thereafter. This payment was demanded purportedly to satisfy storage and towing liens held by U.S. Capital Corp. pursuant to "M.G.L. Chapter 255, Sections 25 & 39A," on the same 25 vehicles identified in the accounting Bishay was ordered to provide late last year of the vehicles constituting CLI's collateral. The letter threatens to sell the vehicles if payment was not received. CLI contends that the purported liens are a sham, and that defendants failed and refused to set up the escrow account as ordered by this Court.

On or about February 28, 2005, defendant Bishay, appearing pro se, served and filed "Defendant Bahig F. Bishay's Answer to Plaintiff's Amended Verified Compliant [sic], Defendants' Counterclaim and Jury Demand" dated February 28, 2005 (hereinafter, the Amended

Answer). No appearance was made on behalf of the corporate defendants, despite several directives by this Court to Bishay to obtain counsel on their behalf as required by CPLR 321(a). On April 4, 2005, the return date of CLI's order to show cause (motion 004), this Court granted CLI the following items of relief: (I) an immediate deposition of Bishay and direction to Bishay to produce all documents regarding the location and/or disposition of the collateral; (ii) a default judgment against the corporate defendants U.S. Auto and 1095 Commonwealth Avenue Corp.; and (iii) discontinuance of the action against defendant U.S. Auto Exchange Group, Ltd., without prejudice, due to a prior bankruptcy filing. The issue of the amount of the judgment to which CLI is entitled, was referred to a Special Referee to hear and report. Referee Howard Leventhal held a damages assessment on May 11, 2005. Upon the testimony and documentary evidence submitted by CLI, there being no appearance by any counsel on behalf of the defaulting corporate defendants, Referee Leventhal placed his report and recommendation on the record. The transcript of said hearing was filed on June 1, 2005.

That portion of CLI's motion (motion 004) that seeks to strike the Amended Answer on the ground that it does not contain a proper verification in accordance with CPLR 3020(a) and 3021, is denied as moot. Bishay has presented the Court with a verification sworn to on March 30, 2005 before a Massachusetts notary. In addition, the Court deems CLI's motion to dismiss (motion 002) to apply to the affirmative defenses and counterclaims asserted in the Amended Answer, as there is no factual or substantive difference between the claims asserted in Bishay's original answer.

For the following reasons, CLI's alternative request for summary judgment in its favor pursuant to CPLR 3212 is granted. Bishay has failed to raise any triable issue of fact as to any

defenses to CLI's claims against him. Dismissal of Bishay's counterclaims and affirmative defenses pursuant to CPLR 3211(a)(1) based on documentary evidence is also warranted. Lastly, Bishay's cross motion to dismiss the complaint, which does not contain a notice of motion in accordance with CPLR 2215, is denied on procedural and substantive grounds.

The Amended Verified Complaint asserts claims against Bishay for breach of a personal guaranty dated March 18, 1997 (the Guaranty) of U.S. Auto's obligations under the Loan and Security Agreement (the Security Agreement). CLI has established a prima facie entitlement to summary judgment on this cause of action against Bishay. "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." City of New York v Clarose Cinema Corp., 256 AD2d 69, 71 (1st Dept 1998). In his Answer, Bishay does not affirmatively deny that he signed the Guaranty. Compare Amended Verified Complaint ¶ 10; Answer ¶ 10. Rather, he denies the allegation based on an alleged superceding agreement. This denial constitutes an admission that he signed the Guaranty. Nor has Bishay raised any triable issue of fact as to U.S. Auto's default, and his own failure to honor the Guaranty.

Bishay's Amended Answer purports to state six affirmative defenses and six counterclaims. The crux of Bishay's claims is that CLI breached an alleged commitment made by its predecessor, European American Bank (EAB), to fund a \$50 million credit facility for Bishay's automobile leasing business. In addition to breach of contract, Bishay purports to sue CLI for "contractual bad faith," "tortious interference," intentional and negligent misrepresentation and breach of the implied covenant of good faith and fair dealing.

Bishay's affirmative defenses and counterclaims are based on the misguided belief that a

letter dated May 11, 1999 from EAB and a July 18, 2001 letter announcing Citibank N.A.'s acquisition of EAB, supercede the Security Agreement and the Guaranty, and that these letters obligated CLI to fund a \$50 million credit facility for U.S. Auto. See Amended Answer ¶¶ 9-10, p. vi. However, the Security Agreement provides that U.S. Auto could "request EAB" to make advances to enable U.S. Auto to purchase motor vehicles for lease to lessees, that all advances would be made solely in "EAB's discretion," and that nothing in that agreement could "be construed, either now or in the future, as imposing upon EAB the obligation to make any Advance to Borrower whatsoever ..." Amended Complaint, Exh. B thereto. The May 31st letter to U.S. Auto states that "EAB will make available up to a maximum of \$50,000,000" subject to numerous conditions set forth therein, including a monthly review and satisfactory performance by U.S. Auto. Amended Answer, Exh. 3 thereto. This letter, in effect, merely advises that EAB would consider advancing as much as \$50 million. In light of U.S. Auto having defaulted in payment of over \$2.4 million, this claim lacks merit.

Bishay also accuses CLI of maliciously interfering with his business by writing to lessees without his knowledge, and demanding that all monthly payments, as well as buyout payments, be sent directly to CLI. See Counterclaim ¶ 8, at p. ix. However, section 7(a) of the Security Agreement specifically authorizes CLI to notify lessees to make payments directly to CLI. Moreover, the typical loan documentation executed by U.S. Auto in support of each advance contained a note, lease and assignment of lease to CLI. At the time of each advance, U.S. Auto wrote to each lessee and provided a "Lessee Assignment Notice," which advises each lessee that the lease had been assigned to CLI and directing the lessee to make all payments to CLI.

In any event, Bishay lacks standing to assert claims belonging to U.S. Auto. Bishay is a

party to this action in his capacity as a guarantor of the obligations of U.S. Auto. All of his affirmative defenses and counterclaims concern the principal transaction between CLI and U.S. Auto. In the first paragraph of the Guaranty, Bishay agreed that his liability was unconditional and absolute, irrespective of the genuineness, validity and enforceability of the liabilities of the debtor, U.S. Auto. See Jason Trading Corp. v Lason Trading Corp., 303 AD3d 180 (1st Dept 2002); Raven Elevator Corp. v Finkelstein, 223 AD2d 378 (1st Dept), lv dismissed, 88 NY2d 1016 (1996); European American Bank v LoFrese, 182 AD2d 67, 73 (2d Dept 1992). Bishay further waived the right to assert any counterclaims in this action, and such waivers are fully enforceable. Josephthal Holdings, Inc. v Weisman, 5 AD3d 221, 222 (1st Dept 2004); Bank of India v Sanghvi, 224 AD2d 347 (1st Dept 1996).

CLI has also established its right to summary judgment against Bishay on its conversion claim. Conversion is the unauthorized exercise of dominion or control over specifically identified property which interferes with the owner's rights. Hoffman v Unterberg, 9 AD3d 386, 388 (2d Dept 2004), citing Republic of Haiti v Duvalier, 211 AD2d 379, 384 (1st Dept 1995). The unrefuted documentary evidence shows that Bishay, the President and sole shareholder of U.S. Auto, accepted payments from lessees and vehicles from lessees – which constitute CLI's collateral for the advances to U.S. Auto – even though U.S. Auto entered into lease assignments with CLI, giving CLI the exclusive right to receive all payments from lessees.

In addition, Bishay has threatened to sell 25 vehicles in which CLI has a perfected security interest through a subterfuge involving another wholly-owned company, U.S. Capital Corp., located at the same place of business as U.S. Auto in East Walpole, Massachusetts. According to filings with the Secretary of State of Massachusetts, Bishay is the President,

Treasurer and sole Director of U.S. Capital Corp., a company engaged in “automobile/truck sales, service, leasing, & finance,” the same business as U.S. Auto. More importantly, U.S. Capital Corp. was incorporated on May 28, 2003, which is after the two highest claimed storage fees began accruing. See Schickler 3/4/05 Affirm. Exhs. 6 and 8. According to Bishay’s January 31st letter, U.S. Capital Corp. is claiming liens for storage and towing pursuant to M.G.L. Chapter 255, Sections 25 and 39A. However, there is no evidence that U.S. Capital is operating as a “public garage” in accordance with M.G.L. Section 25, or that any of the vehicles were delivered to U.S. Capital by the police in accordance with Section 39A. Thus, these alleged storage and towing charges cannot serve as a legal predicate to justify U.S. Capital’s sale of the vehicles. For these reasons, summary judgment on the third cause of action alleging conversion by Bishay of CLI’s collateral securing the advances is warranted.

As noted above, the amount of damages sustained by CLI on its claims against the debtor, U.S. Auto and another guarantor, 1095 Commonwealth Corp., was the subject of a damages assessment on May 11, 2005 before Referee Howard Leventhal. Referee Leventhal’s report has not yet been confirmed in accordance with CPLR 4403. Thus, the question of damages to be awarded against Bishay, who must have an opportunity to contest CLI’s damage claims, is respectfully referred to Referee Leventhal to hear and report.

The grant of summary judgment to CLI moots that portion of CLI’s motion (seq. no. 002) seeking to strike the jury demand in Bishay’s Amended Answer. Nevertheless, that demand is clearly inappropriate. Bishay waived trial by jury in the fifth paragraph of the Guaranty, and such waivers are enforceable. Bank Leumi Trust Co. v Modell, 258 AD2d 304 (1st Dept 1999); Fordham University v Manufacturers Hanover Trust Co., 145 AD2d 332, 333 (1st Dept 1988).

In addition, the demand is both premature and lacks the appropriate court forms and filing fees.

See CPLR 4102, 8020©.

CLI moves, pursuant to CPLR 2701, 2702, and UCC 9-609, for an order directing defendants to deliver to CLI all vehicles that constitute the collateral for the loan and to permit CLI to sell the vehicles and apply the proceeds to U.S. Auto's debt. In the alternative, CLI moves for summary judgment on its fifth cause of action for a permanent injunction with respect to the collateral.

CPLR 2701 provides, in relevant part, that a court "may order personal property capable of delivery which is the subject of the action, paid into court, or delivered to such person as it may direct, with such security as the court shall direct, and subject to its further direction ... (1) ... where it belongs or is due to another party ..." CPLR 2702 further provides that the court may order the sale of such property "if it shall appear likely that its value will be substantially decreased during the pendency of the action." Disobedience of any such orders may be punished as a contempt, and the court may direct the sheriff to take and dispose of the property. CPLR 2703. Section 9-609 of the Uniform Commercial Code provides that a secured creditor may take possession of collateral pursuant to judicial process.

The Court notes that, in essence, what CLI is seeking by way of this motion is the recovery and sale of chattel pledged to secure its loans, despite the fact that CLI has not commenced a replevin action pursuant to CPLR Article 71. Indeed, since the vehicles pledged as collateral for the advances appear to be located outside this state and in the State of Massachusetts, proceedings to foreclose on the security interest must be brought in that jurisdiction. Marston v Rose-Elash, 720 SW2d 783 (Miss Ct Appeals 1986)(trial court lacked

subject matter jurisdiction to entertain replevin action where personal property sought to be recovered was located in another state). Even assuming the injunctive relief sought by CLI on this motion is warranted pursuant to CPLR 2701 and 2702, a New York sheriff would have no jurisdiction to enforce any order issued by this Court relating to property located in Massachusetts, as is contemplated in CPLR 2703.

However, it cannot be disputed that CLI is entitled to possession of the collateral, and that the collateral is being threatened by Bishay, who has flouted the preliminary injunction previously issued by this Court to preserve the status quo. As this Court has already ruled, injunctive relief is warranted to remedy the conversion of identifiable proceeds. See Amity Loans, Inc. v Sterling National Bank and Trust Co. of New York, 177 AD2d 277 (1st Dept 1991); Crocker Commercial Services, Inc. v Davan Enterprises, Inc., 88 AD2d 877 (1st Dept 1982). To the extent that an injunction directing Bishay to turn over possession of the vehicles to CLI may assist CLI in its efforts to collect on U.S. Auto's debt, either here or in Massachusetts, such relief is warranted. Accordingly, summary judgment on CLI's fifth cause of action seeking a mandatory injunction directing defendants "to release to CLI Vehicles which constitute the Collateral of CLI" (Amended Verified Complaint ¶ F[2]), is granted. The sale of any collateral recovered pursuant to this Court's directive shall, of course, be conducted in a commercially-reasonable manner, in accordance with the requirements of Article 9 of the Uniform Commercial Code, and the proceeds recovered from any such sale be applied to reduce the amount of the judgment recovered in this action.

To conclude, CLI has established its entitlement to summary judgment against Bishay on its second and third causes of action in an amount to be determined, and to dismissal of Bishay's

affirmative defenses and counterclaims pursuant to CPLR 3211(a)(1). Bishay's purported cross motion to dismiss the complaint is denied. Finally, CLI's request for a mandatory injunction is granted to the extent of ordering Bishay to release and deliver to CLI, the motor vehicles which constitute the collateral of CLI.

For the foregoing reasons, it is hereby

ORDERED that plaintiff Citicorp Leasing Inc. is entitled to summary judgment on its second and third causes of action against defendant Bahig F. Bishay; and it is further

ORDERED that the issue of the amount of the judgment to be awarded on the second and third causes of action is referred to a Special Referee, preferably Referee Howard Leventhal, if he is available, to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, shall determine the aforesaid issue; and it is further

ORDERED that portion of plaintiff's motion for summary judgment on the second and third causes of action be held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee; and it is further

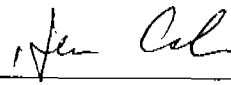
ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office to arrange a date for the reference; and it is further

ORDERED that plaintiff Citicorp Leasing, Inc. is granted summary judgment on its fifth cause of action, to the extent of directing Bishay and his agents to release to CLI, the motor vehicles which constitute the collateral of CLI, and this claim is severed pursuant to CPLR 5012 for immediate entry of judgment.

Settle judgment on the fifth cause of action.

Dated: June 8, 2005

ENTER:



J.S.C.