

Wells Fargo Financial Leasing, Inc. v Print Zone, Inc.
2006 NY Slip Op 30088(U)
June 27, 2006
Supreme Court, New York County
Docket Number: 0600449/0449
Judge: Faviola Soto
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **FAVIOLA SOTO**
J.S.C.

PART 7

Index Number : 600449/2006
WELLS FARGO FINANCIAL LEASING
vs
PRINT ZONE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/7/06
MOTION SEQ. NO. _____
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 _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 12 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 27, 2006

FAVIOLA SOTO J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Copies marked

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

WELLS FARGO FINANCIAL LEASING, INC.,

Plaintiff,

Index No. 600449/06

-against-

PRINT ZONE, INC. d/b/a DIGIZONE,

Defendant.

DECISION & ORDER

HONORABLE FAVIOLA A. SOTO, J.:

Plaintiff moves, pursuant to CPLR Section 3212, for summary judgment, and, pursuant to CPLR Section 3211, to strike the first and third affirmative defenses. Defendant opposes.

By summons and complaint dated February 13, 2006, plaintiff asserts three causes of action, arising from defendant's default of a commercial equipment lease agreement which is an exhibit to the complaint. By verified answer dated March 21, 2006, defendant denies the allegations and asserts six affirmative defenses: lack of personal jurisdiction (first), lack of privity, failure to state a cause of action (third), non-conforming goods, defendant objected to the invoices, and plaintiff agreed to certain adjustments not reflected in the claims.

Plaintiff now moves for summary judgment and to strike the first and third affirmative defenses. Plaintiff relies on: an affidavit from its loan adjuster and employee, who is a custodian of the records and is based upon her review of the books and records and computer records kept in the ordinary course of business; the attorney affirmation; and documents, including the affidavit of service of the complaint upon the Secretary of State and the receipt for said service, the lease agreement, the assignment of the lease from Leslie Digital Imaging, LLC (LDI) to

plaintiff, Certificate of Acknowledgment Acceptance of Leased Equipment, signed by defendant, the payment statement, and correspondence to defendant dated April 28, 2005 setting forth a payment schedule, which bears the signatures of plaintiff's representative and, by the acknowledged and agreed by lines, defendant's Vice President.

Plaintiff argues that based on this showing, there are no issues of fact in dispute, defendant's defenses are without merit and it is entitled to judgment in its favor as a matter of law. It argues that the terms of the lease are clear and unambiguous and the assignment is valid, defendant's allegations and defenses can not serve as defenses to this action, there is no dispute that defendant fell behind in its obligation to make 36 consecutive monthly lease payments and while plaintiff agreed as an accommodation to waive certain late charges and permitted defendant to cure its defaults and make certain future lease payment obligations over time, no other amendments were made and the lease obligations remain in effect. Plaintiff further asserts that it has shown that defendant was credited with payments. The legal fees incurred by plaintiff, to which it is entitled under the lease, are described and set forth.

Defendant opposes. It relies on an affidavit from its President, an attorney affirmation, and documents, including copies of cancelled checks, a fax dated April 27, 2005 addressing settlement options, the letter dated April 28, 2005 with certain handwritten notes, and a printout of payment history dated April 27, 2005.

Defendant asserts: it has experienced hard financial times but has a history of working successfully with its creditors rather than litigating with them; it accepted delivery of the equipment from LDI and had problems with the equipment almost immediately, including that it could not be programmed properly and produced inferior images in a number of categories;

defendant made it clear in a series of telephone calls to LDI and then plaintiff, in or about November 2003, that there would be no payment on the equipment lease until the "bugs" were worked out of the equipment; defendant realized the equipment was a "lemon", and the bugs were not worked out; defendant restructured the debt to bring it up to date on payments; defendant was promised a credit on certain insurance payments made as part of the lease but defendant was not given a credit; there is an unresolved standing issue of misapplied payments with plaintiff, and, for example, they made a payment for January of 2004, check number 6643, dated 12/31/03, for which they were not credited; they also had persistent problems getting credit for telephone checks; it was with great reluctance that defendant stopped making payments on the lease, but plaintiff's failure to honor agreements and to credit payments and the shoddiness of the equipment left defendant no choice.

Defendant therefore argues that summary judgment should be denied in light of these factual issues regarding payment and proper credit, and whether plaintiff is a holder in due course as it was aware of the equipment problems prior to the assignment. Defendant also argues that it should be allowed limited discovery on the facts and circumstances surrounding the assignment which are uniquely within the knowledge of the assignor and plaintiff.

Plaintiff replies, by way of an affidavit from the loan adjuster, the attorney affirmation, and print-out indicating receipt of payments and applications of those payments, that there are no genuine remaining issues of fact here and that defendant failed to defeat its showing by evidentiary proof. It argues that contrary to defendant's assertions, there is no genuine dispute regarding the monies owed, as credit of payments was properly given, including for the insurance, and the checks defendant relies upon to show an issue as to the owed monies herein

either were not in payment of the monthly lease payments owing for this lease and were for another equipment lease, or were in payment and duly credited for other monies due under this lease, such as UCC fees, taxes, telephone fees, and late charges.

Additionally, plaintiff argues that defendant's claims of problems with the equipment can not serve, as a matter of law, as a defense to payment to plaintiff, as paragraph two of the lease specifically states that the equipment is leased "AS IS" and without implied or express warranties, this waiver of warranty provision is in full compliance with the UCC, and, by virtue of defendant's execution of the Certificate of Acknowledgment Acceptance of Leased Equipment, defendant's promises to plaintiff are irrevocable. Additionally, plaintiff is a holder in due course, and therefore defendant's alleged issues with the equipment are not defenses, as paragraph 11 of the lease specifically states that upon an assignment of the lease, the assignee will not be subject to any claim, defense or set-off that defendant may have against LDI.

Plaintiff also argues that it established that it is a holder in due course, the assignment was valid, and it is in privity with the defendant, and defendant's baseless self-serving allegations to the contrary fail to defeat that showing. Nor can defendant's request for discovery defeat the motion, as there are no issues of fact and defendant failed to show an evidentiary basis for even suggesting that discovery may lead to relevant evidence. Plaintiff further requests and details the additional attorneys' fees that it incurred since the drafting of the motion.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". Winegrad v. New York University Med. Center, 64 N.Y.2d 851. Once the proponent has made the showing, the burden of proof shifts to the party

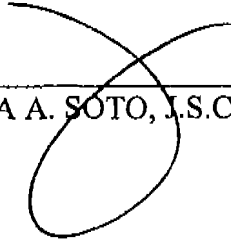
opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320,324. Moreover, “[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law...[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided.” Andre v. Pomeroy, 35 N.Y.2d 361. Mere conjecture, speculation and conclusory assertions are insufficient. The role of the court in determining a summary judgment motion is issue finding, not issue resolution. The opponent of the motion is entitled to all reasonable inferences in its favor.

Here, plaintiff met its prima facie burden and demonstrated that there are no genuine issues of disputed fact and that it is entitled to judgment as a matter of law on its claims for monies due and owing under the equipment lease, in taxes and attorneys’ fees, and that the court should strike the defenses of lack of personal jurisdiction and failure to state a cause of action as they are without merit. The burden then shifted to defendant to demonstrate, by admissible evidence, that a genuine issue of fact remains. This defendant failed to do. Instead, defendant asserts conjecture and conclusory allegations, claims as to problems with the equipment that, as a matter of law, can not be asserted as valid defenses under this lease and assignment, and other allegations that are not supported by admissible evidence. To the extent defendant raised an issue, such as to whether monies were properly credited, plaintiff defeated, by admissible evidence, that showing. Nor has defendant staved off summary judgment by asserting discovery is needed on the assignment, as it has failed to make the requisite showing. The court further finds that plaintiff has shown that, pursuant to the lease and as demonstrated in its papers, it is entitled to recover the amount of reasonable attorneys’ fees it requests.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment and to strike the first and third defenses is granted, the court strikes said defenses, and the Clerk is directed to enter judgment in favor of plaintiff Wells Fargo Financial Leasing, Inc. and against defendant Print Zone, Inc. d/b/a Digizone, in the amount of \$33,234.01, plus interest from September 20, 2005 as calculated by the Clerk, plus taxes in the sum of \$2,783.35, plus reasonable attorneys' fees in the sum of \$2,386.50, with costs and disbursements.

Dated: New York, New York
June 27, 2006



FAVIOLA A. SOTO, J.S.C.

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