

**Orix Fin. Servs. Inc. v Lewis Group Inc.**

2007 NY Slip Op 30453(U)

March 28, 2007

Supreme Court, New York County

Docket Number: 0101525/2006

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PART 17

F Index Number : 101525/2006  
- ORIX FINANCIAL SERVICES INC  
vs  
LEWIS GROUP INC  
Sequence Number : 001  
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*decided per attached.*

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

**FILED**  
APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/28/07

*[Signature]*  
EMILY JANE GOODMAN S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

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ORIX FINANCIAL SERVICES, INC  
formerly know as  
ORIX CREDIT ALLIANCE, INC,

Plaintiff,

Index No. 101525/06

-against-

THE LEWIS GROUP, INC and JASON LEWIS,

Defendants.

**FILED**  
APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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**Emily Jane Goodman, J.S.C.:**

Plaintiff Orix Financial Services, Inc (Orix) moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint in connection with two contracts of sale and a corresponding guaranty executed by defendants. For the reasons stated below, the motion is denied.

Orix alleges that on November 17, 1998, non-party Yancey Bros. Co. and defendant Lewis Group entered into a Conditional Sale Contract Note for \$245,520. The Note, which was payable in monthly installments, was executed in connection with the Lewis Group's purchase of a Caterpillar Crawler Loader from Yancey. On that same date, defendant Jason Lewis, the President of the Lewis Group, executed a personal guaranty of the Lewis Group's obligations under the Note. Also on that same day, Yancey assigned the Note to Orix.

Orix states that the Lewis Group defaulted on its payments beginning on May 1, 2001 and for each subsequent month. Orix then accelerated the balance owed and eventually repossessed the equipment. On March 17, 2003, Orix resold the crawler loader in a private sale for \$86,500. Orix states that it incurred expenses of \$2124.90 in conducting the sale. Thus, a total of \$84,375.10 was deducted from the balance owed by defendants.

In the meantime, on November 10, 1999, Yancey and the Lewis Group had executed a second Note, for \$116,496, in connection with the purchase of a Caterpillar Fork Lift. The Note was assigned to Orix on that same day. However, a second guaranty was not executed.

The Lewis Group allegedly defaulted on its payments under the second Note beginning on January 10, 2001. Orix then repossessed the fork lift and eventually resold it for \$23,500, on March 31, 2003. Orix credited defendant's balance, minus expenses incurred in conducting the sale.

Orix now moves, pursuant to CPLR 3213, to recover the amounts allegedly owed by defendants pursuant to the two Notes and the Guaranty. Orix also seeks to recover substantial amounts of interest, late charges and attorney's fees.

"When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the

summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." Weissman v Sinorm Deli, Inc, 88 NY2d 437, 443 [1996]. "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money--an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time." Id at 444.

"Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable." Id. Thus, "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." Id; see, Kerin v Kaufman, 296 AD2d 336, 337 [1st Dept 2002].

Here, Orix has not demonstrated that it is entitled to recover pursuant to CPLR 3213. Numerous questions of fact exist which require the court to look beyond the face of the documents, or a de minimis deviation therefrom.

Among other things, there are questions of fact as to whether Orix resold each piece of equipment in a commercially reasonable manner and, as such, deducted a sufficient amount from the balances allegedly owed by the defendants.<sup>1</sup> Defendants assert that the

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<sup>1</sup>The crawler loader was resold nearly two years after the alleged default. The fork lift was resold more than two years

equipment was sold in an improper manner which resulted in Orix recovering amounts that were below the actual value of the equipment at the time of sale. Determination of this issue clearly requires the court to look beyond the face of the documents at issue here. See, HSBC Bank USA v IPO, LLC, 290 AD2d 246 [1st Dept 2002] (CPLR 3213 motion denied due to triable issue of fact as to whether plaintiff properly marshaled and disposed of the collateral in its possession in a commercially reasonable manner).

Orix has also not demonstrated that the substantial amounts of interest, late charges and attorney's fees which it seeks can be ascertained simply from the face of the documents at issue here. Such calculations appear to require additional documentary proof or further explanation. See, HSBC Bank USA v IPO, LLC, 290 AD2d 246 [1st Dept 2002]. Therefore, the motion for summary judgment in lieu of complaint is denied.

The court notes that defendants' papers in opposition to plaintiff's motion raise certain jurisdictional issues. Among other things, defendants question whether they were properly served in this action. However, defendants have not moved to dismiss on this basis. Therefore, defendants may raise any such objections, if appropriate, after such time as plaintiff serves a formal

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after the default.

Complaint. Accordingly, it is

ORDERED that defendant's motion for summary judgment in lieu of complaint is denied.

**This Constitutes the Decision and Order of the Court.**

DATED: March 28, 2007

ENTER:



J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
APR 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE