

**Sterling Natl. Bank v Crossings Recovery
Sys., Inc.**

2007 NY Slip Op 30600(U)

April 5, 2007

Supreme Court, Suffolk County

Docket Number: 0025275/2006

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #002-MG _____
R/D: 011607
S/D 021307

STERLING NATIONAL BANK

PLTF'S/PET'S ATTY:
MAGNOZZI & KYE, LLP
One Expressway Plaza, Suite 114
Roslyn Heights, New York 11577

Plaintiff,

- against -

CROSSINGS RECOVERY SYSTEMS, INC. and
FRANK W. BUONANOTTE,

DEFT'S/RESP'S ATTY:
JASPAN, SCHLESINGER, HOFFMAN
300 Garden City Plaza
Garden City, New York 11530

Defendants.

Upon the following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR §

_____. Notice of
Motion/Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers _____ Answering
Affidavits and supporting papers 8-11 Replying Affidavits and supporting papers 12-13 Other _____
_____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Sterling National Bank ("SNB") for an order pursuant to CPLR §3212 granting summary judgment against defendants Crossing Recovery Systems, Inc ("CRS") and Frank W. Buonanotte ("Buonanotte") for \$27,606.86 with interest from June 3, 2006, attorneys fees and costs is granted.

On October 19, 2004 defendant "CRS" entered into a lease with plaintiffs assignor DLC Commercial Corporation ("DLC") for use of telephone equipment. The lease provided that defendant "CRS" was required to make 60 monthly payments of \$698.18 commencing February 3, 2005. One day earlier, on October 18, 2004 defendant "Buonanotte" executed a guarantee on behalf of the corporate defendant "CRS". On February 1, 2005 the lease was assigned from "DLC" to plaintiff "SNB".

Defendant "CRS" defaulted in making timely monthly lease payments beginning June 3, 2006. Plaintiff's motion seeks an order granting summary judgment against the defendants upon their failure to make timely payments due under the terms of the lease. In support plaintiff submits an affidavit from an "SNB" vice president and two affirmations of counsel and claims that summary judgment must be granted against both defendants for the amounts due pursuant to the agreement including an award for reasonable attorney's fees.

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In opposition defendants submits an affidavit from defendant "Buonanotte" and an attorney's affirmation and claim that plaintiffs motion is premature since discovery has never been conducted. Defendants claim substantial issues of fact exist concerning the actions of a Court appointed receiver which maintained "CRS" facilities (chemical dependance outpatient treatment centers) from February, 2006 through June, 2006. Defendants contend the receiver returned "CRS" property but did not return the telephone equipment provided to "CRS" under the lease. It is defendants position that questions of fact exist concerning: 1) the location of the equipment; 2) whether the receiver made rent payments for the use of the equipment; and 3) whether "SNB" failed to investigate by recovering the equipment and re-renting it. Defendants assert that the "SNB" vice president has no personal knowledge of the facts surrounding negotiations of the lease or whether adequate affirmative defenses have been properly plead by the defendants.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

Paragraph 17 of the October 19, 2004 lease provides:

Default.

Any of the following events or conditions shall constitute an event of default hereunder. (Lessee's failure to pay any rent or other sum due Lessor or other party, as herein provided, on the due date thereof; (b) Lessee's failure to observe keep or perform any other term, covenants or condition of this lease, or any other agreement with Lessor, as such failure continues after the due date; (c) Lessee or any partner of Lessee. If Lessee is a partnership, or any guarantor dies, becomes insolvent or unable to pay debts when due; stops doing business as a going concern, merges, consolidates, transfers all of substantially all of his assets; makes an assignment for the benefit of creditors or undergoes a substantial deterioration of health; (d) Lessee or any guarantor of this Lease agreement or any partner of Lessee, if Lessee is a partnership, shall voluntarily file, or have filed against it voluntarily, a petition for liquidation, reorganization, adjustment of debts or similar relief under the Federal Bankruptcy Code or any state insolvency law, or if any trustee, receiver or liquidator shall be appointed over it or over all or part of its assets; (e) breach of any representation or warranty made by Lessee or guarantor herein or in any document delivered to Lessor in connection herewith; or (f) levy, seizure or attachment of the equipment.

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There is no dispute that defendant "CRS" defaulted under the terms of the lease by failing to make the required monthly lease payments since June, 2006. Under such circumstances plaintiff is entitled to judgment against the corporate defednant "CRS" and the individual defendant "Buonanotte" under the terms of the lease and the personal guaranty. Plaintiffs motion for an order pursuant to CPLR §3212 must therefore be granted.

Submit a proposed judgment together with an attorney's affirmation with respect to the issue of reasonable attorney's fees, outlining the number of hours counsel has devoted and will devote to the prosecution of this action and counsel's customary hourly fee for such legal services.

Dated: April 5, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION