

**Orix Fin. Servs., Inc. v K.C. Logging, Inc.**

2007 NY Slip Op 30848(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0108930/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART \_\_\_\_\_

Index Number : 108930/2006  
ORIX FINANCIAL SERVICES  
vs  
K.C. LOGGING  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_  
**FILED**  
APR 23 2007

Cross-Motion:  Yes  No

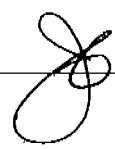
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this ~~motion~~

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**  
APR 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/16/07

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
Orix Financial Services, Inc.  
f/k/a Orix Credit Alliance, Inc.

Plaintiff,

**Decision/Order**

-against-

Index#108930/06  
Mot. Seq. #001

K.C. Logging, Inc. and  
Kevin Schaben,

Defendants.

-----X  
Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

**PAPERS**

Notice of Motion, YK affd., WS affirm., exhibits.....	1
Notice of Cross-Motion, KS affd., exhibits.....	2
Reply affirmation, YK affd., exhibits.....	3

**FILED**

APR 23 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff, Orix Financial Services, ("Orix") moves for summary judgment.

Defendants K.C. Logging ("K.C. Logging") and Kevin Schaben ("Schaben") (collectively "defendants") oppose the motion and cross move for dismissal based on inconvenient forum or, alternatively, for discovery. Issue has been joined, the motion is otherwise timely and it will be considered by the court on its merits. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004).

**Discussion**

Summary Judgment

On a motion for summary judgment, it is the movant's burden to set forth

[\* 3 ]

evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once an issue of fact is identified, the court's examination ends. The court's function is limited to issue finding, not issue determination. Brunetti v. Musallam, 11 AD3d 280 (1<sup>st</sup> dept. 2004).

The underlying action seeks a deficiency judgment against a debtor and guarantor in connection with the financing provided to purchase a certain piece of logging equipment. Certain facts are either undisputed or indisputable based upon the evidence.

K.C. Logging was a logging business operating solely in the State of Washington. In or about March 18, 1999, K.C. Logging purchased a new piece of logging equipment known as a Thunderbird Swing Yarder ("Thunderbird"), from a Washington State equipment dealer, known as Ross Corporation. The total purchase price was \$475,000. K.C. Logging paid for the purchase by turning in an older piece of equipment worth \$95,000 and financing the remaining \$380,000 balance.

In connection with the financing, K.C. Logging signed a promissory note payable to Ross Corporation in the amount of \$482,394 reflecting its commitment to make 60 installment payments each in the amount of \$8,039.90. It also gave Ross Corporation a security interest in not only the Thunderbird it was purchasing at the time, but also in

other logging equipment owned by K.C. Logging, including a Hahn Harvester, a Caterpillar Crawler Tractor and an International Skidder.

On the same date that the sale and financing took place, for value received, Ross Corporation assigned its interest in the note and security agreement to Orix<sup>1</sup>. K.C. Logging also signed a form acknowledgment of satisfactory delivery of the new Thunderbird, knowledge of the sale of the note and security agreement to Orix, and a waiver of any defenses, offsets or counterclaims against Orix. Finally, as part of the same transaction and on the same date, Schaben signed a personal guarantee of K.C. Logging's obligations under the financing agreements.

In or about October 2000, K.C. Logging experienced business difficulties and could no longer pay on the promissory note. Schaben approached Orix about allowing K.C. Logging, for a time, to make payments of interest only, until business improved. Orix rejected the offer. Since defendants could no longer make the agreed to payments, they voluntarily surrendered the collateral, including the Thunderbird and the three other pieces of equipment, to a local dealer selected by Orix.

On March 21, 2001 Orix sold all four pieces of equipment for \$270,000. After deducting its expenses for conducting the sale, Orix credited K.C. Logging's account with the sum of \$263,339.70. It now seeks a deficiency judgment against both defendants, which it calculates as \$52,920.01, inclusive of late charges and interest. It also seeks in additional interest calculated from the day after the sale and its attorneys'

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<sup>1</sup>The assignment was actually made to Orix' predecessor in interest. Since there is no issue about the relationship between plaintiff or its predecessor in interest, the court collectively refers to them as Orix.

[\* 5 ]  
fees.

As more fully set forth below, summary judgment must be denied. At a minimum, there are serious factual disputes about the correctness of the calculation of the amounts due and whether the sale of the collateral was commercially reasonable.

There are disputed issues of fact about the sums due. Orix calculated the sums due based upon its conclusion that in March 2001, when it sold the collateral there was an outstanding balance of \$377,675.00. This balance was calculated based upon the face amount of the note (\$482,394.00) less the payments made of \$144,719.20. The problem with this calculation is, as Orix acknowledges, the gross amount in the note was comprised of both principal and interest. At the time of the sale there were still two years left on the note. Thus an adjustment had to be made to reduce the balance on account of interest that had not yet come due.

While Orix's own worksheet gives a "discount" it is not clear how the discount was arrived at and whether is it due to interest or something else. Moreover the amount claimed due is at odds with the balance as derived from the amortization schedule Schaben claims he was given when he obtained the financing. There are also additional charges of over \$28,000 included in the claimed deficiency amount which are not explained by Orix. They are conclusively lumped together as "late charges" and "interest" on Orix's own work sheet. Although Orix dismissively states that the amortization schedule is "sheer fantasy," it has not provided any statement, based on personal knowledge, refuting Schaben's claim the he received the schedule as part of the financing. In any event, Orix does not refute the math contained in the schedule. Further even without the schedule, Orix has not explained how (or whether) it

discounted the sums it seeks on account of interest that had not yet come due when the collateral was sold.

Summary judgment must also be denied because there are serious issues of fact regarding whether the sale of the collateral was made in a commercially reasonable manner. A party asserting the right to a deficiency judgment must carry its burden of establishing the commercial reasonableness of every aspect of the disposition of the collateral. UCC §9-610; Merchants Bank of New York v. Gold Lane Corp., 28 AD3d 266 (1<sup>st</sup> dept. 2006). Every aspect of the sale must be commercially reasonable, including the method, manner, time, place and other terms. UCC §9-610(b). Where, as here, there is no recognized market for the collateral,<sup>2</sup> disposition of collateral is commercially reasonable if it is made in conformity with reasonable commercial practices among dealers in the type of property disposed. UCC §9-627(b). While the fact that a greater amount could have been obtained for the collateral does not preclude a judgment for the deficiency (UCC § 9-627[a]), it is still evidence for the trier of fact to consider in deciding whether the sale was commercially reasonable. UCC § 9-627 Official Comment 2.

In its original motion, Orix does not provide any factual information about the commercial reasonableness of the sale of the four pieces of logging equipment. There is no evidence in this record that the sale was advertised in accordance with the parties' agreement. The agreement requires that a sale be advertised in at least one paper of

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<sup>2</sup>The concept of limited markets applies only to markets where there are standardized price quotations for property that is essentially fungible. Official Comment 4 to UCC 9-627; Merchants Bank of New York v. Gold Lane Corp., *supra* (McGuire, concurring opinion)

\* 7 ]  
general circulation at least two times before the actual sale. No information whatsoever is provided about what actually happened at the sale itself, including where and how the property was sold. Orix does not make out a prima facie case on the commercial reasonableness of the sale.

Schaben did attend the sale on March 22, 2001. He claims the collateral was not sold at publicly at that time. He states that only he and the seller attended the sale. He shows that two contradictory notices of sale were sent indicating that the collateral was to be sold on two different dates. He submits evidence that the collateral was sold for well below what it was actually worth. He includes advertisements for Thunderbirds that were older than the collateral selling for prices between \$35,000 to \$55,000 thousand dollars higher than for what Orix sold the subject thunderbird and three other pieces of logging equipment.

Defendants further claim that the collateral was eventually bought privately by someone named Crowley who subsequently resold it for substantially more than what was paid. Although Orix correctly argues that this is inadmissible hearsay, even without considering such information, it is clear that summary judgment is not available to it on the commercial reasonableness of the sale.

Given the serious disputed material issues of fact the court does not reach the other arguments made by the parties on the issue of summary judgment.

#### Inconvenient Forum

Defendants seek dismissal because they believe the action is more appropriately heard in Washington State. Neither the parties nor the underlying events have connections with New York State. Although Orix maintains an office in this state, it is

[ 8 ]

clear that its principal offices are in Georgia. The employees submitting affidavits on plaintiff's behalf are all located in Georgia, as apparently are all Orix' documents relating to this matter. The defendants are located in Washington State, the events underlying the claims all occurred in Washington State. The sale of the collateral occurred in Washington State to an entity also located in Washington State.

Defendants consequently argue that New York is an inconvenient forum CPLR §327.

Under the financing documents it is clear that defendants agreed to both personal and subject matter jurisdiction over this case in New York State. Such choice of forum agreements are enforceable. Sterling National Bank v. Eastern Shipping Worldwide, 35 AD3d 222 (1<sup>st</sup> dept. 2006). While defendants make a compelling case that New York is inconvenient, unless there is reason to set the choice of forum agreement aside, inconvenience alone is not a sufficient basis to dismiss the case. Any other result would effectively eviscerate the choice of forum clause.

Defendants have not shown that enforcement of the choice of forum clause would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his/her day in court. Sterling National Bank v. Eastern Shipping Worldwide, *supra*. Consequently there is no basis to dismiss this case on the basis of inconvenient forum.

To the extent that defendants have cross-moved for discovery, the matter is set down for a preliminary conference on May 24, 2007 at 9:30 am.

Conclusion

In accordance with this decision it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that defendants' motion to dismiss the complaint is denied, and it is further

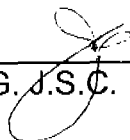
ORDERED that defendants' motion for discovery is granted to the extent that the matter is set down for a preliminary conference on **May 24, 2007 at 9:30 am** before this court, and it is further

ORDERED that any requested relief not expressly granted herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
April 16, 2007

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.

**FILED**  
APR 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE