

Orix Fin. Servs. Inc. v Hubbard

2007 NY Slip Op 31353(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0105066/2006

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

Only

INDEX NO. 105066106

MOTION DATE 2.9.07

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

Husband, W

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

**IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or self-represented party must appear in person at the Judgment Clerk's Desk (Room 1147).

Dated: 2/9/07

W
WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

----- x
ORIX FINANCIAL SERVICES INC., formerly
known as ORIX CREDIT ALLIANCE, INC.,

Plaintiff,

Index No. 105066/06
Motion Seq. 003

-against-

WALTER H. HUBBARD, doing business as
MAGIC TRUCKING, and THE KINGSMEN, INC.,

Defendant.
----- x

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, contact or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

WALTER B. TOLUB, J.:

By this motion, plaintiff seeks to reargue its prior motion for summary judgment in lieu of complaint solely to the extent that the court dismissed the cause of action against The Kingsmen, Inc. (the Guarantor).

Facts

In this action plaintiff, Orix Financial Services, Inc., f/k/a Orix Credit Alliance, Inc. (Orix), seeks \$43,809.88 plus interest, together with attorneys' fees, costs and disbursements, representing a deficiency balance resulting from defendants' default under an installment sales contract for the purchase of a truck. On or about February 8, 2000, defendant Hubbard signed a Conditional Sales Contract Note (Note) with Freightliner of Chattanooga, LLC (Freightliner) for the purchase of a 2000 Freightliner Road Tractor (Equipment) for \$129,540.00. Hubbard placed

a \$11,150.00 down payment, leaving a balance of \$97,676.00 to be paid off in monthly installments. Hubbard also signed a Delivery/Installation Certificate which included an assignment clause, indicating an intention to assign the Note and Delivery/Installation certificate to Orix. The third document executed on that day was an unconditional Guaranty of all of the obligations of Hubbard to Orix.

Plaintiff claimed that Hubbard defaulted on the monthly installment payments, as required pursuant to the Note, starting on December 24, 2000. Plaintiff claims that, as a result, the entire amount accelerated and became due. Orix then repossessed the Equipment and sold the Equipment at a public sale for a gross sales price of \$50,000 on May 11, 2001. After deducting expenses, plaintiff claims that there is a deficiency due in the amount of \$43,809, plus interest as set forth in the Note.

By order dated October 5, 2006, this court denied plaintiff's motion and granted defendants cross motion to dismiss this action on the ground that plaintiff's cause of action on the Note is time-barred, applying the four-year statute of limitations set forth in UCC 2-725, rather than the six-year statute of limitations provided for in CPLR 213. The court determined that the Note constitutes a contract for the sale of goods under UCC 2-725 rather than a financial document.

Discussion

Plaintiffs argue that the court overlooked the fact that the guaranty of defendant. The Kingsmen, Inc., is a separate and independent financial agreement from the Note with a six year statute of limitations, and thus, should not have been treated as a contract for the sale of goods with a four-year statute of limitations.

A motion to reargue is necessarily addressed to the discretion of the trial court and may be granted only upon a showing that the court, in its earlier determination, either overlooked or misapprehended the facts or the law or arrived at its prior decision by mistake (*Marini v Lombardo*, 17 AD3d 545 [2nd Dept. 2005]; *Carillo v PM Realty Group*, 16 AD3d 611 [2nd Dept. 2005]). Plaintiff has satisfied its statutory burden of demonstrating that the court either overlooked or misapprehended issues of law or fact (CPLR 2221[d]); *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636 [2nd Dept. 2000]), and likewise has demonstrated that the law was misapplied as to the Kingsmen Guaranty, and thus, leave to reargue the CPLR 3213 motion is granted and the court finds that the six-year statute of limitations applies to the Kingsmen Guaranty.

Defendants, in opposition, argue that the Guaranty is not enforceable under CPLR 3213, an argument not raised in opposition to plaintiff's former motion. In addition, defendants argue that the Guaranty is subject to a four year statute of limitations just as the Note was for Hubbard, since the language of the Guaranty does not contemplate a situation in which Kingsmen's responsibility for payment of the indebtedness incurred by Hubbard to plaintiff may be greater than Hubbard's responsibility.

With regard to the issue of the enforceability of the Guaranty on a CPLR 3213 motion, the court notes that this issue was not raised in the original opposition papers, and generally a defendant opposing a motion to reargue may not raise new legal issues not previously raised on the original motion (*Mariani v Dyer*, 193 AD2d 456 [1st Dept 1993]). Even if these arguments were permitted, it is clear that a guaranty is the proper subject of a summary judgment in lieu of complaint motion (*Weissman v Sinorm Deli*, 88 NY2d 437 [1996]; *Orix Credit Alliance, Inc. v*

