

**Orix Fin. Servs. Inc. v Sylvain**

2007 NY Slip Op 31444(U)

May 30, 2007

Supreme Court, New York County

Docket Number: 0100241/2007

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 : 100241/2007

ORIX FINANCIAL SERVICES INC

vs

SYLVAIN, LIONEL F.

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

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of entry**

Dated: 5/30/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE\*

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., formerly  
known as ORIX CREDIT ALLIANCE, INC.,

Plaintiff,

-against-

LIONEL F. SYLVAIN d/b/a SYLVAIN'S  
TRUCKING,

Defendant.  
-----x

**Decision/Order**

Index No.: 116364/05  
Seq. No. : 003

Present:  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Pltf's motion [SJLC] w/WMS affirm in support, exhs

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE  
Numbered ..... 1

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

Plaintiff Orix Financial Services, Inc. ("OFS") formerly known as Orix Credit Alliance, Inc. ("OCAI"), now moves, pursuant to CPLR § 3212, for summary judgment in its favor and against Lionel F. Sylvain d/b/a Sylvain's Trucking (the "Defendant"). Since issue has been joined, but note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

**Background**

There is due proof of service of the underlying Summons and Notice of Motion for Summary Judgment. Defendant has appeared in this action, but has not opposed

the instant motion.<sup>1</sup>

Certain facts are established by the documentary evidence provided on this motion. On January 27, 2000, Defendant executed a Conditional Sale Contract Note (the "Note") whereby Utility Trailers of New England, Inc (the "Seller") sold to Defendant certain Equipment. On the same day, January 27, 2000, the Seller thereafter assigned the Note to Plaintiff via an Assignment. The Note and Assignment have been provided. The Note provides that Defendant consented to venue and jurisdiction of this court in any matter arising under the terms of the Note. By separate document, also dated January 27, 2000, Defendant acknowledged receipt of the Equipment. Defendant also represented that he had no defenses, offsets or counterclaims against Plaintiff and waived any claims or offsets against Plaintiff.

Defendant made a series of payments, but thereafter defaulted under the terms of the Note by failing to tender the payment due to Plaintiff on July 1, 2001. Plaintiff thereafter accelerated the balance owed under the Note. A record of Defendant's payment history has been provided.

As provided for in the Note, Plaintiff took possession and subsequently sold the Equipment on August 24, 2001. Plaintiff claims that the sale was conducted in a commercially reasonable manner for a gross purchase price in \$9,000. The total amount of costs and expenses of the sale of the Equipment was \$574. Pursuant to the Note, Defendants are afforded a credit in the amount of \$8,426.

Plaintiff claims that the amount due and accelerated under the Note is

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<sup>1</sup> Defendant appeared *pro se* and answered by letter filed with the court, which letter the court liberally construes as an answer.

\$18,784.41, plus late charges on payments received before the date of default in the amount of \$1.05, plus late charges of \$676.24, on the unpaid balance of \$18,784.41 from the day after the default to the date of sale of the Equipment, and less the resale credit of \$8,726, resulting in a total balance due of \$11,035.70. Default interest, as provided under the note, accrues at a rate of one-fifteenth of one percent (1/15 of 1%) per *diem* from the date after the sale.

Plaintiff also seeks legal fees in the amount of \$2,207.14, equal to 20% of the outstanding balance. Plaintiff has provided the affirmation of William M. Stein, Esq. which details the services that have been provided.

Defendant's answer claims that the action is time barred and should be dismissed. In any event, Defendant also has stated in the answer that at the time he gave back the Equipment, Dennis Daly, the division Asset Manager for Plaintiff, told his wife that Plaintiff would sell the Equipment at auction and "that would be the end of it - [he] would not owe anymore money [sic]."

### **Discussion**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 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 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept. 2003).

Plaintiff's sole cause of action is for breach of contract. The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). The above claims establish the elements of a *prima facie* cause of action for breach of contract and Plaintiff has therefore met its burden.

Defendant's claim in the answer that this action is time-barred is without merit. CPLR 213. Defendant's claim that a representative of Plaintiff orally discharged his obligations to Plaintiff is not supported by any affidavit or documentary evidence. Further, the Note provides that it can not be modified or terminated unless such modification or termination was made in writing. Therefore, an alleged oral discharge by Plaintiff's representative was ineffectual to terminate Defendant's obligations. N.Y. Gen. Oblig. Law § 15-301(2); Jaffe v. Paramount Communications Inc., 222 A.D.2d 17 (1<sup>st</sup> Dept. 1996). Therefore, Defendant has not met its burden in opposing this motion. Accordingly, Plaintiff's motion for summary judgment is granted.

The clerk shall enter judgment in favor of plaintiff and against defendant in the sum of \$11,035.70, plus interest at the default rate (1/15th of 1% per diem) from the day after the date of the sale (e.g. August 24, 2001).

Plaintiff may also recover its legal fees. The note provides that "reasonable" legal fees are agreed to be equal to 20% of the unpaid balance. Counsel has provided an affirmation of services setting forth its hourly rate, number of hours spent, and other expenses. The law firm seeks legal fees of \$2,207.14. These fees bear a reasonable relationship to the services provided. First National Bank of East Islip v. Brower, 42 N.Y.2d 471 (1977).

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion for summary judgment is granted; and it is further

**ORDERED** that the The clerk shall enter judgment in favor of plaintiff and against defendant in the sum of \$11,035.70, plus interest at the default rate (1/15th of 1% per diem) from the day after the date of the sale (e.g. August 24, 2001), plus attorney's fees in the amount of \$2,207.14, together with the costs and disbursements of this action.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 30, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE