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

PRESENT: HON. LELAND DEGRASSE PART 25

Index Number : 603798/2006
ORIX FINANCIAL SERVICES INC
VS
HASSAN, WAHEED
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 603798/06
MOTION DATE 2/20/07
MOTION SEQ. NO. 001
MOTION CAL. NO. 108

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED
JUN 11 2007
COUNTY CLERK'S OFFICE
NEW YORK

JUN 04 2007

Dated: _____

_____
J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

ORIX FINANCIAL SERVICES, INC. :
formerly known as Index No.: 603798/06
ORIX CREDIT ALLIANCE, INC. :
Plaintiff, Cal. No.: 108 of 2/20/07
:
-against-
:
WAHEED HASSAN and MALIK HASSAN :
Defendants. :

DeGRASSE, J.:

In this breach of contract action plaintiff Orix Financial Services, Inc. ("OFSI"), formerly known as Orix Credit Alliance, Inc. ("OCAI"), moves pursuant to CPLR 3212 for summary judgment against *pro se* defendants Waheed Hassan and Malik Hassan on its second cause of action. Plaintiff also moves for leave to sever (CPLR 1003) and to discontinue (CPLR 3217 [b]) the first cause of action without prejudice.

FACTS

Plaintiff commenced the instant complaint to recover the balance of all amounts due under two separate conditional sale contract notes. The first cause of action alleges that on May 18, 1999, OCAI was assigned a Conditional Sale Contract Note ("Note 1") from Harvey Mack Sales & Service, Inc. ("HMSS"), which was to secure against default in payment for a 1995 Mack Model CH613 Tractor purchased from HMSS by defendants. On the same day, defendants executed a Delivery/Installment Certificate, Waiver, and Agreement, whereby defendant acknowledged

complete and satisfactory delivery of the equipment. Defendants defaulted in the monthly payment due under Note 1 by failing to make the payment due on September 18, 1999, and on the 18th day of each month thereafter. Pursuant to the terms of Note 1, plaintiff accelerated the balance owed and repossessed the equipment. According to the complaint, there is due and owing to OFSI from defendants the sum of $20,848.32, together with default interest as set forth in Note 1 (1/15th of 1% per day) from September 18, 1999 through the entry of judgment, plus attorneys' fees in the amount of $4,169.66 (20% of the total balance due under Note 1).

The second cause of action alleges that on December 27, 1999, OCAI was assigned a Conditional Sale Contract Note ("Note 2") from HMSS, which was to secure against default in payment for a 2000 Mack Model RD688s VIN and a J&J Model DA3 Aluminum Dump Body purchased from HMSS by defendants. On the same day, defendants executed a Delivery/Installment Certificate, Waiver, and Agreement, whereby defendant acknowledged complete and satisfactory delivery of the equipment. Defendants defaulted in the monthly payment due under Note 2 by failing to make the payment due on April 1, 2001, and on the 1st day of each month thereafter. Pursuant to the terms of Note 2, plaintiff accelerated the balance owed and repossessed the equipment. On June 1, 2001, plaintiff held a private sale and sold the equipment for a gross purchase price of $77,000, minus $3,150 in costs and expenses. According to the complaint, there is due and owing to OFSI from defendants the sum of $22,552.66, together with default interest as set forth in Note 2 (1/15 of 1% per day) from June 1, 2001 through the entry of judgment, plus attorneys' fees in the amount of $4,510.53 (20% of the total balance due under Note 2).

On November 1, 2006, plaintiff filed a complaint against defendants, seeking payment of the balance of all amounts owed under the notes, plus default interest and attorneys' fees. By

answer, dated December 9, 2006, defendants asserted, *inter alia*, affirmative defenses sounding in release, laches and statute of limitations. Plaintiff now moves for summary judgment against defendants as to the second cause of action, seeking to recover $22,552.66, plus interest and attorneys' fees, together with the costs and disbursements of this action. Plaintiff also seeks leave to sever and discontinue the first cause of action without prejudice.

DISCUSSION

Plaintiff's Motion Pursuant to CPLR 3212

It is well settled that a party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Romano v St. Vincent's Med. Ctr. of Richmond*, 178 AD2d 467, 470 [1991]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In support of the motion plaintiff submits a copy of Note 2, executed by defendants and HMSS, which unequivocally establishes defendants' obligation to pay monthly installments for the equipment they purchased on December 27, 1999. Plaintiff also submits a copy of the Assignment, which establishes that HMSS assigned its rights under Note 2 to plaintiff. Plaintiff has also provided the court with the affidavit of its senior vice president, Yvonne Kalpakoff, who states that defendants defaulted in making the monthly payment due under Note 2 on April 1, 2001, and they have failed to make any further payments upon the balance. Thus, plaintiff has met its initial burden of

establishing its entitlement to judgment as a matter of law by submitting proof in documentary form that defendants breached a conditional sale contract note assigned to plaintiff by the seller, HMSS (*see Citibank, N.A. v Furlong*, 81 AD2d 803, 804 [1981]; *GTF Mktg. v Colonial Aluminum Sales, Inc.* 66 NY2d 965, 967 [1985]). As such, the burden shifts to defendants to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman*, 49 NY2d at 560).

In opposition to the motion defendants do not deny executing the conditional sale contract note in question, or dispute that the note is in default and unpaid. Rather, defendants argue that this court does not have personal jurisdiction over them based on the grounds that (1) defendants are residents of Maryland, (2) the equipment was purchased in Maryland, (3) the contract between the parties was executed in Maryland, and (4) the equipment was delivered to defendants in Maryland. Defendants further argue that this court lacks subject matter jurisdiction over this controversy because the action is governed by the laws of the state of Maryland, and, thus, is barred by Maryland's applicable three-year statute of limitations. Additionally, defendants argue that this action is barred by New York's applicable statute of limitations.

Defendants' argument that this court lacks personal jurisdiction over them was not asserted in their answer or in a pre-answer motion to dismiss and has thus been waived (*see* CPLR 3211 [e]; *see also Interlink Metals and Chemicals, Inc. v Kazdan*, 222 AD2d 55, 58 [1996]; *Urena v Nynex, Inc.*, 223 AD2d 442, 444 [1996]). Moreover, the record clearly shows that defendants consented to the jurisdiction of this court in that Note 2 contains a provision specifying the state and county of New York as the venue and jurisdiction for any legal action concerning the parties. Additionally, Note 2 specifically provides that the parties' agreement "shall be governed by and construed in

accordance with the laws of the State of New York." Forum selection clauses "are prima facie valid" (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]), and "'[i]t is the policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation'" (*Micro Balanced Products Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284, 285 [1997], quoting *Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1995]; *see also Boss v American Exp. Fin. Advisors, Inc.*, 15 AD3d 306, 307 [2005] *affd* 6 NY3d 242 [2006]).

With respect to defendants' argument that plaintiff's second cause of action is barred by New York's applicable statute of limitations, a breach of contract action concerning a conditional sale contract note is subject to the six-year limitations period prescribed by CPLR 213 (2) (*see Stewart v Stuart*, 262 AD2d 396 [1999], *lv denied* 94 NY2d 753 [1999]). By the very terms of Note 2, acceleration was effected immediately upon default. Since the default took place on April 1, 2001, and this action was commenced on November 1, 2006, plaintiff's second cause of action is timely.

Plaintiff's Motion Pursuant to CPLR 1003 and CPLR 3217(b)

Plaintiff now moves for leave to sever the first cause of action for breach of a conditional sale contract note (CPLR 1003), and to discontinue said action without prejudice (CPLR 3217 [b]). Here, CPLR 1003, which provides that "[t]he court may order any claim against a party severed and proceeded with separately," is not the appropriate vehicle to discontinue a cause of action. Rather, it is CPLR 3217 that controls (*see Aison v Hudson River Black River Regulating Dist.*, 279 AD2d 754 [2001]). A plaintiff should be permitted to discontinue the action at any time "unless substantial rights have accrued or his adversary's rights would be prejudiced thereby" (*see Louis R. Shapiro, Inc. v Milspemes Corp.*, 20 AD2d 857 [1964]). Here, it is evident that by its attempt to discontinue

without prejudice plaintiff seeks to preserve its claim for the future. However, defendants' defense of the statute of limitations is conclusively established as to the first cause of action which accrued on September 18, 1999, more than six years prior to the commencement of this action on November 1, 2006 (*see* CPLR 213 [2]). Since the reassertion of this claim at a later time will be met by the statute of limitations defense, the branch of plaintiff's motion by which it seeks leave to discontinue is granted to the extent that the first cause of action is discontinued with prejudice.

CONCLUSION

For the foregoing reasons, plaintiff is granted summary judgment on its second cause of action and the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of $22,552.66, plus interest from June 1, 2001, costs and disbursements. The branch of the motion by which plaintiff seeks reasonable attorneys' fees is also granted. This matter is referred to the Special Referee Clerk in the IAS Motion Support Office for assignment to a special referee to hear and determine the reasonable amount of such fees. Pursuant to CPLR 3215 (b) the Clerk shall enter judgment in accordance with the special referee's report without any further application to this court. As a condition of the foregoing relief, plaintiff shall file a copy of this order with the Special Referee Clerk within 20 days after entry. The motion is granted to the further extent that the first cause of action is discontinued with prejudice.

This constitutes the decision and order of the court.

DATED: JUN 04 2007

FILED
JUN 11 2007
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

HON. LELAND DeGRASSE