

M & T Bank v Piwinski

2007 NY Slip Op 32006(U)

June 29, 2007

Supreme Court, Suffolk County

Docket Number: 0034260/2006

Judge: Emily Pines

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Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 03-09-2007
Motion Submit Date: 05-31-2007
Motion Sequence No(s): 001 MG
CASEDISP

_____ X
M & T BANK,

Plaintiff,

-against-

ANNETTE C. PIWINSKI a/k/a ANNETE
PIWINSKI and STANLEY PIWINSKI,

Defendants .

_____ X

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ORDERED, that the motion (motion sequence number 001) by Plaintiff for summary judgment is granted as set forth herein below.

This is an action to recover monies owed by Defendants to Plaintiff pursuant to a retail finance agreement between the parties dated March 30, 2000. Pursuant to the agreement, Plaintiff provided financing for Defendants' purchase of a boat and such agreement was secured by a preferred ship mortgage. Plaintiff alleges that the amount of \$93,609.06 remains due and owing from the Defendants, with interest thereon from August 9, 2006, together with costs and disbursements. Plaintiff also seeks counsel fees, pursuant to the agreement, in the amount of \$18,721.81 plus costs.¹

Plaintiff commenced the action by filing of a Summons and Verified Complaint on or about December 9, 2006 and issue was joined

¹Paragraph 22 of the Preferred Ship Mortgage provided that in the event of repossession and sale, Plaintiff had the right to recover attorney's fees and court costs.

by Defendants' service of a Verified Answer on or about January 12, 2007. Defendants' answer consists of general denials of each and every allegation of the complaint.

Plaintiff now moves for summary judgment and annexes the pleadings, an affidavit by Beverly Ingalsbe, the Attorney Specialist for Plaintiff, a copy of the agreement, Preferred Ship Mortgage, Notice of Repossession and Sale of Merchandise and correspondence to Defendants dated July 14, 2006 indicating the sale of the vessel and amount of deficiency. The submissions reflect that pursuant to the agreement, Plaintiff repossessed the Bayliner boat that secured the financing agreement and same was sold at private auction on July 6, 2006 for the amount of \$70,500.00. According to Plaintiff's submissions, the amount due on the finance agreement was \$151,936.23, plus the expenses of the auction and repossession, and after deduction of the auction proceeds, the net amount still outstanding is \$93,609.06.

In opposition to the motion, Defendants submit an affirmation by their attorney and an affidavit by defendants in which they argue that Plaintiff did not sell the boat in a commercially reasonable manner. They further allege that the boat was worth more than the amount for which it was sold. Defendants' attorney argues that the motion is premature because discovery has not been conducted. In reply, Plaintiff submits an affidavit by Thomas Thornton, its Banking Officer, where he sets forth the procedures that were followed to sell the boat. Specifically, Plaintiff annexes the Report of Marine Insurance Survey for the vessel, a detailed survey indicating that the appraised market value of the boat was \$60,000 and that the vessel was found to be in poor condition. Mr. Thornton notes that the boat was sold for \$70,500, more than its appraised value.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Winegrad v. New York University Medical Center***, 64 N.Y.2d 85, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d

718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. ***State Bank of Albany v. McAullife***, 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983).

Uniform Commercial Code §9-610 provides in relevant part that after a default, a secured party may sell any or all of the collateral, but that every aspect of the disposition, including the method, manner, time, place and other terms, must be "commercially reasonable." **U.C.C. §9-627** states:

- (a) Greater amount obtainable under other circumstances; no preclusion of commercial reasonableness. The fact that a greater amount could have been obtained by a collection, enforcement, disposition or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
- (b) Dispositions that are commercially reasonable. A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
 - (1) in the usual manner on any recognized market;
 - (2) at the price current in any recognized market at the time of the -disposition; or
 - (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Here, Plaintiff has met its burden of demonstrating entitlement to summary judgment by the submission of the agreement, mortgage and proof of Defendant's default in payment. Further, Plaintiff has demonstrated the commercial reasonableness of the sale by the submission of the Plaintiff's affidavit detailing the procedures followed in the sale, which included the Notice of Repossession and Sale sent to Defendants and the appraisal of the subject vessel. In opposition, Defendants merely argue that the boat could have sold for a higher value. Defendants do not articulate any further basis for

their claim that the sale did not take place in a commercially reasonable manner. The fact of a resale of collateral at a lower price than the original price, does not by itself create a triable issue of fact. **Marine Midland Bank v. St. Louis**, 75 A.D.2d 972, 428 N.Y.S.2d 528 (2d Dept. 1980). **U.C.C. §9-627(a)**. It is noteworthy, that Defendants dispute neither their failure to make the payments pursuant to the financing agreement, nor challenge their receipt or the validity of the notice of repossession and sale. The Court finds the argument of Defendants' counsel that the motion is premature because there has been no discovery to be without merit.

Based upon the foregoing, the motion for summary judgment is granted in the amount of \$93,868.24 plus interest from August 9, 2006 at 9.75%, together with attorney's fees and costs.

Submit Judgment in accordance with this Order on fifteen (15) days notice of settlement.

Dated: June 29, 2007
Riverhead, New York



EMILY PINES
J. S. C.