

**A.I. Credit Corp. v Buckingham Trading Partners,
Inc.**

2007 NY Slip Op 32043(U)

July 3, 2007

Supreme Court, NewYork County

Docket Number: 0600658/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 600658/2006

A.I. CREDIT

vs
BUCKINGHAM TRADING PARTNERS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for summary judgment

PAPERS NUMBERED

83212

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

FILED

JUL 12 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and PC is hereby scheduled
for Sept 27, 2007 at 9:30 am in Part 10*

Dated: JUL 03 2007

HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

... BEING RETURNED TO JUSTICE

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

-----X
A.I. Credit Corp and AICCO Inc.,

Plaintiffs

-against-

Buckingham Trading Partners, Inc.

Defendant.
-----X

DECISION/ORDER

Index No.: 600658/06
Seq. No.: 001

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

Numbered

Pltff n/m (§3212) w/JS affid, MDS affirm (sep back), exhs . . . 1,2
Def's opp w/LF affid, BW affid, exhs 3
Pltff reply w/JS affid, MDS affirm (sep back) exhs 4

FILED

JUL 12 2007
NEW YORK
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Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is a breach of contract action in which plaintiffs seek monetary damages equal to unpaid late fees and attorneys' fees in connection with insurance premium payments. The defendant has answered the complaint, but the note of issue has not yet been filed. The court has before it a timely motion by plaintiffs for summary judgment, and it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The decision and order of the court is as follows:

Background

Most of the underlying facts in this case are not disputed. It is undisputed that defendant Buckingham Trading Partners, Inc. ("defendant") has a premium finance agreement ("finance agreement") with each of the named plaintiffs who are lenders that finance defendant's insurance premiums and charge interest on the loans.

Defendant's agreement with plaintiff A.I. Credit Corp. [Acct 01-852873-0] is dated October 3, 2003 (the "AIC finance agreement"). Defendant's finance agreement with plaintiff AICCO, Inc. [Acct 15-3-9276-9] is dated November 10, 2004 (the "AICCO finance agreement"). As per the AIC finance agreement, defendant was required to repay \$2,519,104.60 in 10 equal monthly payments of \$251,910.46 each, the first of which was due December 1, 2003. As per the AICCO finance agreement, defendant had to repay \$1,399,576.68 in 9 equal monthly payments of \$155,508.52 each, the first of which was due November 30, 2004.

The parties' dispute centers on an issue of contract interpretation. Plaintiffs contend that defendant is obligated to make its loan payments so that they are received by them within the 5 day grace period articulated in each finance agreement. Thus, it is plaintiffs' contention that under each finance agreement defendant's payment is due on the 1st day of the month, but after the fifth day (e.g. starting the 6th day) they can impose a late fee.

Defendant differently interprets the agreements to require that payment be made, that is the check drawn and mailed, within that five day period. Defendant does not deny that it may have mailed payments after the first of the month, or even that plaintiffs may have received them after the fifth day. In fact, defendant relies upon

copies of cancelled checks in its possession dated 12/3/03, 6/2/04, and 6/30/04. Each check was paid more than five (5) days after the due date (e.g. after the 1st of the month).

Alternatively, defendant opposes plaintiffs' motion based upon the parties' established course of dealing with each other. Defendant contends that these payments were not made any differently than others that plaintiffs accepted, without the imposition of any late fee or objection. Thus, defendant contends that these actions follow its decision to consider other lenders and take its business elsewhere. Finally, defendant challenges the late fees as being unenforceable penalties.

Plaintiff argue that they are entitled to summary judgment because the finance agreements plainly require that payments thereunder be made on the 1st of the month with a grace period. They deny the agreements are ambiguous, or the late fee is usurious or a penalty.

Plaintiffs also seek the dismissal of each of the defendant's eight (8) affirmative defenses, which include a challenge to the agreement as violating the Statute of Frauds [GOL § 5-701 (a) (1)], being barred by the Statute of Limitations, barred by estoppel, and that the agreement is unenforceable because it is vague. The 8th defense is that the late fees are nothing more than an "illegal sales tool to prevent customers from seeking premium financing elsewhere."

Examining the first page of each agreement, which both sides agree govern their dispute, it sets forth the amount of each payment due, the number of monthly payments, and the due date. The AIC finance agreement provides the "1st payment is

due 12/01/2003" and the "final payment [is] due 09/01/2004" The AICCO finance agreement provides the "1st payment is due 11/30/04" and the "final payment [is] due 08/01/2005." The disputed printed provision in each agreement which pertains to late fees provides as follows:

"14. **Late Charges.** Upon default in payment of any installments for not less than five days . . . [defendant] agrees to pay a late charge in accordance with applicable law. In no event shall such late charge exceed a maximum of 5% of such installment."

Law applicable to a motion for summary judgment (CPLR § 3212)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

The interpretation and construction of an ambiguous contract presents a mixed question of law and fact. Tri-State Pipe Lines Corp. v. Sinclair Refining Co., 24 A.D.2d 756 (1st Dept 1965); Long Island Trust Co. v. Clougher, 125 A.D.2d 368 (2nd Dept.

1986). Although each of these finance agreements specifies when the late charge may be imposed (“[u]pon default in payment of any installments for not less than five days”), neither finance agreement clearly states when the monthly payments are “due.” Rather, each finance agreement specifies the date the first payment is due, the total number of monthly installments, and the last date of payment, but does not set forth or define the “due date.” Therefore, plaintiffs have failed to prove an essential element of their *prima facie* case.

Even assuming, arguendo, that plaintiffs have proved their *prima facie* case, defendant raises a number of material factual disputes that would require a trial in this case, precluding the grant of summary judgment.

Defendant contends that throughout the parties’ extensive course of dealings with each other, plaintiffs never imposed late fees on other payments it made by mail, which plaintiffs received after the grace period. Defendant also raises a factual dispute about whether plaintiffs delayed the processing of the checks it sent timely, raising the separate issue of whether “due” is consonant with the cashing or “payment” of the check. Defendant presents legal authority that a payment deposited in the mail within the grace period is considered timely, depending on its postmark. See: GEICO v. Solaman, 157 Misc2d 737 (Sup Ct 1993). Although the facts of that decision are different (whether an insurance policy had lapsed), it nonetheless frames a similar issue to the one bar, about when payments are “due” and whether it means the same thing as “so as to be received by” or “to be in hand” by a particular date.

Although plaintiffs also seeks an order striking defendant’s defenses, it only

addresses three of them. They are the 6th affirmative defense - that the contract is void for lack of definiteness or specificity, 7th affirmative defense - that the fees sought are unconscionable and unenforceable penalties, and 8th affirmative defense - the fees are an illegal sales tool.

The 6th and 7th defenses go to the heart of the plaintiffs' claims, and withstand their motion to strike. The defense, that the fees plaintiffs seek to impose are "an illegal sales tool," is vague and does not present a valid defense against plaintiffs' claim for late fees. Plaintiffs' motion to strike that defense is granted and the 8th affirmative defense is stricken. All the other defenses, however, remain for trial.

Conclusion

Plaintiffs motion for summary judgment is denied. Their motion to strike the defenses is granted only as to defendant's 8th defense which is hereby stricken, but the other defenses remain for trial.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This case is scheduled for a preliminary conference on September 27, 2007 at 9:30 a.m. in Part 10, Room 122 at 80 Centre Street.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 3, 2007

So Ordered: *JJ*
Hon. Judith J. Gische, JSC

FILED
JUL 12 2007
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