

**Citicorp Leasing, Inc. v U.S. Auto Leasing, Inc.**

2007 NY Slip Op 32553(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0603254/2004

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN  
*Justice*

PART 49

Index Number : 603254/2004

CITICORP LEASING

vs

U.S. AUTO LEASING

Sequence Number : 010

CONFIRM/REJECT REFEREE REPORT

INDEX NO. \_\_\_\_\_

MOTION DATE

4/25/07

MOTION SEQ. NO.

010

MOTION CAL. NO. \_\_\_\_\_

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

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

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

Dated: 4/15/07

Herman Cahn

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
CITICORP LEASING, INC.,

Plaintiff,

Index No. 603254/04

-against-

U.S. AUTO LEASING, INC., U.S. AUTO  
EXCHANGE GROUP, LTD., 1095 COMMONWEALTH  
AVENUE CORP., and BAHIG BISHAY,

Defendants.  
-----X

Cahn, J.:

Plaintiff Citicorp Leasing, Inc., (Citicorp) moves to confirm Special Referee Howard Leventhal's Report and Recommendation, dated March 28, 2007, pursuant to CPLR 4403, and for an order entering judgment in its favor against defendant Bahig F. Bishay as follows: (a) \$2,261,952 on plaintiff's second cause of action for breach of a guaranty together with interest at the rate of 9% per annum from September 13, 2004; (b) \$60,207.02 on the third cause of action for conversion together with interest at the rate of 9% per annum from September 13, 2004; and (c) \$142,946.16 as reasonable attorneys' fees and expenses, and that judgment be entered thereon as recommended in the Referee's Report.

Judgment was previously entered against defendants U.S. Auto Leasing, Inc. and 1095 Commonwealth Avenue Corp. on April 13, 2005, and the action was discontinued without prejudice against defendant U.S. Auto Exchange Group, Ltd. as ordered by this court on April 4, 2005.

Since the background of this action has been discussed at length in previous decisions, the court will only describe facts relevant to this motion.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

On June 8, 2005, this court granted plaintiff's motion for summary judgment against defendant Bahig F. Bishay and referred the issue of the amount of damages to a Special Referee to hear and report.

On July 19, 2005, September 15, 2005, October 11, 2005, October 12, 2005, October 28, 2005 and November 4, 2005, hearings were held before Special Referee Howard Leventhal. During these six days, Special Referee Leventhal heard testimony and also considered post-hearing memoranda submitted by both parties, as well as affidavits and letters. On March 28, 2007, Special Referee Leventhal rendered his report. In the report, the Special Referee found defendant Bishay liable for damages to plaintiff as follows: \$2,261,952 on plaintiff's second cause of action for breach of the guaranty; \$60,207.02 on the third cause of action for conversion; and \$142,946.16 in reasonable attorneys' fees and expenses, and that judgment be entered thereon.

During the July 19, 2005 hearing, defendant Bishay requested discovery to enable him to defend the assessment of damages. Special Referee Leventhal granted defendant Bishay limited discovery and directed plaintiff's counsel to furnish copies of billing records and an updated detailed report in connection with counsel's services. Special Referee Leventhal denied Bishay's request to depose eight Citicorp employees and for other additional discovery as over-broad, oppressive and unduly burdensome. The court agrees with this decision and, in fact, signed its own order on August 9, 2005, denying Bishay's application to the court for further discovery.

Bishay argues that the court has denied him his fundamental rights to due process. However, the court finds the contrary. Bishay was given the opportunity and benefit of conducting reasonable discovery during the course of the action. Due process does not require

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that a litigant be given the right to depose any and every person he may think of, or seek the production of any documents regardless of relevance, etc.

At the September 15<sup>th</sup> and October 11<sup>th</sup> hearings, Special Referee Leventhal heard testimony from Priscilla O. Lozada-Stevens, the Vice President and Risk Manager of Citicorp. At the time of the hearings, Ms. Lozada-Stevens was assigned to the co-defendant U.S. Auto's account. She testified as to the amounts owed to Citicorp. She also submitted documentary evidence in regard to this issue. The Special Referee found her to be a credible witness, and the record amply supports such a finding. *RC 27th Ave. Realty Corp. v N.Y. City Hous. Auth.*, 305 AD2d 135 (1<sup>st</sup> Dept 2003). Based on Ms. Lozada-Stevens' testimony, the plaintiff's documentary evidence, and defendant Bishay's own admission that U.S. Auto Leasing owed over \$2,000,000 to Citicorp (see 11/04/05 Transcript at 12; 10/12/05 Transcript at 32), the Special Referee found that plaintiff is entitled to damages of \$2,261,952 on its breach of guaranty claim against Bishay. The court confirms the Special Referee's finding.

Bishay argues that his statement that U.S. Auto owed more than \$2,000,000 to the plaintiff was taken out of context. However, Bishay's statement was not the sole basis of the Special Referee's finding as to the amount of damages on the plaintiff's breach claim, as the Special Referee also relied on the documentary evidence submitted and Ms. Lozada-Stevens' testimony.

The court finds no merit to Bishay's argument that plaintiff is committing fraud and/or "bogus accounting." Bishay has not presented any evidence to support such allegations.

Further, the court agrees with the Special Referee's finding that Bishay offered no admissible evidence which would tend to reduce the damage award for the plaintiff's breach of

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guaranty claim. Bishay attempted to reduce these damages by asserting that an alleged oral settlement agreement was reached between U.S. Auto and Citicorp. Special Referee Leventhal's finding that this evidence was inadmissible is proper as a matter of law because, first, the Security Agreement between U.S. Auto and CitiCorp at issue in this action provides that the Agreement could not be changed or terminated orally and, second, parol evidence cannot be used to vary the terms of the Security Agreement. *Peacock Holdings, Inc. v Keefe & Keefe, Inc.*, 232 AD2d 331 (1<sup>st</sup> Dept 1996). Therefore, evidence of an alleged oral settlement agreement is inadmissible.

Special Referee Leventhal also noted that the alleged settlement agreement was not pleaded as an affirmative defense or otherwise in defendant's answer to the amended complaint, and Bishay did not raise it in connection with plaintiff's summary judgment motion.

On plaintiff's third cause of action for conversion, Special Referee Leventhal found that the evidence demonstrated that damages should be awarded in the amount of \$60,207.02. The court confirms the Special Referee's findings. The Special Referee reviewed extensive documentary evidence, as well as testimony from Ms. Lozada-Stevens and defendant Bishay.

Further, the Referee's Report shows that the only evidence Bishay submitted with respect to the damages for conversion was a copy of a lease to show that U.S. Auto was entitled to charge Lessee Robert Chestnut a \$395 disposition fee. However, the court agrees with the Special Referee that this actually demonstrates that defendant U.S. Auto was required to remit the \$395 disposition fee to Citicorp, because under section 39 (b) of the lease, U.S. Auto assigned its rights under the lease to Citicorp, including the right to receive all payments from lessee, which included the disposition fees. Therefore, this evidence submitted by Bishay does

not contradict any of plaintiff's proven damages for conversion.

Lastly, the Special Referee found that Bishay owes plaintiff \$142,946.16 in reasonable attorneys' fees and expenses. The Special Referee found that by the terms of the Guaranty, Bishay is liable for attorneys' fees and expenses. The Guaranty contained a provision that the guarantor will pay all costs and expenses, including attorneys' fees, incurred in enforcing any of Citicorp's rights in regard to the Guaranty or any liabilities. The Special Referee cited two Appellate Division First Department cases, which held such provisions in guaranties are enforceable, to support his finding. *See Republic National Bank v GSO*, 177 AD2d 417, 418 (1<sup>st</sup> Dept 1991); *BNY Financial Corp. v Clare*, 172 AD2d 203 (1<sup>st</sup> Dept 1991).

After careful review of the Special Referee's Report, which itself considered in great detail the reasonableness of plaintiff's attorneys' fees, the court confirms the findings. The fees charged by plaintiff's attorney are reasonable for the work necessarily performed herein, especially given the difficulty of the matter and the experience of plaintiff's attorney. Further, the court agrees with the Special Referee that the fees charged are reasonable for work of this sort in the New York County Supreme Court, Commercial Division.

Bishay's argument that there was an alleged "two-tier" billing system between Citicorp and its attorney is unsupported. Bishay's evidence of this "two-tier" billing system is a credit of \$35,056.57 that plaintiff's attorney provided to Citicorp on its legal bills. Bishay contends that plaintiff's attorney lied in his June 6, 2005 affirmation and at the May 11, 2005 Assessment of Damages, in regard to the other defendants, about this credit. The Special Referee found no basis to these contentions. Plaintiff's attorney testified that the credit was provided to Citicorp at its request based in large part on the fact that Bishay appeared pro se and Citicorp felt a credit was

appropriate. Further, plaintiff's attorney stated that the credit was not given until June 21, 2005. Special Referee Leventhal found this testimony credible, and that plaintiff's attorney disclosed to the court the reduced total for attorneys' fees.

Accordingly, it is

ORDERED that Citicorp's motion to confirm the Report and Recommendation of the Special Referee, dated March 28, 2007, is granted; and it is further

ORDERED that plaintiff's second and third causes of action for breach of the guaranty and conversion, respectively, against defendant Bahig F. Bishay for a money judgment are severed, pursuant to CPLR 5012; and it is further

ORDERED and ADJUDGED that plaintiff Citicorp, having an address at 450 Mamaroneck Avenue, Harrison, New York 10528, have judgment against and recover of defendant Bahig F. Bishay residing at 163 Blue Hill Drive, Westwood, Massachusetts 02090 the amount of \$2,261,952 on plaintiff's second cause of action for breach of the guaranty plus interest at the rate of 9% per annum from September 13, 2004, as computed by the Clerk in the amount of \$ \_\_\_\_\_; \$60,207.02 on plaintiff's third cause of action for conversion plus interest at the rate of 9% per annum from September 13, 2004, as computed by the Clerk in the amount of \$ \_\_\_\_\_; and \$142,946.16 in reasonable attorneys' fees and expenses together with costs and disbursements in the amount of \$ \_\_\_\_\_ as taxed by the Clerk, for a total amount of \$ \_\_\_\_\_, and that plaintiff have execution thereof.

Dated: August 15, 2007

ENTER:



J.S.C.

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