

Orix Fin. Servs. Inc. v Arms

2007 NY Slip Op 33559(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0604296/2006

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 10

Index Number : 604296/2006
ORIX FINANCIAL SERVICES INC.
vs
ARMS, MARY
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read in connection 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

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

FILED
NOV 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/24/07

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

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

Plaintiff,

-against-

MARY ARMS,

Defendant.

Decision/Order

Index No.: 604296/06

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

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NEW YORK
COUNTY CLERK'S OFFICE

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

Papers

Pltf's motion [SJ] w/YK affirm in support, exhs

Numbered

1

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

Plaintiff Orix Financial Services, Inc. formerly known as Orix Credit Alliance, Inc. now moves, pursuant to CPLR § 3212, for summary judgment in its favor and against defendant Mary Arms. 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. Therefore, this motion is considered on default.

Certain facts are established by the documentary evidence provided on this motion. On May 3, 2000: [1] Charles E. Arms d/b/a Arms Trucking (the "Purchaser")

executed a Conditional Sale Contract Note (the "Note") whereby Freightliner of Knoxville, Inc. (the "Seller") sold to Purchaser certain Equipment; [2] the Seller thereafter assigned the Note to plaintiff via an Assignment; [3] Purchaser acknowledged receipt of the Equipment and represented that he had no defenses, offsets or counterclaims against plaintiff and waived any claims or offsets against plaintiff; and [4] defendant executed a notarized Guaranty of the Purchaser's obligations under the Note.

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 January 3, 2004. 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 February 9, 2006. Plaintiff claims that the sale was conducted in a commercially reasonable manner for a gross purchase price in \$44,000. The total amount of costs and expenses of the sale of the Equipment was \$2,954.50. Pursuant to the Note, Defendants are afforded a credit in the amount of \$41,045.50.

Plaintiff claims that the amount due and accelerated under the Note is \$59,933.53, plus post-default pre-sale interest in the amount of \$30,685.97 less the net sale proceeds of \$41,045.50, resulting in a total balance due of \$49,574.00. 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 \$9,914.80, equal to 20% of the outstanding balance. Plaintiff has provided the affirmation of John C. Re, Esq. which

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details the services that have been provided.

Defendant's answer claims: [1] she did not sign a personal guaranty; [2] she did not agree to be subject to the jurisdiction of this court; and [3] that she has "no personal knowledge of the allegations of the other 18 paragraphs of the Complaint but demand[s] strict proof."

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 (2nd 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 (2nd Dept. 1990). The above claims establish the

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elements of a *prima facie* cause of action for breach of contract and Plaintiff has therefore met its burden.

Defendant has not opposed this motion nor does her answer dispute any of the relevant facts enumerated in the verified complaint as the the underlying transaction by the Purchaser and Seller. In fact, defendant concedes she has "no personal knowledge" of any of the allegations contained in the verified complaint other than paragraphs 7 and 20, which reference the Guaranty. Defendant's allegations are not supported by any affidavit or documentary evidence. In fact, the documentary evidence refutes defendant's contentions. A notarized guaranty signed by plaintiff has been provided, as has the Note, which states that

"Buyer, Seller, Holder and any Guarantor hereof agree to the exclusive venue and jurisdiction of any court in the state and county of New York for all actions, proceedings, claims, counterclaims or crossclaims arising directly or indirectly out of, under, in connection with, or in any way related to this contract note..."

Defendant has, therefore, failed to raise a genuine issue of fact as to the allegations asserted in the verified complaint. 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 \$49,574.00, plus interest at the default rate (1/15th of 1% per diem) from the day after the date of the sale (e.g. February 9, 2006).

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

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expenses. The law firm seeks legal fees of \$9,914.80. The affirmation of Attorney Re details the time spent and work performed, his firm's hourly rate, the number of hours spent, and other expenses incurred. 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 \$49,574.00, plus interest at the default rate (1/15th of 1% per diem) from the day after the date of the sale (e.g. February 9, 2006), plus attorney's fees in the amount of \$9,914.80, 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
October 24, 2007

So Ordered:



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

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