

**Orlx Financial Services, Inc. v Wolf Mold Inc.**

2007 NY Slip Op 34258(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0112142/2006

Judge: Joan Madden

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

PRESENT: Hon. Jack A. McDDR

PART 11

Index Number : 112142/2006 ice

ORIX FINANCIAL SERVICES

vs  
WOLF MOLD

Sequence Number : 001

SUMMARY JUDGMENT

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

MOTION DATE 6/25/07

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion 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 is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED  
JAN 04 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: December 11, 2007

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON-FINAL DISPOSITION  
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

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

Plaintiff,

-against-

WOLF MOLD INC., CHARMAYNE HONNELL and  
MARVIN A. HONNELL,

Defendant.

-----X  
**Joan A. Madden, J.:**

Index No. 112142/06

**FILED**  
JAN 04 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Orix Financial Services, Inc. moves for summary judgment on its claims for breach of an equipment lease asserted against defendant Wolf Mold Inc. and to enforce personal unconditional guaranties of payment executed by defendants Charmayne Honnell and Marvin A. Honnell.

On October 12, 2000, Orix Financial's predecessor in interest, Orix Credit Alliance, Inc., leased injection molding equipment to Wolf Mold pursuant to a written equipment lease agreement and lease addendum. The lease requires Wolf Mold to pay Orix Financial total rent in the amount of \$122,790.60, in 60 equal monthly installments in the amount of \$2,046.51, beginning November 2000 and ending November 2005. In addition, Wolf Mold executed a waiver agreement in which it waived any defenses, offsets, or counterclaims to which it otherwise might be entitled. Wolf Mold also executed a delivery/installation certificate in which it acknowledged complete and satisfactory delivery of the leased equipment.

On that date as well, Marvin Honnell, Wolf Mold's president, and Charmayne Honnell each admittedly executed personal unconditional and absolute guarantees of Wolf Mold's payment obligations due under its agreements with Orix Financial.

Wolf Mold made monthly payments under the lease beginning in November 2000 and admittedly defaulted on the payments due January 2004 and each month thereafter through expiration of the lease term (see Marvin A. Honnell, Apr. 26, 2007, Aff., ¶ 2). Wolf Mold contends that it ceased payment as the result of a decline in business and, in July 2005, sold most of its assets, including the leased equipment, to a third party who agreed to make all further lease payments to Orix Financial. Defendants allegedly believed that the third party and Orix Financial were entering into a new lease agreement superseding Wolf Mold's lease. The third party defaulted on its alleged payment obligations imposed by the asset purchase agreement with Wolf Mold, apparently after being unsuccessful in its negotiations with Orix Financial. Wolf Mold represents that it has commenced legal action in Idaho against the third party to enforce the terms of their asset purchase agreement.

Following Wolf Mold's default under the equipment lease, Orix Financial alleges that it accelerated the balance due.

With defendants' help, Orix Financial recovered the leased equipment from the third party in August or September 2006 and, on September 19, 2006, sold the equipment at a private sale for the sum of \$20,000. Orix Financial credited Wolf Mold's account by that amount.

Following the sale, Orix Financial demanded that Wolf Mold pay the outstanding balance. Orix Financial alleges that defendants have failed to pay any part of the demanded amount.

Orix Financial then commenced this action to enforce the equipment lease and the personal guaranties and to recover the balance due. Orix Financial moved for summary judgment on its claims and sought a judgment in the amount of \$79,448.36, together with \$15,889.60 in attorneys' fees which it asserts is equal to 20% of the total balance due. Orix Financial initially argued that the balance due consisted of \$46,049.52 in unpaid past due and accelerated lease payments, plus a \$21,262.40 purchase option, plus \$3,368.27 in aggregate late charges, plus \$29,619.73 in default interest at the post-maturity rate set forth in the lease, minus a \$851.56 discount, and minus a \$20,000 sale credit. However, at oral argument, Orix Financial agreed not to charge the purchase option based on defendants' alleged failure to immediately return the leased equipment as required under section 17 (1), (2) of the lease,<sup>1</sup> but instead to

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<sup>1</sup>The lease provides, in relevant part, that Wolf Mold

shall immediately deliver possession of Equipment to [Orix Financial] and [Orix Financial] may, at its option and without notice and without legal process . . . to extent permitted by law: (1) recover the Balance (plus any Terminal Purchase Option Amount which represents [Orix Financial's] reversionary interest in the Equipment, if [Wolf Mold] fails to deliver possession of the Equipment to [Orix Financial]), plus attorneys' fees in the amount aforesaid; (2) take possession of the Equipment . . . whereupon all right of [Wolf Mold] in the Equipment shall terminate absolutely, (but [Wolf Mold] shall not be released from its obligations under this agreement until the Balance plus attorneys' fees in the amount aforesaid have been paid in full).

Equipment Lease § 17 (1), (2) (emphasis added).

The lease further provides that, if Wolf Mold fails to deliver possession of the equipment, and following a private sale of the equipment by Orix Financial, Orix Financial must apply the sale net proceeds to Wolf Mold's account, minus the terminal purchase option amount, "which represents [Orix Financial's] reversionary interest in the Equipment" (*id.*, § 17 [2] [b]).

retain the \$20,000 obtained for the equipment.

In opposition, defendants contend that, pursuant to the lease terms, Orix Financial is entitled to recover no more than the due and owing monthly installment payments.. Defendants further contend that Orix Financial's calculation of the total base rent due (\$46,448.36) is not substantiated by the evidentiary record and that Orix Financial is not entitled to recover attorneys' fees equal to 20% of the total balance due.

Defendants' admitted failure to pay in accordance with the terms of the lease, the lease addendum, and personal unconditional guarantees establishes Orix Financial's prima facie entitlement to the relief sought (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Kornfeld v NRX Technologies, 62 NY2d 686 [1984]). The burden now shifts to defendants to demonstrate with objective proof in evidentiary form establishing the existence of triable issues of fact sufficient to preclude summary judgment in favor of Orix Financial (see Kornfeld v NRX Technologies, 62 NY2d 686, supra; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Defendants have failed to raise a viable defense regarding their liability under the lease and guarantees. Contrary to defendants' suggestion, Wolf Mold's sale of the equipment to a third party did not extinguish its payment obligation. Pursuant to the express terms of the lease, Wolf Mold granted Orix Financial a security interest in the leased equipment, together with Wolf Mold's other assets, and agreed to return the equipment in good repair to Orix Financial at the natural expiration, or earlier termination, of the lease term (see Equipment Lease §§ 9, 12). In addition, the lease terms prohibit Wolf Mold from transferring the lease to a third party without Orix Financial's prior written consent (id., § 15). Defendants do not allege, nor have they submitted any evidence that Orix Financial authorized Wolf Mold's sale of the leased equipment,

waived its right to receive payment from defendants, or agreed to a transfer of Wolf Mold's obligations under the lease to a third party.

Defendants' contention that the motion must be denied because it is not supported by an affidavit of a person with knowledge is similarly unavailing. Orix Financial has submitted an affidavit by Yvonne Kalpakoff, Orix Financial's senior vice president and an officer responsible for collection of delinquent accounts, in which she attests that she has reviewed the relevant corporate books, records, and correspondence made and maintained in the regular course of business in support of the motion (see Yvonne Kalpakoff, Apr. 9, 2007, Aff., ¶ 1). Ms. Kalpakoff is clearly a person with knowledge qualified to give evidence on behalf of Orix Financial regarding this dispute.

For these reasons, that branch of the motion for summary judgment as to liability against defendants is granted.

Defendants next contest the amount of damages sought and contend that Orix Financial has overcharged them.

First, defendants contend that the \$2,046.51 amount of the monthly installment payments set forth in the lease was based on an estimate of the actual cost of the leased equipment to Orix Financial and was subject to adjustment, once Orix Financial obtained more information regarding that cost. Defendants further contend that Orix Financial never advised Wolf Mold of the actual cost or adjusted the amount of the monthly payment and, therefore, is not entitled to recover this amount.

In relevant part, the lease at paragraph three provides that:

the amount of each Rent Payment . . . set forth . . . [is] based on the

estimated cost to [Orix Financial] and shall . . . be adjusted proportionately if the Actual Cost differs from said estimated cost. [Wolf Mold] hereby irrevocably authorizes [Orix Financial] to correct the figure set forth . . . when the Actual Cost is known, and each Rent Payment shall be increased by any sales or other tax that may be imposed on or measured by the rent payments.

Equipment Lease § 3.

When these terms are accorded their plain meaning and construed in context to determine their purpose and the parties' intent (see W.W.W. Associates v Giancontieri, 77 NY2d 157 [1990]), they conclusively demonstrate that Orix Financial had the right, but was not required, to pass along to Wolf Mold any adjustments in its costs in obtaining the equipment being leased. As the record contains no evidence that Orix Financial notified Wolf Mold of any adjustments in the rent amount, Wolf Mold is required to pay the minimum \$2,046 per month in rent, as fixed by the lease terms.

Second, defendants contend that Orix Financial has never declared that it was accelerating the balance due and, therefore, is not entitled to default interest accruing on the accelerated balance, beginning on January 11, 2004, the date of the first default.

The lease provides in relevant part that, upon Wolf Mold's default in payment, Orix Financial "may, without notice or demand, declare immediately due and payable the unpaid aggregate amount of Total Rent for the entire term hereof . . . , plus any additional rent, taxes, late charges, collection charges and all other sums owing to [Orix Financial] by [Wolf Mold] . . . and attorneys' fees . . . , whereupon said Balance and attorneys' fees shall immediately be due and payable" (Equipment Lease § 17 [emphasis added]). Clearly then, Orix Financial acted within its contractual rights in accelerating the unpaid balance without notice and is entitled to recover

default interest on the aggregate amount accruing beginning on January 11, 2004.

Third, defendants contend that the sale of the equipment was not commercially reasonable on grounds that Orix Financial rejected an offer to purchase in the amount of \$25,000 and, later, sold the equipment at a private sale for \$20,000, five thousand dollars below that offer.

Collateral is disposed 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" (UCC § 9-627 [b]; see 96 NY Jur 2d, Secured Transactions § 285). The plaintiff bears the burden of showing the reasonableness of its conduct in a sale (Ford Motor Credit Co., Inc. v Racwell Constr., Inc., 24 AD3d 500 [2d Dept 2005]; see UCC § 9-626 [a] [2]). Here, defendants do not dispute Orix Financial's allegation that it sold the equipment in September 2006 for \$20,000, in accordance with the terms of an earlier scheduled sale that Orix Financial cancelled upon Wolf Mold's failure to return the equipment. Therefore, Orix Financial has demonstrated that it sold the equipment at a private sale upon 15 days' prior written notice, as required by paragraph 17 of the lease.

Contrary to defendants' contention, the \$5,000 difference in price between an offer and the actual sale price does not raise a triable issue regarding the commercial reasonableness of the sale. First, defendants have failed to submit any evidence, including the identity of the purported prospective purchaser, from which an offer to purchase the equipment may be inferred. Second, "[t]he 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" (UCC § 9-627 [a]; see 96 NY Jur 2d, Secured Transactions § 285, supra).

While a wide discrepancy between the gross proceeds from the sale of the collateral and its fair market value signals a need for close scrutiny (see Orix Credit Alliance v East End Dev. Corp., 260 AD2d 454 [2d Dept 1999]), no such discrepancy exists here. The lease provides that Orix Financial's reversionary interest in the equipment at the end of the five-year lease term is equal to the amount of the terminal purchase option (see Equipment Lease § 17). The option amount specified in the lease addendum is \$21,262.40, or, 20% of the original purchase price of the equipment. At the private sale, held one year after the natural expiration of the lease term, the equipment sold for \$20,000, merely \$1,262.40 below the equipment's estimated value.

For these reasons, defendants have failed to raise a triable issue regarding the commercial reasonableness of the private sale of the equipment.

Fourth, defendants contest the amount of \$15,889.60 demanded by Orix Financial for attorneys' fees, calculated at 20% of the total balance due, inclusive of default interest. Defendants contend that, at most, they are obligated to reimburse Orix Financial for no more than its actual, reasonable legal fees incurred in this action.

The lease at paragraph 17 authorizes Orix Financial to recover attorneys' fees at the rate of 20% of the balance due, upon Wolf Mold's default (see A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1 [1986]). However, "the courts possess the traditional authority 'to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law' " (Collier, Cohen, Crystal & Bock v MacNamara, 237 AD2d 152, 152 [1<sup>st</sup> Dept

1997], quoting Matter of First Natl. Bank of E. Islip v Brower, 42 NY2d 471, 474 [1977]). "It is well settled that an award of attorney's fees should be 'reasonable in light of the skill, experience and background of . . . counsel, the nature of the services rendered, the difficulty and complexity of the issues of fact and law involved in the case, as well as the time actually spent on [the case]'" (Willis v Willis, 149 AD2d 584, 584 [2d Dept 1989], quoting Silver v Silver, 63 AD2d 1017, 1018 [2d Dept 1978]).

Here, Orix Financial has submitted an affirmation by its attorney, William M. Stein, Esq., in which Mr. Stein attests that his firm spent 20 hours in connection with this matter and charged at a rate of \$175 per hour (see William M. Stein, Apr. 17, 2007, Affirm., ¶¶ 2, 3). At most, then, Orix Financial would be entitled to recover \$3,500 in legal fees. However, Orix Financial has failed to submit in support of the affidavit copies of invoices for legal services rendered or attorneys' time sheets itemizing the services performed, the time spent by each attorney, paralegal, or secretary, or the fee charged for each individual's services. Therefore, a hearing is required regarding the quality and quantity of the legal services actually rendered in order to determine the amount of the attorneys' fees owed by defendants.

Finally, while Orix Financial seeks \$3,368.27 in aggregate late charges, it inadequately substantiates the basis for the amount of such charges, and thus they will not be awarded.

Accordingly, it is

ORDERED that the motion is granted to the extent that summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff Orix Financial Services, Inc., and against defendants Wolf Mold Inc., Charmayne Honnell, and Marvin A. Honnell in the amount of \$ 74,817.69, together with interest from January 11, 2004, as prayed for allowable by

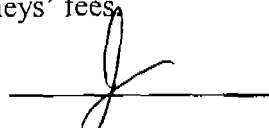
law, until the entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the claim for attorneys' fees is severed for trial; and it is further

ORDERED that on or before ~~November~~<sup>JANUARY</sup> 28, 2008, plaintiff shall file with the Clerk of Trial Support (room 158) a note of issue and statement of readiness and shall pay any appropriate fees and said Clerk is directed to assign this matter to Part 11 for trial; and it is further

ORDERED that plaintiff's failure to timely comply with the immediately preceding paragraph shall result in the dismissal of its claim for attorneys' fees.

Dated: December 7, 2007

  
J.S.C.

**FILED**  
JAN 04 2008  
NEW YORK  
COUNTY CLERK'S OFFICE