

<b>Afco Credit Corp. v Robert Plan Corp.</b>
2008 NY Slip Op 30269(U)
January 28, 2008
Supreme Court, New York County
Docket Number: 0115155/2007
Judge: Jane S. Solomon
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Index Number : 115155/2007

**AFCO CREDIT CORP.**

vs.

**ROBERT PLAN CORP.**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO.

115155/2007

MOTION DATE

1-16-08

MOTION SEQ. NO.

001

MOTION CAL. NO.

this motion to/for Summary judgment/lieu of complan

PAPERS NUMBERED

1-4

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 is decided in accordance with the annexed memorandum decision and order.

FOR THE FOLLOWING REASON(S):

**FILED**  
JAN 31 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1-26-08

**JANE S. SOLOMON** 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 55

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AFCO CREDIT CORPORATION,

INDEX NO. 115155/2007

Plaintiff,

-against-

THE ROBERT PLAN CORPORATION

Defendant.

**FILED**  
DECISION and ORDER  
JAN 31 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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JANE S. SOLOMON, J.

Plaintiff Afco Credit Corporation ("Afco") moves under CPLR § 3213 for summary judgment in lieu of complaint against defendant The Robert Plan Corporation ("Defendant"), for \$50,943.69 plus attorneys fees and interest. Defendant has not appeared. The motion is granted as follows.

Afco is a New York corporation specifically licensed by the New York State Banking Superintendent as a premium financing company. See Banking Law § 555. In February 2007, Afco entered into a Commercial Premium Finance Agreement (the "Agreement") with Defendant, pursuant to which Defendant borrowed a total premium of \$679,890 from Afco at an annual interest rate of 6.386%. Defendant paid a down payment of \$69,624.22 and was to repay the amount financed in nine monthly installments. Paragraph (12) of the Agreement provides that if Defendant "is

late in making an installment payment to Afco by more than the number of days specified by law[, Defendant] will pay to Afco a delinquency charge not to exceed the maximum charge permitted by law." Paragraph (17) states that if, "for collection, this agreement is placed in the hands of an attorney who is not a salaried employee of Afco, then [Defendant] agrees to pay reasonable attorney fees and costs including those in the course of appeal as well as other expenses, as permitted by law or granted by the court."

Afco's General Counsel, Robert J. Ratner ("Ratner"), alleges that Defendant initially made payments, but ceased doing so on or around April 26, 2007. Ratner attests to the authenticity of an "Invoice Collection Record," which provides that on February 26, 2007, Afco advanced a total premium of \$679,890 to Defendant, Defendant paid a down payment of \$69,624.22, and Defendant was assessed a finance charge of \$16,352.20; on March 26, 2007, Defendant paid the first installment of \$69,624.22; on April 26, 2007 a late charge of \$3,481.21 was assessed; and on September 19, 2007, \$511,957.17 was returned to Afco, leaving an outstanding balance of \$48,517.80.

Ratner states that Afco served Defendant with the "required statutory notice complying with the requirements of

Banking Law § 569." Rather Affidavit at 3. Ratner further alleges that Afco served a notice of default and other statements on Defendant, but that Defendant has not responded to any of them, and that Afco is still owed \$48,517.80 on the loan. Afco now moves for summary judgment in lieu of complaint on the amount due under the Agreement, and requests an additional 5% of this amount pursuant to Banking Law § 569(1), plus interest and an additional 20% for attorneys fees.

#### **Discussion**

The Agreement qualifies as an instrument for the payment of money only suitable for expedited treatment under CPLR § 3213. See Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634 (2<sup>nd</sup> Dep't 1992). Moreover, the amount owed to Afco has been established as \$48,517.80, because Defendant has not timely objected to the notices provided to it by Afco. See I Appell Corp. v. Crocker Commercial Servs., Inc., 146 A.D.2d 472 (1<sup>st</sup> Dep't 1991).

Afco also claims an additional 5% of this amount because of Defendant's default. Banking Law § 569(1) states, in pertinent part, that a "premium finance agreement may provide for the payment by the insured of a delinquency and collection charge on each installment in default for a period of not less than five days in an amount of one dollar to a maximum not in excess of

five per centum of such installment . . ." Thus, because the Agreement provides for the payment of a delinquency charge and Defendant has not responded, Afco is entitled to the additional 5% assessed.

Finally, although Afco is entitled to attorneys fees under Paragraph (17) of the Agreement and Banking Law § 569(2), it has not established that it is entitled to the 20% it seeks. Banking Law § 569(2) provides that a "premium finance agreement may also provide for the payment of attorney's fees not exceeding twenty per centum of the amount due and payable under the agreement if it is referred for collection to an attorney not a salaried employee of the premium financing agency holding the agreement." However, this percentage is only a maximum amount that can be charged, limiting the amount of reasonable attorneys fees a creditor may charge upon proving the extent of necessary services actually rendered. Mead v. First Trust & Deposit Co., 60 A.D.2d 71 (4<sup>th</sup> Dep't 1977).

Here, Afco's attorney, Steven G. Legum ("Legum"), and Ratner both affirm that Legum is not a salaried employee of Afco and that he was retained for the purpose of collecting this debt. However, although Legum's affirmation provides a list of the services he has performed and anticipates performing on behalf of Afco, and he contends that "it is clear that more than the twenty

percent (20%) will be due and owing as and for fees," the affirmation does not provide sufficient details about the time and charges incurred. Therefore, the calculation for reasonable attorneys' fees must be submitted to a Special Referee.

Accordingly, it hereby is

ORDERED that Afco's motion for summary judgment in lieu of complaint against The Robert Plan Corporation is granted, and Afco is entitled to judgment under the Agreement in the amount of \$48,517.80, together with a delinquency charge of 5% of this amount (\$2,425.89), and interest on that amount at the rate of 6.386% per annum from April 26, 2007; and it further is

ORDERED that the issue of how much Defendant owes Afco for reasonable attorneys' fees, costs and expenses is referred to a Special Referee to hear and report with recommendations; and it further is

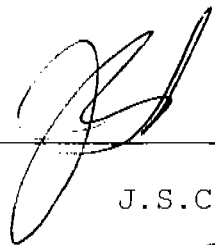
ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it further is

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days of entry on the Motion Support Office (Room 119M) to arrange a date for the reference to a Special Referee, failing which the Clerk is directed to enter judgment in favor of Afco and against Defendant for \$50,943.69

plus interest at the rate of 6.386% per annum from April 26, 2007, together with costs and disbursements as taxed.

Dated: January 28, 2008

ENTER:



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J.S.C.

**JANE S. SOLOMON**

**FILED**  
JAN 31 2008  
NEW YORK  
COUNTY CLERK'S OFFICE