

Orix Fin. Servs., Inc. v Operation Shuttle, Inc.

2008 NY Slip Op 31130(U)

April 16, 2008

Supreme Court, New York County

Docket Number: 0107258/2007

Judge: Jane S. Solomon

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SCANNED ON 4/18/2008

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

PRESENT: JAY E. SOLOMON
Justice

PART 55

ORIX Financial Services, Inc.

INDEX NO. 107258/07

MOTION DATE 9/21/07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
Operation Shuttle, Inc.

The following papers, numbered 1 to 3 were read on this motion to/for default judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided on default in accordance with the annexed Memorandum decision and order.

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COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 16, 2008

JAY E. SOLOMON
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: IAS PART 55

-----X

ORIX FINANCIAL SERVICES, INC.,
 f/k/a ORIX CREDIT ALLIANCE, INC.,

DECISION AND ORDER

Plaintiff,

Index No 107258/07

-against-

OPERATION SHUTTLE, INC., KATHERINE
 DAY and DANNY HUBBARD,

Defendants.

-----X

SOLOMON, JANE S., J.:

Plaintiff Orix Financial Services, Inc. (Orix) moves for default judgment. It seeks to recover money due under five equipment leases (Leases) between Edson Financial, Inc. and defendant Operation Shuttle, Inc. (OSI). Edson Financial assigned the Leases to Orix's predecessor. OSI's payment under the leases is guaranteed by defendants Katherine Day and Danny Hubbard. Orix claims that OSI defaulted on the Leases, and it seized the equipment and sold it at public auction. Orix is now suing for the deficiency, plus interest, costs and attorney's fees.

Orix also claims that it is entitled to recover the value of what it calls a "purchase option", that Orix apparently exercised on defendants' behalf after the default, plus interest on the value of the "purchase option." Neither the verified complaint nor the affidavit in support of the motion state where in the Leases Orix finds the right to recover under the "purchase

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option".¹

Orix designates the Leases as numbers one through five. Leases one and two are dated July 6, 2000; lease three is dated July 25, 2000; lease four is dated April 7, 2000; and lease five is dated October 31, 2000.

Lease one provides for a total rent of \$109,865.60 payable in 40 equal monthly payments of \$2,746.64; Orix alleges that OSI made 38 payments, for a total of \$104,372.32, and defaulted on the second to last payment. Upon default, the remaining amount due under the lease, said to be \$4,962.99, was accelerated and a discount of \$4.57 applied, for a total shortfall of \$4,958.42. Orix demands an additional pre-default interest payment at the rate of 24% for 360 days before the default occurred, but neither the complaint or supporting affidavits explain where in the Leases that is provided for, so that part of the claim is denied as to each lease. Orix further demands post-default interest at the rate of 24% from the date of

¹ A paragraph titled "Lease Term Purchase Option" begins as follows: "At all times hereunder, provided that Lessee has not been and is not in default under the Lease . . . Lessee shall have the right to prepay its obligations hereunder in full . . ." (Verified Complaint, Ex. G, emphasis added). This provision clearly is not applicable. Elsewhere in the Leases, "Terminal Purchase Option Amount" is defined in connection with Orix's right to repossess the equipment in the event of default as "Lessor's reversionary interest if Lessee fails to delivery [sic] possession of the Equipment to Lessor". This also appears inapplicable since Orix alleges that it received the equipment and sold it in a commercially reasonable manner.

default to the date of sale in the amount of \$1,791.64. Accordingly, the total amount due in accelerated payments plus default interest is \$6,750.06. Orix siezed the lease one equipment, which was sold at a public sale for \$6,572, and OSI's account was credited with that amount.

Lease two provides for a total rent of \$54,932.80 payable in 40 equal monthly payments of \$1,373.32; Orix alleges that OSI made 38 payments, for a total of \$52,186.16, and defaulted on the second to last payment. Upon default, the remaining amount due under the lease, said to be \$2,669.81, was accelerated and a discount of \$2.29 applied, for a total shortfall of \$2,667.52. Orix demands post-default interest at the rate of 24% from the date of default to the date of sale in the amount of \$963.86. Accordingly, the total amount due in accelerated payments plus default interest on the date of sale was \$3,231.38. Orix siezed the equipment, which was sold at public sale for \$3,286. The cost of the sale was \$237.50, so OSI's account was credited the balance of \$3,048.40.

Lease three also provides for a total rent of \$54,932.80 payable in 40 equal monthly payments of \$1,373.32; Orix alleges that OSI made 38 payments, for a total of \$104,372.32, and defaulted on the second to last payment. Upon default, the remaining amount due under the lease, said to be \$2,590.08, was accelerated. No post-default interest is sought

under lease three. Accordingly, the total amount due in accelerated payments plus default interest on the date of sale is \$2,590.08. Orix siezed the equipment, which was sold at a public sale for \$3,286, and OSI's account was credited with that amount.

Lease four provides for a total rent of \$51,161.20 payable in 40 equal monthly payments of \$1,279.03; Orix alleges that OSI made 38 payments, for a total of \$48,603.14, and defaulted on the second to last payment. Upon default, the remaining amount due under the lease, said to be \$2,294.85, was accelerated and a discount of \$2.13 applied, for a total shortfall of \$2,292.72. Orix demands post-default interest at the rate of 24% from the date of default to the date of sale in the amount of \$958.36. Accordingly, the total amount due in accelerated payments plus default interest on the date of sale was \$3,251.08. Orix siezed the equipment, which was sold at a public sale for \$1,000, and OSI's account was credited with that amount.

Lease five provides for a total rent of \$176,317.68 payable in 44 equal monthly payments of \$4,007.22; Orix alleges that OSI made 42 payments, for a total of \$168,303.24, and defaulted on the second to last payment. Upon default, the remaining amount due under the lease, said to be \$4,007.22, was accelerated. Orix demands post-default interest in the amount of 24% from the date of default (June 6, 2004) to the date of sale

(May 31, 2005). The default interest demanded in the motion --\$7,626.98--is clearly erroneous, but Orix will be awarded default interest in the amount of \$945.92, representing interest at the rate of 24% for 359 days. Accordingly, the total amount due in accelerated payments plus default interest on the date of sale was \$4,953.14. Orix siezed the equipment, which was sold at a public sale for \$9,857.16, and OSI's account was credited with that amount.

In sum, the total of accelerated lease payments plus default interest at the date of sale was \$20,775.74. The total credited to defendants from the public sale is \$23,763.56, so Orix has not shown that there is a deficiency.

The Leases also provide that Orix is entitled to recover reasonable attorney's fees in the amount of 20% of the amount owed. Since the amount collected exceeds the amount owed as of the date of sale, the percentage rate is not applicable, and reasonable attorneys fees generally are not awarded in New York courts as a percentage of the debt, but rather as reasonable compensation for legal work performed (see, Community Natl. Bank & Trust Co. v. I.M.F. Trading, Inc., 167 AD2d 193 [1st Dept 1990]). Orix's attorney submits an affirmation stating that he expended thirteen hours on this matter, and bills his client \$175 per hour, for a total fee of \$2,275, and this amount is reasonable under the circumstances.


Since the amount recovered at public sale exceeds the amount owed upon default, even when reasonable attorneys fees are added to the alleged debt, Orix has not made a prima facie showing in the verified complaint and supporting papers upon which judgment may be entered. Accordingly, it hereby is

ORDERED that the motion for default judgment is granted in part to the extent that defendants are in default; and upon said default, it further is

ORDERED that the verified complaint is dismissed because plaintiff has not made a prima facie showing that it is entitled to an award of damages in its favor, and the Clerk of the Court is directed to enter judgment dismissing the verified complaint.

Dated: April 16, 2008

ENTER:



J.S.C

MADE & SIGNED

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