

**AFCO Credit Corporation v Trademark Transport
Inc.**

2008 NY Slip Op 31344(U)

May 8, 2008

Supreme Court, New York County

Docket Number: 0600398/2008

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON
Justice

PART 55

Index Number : 600398/2008

AFCO CREDIT CORP.

vs

TRADEMARK TRANSPORT INC.

Sequence Number : 001

SUMMARY JUDGMENT.LIEU COMPLAINTI

INDEX NO. 600398/2008

MOTION DATE 4 - 14 - 2008

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for summary judgment in lieu of complaint

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1 - 5

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.

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

FILED
MAY 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/8/08

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

-----X

AFCO CREDIT CORPORATION,

Plaintiff,

-against-

TRADEMARK TRANSPORT INC.,

Defendant

INDEX NO. 600398/2008
DECISION AND ORDER

FILED
MAY 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON, J.

Plaintiff Afco Credit Corporation ("Afco") moves under CPLR § 3213 for summary judgment in lieu of complaint against defendant Trademark Transport Inc. ("Trademark") for \$21,890.64 plus late fees, attorneys fees and interest. Defendant has not appeared, and the motion is decided 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 or around July 2006, Afco entered into a Commercial Premium Finance Agreement (the "Agreement") with Trademark, pursuant to which Trademark borrowed a total premium of \$99,379.09 from Afco at an annual interest rate of 8.453%. Trademark paid a down payment of \$10,501.37 and was to repay the amount financed in nine monthly installments. Paragraph (12) of the Agreement provides that if Trademark "is late in making an installment payment to Afco by more than the number of days specified by law[, it] 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 [Trademark] 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 Trademark initially made payments, but ceased doing so on or around January 23, 2007. Ratner attests to the authenticity of an "Invoice Collection Record," which is submitted as Exhibit B to the motion papers and which details the account history between Afco and Trademark under the Agreement. The Invoice Collection Record provides that Trademark was late in making several installment payments, and was assessed late fees of approximately 5% on each late payment. The Record further provides that the checks for some of the payments were rejected for insufficient funds, and that beginning on January 23, 2007, no successful installment payments were made. The final five entries are each labeled as "Return Premium," and indicate that as of November 13, 2007, Trademark owes Afco an outstanding balance of \$21,890.64.

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

Banking Law § 569." Rather Aff., ¶ 3. Ratner further alleges that Afco served a notice of default and other statements on Trademark, but that Trademark has not responded to any of them, and that Afco is still owed the \$21,890.64 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 an additional 20% for attorneys fees, as well as interest on the entire amount from January 23, 2007.

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 (2nd Dep't 1992). Moreover, the amount owed to Afco has been established as \$21,890.64, because Trademark 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 (1st Dep't 1991).

Afco also claims an additional 5% of this amount because of Trademark'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 . . ." However, although the Agreement provides for delinquency charges, the Invoice Collection Record specifically details that Trademark has already been assessed late fees on several delinquent installment payments. Thus, Afco is not entitled to the additional 5% requested on this motion.

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 (4th 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" (Legum Aff., ¶ 6), 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 Trademark Transport Inc. is granted, and Afco is entitled to judgment under the Agreement in the amount of \$21,890.64, together with interest on that amount at the rate of 8.453% per annum from January 23, 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

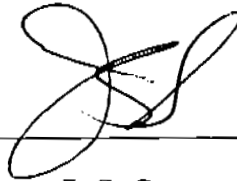
ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it further is

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 Credit Corporation and against

Trademark Transport Inc. for \$21,890.64, together with interest on that amount at the rate of 8.453% per annum from January 23, 2007, together with costs and disbursements as taxed.

Dated: May 8, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
MAY 12 2008
COUNTY CLERK'S OFFICE
NEW YORK