

Orix Fin. Serv., Inc. v C&G Contrs., Inc.
2008 NY Slip Op 31605(U)
June 6, 2008
Supreme Court, New York County
Docket Number: 0106212/2007
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Justice

Index Number : 106212/2007

ORIX FINANCIAL SERVICES, INC.

VS.

C&G CONTRACTORS, INC.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/15/08

MOTION SEQ. NO. _____

MOTION CAL. NO. 66

1 this motion to/for _____

PAPERS NUMBERED

1-2

3-4

5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits 1-8

Answering Affidavits — Exhibits _____

Replying Affidavits (+ memo)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided on per the annexed memorandum decision and order.

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

FILED

JUN 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 6/6/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 7**

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

Index No.: 106212/07

DECISION AND ORDER

Plaintiff

- against -

C&G CONTRACTORS, INC,
JERRY L. GUSS and
GLEN WILLIAMSON,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

FILED
JUN 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Orix sues for unpaid payments due and owing to plaintiff by defendant C&G Contractors, Inc. (C&G) pursuant to a promissory note entered into between the parties and guaranteed by the defendants Jerry L. Guss and Glen Williamson.

Orix moves for judgment pursuant to CPLR 3215(b) against C&B and Guss who have defaulted, and for summary judgment based on the guaranty as against Williamson pursuant to CPLR 3212.

Williamson cross-moves for summary judgment, asserting that he should not be held responsible for a guaranty entered into 27 years prior to the institution of this suit based on a loan made several years after he severed his ties with C&G.

BACKGROUND

On or about December 26, 2000, Orix Financial Services, Inc. (Orix) entered into a promissory note with C&G whereby it provided financing for the purchase of certain farm equipment.

Williamson executed a personal guaranty to assure C&G's performance with Orix Credit Alliance, Inc. in 1980, when he was a shareholder of C&G. Orix Credit Alliance, Inc. changed its name to Orix Financial Services, Inc. on September 26, 2000, and is the successor-in-interest under the guaranty subject to this lawsuit.

The guaranty Williamson executed provides, in pertinent part, that Williamson guaranties C&G's performance for all "past, present and future" obligations to Orix, "whether now or hereafter existing or arising or contracted" The guaranty further states:

This instrument is a continuing Guaranty and shall continue in full force and effect, not withstanding the death of any of us, until the full performance, payment and discharge of all security obligations, and thereafter until actual receipt by you (Orix) from us (Williamson) of written notice of termination

This guaranty was signed by Williamson on July 3, 1980. In January of 1999, Williamson severed his ties with C&G.

Guss also signed a guaranty for C&G's performance under the promissory note with Orix in 1980, and again signed a guaranty when the new loan subject of this suit was entered into in 2000.

C&G defaulted on the promissory note in May of 2003. Pursuant to the terms of the promissory note, the principal due and owing Orix is \$8,701.77. Additionally, Orix asserts that there is default interest due in the amount of \$44,591.40, calculated at the rate of 1/15th of 1% per day as allowed under the promissory note, plus attorneys' fees in the amount of \$1,740.35 (20% of the total

balance due under the note).

DISCUSSION

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998). In support of its motion, Orix has provided a copy of the loan and signed guaranty, proof of the amount due, and evidence of defendants' failure to perform.

As the court stated in *Chemical Bank v Sepler* (60 NY2d 289, 294 [1983]),

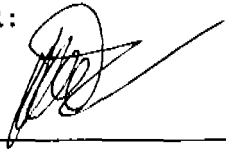
Where, as here, a guaranty is continuing, applicable to after-acquired obligations and terminable only by writing, it may not be said to have terminated due to lack of consideration, or cessation of what one party may have further regarded as the "business relationship." A single, unlimited, continuing guarantee, supported by consideration given once and for all time, is not automatically terminated by a change in the parties' relationship Unless the parties to a continuing guarantee provide otherwise in the writing, such a guarantee is not limited to the life of the loans executed contemporaneously therewith . . . , and generally cannot expire by mere conduct. (citations omitted)

The guaranty that Williamson signed created a continuing obligation that could be released only upon written notification. *Orix Financial Services, Inc. v Barnes*, ___ F Supp 3d ___, 2007 US Dist Lexis 74119 (SDNY 2007). The terms of a guaranty must be strictly construed, and the terms of the instant agreement are

determination of the Special Referee or the designated referee; and
it is further

ORDERED that a copy of this order with notice of entry shall
be served on the Clerk of the Judicial Support Office (Room 311) to
arrange a date for the reference to a Special Referee.

Dated: June 6, 2008
New York, New York

ENTER: 

MICHAEL D. STALLMAN, J.S.C.

HON. MICHAEL D. STALLMAN

FILED
JUN 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

**NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR
HON. JACQUELINE W. SILBERMANN, PRESIDING JUSTICE (PART 50R)**

INFORMATION SHEET

Title of Action: Orix Financial Services, Inc. v C&G Contractors, Inc.

Index No.: 106212/2007

Issues Referred to HEAR AND DETERMINE: Reasonableness of attorneys' fees incurred in action to collect on a guaranty

Estimated Time Needed for Hearing: 1 day at most

Attorney for Plaintiff: William M. Stein, Esq.
Stein & Stein
PO Box 30
One Railroad Square
Haverstraw, NY 10927
(845) 492-3900

**Attorney for Defendant
Glen Williamson:** Alan A. Heller, Esq.
Heller, Horowitz, & Feit, PC
292 Madison Avenue
New York, NY 10017

Defendants C&G Contractors, Inc. & Jerry L. Guss are in default

Please attach this form to a copy of the order of reference or transcript and file, as soon as possible after issuance and in any event within 60 days thereof, with:

Special Referee Clerk - Motion Support Office
60 Centre Street - Room 119, New York, New York 10007

- You will be notified by mail of the date and time of the hearing.
- Please direct all inquiries to the Special Referee Clerk (646-386-3028); DO NOT contact Part 50R.
- Please consult the court's website (www.courts.state.ny.us/supctmanh) (see "Justices' Rules" under "Courthouse Operations"; the rules are listed under Hon. Jacqueline W. Silbermann, Part 50R)) or the New York Law Journal website for the Rules of Part 50R.
- Usually, cases are assigned to a Referee and the hearing commences on the original hearing date. Counsel therefore should be prepared with witnesses and evidence on the original date. Counsel are required to consult with all adversaries in regard to requests or applications for an adjournment. See Part 50R Rules.