

Sunbridge Capital, Inc. v G Bon Funding Corp.

2008 NY Slip Op 31873(U)

June 24, 2008

Supreme Court, Nassau County

Docket Number: 3963-07/

Judge: Leonard B. Austin

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**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 1-18-08
Submission Date: 1-25-08
Motion Sequence No. 002/MOT D

SUNBRIDGE CAPITAL, INC.

Plaintiff,

**COUNSEL FOR PLAINTIFF
Magnozzi & Kye, LLP
1 Expressway Plaza, Suite 114,
Roslyn Heights, NY 11577**

- against -

**G BON FUNDING CORP. and GLORIA
BONSERA**

Defendants

**COUNSEL FOR DEFENDANTS
Shaw, Licitra, Gulotta, Esernio &
Schwartz, P.C.
1050 Franklin Ave., Suite 400
Garden City, NY 11530**

**G BON FUNDING CORP. and GLORIA
BONSERA,**

Third Party Plaintiffs,

- against -

**LMR SERVICES, MICHAEL BONSER, DAVID MORRELL and RISE LEASING
SYSTEMS, INC.,**

Third-Party Defendants.

X

ORDER

The following papers were read on Plaintiff's motion for summary judgment on its complaint and for dismissal of Defendants' affirmative defenses and counterclaim:

- Notice of Motion dated December 27, 2006;
- Affirmation of Matthew F. Kye, Esq. dated December 27, 2007;

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Affidavit of Robin Roberts sworn to on December 27, 2007;
Plaintiff's Memorandum of Law;
Affirmation in opposition of Thomas M. Hoey, Jr., Esq. dated January 18, 2008;
Affidavit of Gloria Bonsera sworn to on January 18, 2008;
Reply Affirmation of Matthew F. Kye, Esq. dated January 24, 2008;
Affidavit of Robin Roberts sworn to on January 24, 2008.

Plaintiff moves for summary judgment pursuant to CPLR 3212 against both Defendants in the amount of \$130,269.21 with interest from November 5, 2006, costs and attorneys' fees, and for dismissal of the affirmative defenses and counterclaim asserted by both Defendants.

BACKGROUND

The record contains an Equipment Lease ("the Lease") dated August 22, 2006, between Plaintiff Sunbridge Capital, Inc. ("Sunbridge") and Defendant G Bon Funding Corp ("G Bon"). The Lease was executed by Defendant Gloria Bonsera ("Bonsera") in her capacity as president of G Bon. Schedule A to the Lease provides for 60 monthly payments of \$4,300.69. Schedule B to the Lease describes the leased equipment as two new Sterling Cabs, each valued at \$92,243.00. The record further contains an Acceptance Notice dated August 14, 2006, wherein Bonsera acknowledged acceptance of the equipment by G Bon "in good working order and condition," and a Guaranty dated August 14, 2006, executed by Bonsera, which is applicable to all obligations of G Bon under the Lease.

The Servicing Manager in Sunbridge's collection department, Robin Roberts, has submitted an affidavit attesting to G Bon's default on the payment due November 5,

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2006, and Plaintiff's termination of the Lease on December 14, 2006. Apparently the equipment was returned to Plaintiff, after this Court directed the return, but, according to Plaintiff, the equipment was returned in poor condition and required over \$25,000 in reconditioning charges.

The complaint contains four causes of action; namely, breach of contract against G Bon, replevin against G Bon, breach of Guaranty against Bonsera and attorneys' fees against both Defendants.

On this motion, Sunbridge seeks summary judgment generally, in the total sum of \$130,269.21. This sum represents the alleged accelerated balance under the Lease in the amount of \$94,293.53, plus two holdover charges in the amount of \$4,300.69 each, plus \$27,374.44 for reconditioning charges. Plaintiff also requests interest, costs, and attorneys' fees.

In opposition, Bonsera avers that the only documents she ever executed were to effect the transfer of G Bon's last remaining equipment to the business of her son, third-party Defendant, Michael Bonsera ("Michael"). She further claims that if she did execute the subject documents, she did so because she had been misled by Michael and third-party Defendant, David Morrell ("Morrell").

Defendants' answer contains two affirmative defenses; namely, that Plaintiff fails to state a cause of action for replevin and fraud in the inducement. Defendants further allege a counterclaim against Plaintiff for fraudulent inducement on the grounds that third-party Defendant Rise Leasing Systems, Inc. ("Rise") and Michael were Plaintiff's

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agents, and that Michael made false representations regarding the Lease and
Guaranty.

Nothing has been submitted by Michael Bonsera or David Morrell.

DISCUSSION

A. Choice of Law

Both the Lease at ¶12, and the Guaranty at ¶11, provide that they are to be governed by the laws of the state of Kansas. Generally, New York courts will enforce a choice-of-law clause (Welsbach Elec. Corp. v Mastec North America, Inc., 7 N.Y.3d 624, 629 [2006]), although they apply the contractual choice-of-law clauses only to substantive issues, and New York law to procedural issues. Education Resources Institute, Inc. v Piazza, 17 A.D.3d 513 (2nd Dept. 2005).

B. Summary Judgment Standard

Summary judgment is the procedural equivalent of a trial. S. J. Capelin Assoc. Inc. v Globe Mfg. Corp., 34 N.Y.2d 338, 341(1974). The function of the court in deciding a motion for summary judgment is to determine whether triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v James M., 83 N.Y.2d 178, 182 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. Giuffrida v Citibank Corp., 100 N.Y.2d 72, 82 (2003); and Alvarez v Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure

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to do so. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and give that party all of the favorable inferences which can be drawn from the evidence. Branham v Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007). The New York standard for summary judgment is virtually identical in Kansas. Korytowski v City of Ottawa, 283 Kan. 122, 128 (2007).

C. Breach of Contract

Under Kansas law, a plaintiff meets its burden of proof in an action for breach of contract by showing (1) execution and existence of the contract; (2) sufficient consideration to support the contract; (3) performance; and (4) defendant's breach, insofar as such matters are alleged. Student Loan Marketing Assn ex rel Sallie Mae Servicing, LP v Hollis, 34 Kan. App. 2d 541, 545 (Kan. Ct. App. 2005). By submitting copies of the Lease and its Schedules, and the Guaranty, together with the Roberts affidavit of nonpayment, Plaintiff has met its burden. Such a showing has been made here as to both the Lease and the Guaranty. New York law is in accord. Key Equipment Finance, Inc. v South Shore Imaging, Inc., 39 A.D.3d 595 (2nd Dept. 2007); and North Fork Bank Corp v Graphic Forms Assoc., Inc., 36 A.D.3d 676 (2nd Dept. 2007).

Kansas has long held that it is the duty of every contracting party to learn and know the contents of a contract before signing it. Commercial Credit Corp v Harris, 212 Kan. 310, 314 (1973); Aylward v Dar Ran Furniture Industries Inc., 32 Kan. App. 2d 697, 700 (Kan. Ct. App. 2004); Ridgway v Shelter Ins. Co., 22 Kan. App. 2d 218, 225

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(Kan. Ct. App. 1996); and Miner v Farm Bureau Mut. Ins. Co., Inc., 17 Kan. App. 2d 598, 609 (Kan. Ct. App. 1992). Consequently, a person who signs a written contract is bound by its terms regardless of his or her failure to read and understand the terms. Ridgway v Shelter Ins. Co., *supra*. See also Pimpinello v Swift & Co., 253 N.Y. 159 (1930). Enforcement of this rule gives stability to contracts and removes the temptation and possibility of perjury at a later date to vary the terms of the instrument. Miner v Farm Bureau Mut. Ins. Co., Inc., *supra*.

The fact that a party signs a contract and does not know its contents is not alone sufficient to permit a party to void the contract on the grounds of fraud. Albers v Nelson, 248 Kan. 575, 579-580 (1991). On this record, Defendants have failed to present a triable issue of fact in opposition to the motion for summary judgment on the first and third causes of action for breach of the Lease and the Guaranty, respectively be granted.

D. Attorneys' Fees

As to the fourth cause of action for attorney's fees, pursuant to current Kansas law, attorney's fees incurred by a prevailing party are recoverable where provided for in a clear and specific statutory provision or in an agreement between the parties. Idbeis v Wichita Surgical Specialists, PA, 285 Kan. 485, 488 (2007). In this case, both the Lease (¶12) and the Guaranty (¶19) provide for the recovery of such fees, and such fees have been statutorily authorized pursuant to K.S.A. 58-2312 since 1994. Ryco Packaging Corp of Kansas v Chapelle International, Ltd., 23 Kan. App. 2d 30, 42-43

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(Kan Ct. App. 1997). Under these circumstances, Sunbridge has also met its *prima facie* burden with respect to its fourth cause of action. Defendants do not address this cause of action in their opposition papers.

E. Affirmative Defenses and Counterclaim

In their first affirmative defense, Defendants assert that the replevin claim fails to state a cause of action because the equipment has been returned. Plaintiff concedes this defense. Accordingly, Plaintiff's second cause of action for replevin shall be dismissed as moot.

The second affirmative defense and counterclaim alleges fraud in the inducement. One who alleges fraud is not entitled to relief if he or she could have ascertained the truth by ordinary care and attention Weigand v Union National Bank of Wichita, 227 Kan. 747, 756 (1980). Bonsera's failure to read the documents at issue is insufficient to void the Lease and Guaranty for fraud. Defendants have not produced sufficient evidence to support a claim of fraud in opposition to summary judgment. Albers v Nelson, 248 Kan. at 580. Nor have Defendants submitted any evidence whatsoever in support of their counterclaim allegation that "David Morrell of Rise Leasing was a disclosed and fully authorized agent acting on behalf of plaintiff in connection with the alleged transaction" (Answer, Counterclaim and Third-Party Complaint, ¶60). Both the affirmative defense and the counterclaim must be dismissed as Defendants have failed to raise a triable issue of fact.

Thus, Sunbridge is entitled to summary judgment against Bonsera and G Bon on

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the issue of liability on the subject Lease, the Guaranty and its claim for attorneys' fees.

F. Damages

It is unclear why the accelerated balance under the Lease is \$94,293.53, if the loan amount was \$184,496.00 and only one or two payments were made. Indeed, the Lease called for 60 payments of \$4,300.69. It is further unclear why reconditioning in the amount of \$27,374.44 was required, if the equipment was new, as set forth in Schedule B to the Lease. Furthermore, while Sunbridge may be entitled to its attorneys' fees, the reasonable value of those fees rests within the sound judicial discretion of the trial judge. Hall v Hamilton, 233 Kan. 880, 886 (1983). See also, Arent Fox Kintner Plotkin & Kahn PLLC v Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002). Overall, a trial on the issue of all damages is required.

Accordingly, it is,

ORDERED, that Plaintiff's second cause of action for replevin is dismissed on consent; and it is further,

ORDERED, that Plaintiff's motion for summary judgment dismissing Defendants' second affirmative defense and counterclaim for fraud is **granted**; and it is further,

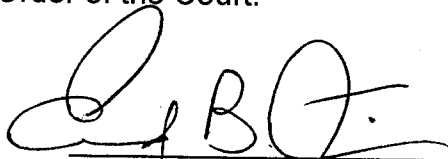
ORDERED, that Plaintiff's motion for summary judgment on its first cause of action against G Bon Funding Corp. for breach of the Lease, on its third cause of action against Gloria Bonsera for breach of the Guaranty, and on its fourth cause of action against both Defendants for attorneys' fees is **granted** on the issue of liability; and it is further,

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ORDERED, that counsel shall appear for a conference to schedule an inquest on
the issue of damages recoverable in the first, third, and fourth causes of action on
July 17, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, N.Y.
June 24, 2008



HON. LEONARD B. AUSTIN, J.S.C.

ENTERED
JUN 26 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE