

**Orix Fin. Servs., Inc. v United Diversified,
LLC**

2008 NY Slip Op 32008(U)

July 11, 2008

Supreme Court, New York County

Docket Number: 0604358/2006

Judge: Bernard J. Fried

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

PRESENT: 604358/06
INDEX NUMBER: 00700012006

PART 60

— ORIX FINANCIAL SERVICES INC.

vs

UNITED DIVERSIFIED LLC

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

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

Dated: 7/11/08



HON. BERNARD J. FRIED ^{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: PART 60

----- X

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

Index No. 604358/06
Mot. Seq. 001

Plaintiff,

- against -

UNITED DIVERSIFIED, LLC, JOSEPH ZINGALE
and MICHAEL GALELLA,

Defendants.

----- X

APPEARANCES:

For Plaintiff:

For Defendants:

Marshall & Quentzel, LLC

Riker, Danzig, Scherer, Hyland,
Perretti

15 North Mill Street
Nyack, New York 10169
(Robert M. Marshall)

One Speedwell Avenue
Morristown, New Jersey 07962
(Lauren H. Lezak)

FRIED, J.:

Plaintiff Orix Financial Services, Inc. f/k/a Orix Credit Alliance, Inc. (Orix) moves, pursuant to CPLR 3212, for summary judgment against United Diversified, LLC (United), Joseph Zingale, and Michael Galella (Zingale and Galella together, Guarantors).

Orix alleges as follows: on June 12, 2000, United executed and delivered to Binder Machinery Co. (Binder) a "Conditional Sale Contract Note" (June 12 Note) pursuant to which United purchased from Binder one "Nordberg Screening Plant, Model ST170, S/N 1014" (Collateral).

Under the terms of the June 12 Note, United agreed to pay Binder total payments of \$169,664.68. On June 12, 2000, Binder executed an assignment of the June 12 Note and

the loan documents to Orix. Orix perfected its security interest in the Collateral by filing a UCC-1 financing statement. United agreed that if it failed to make the payments when due, it would pay, in addition to the unpaid amount, late charges of 1/15 of 1% per day (not to exceed the maximum permitted by law), collection fees, attorney's fees of 20%, and costs.

United defaulted on the June 12 Note by failing to pay the installment due on May 1, 2001, as well as all subsequent payments, and Orix accelerated the entire amount due, pursuant to the note. On May 6, 2003, Orix sold at public sale the Collateral on notice to United and the Guarantors.

Orix alleges further that, as of July 10, 2007, there was due and owing to it on the June 12 Note, the amount of \$256,233.78 consisting of (1) the unpaid balance of \$114,010.06; (2) late charges on scheduled payments prior to default of \$514.28; (3) late charges on the accelerated unpaid balance of \$55,864.93 at 1/15th of 1% per day from May 1, 2001, the date of default, to May 6, 2003, the sale date of the Collateral; (4) less the gross sale proceeds of \$47,500; (5) the costs of sale of \$7,178.64; (6) default interest in the amount of \$132,322.42 from the May 6, 2003 sale date to July 10, 2007; and (7) 20% attorney's fees and costs, all pursuant to the loan documents (Affidavit of Yvonne Kalpakoff, Orix senior vice-president, sworn to July 10, 2007).

Orix also alleges that the Guarantors executed and delivered to it an unconditional and unlimited guaranty of all obligations and liabilities of United to Orix, including, but not limited to, the June 12 Note. Despite due demand, the Guarantors have failed to pay Orix the amounts due to it, as set forth above.

Orix has established a prima facie entitlement to judgment on the June 12 Note as against United as well as the Guarantors by proof of the execution of the note and guarantees, the subsequent default, and defendants have failed to come forward with evidence establishing a triable issue (*Takeuchi v Silberman*, 41 AD3d 336 [1st Dept 2007]; *Citidress II v 207 Second Ave. Realty Corp.*, 21 AD3d 774 [1st Dept 2005]).

Defendants argue that the June 12 Note is usurious, because the amount sought under the June 12 Note far exceeds the total principal owed. They contend that Orix arrives at the amount sought by adding “late charges” at the annual rate of 24%, plus “default interest,” at an unspecified rate, plus “attorney’s fees” calculated as 20% of the amount allegedly due. Defendants argue that such charges are usurious, because they exceed an annual interest rate of 25%, and, therefore, they constitute illegal and unenforceable interest (Penal Law § 190.40). Defendants also seek discovery as to the commercial reasonableness of the sale of the Collateral.

Where usury does not appear on the face of the note, usury is a question of fact (*Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254 [1984]; *Hort v Devine*, 1 AD3d 266 [1st Dept 2003]). Here, however, defendants have not demonstrated any triable issues of fact as to the defense of criminal usury (Penal Law § 190.40). Among the charges, Orix is seeking late charges on the accelerated unpaid balance of \$55,864.93 at 1/15th of 1% per day from May 1, 2001, the date of default, to May 6, 2003, the sale date, amounting to 24.333%, and which is not usurious because there are no other charges during that time period. This formula has been upheld (*see e.g. Orix Fin. Servs. v Solace*, 2007 WL 1455757, 2007 US Dist LEXIS 36294 [SD NY 2007]). The usury defense is conclusory and unsubstantiated

and, therefore, unavailing (*see Tower Funding v Berry Realty*, 302 AD2d 513 [2d Dept 2003]), as is the claim that the charges constitute an unenforceable penalty. The actual costs incurred after default are not easily ascertained in light of action that may be required to enforce the terms of the note. The party challenging liquidated damages must demonstrate that it is an unenforceable penalty (*see Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120, *rearg denied* 7 NY3d 784 [2006]), which has not been shown to be the case here. To the extent that there may be an overlap between the costs incurred because of the default, and intended to be compensated for by the default interest rate, and the provision in the note for attorney' fees, Orix has represented that it has waived the attorney's fee request (*see* Reply Memorandum, at 4).

Defendants also argue that they are entitled to discovery concerning Orix's claim that, only three years after the purchase, it sold the Collateral securing the loan for \$47,500, less than one-third of its purchase price of \$148,000. Moreover, Orix claims that the cost of the sale totaled \$7,178.64, amounting to 15% of the proceeds. Defendants argue that they are entitled to discovery as to (1) whether Orix obtained adequate value for the Collateral, (2) why Orix received so little money, (3) the condition of the Collateral when sold, (4) whether Orix damaged the Collateral prior to sale, (5) whether the sale was bone fide, (6) the identity of the purchaser, (7) why the sale costs were so high, and (8) the relationship of the sales agent to Orix, if any.

As a preliminary matter, this defense has no bearing on liability, it only relates to damages (*General Trading Co. v A & D Food Corp.*, 292 AD2d 266 [1st Dept 2002]). Moreover, mere inadequacy of price does not furnish sufficient grounds for vacating a sale

(*Guardian Loan Co. v Early*, 47 NY2d 515 [1979]). The sale of the Collateral, three years after the purchase, for \$47,500, less than one-third of its purchase price of \$148,000, was not so unconscionably low as to require vacatur of the sale considering that the sale was duly advertised and there was no indication of irregularity to hinder the attendance of other prospective bidders (*Frank Buttermark Plumbing & Heating Corp. v Sagarese*, 119 AD2d 540 [2d Dept], *appeal denied* 68 NY2d 607 [1986]). Thus, further scrutiny is not required (*American Furniture, LLC v ACG Credit Co., LLC*, 50 AD3d 494 [1st Dept 2008]). Furthermore, the record indicates that defendants had not sought any discovery prior to their opposition to this motion.

On the original motion papers, Orix submitted, among other items, the notice of public sale of the Collateral, which included a description of the Collateral, time and place of the sale, and the terms of the sale. The additional evidence pertaining to the sale of the Collateral that Orix submitted in reply properly responded to arguments raised in defendants' opposition papers (*Merchants Bank of N.Y. v Gold Lane Corp.*, 28 AD3d 266 [1st Dept 2006]). This included (1) the supplemental affidavit of Yvonne Kalpakoff, Orix's senior vice president, (2) proof of publication in the Philadelphia Daily News of the notice of the public sale, (3) copies of letters sent to ten entities, potentially interested in the Collateral, informing them of the sale, (4) the auctioneer's worksheet, (5) a "Repro Delivery and Acceptance Report," (6) a report of similar auction results, and (7) proof of advertising of the sale.

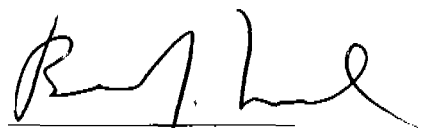
Settle judgment on notice. The proposed judgment, which should explain how Orix arrived at default interest of \$132,322.42 from the May 6, 2002 sale date to July 10, 2007 (or

some other amount), shall be submitted through the Commercial Division Office, Room 148. The proposed judgment should not include any amount for attorney's fees, because Orix has waived such request.

The foregoing constitutes the decision and order of the court.

Dated: 1/11/08

ENTER:


J.S.C.

HON. BERNARD J. FRIED