

A.I. Credit Corp. v George G. Sharp, Inc.

2008 NY Slip Op 32527(U)

September 15, 2008

Supreme Court, New York County

Docket Number: 0103757/2006

Judge: Barbara R. Kapnick

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

PRESENT: **HON. BARBARA R. KAPNICK**

PART 12

Index Number : 103757/2006

A.I. CREDIT

vs

GEORGE G. SHARP, INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 103757/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION 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

and cross-motions
**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

SEP 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/15/08

BARBARA R. KAPNICK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST *Referend*

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X

A.I. CREDIT CORP.,

Plaintiff,

DECISION/ORDER
Index No. 103757/06
Motion Seq. No. 001

- against -

GEORGE G. SHARP, INC.,

Defendant.

-----X

GEORGE G. SHARP, INC.,

Third-Party Plaintiff,

- against -

EDWARD E. HALL & CO.,

Third-Party Defendant.

-----X

BARBARA R. KAPNICK, J.:

FILED
SEP 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of the failure of defendant/third-party plaintiff George G. Sharp, Inc. ("Sharp") to pay late charges as allegedly required under two insurance premium finance agreements entered into between plaintiff A.I. Credit Corp. ("A.I. Credit")¹ and defendant/third-party plaintiff in January 2004.

In Premium Finance Agreement No. 1, defendant agreed to make nine monthly installment payments starting on February 29, 2004, and thereafter on the first day of each month from April 1, 2004 through November 1, 2004. The copy of the agreement annexed to the moving papers provides, in relevant part, as follows:

¹ A.I. Credit is a corporation in the business of financing insurance premium payments owed by insureds to the insurance companies from which they are procuring insurance.

14. Late Charges. Upon default in payment of any installments for not less than five days (or such greater number of days required by applicable law), Insured agrees to pay a late charge in accordance with applicable law. In no event shall such late charge exceed a maximum of 5% of such installment...²

Plaintiff claims that defendant failed to timely forward the March, April, May, July, August, September, October and November 2004 installment payments due under Premium Finance Agreement No. 1. Plaintiff contends that it properly charged defendant the applicable 5% late charge fee of \$5,097.89 on March 8, April 7, May 7, July 7, August 9, September 8, October 7 and November 9, 2004, leaving a late charge balance due of \$40,783.12 on Premium Finance Agreement No. 1.

Plaintiff has demanded payment from defendant for the outstanding late charges allegedly due under Premium Finance Agreement No. 1, but no payments have been made.

² New York Banking Law § 569 ("Delinquency, collection and cancellation charges; attorney's fees") provides, in relevant part, as follows:

1. A premium finance agreement may provide for the payment by the insured of a delinquency and collection charge on each instalment 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 instalment,...

In Premium Finance Agreement No. 2, defendant agreed to make nine monthly installment payments starting on January 30, 2004, and thereafter on the first day of each month from March 1, 2004 through October 1, 2004. The copy of the agreement annexed to the moving papers contains the same "Late Charges" provision allegedly contained in Premium Finance Agreement No. 1.

Plaintiff claims that defendant failed to timely forward the February, March, May, July, August, September and October 2004 installment payments due under Premium Finance Agreement No. 2. Plaintiff contends that it properly charged defendant the applicable 5% late charge fee of \$1,086.78 on February 5, March 9, May 7, July 7, August 9, September 8, and October 7, 2004, leaving a late charge balance due of \$7,607.46 on Premium Finance Agreement No. 2.

Plaintiff has demanded payment from defendant for the outstanding late charges allegedly due under Premium Finance Agreement No. 2, but no payments have been made.

Plaintiff's Complaint seeks to recover damages in the amount of \$40,783.12 on Premium Finance Agreement No. 1 and in the amount of \$7,607.46 on Premium Finance Agreement No. 2, for a total of \$48,390.58 (first cause of action), and attorneys' fees and costs

incurred by plaintiff in connection with the collection of those monies (second cause of action).

Sharp's Treasurer and Chief Financial Officer, Al Seneca, claims that he deleted the "Late Charges" provisions prior to signing the agreements and returning them to the insurance broker, third-party defendant Edward E. Hall & Co. ("Hall"). Seneca contends that

12. In spite of receiving Premium Financing Agreements 1 and 2 from me with the "Late Charges" provision deleted, Hall may have submitted just the front page of the Agreements (containing my signature), with a standard second (and third) page attached thereto that did not reflect the deletion of the "Late Charges" provisions. Alternatively, Hall may have submitted just the front page of the Agreements to AI Credit, and AI Credit may have attached a standard second (and third) page that did not reflect the deletion of the "Late Charges" provision.

13. In any event, by sending the Agreements with my signature to Hall with the "Late Charges" provision deleted, Sharp has no responsibility for the late charges in question. The responsibility must lie with either AI Credit (if AI Credit added page two without the "Late Charges" provision deleted, or if Hall acted as AI Credit's agent), or Hall (if Hall added page two without the "Late Charges" provision deleted and was not acting as AI Credit's agent)...

Sharp has asserted third-party claims against Hall for breach of contract (first cause of action), negligence (second cause of action), indemnification (third cause of action) and contribution (fourth cause of action).

Plaintiff now moves for summary judgment against the defendant/third-party plaintiff for the relief demanded in the first and second causes of action of the Complaint upon the ground that there are no defenses to those causes of action.

Defendant/third-party plaintiff opposes the motion and cross-moves for an order:

(1) granting summary judgment finding that Sharp has no liability to A.I. Credit and dismissing plaintiff's Complaint against it, or, in the alternative,

(2) granting it summary judgment against the third-party defendant on the ground that any liability that Sharp may have to A.I. Credit is subject to indemnification or full contribution by Hall.

Counsel for defendant/third-party plaintiff conceded on the record on September 5, 2007 that summary judgment with respect to the third-party action is premature since there is outstanding discovery, including depositions. Accordingly, that portion of the cross-motion seeking summary judgment on the third-party action is denied.

Plaintiff argues that any dispute that Sharp may have with Hall does not affect Sharp's liability to A.I. Credit.

Defendant, however, contends that a 'course of conduct' was established between the parties in connection with past insurance premium financing agreements over a ten-year period, whereby A.I. Credit acquiesced to Sharp's non-payment of late charges.

Seneca specifically claims that

[i]dential late charges had regularly been reflected on invoices and Notices of Intent to Cancel with respect to prior premium finance agreements between Sharp and AI Credit..., and Sharp did not pay the late charges under those agreements. Indeed, Sharp sent its installment payments to AI Credit via regular mail because, without late charges, time was not of the essence. Had the late charges been charged to Sharp legitimately pursuant to the Premium Finance Agreements, I would certainly have sent all payments on time, and would have sent them all by overnight courier service.

However, the parties' purported course of conduct with respect to prior agreements cannot, as a matter of law, be deemed to have modified the clear and unequivocal terms of the subject agreements. See, *Peisinger Creative Branding Systems v. CBS Cable Networks, Inc.*, 299 AD2d 184 (1st Dep't 2002); *Eisert v Ermco Erectors, Inc.*, 60 AD2d 903 (2nd Dep't 1978).

Defendant alternatively argues that many or most of the allegedly late payments were in fact timely made. However, defendant has not submitted any proof to refute plaintiff's claim

that all the payments in question were received more than five days after the due date.

Accordingly, plaintiff's motion for summary judgment is granted.

The Clerk may enter judgment in favor of plaintiff A.I. Credit Corp. and against defendant George G. Sharp, Inc. in the sum of \$48,390.58, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Plaintiff's claim for attorney's fees is severed and continued, and the issue of the amount of fees is referred to a Special Referee to hear and determine.

Upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50R calendar for reference to a Special Referee.

The defendant/third-party plaintiff's claims against third-party defendant Edward E. Hall & Co. are also severed and continued. A status conference shall be held in IA Part 12 on November 19, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: September 15, 2008



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
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NEW YORK

**Supreme Court
60 Centre Street, New York, New York 10007**

Special Referee Clerk, Room 119

Information Sheet

To be attached to a copy of order and filed in Room 119
Special Referee Selection Program

Date: Sept. 15, 2008

Title of Action: A.I. Credit Corp. v. George G. Sharp, Inc.

Index No. 103757/06

Issues: See order dated: ^{Attorneys' Fees —} September 15, 2008

Estimated Length of Time Needed for Hearing: 1 day

Attorneys

Names, Address and Telephone Numbers

For Plaintiff:	Mark D. Speed, Esq. 60 East 42nd Street, Suite 1563 New York, New York 10165	(212) 344-3339
For Defendant/ Third-Party Plaintiff	Vedder Price Kaufman & Kammholz 805 Third Avenue New York, New York 10022	(212) 407-7700
For Third-Party Defendant:	Traub Eglin Lieberman Straus 7 Skyline Drive Hawthorne, New York 10532	(914)347-2600