

**General Elec. Capital Corp. v New York
Medscan, L.L.C.**

2008 NY Slip Op 33174(U)

November 7, 2008

Supreme Court, New York County

Docket Number: 600132/2008

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT:

PART _____

Index Number : 600132/2008

BENERAL ELECTRIC CAPITAL CORP.

vs

NEW YORK MEDSCAN, L.L.C.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with
accompanying Memorandum Decision.

FILED

NOV 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/7/08

HON. CHARLES E. RAMOS

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X

GENERAL ELECTRIC CAPITAL CORPORATION
and GE HEALTHCARE FINANCIAL SERVICES, a
component of GENERAL ELECTRIC COMPANY,

Plaintiffs,

-against-

NEW YORK MEDSCAN, L.L.C., and JACK
LEFKOWITZ,

Defendants.

Charles Edward Ramos, J.S.C.:

Defendants New York Medscan, L.L.C. (Medscan) and Jack Lefkowitz (Lefkowitz), the president of Medscan, move to dismiss the complaint pursuant to CPLR 3211 [a] [1] and [7], and to impose sanctions and award costs pursuant to N.Y.C.R.R. Part 130-1.1.

Background

Medscan leased two pieces of equipment from GE which are used in the detection of cancer, a PET Advance NX/I (PET) in June 2001, and a Discovery LS 16 Slice System (Slicer) in September 2003. Medscan also granted GE a security interest in the equipment as collateral. In addition, Lefkowitz executed a personal guaranty in favor of GE for both leases in the amounts of \$320,000 and \$600,000.

In November 2004, a dispute arose between Medscan and GE over payments and repairs to the equipment. That dispute was resolved in a settlement agreement that was executed in January 2005 (Exhibit E, annexed to Motion to Dismiss). One of the material terms of the settlement agreement was that Medscan and

Index No.
00132/08
FILED
NOV 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

GE would start anew in regards to the dates and number of payments remaining, but all other terms of the lease agreements were to remain in effect (id., ¶¶ 2-4).

Subsequently, another dispute arose, this time over two payments due to GE in June and July 2005. Medscan claims that it was never billed for the payments, but, nonetheless, made them within the cure period. GE accepted the two payments, but charged a late fee of \$4,978.18 that it alleges was not paid within the cure period. Despite Medscan's attempt to pay the late fee, GE filed a second action seeking the \$4,978.18 late fee and seeking to seize the PET and the Slicer, and acceleration of approximately \$1.3 million dollars due under the two leases.

That action was dismissed by this court in November of 2006 (Exhibit E, annexed to Motion to Dismiss). Plaintiffs then commenced this, the third action, asserting causes of action for breach of contract (for the PET and the Slicer), foreclosure of the security interest and breach of guaranty.

Plaintiffs allege that Medscan breached both leases. The lease agreement for the PET (Lease Agreement No. 1) was entered into in June of 2001. Lease Agreement No.1 listed certain occurrences that would constitute a default on the part of Medscan (Lease Agreement No. 1 ¶ 8 (a)). GE claims that Medscan defaulted under Lease Agreement No. 1 by failing to make payments and failing to cure that default within ten days, by assigning its interest in the PET without GE's consent, by material adverse changes in Medscan's financial condition and business operations,

and by returning the PET to GE before the expiration of the lease. GE is seeking damages and other remedies (Lease Agreement No. 1 ¶8 (b)). The lease agreement for the Slicer (Lease Agreement No. 2) was entered into in September 2003. GE makes similar allegations of breach of Lease Agreement No. 2 by Medscan.

In addition, GE argues that because of the alleged defaults under the equipment leases, Medscan is also in default of the security agreement and Lefkowitz is in default of the personal guaranties he executed in connection with both equipment leases.

Discussion

Under CPLR § 3211(a) (1), a motion to dismiss may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Goshen v Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326, (2002).

Medscan moves to dismiss the breach of contract claim because it contends all payments were made in full, therefore, Medscan was not in default and thus exercised its election to purchase the PET and the Slicer pursuant to the terms of the lease. Medscan also claims that no month to month lease took effect with regard to the Slicer because GE's refusal to sell the equipment to Medscan was baseless. However, defendants fail to submit documentary evidence that would support dismissal under CPLR § 3211(a) (1). The only documentary evidence submitted in support of the motion to dismiss consists of Lease Agreements No.

1 and 2, two letters in which Medscan notified GE of its intent to purchase the PET and the Slicer, and a letter documenting Medscan's surrender of the PET and the Slicer to GE. Taken as a whole, this documentary evidence does not utterly refute GE's allegations. No evidence has been produced that would refute GE's allegations that Medscan failed to make timely payments, such as cashed checks or bank statements that show payments were made through the time of surrender of the equipment. Such evidence would also defeat GE's claims that Medscan is in default of the security agreement and that Lefkowitz is in default of the personal guaranties. In addition, there is absolutely no documentary evidence refuting GE's claim that material and adverse changes in Medscan's financial conditions and business operations occurred. Financial statements and other business records could easily defeat such a claim.

GE's pleadings, construed liberally, sufficiently allege the basis for Medscan's defaults and sets forth cognizable actions at law. This Court need not address Medscan's request for costs and sanctions under 22 N.Y.C.R.R. Part 130-1.1.

Accordingly, it is

ORDERED that the motion to dismiss the complaint by defendants New York Medscan, L.L.C., and Jack Lefkowitz is

denied; and defendants shall serve an within 10 days after service of a copy of this order with notice of entry.

Dated: November 7, 2008

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 NEW YORK

J.S.C.
 HON. CHARLES E. RAMOS

