

**Orix Fin. Servs., Inc. v McMullen**

2008 NY Slip Op 33213(U)

November 26, 2008

Supreme Court, New York County

Docket Number: 602846/06

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 7

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

INDEX NO. 602846/06

Plaintiff,

- v -

MOTION DATE 10/15/08

MOTION SEQ. NO. 002

TERRY McMULLEN and CONNIE J. SMITH a/k/a  
CONNIE McMULLEN,

MOTION CAL. NO. 90

Defendants.

The following papers, numbered 1 to 5 were read on this motion for summary judgment

Notice of Motion— Affidavit—Affirmation-- Exhibits A-F

PAPERS NUMBERED

1-3

Answering Affidavit — Exhibits 1-4

4

Replying Affirmation — Exhibit 1

5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that plaintiff's motion for summary judgment as against defendant Smith is determined in accordance with the annexed memorandum decision and order.

**FILED**

DEC 02 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MICHAEL D. STALLMAN**  
J.S.C.

Dated: 11/26/08  
New York, New York

*[Signature]*  
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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 7**

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

**Index No.: 602846/06**

**Decision and Order**

Plaintiff

-against-

TERRY McMULLEN and  
CONNIE J. SMITH a/k/a  
CONNIE McMULLEN,

Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.**

**FILED**  
DEC 02 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

This is an action for unpaid payments due and owing to plaintiff by defendant Terry McMullen pursuant to a promissory note entered into between the parties and allegedly guaranteed by defendant Connie Smith (Smith).

**BACKGROUND**

Orix Financial Services, Inc. (Orix) moves for summary judgment pursuant to CPLR 3212 against Smith. Previously, this Court granted summary judgment against Terry McMullen, Smith's husband, but denied summary judgment against Smith. The denial of summary judgment against Smith was based on her allegation that her signature on the guaranty was a forgery, and that the notarization is false, because she never signed a guaranty in the year acknowledged, nor was she in the state in which the alleged notarization took place.

[\* 3 ]

On April 24, 2008, Smith signed a stipulation in which she acknowledged that it was her signature that appears on the guaranty attached to the papers, but she still maintains that the date and notarization are false. Orix has conceded that Smith did not appear before the notary.

The guaranty attached to the moving papers that contains Smith's signature provides, in pertinent part, that Smith guarantees Terry McMullen'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 ... .

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557,

562 (1980).

"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 (1<sup>st</sup> Dept 1998). In support of its motion, Orix has provided a copy of the loan, proof of the amount due, evidence of defendants' failure to perform, and the signed guaranty.

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 Smith signed contains a provision creating a continuing guaranty obligation that could only be released upon written notification. *Orix Financial Services, Inc. v Barnes*, \_\_\_ F Supp 3d \_\_\_, 2007 US Dist Lexis 74119 (SD NY 2007).

Smith argues that she should not be bound to the alleged guaranty because the notarization is false, and a guaranty without

a valid notarization is unenforceable. The Court finds no merit in this argument.

In *Columbus Trust Company v Campolo* (110 AD2d 616, 617 [2d Dept 1985]), *affd* 66 NY2d 701 (1985), the court held that the "defendant's allegation that the guarantee was not executed in the presence of a notary, and is thus void, is without merit since a notary's acknowledgment was not necessary to make the guarantee legally binding on the parties."

#### CONCLUSION

Plaintiff Orix had demonstrated entitlement to summary judgment against co-defendant Smith. As a guarantor, Smith is jointly and severally liable for the default judgment previously granted as against Terry McMullen by decision and order dated October 26, 2007.

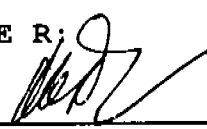
It is hereby

**ORDERED that** the part of plaintiff Orix Financial Services, Inc.'s motion for summary judgment is granted against defendant Connie J. Smith a/k/a Connie J. McMullen; and it is further

**ORDERED that** the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Connie J. Smith a/k/a Connie J. McMullen in the amount of \$27,263.22, together with interest as prayed for allowable by law at the rate of 1/15th of 1% per day from the date of November 30, 2001, until the date of entry of judgment, as calculated by the Clerk, and

thereafter at the statutory rate, and attorneys' fees and expenses in the amount of \$5,477.24, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: November 26, 2008  
New York, New York

ENTER:   
\_\_\_\_\_  
Michael D. Stallman, J.S.C.

**MICHAEL D. STALLMAN**  
J.S.C.

**FILED**  
DEC 02 2008  
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NEW YORK