

**CIT Group/Equipment Fin., Inc. v America
Imaging Ctr. Inc.**

2009 NY Slip Op 31248(U)

May 28, 2009

Supreme Court, Nassau County

Docket Number: 015466/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

THE CIT GROUP/EQUIPMENT FINANCING, INC.,
Plaintiff,

INDEX NO.: 015466/2008
MOTION DATE: 03/25/2009
MOTION SEQUENCE: 002 and 003

- against -

AMERICA'S IMAGING CENTER INCORPORATED
doing business as "EMPIRE IMAGING" and DR.
PEYAM TOOBIAN,

Defendants.

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion, Affirmation & Exhibits Annexed | 1 |
| Notice of Cross-Motion, Affidavit, Affirmation & Exhibits Annexed | 2 |
| Affirmation of Robert M. Tils in Opposition | 3 |
| Affirmation of Allan Schiller in Reply | 4 |

PRELIMINARY STATEMENT

The matter comes before the Court by way of a Motion to serve and Amended Complaint, and a Cross-motion seeking a denial of the Plaintiff's Motion to Amend, and the award of sanctions for costs in the form of reimbursement for actual expenses reasonably incurred in connection with the Defendants' efforts to vacate a default judgment, which was based upon an equipment lease agreement which the Plaintiffs knew, or should have known, never transpired.

BACKGROUND

This action involves a rather unusual set of circumstances. The action was commenced by the filing of a Summons and Verified Complaint on August 19, 2008. The Complaint recites Four Causes of Action involving the lease by the Plaintiff to the Defendant American Imaging Center (AIC) and the personal guaranty of payments by Dr. Peyam Toobian (Toobian).¹ It is verified by one Cole Silver, an Assistant Vice President and Secretary of CIT Group/Equipment Financing, Inc. (CIT). Remarkably the lease agreement,² though executed, was never effectuated, and was replaced by a capital loan, with no change in the language of the lease agreement. The lease provides at ¶ 26.4 as follows:

26.4 THE LEASE REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES, EMBODIES THE ENTIRE AGREEMENT AND UNDERSTANDING BETWEEN THE PARTIES THERETO, SUPERSEDES ALL PRIOR AGREEMENTS AND UNDERSTANDINGS RELATING TO THE SUBJECT MATTER THEREOF, AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES. THE LEASE MAY NOT BE ALTERED, MODIFIED, TERMINATED OR DISCHARGED EXCEPT BY A WRITING SIGNED BY THE PARTY AGAINST WHOM SUCH ALTERATION, MODIFICATION, TERMINATION OR DISCHARGE IS SOUGHT.

The Plaintiff now seeks to amend their complaint to reflect the changed circumstances. The proposed amended complaint relates the fact of the Master Lease Agreement,³ but thereafter alleges that CIT wired \$387,353.0 to AIC on or about December 3, 2003, and that AIC elected to borrow this sum in lieu of the leasing agreement. Rather than accurately document the reality, however, the parties continued to proceed under the guise of an equipment lease agreement. In fact, on January 30, 2006, AIC acknowledged receipt of the equipment called for in the lease, and agreed to pay CIT the sum of \$336,185.09 by monthly payments of \$10,475.70 commencing

¹ Exh. "A" to Motion.

² *Id.* as Exh. "A" to Complaint.

³ Exh. "A" to Amended Verified Complaint, Exh. "C" to Motion.

on March 1, 2006 and continuing for the next ensuing 35 months.⁴ A personal guaranty of all obligations owed by AIC to CIT is dated Nov. 19, 2003 and signed by Toobian.⁵

The Proposed Amended Complaint thereafter alleges Six Causes of Actions as follows:

- FIRST: That AIC stopped making payments as of October 1, 2007 and thereafter. Under the terms of the Leasing Agreement, the Plaintiff has declared the total unpaid balance due and payable;
- SECOND: The lease agreement calls for AIC to be liable for reasonable attorneys' fees in the event CIT is required to seek enforcement of payments under the agreement;
- THIRD: By virtue of the failure of AIC to make payments in full, they are indebted to CIT in the amount of \$172,287.08, with interest from October 31, 2007;
- FOURTH: AIC has derived benefit from the transfer of funds from CIT, and it would be inequitable for them not to reimburse CIT. The claim is for \$172,278.07, with interest from October 31, 2007, on the basis of quantum meruit;
- FIFTH: Toobian is responsible to CIT on the basis of the November 19, 2003 guaranty of all indebtedness of AIC to CIT; and,
- SIXTH: Pursuant to the personal guaranty, Toobian is responsible to CIT for reasonable attorneys' fees.

The Cross-motion by AIC and Toobian requests that the motion to amend the Complaint be denied and further requests the imposition of costs upon the Plaintiff, not based upon the motion to amend, but rather because of the Plaintiff's opposition to the motion to vacate a prior default judgment, when they knew full well that the judgment was based upon a complaint which was a misstatement of fact as to the nature of the agreement between the parties.

⁴ Exh. "B" to Amended Verified Complaint, Exh. "C" to Motion.

⁵ Exh. "C" to Amended Verified Complaint, Exh. "C" to Motion.

DISCUSSION

The Motion

The Plaintiff's motion to amend its complaint in the form annexed to the motion is granted. Amendment of pleadings is governed by Civil Practice Law and Rules § 3025, which provides as follows:

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

Recent decisions have been virtually unanimous in concluding that the denial of an application to amend pleadings is an abuse of discretion where there is no undue surprise or prejudice to the non-moving party. This is true even as late as at the conclusion of a trial, after

which the motion is made to amend the pleadings to the proof.⁶ In the case at bar, the proceeding is in its pre-discovery stage. The Defendants, parties to the same transactions as the Plaintiff, cannot claim surprise or prejudice.

The Cross-motion

The Cross-motion for the award of attorneys' fees in connection with the motion to vacate a default judgment is denied. In the face of a verification by an officer of the Plaintiff, counsel for the Plaintiff should not be faulted for filing and serving a complaint which bore no relationship to the true underlying claim. But once it was clear that the allegations of the complaint, and the resulting judgment by default, were premised upon a total misstatement of the basis for the claim, the Defendants contend that it was incumbent upon Plaintiff to acknowledge the error, and not prolong the effort to correct it.

Frivolous conduct is defined as follows:

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.⁷

⁶ *Bryant v. Broadcast Music, Inc.*, 60 A.D.3d 799 (2d Dept. 2009).

⁷ N.Y.Comp. Codes R. & Regs

The issue is whether or not the Plaintiff, when they became aware that the allegations of the complaint which formed the basis for the default judgment were fallacious, continued to oppose the motion to vacate the judgment, thereby causing the Defendants to incur unnecessary expenses. A review of the papers in opposition to the motion to vacate the judgment leads the Court to conclude that the conduct was not frivolous.

Recognizing the erroneous allegations of the complaint, Ms. Godish, Assistant Vice President of the Plaintiff, did not dispute the claim of Dr. Toobian that the basis for the judgment was a commercial loan as opposed to a lease for the equipment.⁸ As some evidence of the fact that the entered judgment was not over-reaching, the judgment amount, exclusive of interest, was \$176,680.01. The amount claimed in the proposed amended complaint is \$172,287.07, essentially consistent with the vacated judgment amount.

The underlying transaction was certainly unusual, in that both parties knew full well that the physical limitations and proximity of subway lines made the installation of the "leased" equipment impractical, and, without much formality, the Plaintiff advanced money as a loan, with repayments regularly referred to as lease payments. The Defendants should not be heard to complain that the allegations of the complaint failed to accurately track reality, since it was they as much as anyone, who contributed to the confusion in failing to restructure the agreement.

The Cross-motion for costs and attorney's fees is denied.

Dated: May 28, 2009


J.S.C.

ENTERED
JUN 01 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

⁸ Exh. "C" to Cross-motion.