

**Commerce Commercial Leasing, LLC v PIO Enters.,
Inc.**

2009 NY Slip Op 31428(U)

June 22, 2009

Supreme Court, Nassau County

Docket Number: 18122/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

COMMERCE COMMERCIAL LEASING, LLC,
Plaintiff,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 18122/08

- against -

Motion Sequence No. 001

PIO ENTERPRISES, INC., ANGELO
INGRASSA a/k/a ANGELO J. INGRASSIA and
GIUSEPPE FARACI a/k/a JOE FARACI,
Individually,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The plaintiff moves for summary judgment, and dismissing the defense amended answer containing general denials and unsubstantiated affirmative defenses on the ground there are no triable issues of fact, and summary judgment is warranted as a matter of law. The defendants oppose the motion, and claim the defendant Giuseppe Faraci a/k/a Joe Faraci died on January 21, 2009, so the underlying action as to him is stayed. This Court has carefully reviewed all of the papers submitted with respect to this motion.

The plaintiff counsel points to the affidavit dated December 22, 2008, by Joseph

Nelson, the plaintiff's vice president, who has personal knowledge of the facts and circumstances. The plaintiff seeks to recover the liquidated sum of \$63,578.77 due pursuant to an equipment lease agreement executed by the corporate defendant on December 15, 2005, with guarantees by the other co-defendants. The defendant corporation agreed to remit monthly payments of \$2,038.00 plus tax in the amount of \$170.66, or a total monthly payment of \$2,208.66 for 60 consecutive months to the plaintiff, a financier of the equipment leased to the corporate defendant. The corporate defendant accepted the equipment. The corporate defendant ceased payment, and has been in default since July 30, 2008.

The lease sets forth in paragraph 15 a process for remedies with respect to the corporate defendant, however the defendants never revoked, denied nor disputed the existence or validity of the lease and the guarantees. The plaintiff claims the defendants breached the lease, and on or about September 22, 2008, the plaintiff sold the equipment to a third party recovering \$7,500.00 which is credited to the defendants. The plaintiff indicates the revised amount due to it from the defendants as of October 2008, is \$58,553.70 plus interest from October 17, 2008 plus late charges, reasonable attorney fees and expenses for this action.

The plaintiff's counsel states, in an affirmation dated December 22, 2008, the defense alleges, in the first affirmative defense. the plaintiff lacks the capacity to do business in New York State, to wit the plaintiff is an unauthorized foreign corporation

which is not licensed here. However, the plaintiff's counsel submits that first affirmative defense is without merit because the plaintiff is not a corporation, but rather a limited liability company organized pursuant to the laws of New Jersey, and duly registered with the New York State Secretary of State, so authorized to do business in New York. The plaintiff's counsel states the defense alleges, in the second affirmative defense, the plaintiff sold the equipment, so the funds from the sale should be offset against any amount due from the defendants to the plaintiff. The plaintiff's counsel submits the plaintiff, as addressed in Nelson's affidavit, has offset against the amount stated in the summons and the complaint, so this second affirmative defense is moot and fails to raise a triable issue of fact. The plaintiff's counsel states the defense alleges, in the second affirmative defense, the plaintiff sold the equipment, and that sale was not commercially reasonable, so the plaintiff is not entitled to recover any sums against these defendants. The plaintiff's counsel contends that defense position is without merit as a matter of law, since the plaintiff sold the equipment in a commercially reasonable manner.

The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia states, in an affidavit dated February 11, 2009, the defendant Giuseppe Faraci a/k/a Joe Faraci died on January 21, 2009, so this action must be stayed against the defendant Giuseppe Faraci a/k/a Joe Faraci. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia contends the plaintiff failed to make a *prima facie* showing of entitlement to summary judgment as a matter of law. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia points to documents

submitted with opposition papers which demonstrate the plaintiff committed acts which neutralize the defendants' obligations under the guaranty. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia claims the choice of law is New Jersey, and submits the law of that State is the same as New York since the parties dealt with the provisions of the Uniform Commercial Code. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia asserts the defendants paid a \$32,976.00 deposit for the equipment, that is 30% of the total cost. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia challenges the cogency of the equipment sale since the defense attorney sent notice to the plaintiff that the corporate defendant ceased business sometime in June 2008, and the amount obtained from the sale is not commercially reasonable. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia states the defense attorney followed with another notice about removing the equipment, and submits the plaintiff did not have a warehouse to do it, and waited more than three months to sell the property because it could not properly store it which was commercially unreasonable. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia avers the equipment, a tomato packing line, was sold for \$7,500.00 when the December 2005 invoice balance reflected \$65,951.00, and the fair market value of the equipment was \$98,927.00 together with a demonstration the plaintiff lacked experience with handling a commercially reasonable sale. The defendant Angelo Ingrassia a/k/a Angelo J. Ingrassia calls into question the dubiousness of utilizing only an electronic auction with scant details presented to the Court. The defendant Angelo Ingrassia a/k/a

Angelo J. Ingrassia maintains the wide variance between the sale proceeds and the value of the equipment require close examination by the Court, to wit discovery with respect to documents and sworn testimony.

The plaintiff's counsel states, in a reply affirmation dated February 23, 2009, the plaintiff's motion stands largely unopposed because the defendants do not contest their default nor liability under the lease agreement, rather the defendants contest the assessment of damages. The plaintiff's counsel states the defendants have not raised issues of fact on commercial reasonableness as a matter of law. The plaintiff's counsel asserts the plaintiff's notice of the disposition of the collateral was sufficient, and commercially reasonable. The plaintiff's counsel maintains a fair market analysis of the equipment based upon an internet and trade reference search showed the most the plaintiff could hope to recover for the equipment was approximately \$9,000.00, so the gross sale proceeds, prior to paying the auction costs, was almost exactly in line with the maximum amount the plaintiff could have hoped to recover despite the defense allegations to the contrary. The plaintiff's counsel avers the guarantees are valid and enforceable as a matter of law. The plaintiff's counsel contends a CPLR 3214 (b) stay pending the outcome of the plaintiff's motion is inapplicable because the defendants fail to satisfy the requirements of CPLR 3214 (f), and have not demonstrated the likelihood any discovery will lead to evidence sufficient to defeat this motion. The plaintiff's counsel argues the mere hope such evidence may be uncovered is insufficient. The

plaintiff's counsel notes the claims against the defendant Giuseppe Faraci a/k/a Joe Faraci, who allegedly died, are not stayed because CPLR 1015 (b) is inapplicable since New York law clearly states most claims survive, specifically actions involving contracts, such as here. The plaintiff's counsel opines the Court should consider a substitution of the representative of the deceased party as set forth in CPLR 1015 (a).

The Court notes the defendants have not met their burden of showing their claim the defendant Giuseppe Faraci a/k/a Joe Faraci died on January 21, 2009. There is no death certificate nor other admissible evidence showing that circumstance. The Court determines the plaintiff has established a prima facie showing of entitlement to summary judgment. In opposition, the defendants fail to show there are any genuine triable issues of fact (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The Court has considered the factors involved in testing whether the plaintiff has met the tests regarding the commercial reasonableness of the equipment sale (*Banks Trust Co. v. J.V. Dowler & Co., Inc.*, 47 NY2d 128 [1979]; *Federal Deposit Ins. Corp. v. Herald Square Fabrics Corp.*, 81 AD2d 168 [2nd Dept, 1981]). This Court holds the plaintiff has shown, pursuant to the Uniform Commercial Code, the disposition of the equipment was commercially reasonable. This Court finds the defendants' answer is merely a general denial of the plaintiff's claims, and fails to raise triable issues of fact.

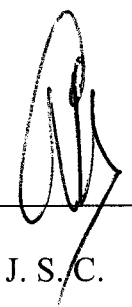
Accordingly, summary judgment is granted to the plaintiff for \$63,578.77 plus interest from July 30, 2008 together with costs and disbursements. The Clerk is directed

to enter judgment pursuant to CPLR 5016 upon submission of a proposed judgment which complies with the mandates of CPLR 5018.

So ordered.

Dated: **June 22, 2009**

ENTER:



J.S.C.

ENTERED
JUN 24 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE
FINAL DISPOSITION

FINAL DISPOSITION XXX