

NTL Capital LLC v Jethani

2009 NY Slip Op 32051(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 106858/08

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

NTH Capital, LLC
- v -
Jethani, Arun

INDEX NO. 106858/2008
MOTION DATE 6/10/09
MOTION SEQ. NO. 001
MOTION CAL. NO. 10

The following papers, numbered 1 to 4 were read on this motion to/for 85

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits	<u>2, 3</u>
Repeating Affidavits	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
SEP 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/31/09 _____ *SAT*
J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
NTL CAPITAL LLC , ASSIGNEE IN INTEREST TO
WELLS FARGO BANK, NATIONAL ASSOCIATION,
Plaintiff,

-against-

ARUN JETHANI, ALBERT SAVAR a/k/a ALBERT A.
SAVAR, JAMES SULLIVAN a/k/a JIM SULLIVAN,
MARY BITANGA,
Defendants.

Index No. 106858/08
Mot. Seq. 001
Submission Date 6/10/09
Calendar No. 10

DECISION & ORDER

Appearances:

Plaintiff:

Malen & Associates, P.C.
By: Timothy Murtha, Esq.
123 Frost Street
Westbury NY 11590
516-479-5952

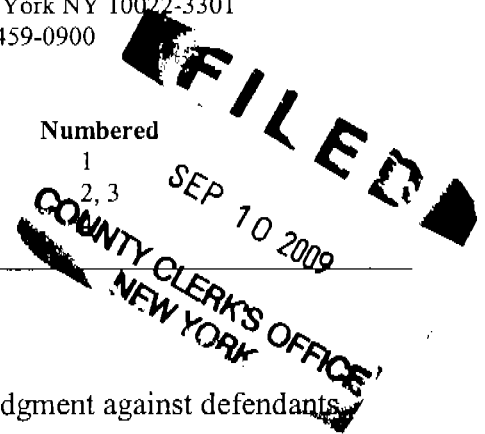
Defendants

Law Offices of Andrew P. Saulitis, P.C.
By: Andrew P. Saulitis, Esq.
555 Madison Avenue
New York NY 10022-3301
212-459-0900

Papers considered on this motion for summary judgment:

Papers

Notice of Motion, Affirmation in Support, Exhibits
Defendant's Opposition Affirmation, Exhibits, Memo of Law
Reply Affirmation



PAUL G. FEINMAN, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendants
alleged guarantors of a lease agreement between plaintiff's assignor and AtBalance, Inc.
(AtBalance), a non-party to this action. The plaintiff also moves, pursuant to CPLR 3211 (a) (6)
and (8), to dismiss defendants' counterclaims. For the reasons set forth below, the motion is
denied in its entirety.

BACKGROUND

In support of its motion, plaintiff provides a copy of an equipment finance lease agreement,
dated December 12, 2000, between AtBalance and Crocker Capital, Inc. (Crocker). This lease was

purportedly signed by defendant James Sullivan on behalf of AtBalance. Plaintiff also supplies personal Equipment Lease Guaranties, allegedly signed by defendants, individually, on December 12, 2000.

Plaintiff's motion papers also include a document entitled "Assignment and Bill of Sale," dated December 12, 2000, allegedly entered into by Crocker and Terminal Marketing Company (Terminal), another non-party to the instant action. In addition, plaintiff provides a document entitled "General Assignment & Bill of Sale," dated December 8, 2006, between Wells Fargo Bank, National Association, as indenture trustee, and Terminal, in favor of NTL Capital LLC.

Also among the moving papers are: (1) a cancelled check, dated December 8, 2000, in the sum of \$1,358.50, made payable to Crocker by AtBalance; (2) a document purporting to be an authorization for automatic direct debit from the AtBalance account, dated December 8, 2000, in favor of Crocker, permitting a monthly deduction to Crocker of \$4,279.32 for 24 months; (3) an insurance verification, dated July 10, 2000, indicating that AtBalance maintained insurance for leased equipment; and (4) a document, allegedly signed by Crocker, listing documents in its possession as of December 12, 2000, which indicates that the subject leased equipment was not delivered to or accepted by AtBalance, although this document is not signed by AtBalance. Lastly, there is an unsigned purchase order from Globix, an equipment supplier, listing various computer equipment.

In their answers, all of the defendants deny knowledge of the alleged lease and guaranties. Defendants have made demands for interrogatories, notices to produce, and requests to admit. Plaintiff has failed to respond to any of the defendants' demands.

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 (1st 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 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

In this action, plaintiff failed to carry its initial burden of establishing its right to judgment as it failed to submit the alleged lease, guaranties, and proof of non-payment in legally admissible form (*Key Equipment Finance, Inc. v South Shore Imaging, Inc.*, 39 AD3d 595 [2d Dept 2007]; *Advanta Leasing Services v Laurel Way Spur Petroleum Corp.*, 11 AD3d 571 [2d Dept 2004]). Specifically, the lease and guaranties submitted with its motion, are of no use to the court absent testimony from a witness or an affidavit from a person with personal knowledge to identify the lease and guaranty, authenticate it by attesting to its execution, and thereby lay the foundation for its admissibility. See generally *Zuluaga v P.P.C. Construction, LLC*, 45 AD3d 479 (1st Dept 2007). Merely annexing these documents to an attorney’s affirmation is inadequate.

Furthermore, plaintiff was not a party to the alleged lease, guaranties, or initial assignment; defendants, in their answers, deny those documents’ authenticity; and plaintiff does not offer another authenticated signature for the court to compare with the signatures on those documents. CPLR 4536; *Odom v Goord*, 271 AD2d 723 (3d Dept 2000). Consequently, there is no evidence

as to the authenticity of those signatures. Without an authenticated and admissible lease, guaranty or assignment, the documents submitted constitute hearsay, and are insufficient to support the instant motion. It bears noting that these documents do not constitute a business record *of the plaintiff*, because they were not made by plaintiff in its regular course of business; rather they were generated by other companies and merely maintained in plaintiff's records. *Lodato v Greyhawk North America, LLC*, 39 AD3d 494 (2d Dept 2007).

Additionally, there is no evidence that AtBalance ever received the equipment. In order for any assignee of Crocker to be entitled to Crocker's rights, it must be evidenced that Crocker was entitled to rights by performing its obligations under the contract. An unsigned purchase order, and written and testimonial evidence that the equipment was never delivered, create a factual question as to whether Crocker ever performed under the purported lease. *See Motorola Communications & Electronics, Inc. v National Equipment Rental, Ltd.*, 74 AD2d 564 (2d Dept 1980)(evidence presented that plaintiff substantially performed under the contract, and that the equipment was observed at defendant's place of business). At least proof of delivery, which does not appear in the case at bar, would indicate substantial performance on Crocker's part. *Standard Textile Company, Inc. v National Equipment Rental, Ltd.*, 80 AD2d 911 (2d Dept 1981).

The court also finds unavailing plaintiff's arguments that the existence of a cancelled check made out to Crocker, and evidence of equipment insurance, prove the existence of the lease. The check was made out several days prior to the alleged date of the lease, for an amount far less than the amount required under the lease, and the insurance verification form indicates that AtBalance had equipment insurance five months prior to the date of the alleged lease. Neither document proves the execution of a lease dated December 12, 2000.

Nor is there any evidence from an individual with personal knowledge that AtBalance ever defaulted on the alleged lease. Plaintiff's motion includes an authorization from AtBalance to its bank to have the bank automatically deduct lease payments in favor of Crocker. However, once again, this authorization was entered into prior to the date appearing on the lease, and does not prove that the lease was eventually executed. Additionally, there is no evidence, one way or the other, as to whether any such deductions from AtBalance's account were ever made or requested.

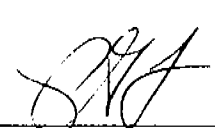
Finally, plaintiff's argument that the lease contained a "hell or high water clause," whereby the lessee is required to fulfill its obligations regardless of any problems with the equipment, cannot save plaintiff's motion, since material questions exist as to the authenticity of the lease in which that clause appears. *Wells Fargo Bank, National Association v Stargate Films, Inc.*, 18 AD3d 264 (1st Dept 2005).

For the all the above stated reasons, plaintiff's motion for summary judgment on the complaint must be denied. The court also denies the branch of plaintiff's motion which seeks dismissal of the counterclaims pursuant to CPLR 3211 (a) (6) and (8). Although defendants, in their answers, have asserted numerous affirmative defenses, none has asserted a counterclaim, thus granting plaintiff relief as to none-existent counterclaims would be meaningless. It is therefore

ORDERED that plaintiff's motion for summary judgment and dismissal of defendants' counterclaims is denied.

Dated: August 31, 2009

2009 Pt 12 D&O_1068858_2008_001_LD_JAH



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