

Orix Fin. Servs., Inc. v Steve King Constr., Inc.

2009 NY Slip Op 32351(U)

October 8, 2009

Supreme Court, New York County

Docket Number: 113771/08

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

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

Plaintiff,

-against-

INDEX NO. 113771/08

MOTION SEQ. NO. 001

STEVE KING CONSTRUCTION, INC.,
STEVEN W. KING and KARLA D. KING,

Defendants.

The following papers, numbered 1 - 5 were considered on this motion to/for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3, 4</u>
Replying Affidavits	<u>5</u>

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is decided to the extent set forth below.

This action arises out of alleged unpaid payments due to plaintiff by defendants pursuant to a written note and personal guaranties by the individual defendants. On April 6, 2006, J.W. Burress, Inc. ("Burress") entered into a Conditional Sale Contract Note (the "Note") with defendant Steve King Construction, Inc. ("King Construction"), whereby it sold to King Construction a used 2001 Moxy MT-31 Truck S/N 710103 (the "Equipment"). On the same date, the individual defendants Steven W. King and Karla D. King executed personal guaranties, pursuant to which they agreed to be liable for the performance of all obligations of King Construction with regard to the Note. Also on the same date, Burress assigned the Note to plaintiff.

King Construction defaulted in making the required payments due on January 7, 2008 and all

subsequent payments. As a result, plaintiff accelerated the balance due and owing. When payment was not forthcoming, plaintiff took possession of the Equipment, pursuant to the terms and conditions of the Note.

On June 3, 2008, plaintiff conducted an auction of the Equipment, after providing defendants with the requisite notice and publishing the Notice of Public Sale in the Pittsburgh Post-Gazette on May 20, 2008 and May 27, 2008. The Equipment was sold for \$44,000.00 and after expenses for the auction were deducted, a net credit of \$38,525.00 was applied to the amount owed to plaintiff by King Construction.

Plaintiff now moves for summary judgment, pursuant to CPLR 3212, against defendants in the sum of \$54,953.39, plus default interest at the post-maturity rate set forth in the Note, from the day after the sale on June 3, 2008 and attorneys' fees in the amount of \$10,990.68, plus costs and disbursements of this action.

It is well settled that 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 demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

Plaintiff's motion is granted and judgment is awarded in its favor as indicated below. It is undisputed that the parties entered into the Note and the guaranties, the terms of which are clearly spelled out therein. There is also no dispute that King Construction defaulted in making payments, which entitled plaintiff to accelerate the remaining principal and interest due. Further, it is clear that

plaintiff was entitled to re-possess the Equipment in light of King Construction's default and conduct an auction to sell the Equipment and seek any remaining monies owed to plaintiff after the sale.

Defendants contend that the motion for summary judgment should be denied because: (1) the documents attached as exhibits in support of plaintiff's motion are illegible and should be disregarded; (2) there are material issues of fact; (3) the Equipment was not sold in a commercially reasonable manner because it was advertised and sold as a 2001 model, and not as a 2003 model; (4) attorneys' fees sought by plaintiff in the amount of \$10,990.68 are unreasonable; and (5) summary judgment is premature as no discovery has been conducted.

In their opposition, however, defendants fail to establish any *genuine* issues of material fact, which would preclude the granting of summary judgment. While defendants have asserted various factual issues, they did so in a conclusory fashion, which are insufficient to warrant denial of the motion. "Bald conclusory assertions, even if believable, are not enough (to defeat summary judgment)." *S. J. Capelini Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 (1974) (internal quotations and citations omitted). The party opposing the summary judgment motion must "present[] proof in evidentiary form substantiating" that there is a genuine issue of fact. *Id.*

With respect to defendants' first argument that summary judgment should not be granted because some of the documents submitted by plaintiff are illegible, the Court notes that although difficult to read, most of the significant documents are legible and, moreover, plaintiff has submitted a clearer version of all exhibits, attached to its reply papers. In any event, while defendants challenge the legibility of the documents, they do not dispute the existence of the Note, the terms of the Note, and their failure in making payments pursuant to the Note.¹

Defendants also argue that there is a material issue of fact as to whether the Equipment was sold

¹ As King Construction was a party to the Note, presumably, defendants have a copy of the Note in their possession and could have adequately contested the Note without needing to rely on the illegible copy, if such was their intention.

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in a commercially reasonable manner since it was advertised and sold at the auction as a 2001 model, instead of a 2003 model. Defendants make this assertion, relying on the fact that the Equipment was listed as a 2003 model in the rental agreement between King Construction and Burrell, prior to the purchase of the Equipment by King Construction. However, the rental agreement is not the subject of this lawsuit, and the Note, which this breach of contract action is based upon, clearly lists the Equipment as a 2001 model. Furthermore, plaintiff has submitted evidence to indicate that, even if the rental agreement listed the Equipment as a 2003 model, thereafter, steps had been undertaken to ascertain when the Equipment was manufactured. The Equipment was determined to be a 2001 model, prior to it being sold to King Construction (as illustrated by the fact that it was listed as a 2001 model in the sales contract) and later at the auction. As the burden shifts to the opposing party to provide evidentiary proof of genuine issues of material fact after movant makes a prima facie showing of entitlement to judgment as a matter of law, defendants have not submitted sufficient evidence to contradict plaintiff's assertions. *Zuckerman*, 49 NY2d at 562.

However, with regard to the attorneys' fees sought by plaintiff, defendants contend that the requested amount is unreasonable. In its reply papers, plaintiff "agree[s] to limit its attorneys fees to all time actually spent on this matter by its attorney" and requests a hearing to determine attorneys' fees. *Jean DeGrave Reply Aff ¶¶ 20-21*. Thus, plaintiff's claim for attorneys' fees is severed and shall be referred to a referee to hear and determine in accordance with CPLR 4317(b), provided that plaintiff complies with the below in a timely fashion.

While defendants allege that no discovery has yet taken place, defendants have not demonstrated that necessary facts are unavailable to them to adequately oppose this motion, thus requiring discovery, as contemplated in CPLR 3212(f). Thus, this remaining argument is without merit.

Accordingly, it is

ORDERED that the motion is granted to the extent that the Clerk of the Court is directed to enter

judgment in favor of plaintiff and against defendants Steve King Construction, Inc., Steven W. King and Karla D. King, individually and jointly and severally, in the amount of \$54,953.39, together with interest at the contract rate from the day after the sale on June 3, 2008, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's claim for attorneys' fees is hereby severed and referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served by plaintiff on the Special Referee Clerk (Room 119M) within 45 days to arrange a date for the reference to a Special Referee. Failure to comply with this order shall be deemed a waiver of plaintiff's claim for attorneys' fees; and it is further

ORDERED that within 30 days of entry of this judgment and order, plaintiff shall serve a copy upon defendants with notice of entry.

This constitutes the decision and order of the Court.

Dated: 10/8/09


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

J:\Summary Judgment\Orix Financial.Steve King Construction, sj - granted, attys fees to referee.wpd

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