

General Elec. Capital Corp. v Cinematrec Ltd.

2009 NY Slip Op 32398(U)

October 14, 2009

Supreme Court, New York County

Docket Number: 603942/2007

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 603942/2007
GENERAL ELECTRIC CAPITAL
 VS.
CINEMATREC LTD.
 SEQUENCE NUMBER : 002
 VACATE STAY/ORDER/JUDGMENT

INDEX NO. 603942/2007
 MOTION DATE 7/29/07
 MOTION SEQ. NO. 002
 MOTION CAL. NO. 3

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1
2-4
5

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 AND CROSS MOTION(S) ARE DECIDED
 IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

FILED
 OCT 19 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10/14/09

[Signature]
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST reference

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

-----X
GENERAL ELECTRIC CAPITAL CORPORATION,

Plaintiff,

against

CINEMATREC LTD. AND HERBERT RECTOR,
Defendants.

Index Number 603942/2007
Mot. Seq. No. 002

DECISION AND ORDER

-----X

For the Plaintiff:

Nanis & Rinaldi, LLP
By: Therese M. Reyes, Esq.
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For the Defendants:

Herbert Rector, *pro se*
By: Tabor Rector, power-of attorney
561 W. 147th Street #7
New York NY 10031

Papers considered in review of this motion to vacate & cross-motion for sanctions

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answer and Motion for Sanction; Answer	2, 3
Affidavit of Service	4
Reply Affirmation	5

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OCT 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision.

By decision dated October 23, 2008, the court denied plaintiff's motion for summary judgment, based on insufficient proof, and directed that the parties were to appear for a preliminary conference on November 12, 2008. The same decision also noted that in the future, the corporate defendant was to appear by counsel (CPLR 321 [a]). On November 12, 2008, the action was dismissed in its entirety based on plaintiff's default in appearance at the preliminary conference.

Plaintiff moves pursuant to CPLR 5015 (a) (1) to vacate the dismissal and restore the matter to the calendar; plaintiff further asks that the court grant renewal of its previous motion

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pursuant to CPLR 2221, and upon renewal, that it be granted summary judgment against both defendants pursuant to CPLR 3212.

Defendants cross-move for sanctions. For the reasons set forth below, the motion is granted in part and otherwise denied, and the cross-motion is denied.

A default judgment will be vacated when the movant proffers a justifiable excuse for the default and a meritorious cause of action (*Barasch v Micucci*, 49 NY2d 549 [1980]). In assessing the motion to vacate a default judgment, the court will consider, among other factors, the presence of excusable neglect and delay, absence of prejudice, a meritorious cause of action, and good faith in prosecuting or defending the action (*Heffney v Brookdale Hosp. Center*, 102 AD2d 842 [2d Dept], *app. dismissed* 63 NY2d 770 [1984]). Here, plaintiff's counsel avers that she had a family medical emergency, was unable because of the emergency to find other counsel to appear in her stead, and did not have a way to contact the defendants to inform them of her need for an adjournment; she apparently did contact the part clerk (Mot. Reyes Aff. ¶¶ 8-9). As to the merits of its claim, plaintiff submits copies of the two lease agreements at issue, including an enlargement of the portion of the lease containing the terms pertinent terms to this litigation (Mot. Ex. A, Reply Ex. A), the affidavit of its litigation specialist who reviewed and describes the documents and sets forth the terms of the two agreements and their breach by defendants, which includes an out-of-state certification pursuant to CPLR 2309 (c) (Mot. Boddicker Aff.), a copy of the October 2007 notification by Apple Financial Services that the two lease agreements had been sold and assigned to plaintiff, GE Capital (Mot. Ex. A), and a copy of the two October 31, 2007 notices of default sent to defendants demanding the overdue payments and threatening automatic acceleration of the payments due and repossession of the equipment (Mot. Ex. B).

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According to plaintiff, after commencement of the litigation, defendants made payments in the amount of \$2,118.63, and have been given credit for those payments, but remain in default for the entirety of the accelerated balance plus interest (Boddicker Aff. ¶ 17)

Defendants' opposition, which can only be considered as to the individual defendant, contends first that plaintiff has not cured the defects in its original motion, and second that vacating the default would be prejudicial because counsel for plaintiff continues to seek continuances, in addition to her non-appearance in November 2008, which is "costly to [defendants] both in time and stress" (Def. Answer & Motion for Sanction). As noted above, plaintiff has submitted enlarged and better quality copies of the relevant terms of the lease agreements as well as a new affidavit of merits, notarized and certified. As concerns the procedural history, plaintiff's counsel replies that she has appeared in court at every scheduled date after the preliminary conference. She concedes she asked for an adjournment of the motion on March 31, 2009, but avers this was because defendants appeared with papers that had not been served on plaintiff. She again asked for an adjournment on April 14, 2009, because defendants had only served their opposition papers the day before and she had not received them (Reply Aff. ¶ 9).

There is a strong public policy that matters be disposed of on the merits in the absence of real prejudice (*Stephenson v Hotel Empl. and Rest. Empl. Union Local 100 of AFL-CIO*, 293 AD2d 234, 234 [1st Dept. 2002]). Defendants have not shown actual prejudice, in particular as they themselves have not fully complied with court deadlines. Accordingly, the branch of plaintiff's motion seeking to vacate the default is granted.

In general, a motion for leave to renew under CPLR 2221(e) is based on new facts not

offered in the prior motion and should include the reason for the failure to include such facts (*Castillo v Zimmerly*, 260 AD2d 243 [1st Dept. 1999]). Here, after the court held that the poor quality and small type face of the copy of the lease agreement failed to establish plaintiff's claims, plaintiff's counsel proffers a more legible copy of the lease agreement, enlarged, that it obtained from the plaintiff, and explains that it is "not regular practice to forward originals to counsel unless needed for trial" (Reyes Reply Aff. ¶ 6). The lease agreement contains terms addressing default, acceleration of payments, and attorney's fees. Although plaintiff's attorney is reminded that the standard to grant a motion on summary judgment requires initial submission of legible evidentiary proof of the claim, the court, in its discretion, may grant renewal of a motion in the interest of justice (*see Garner v Latimer*, 306 AD2d 209, 210 [1st Dept. 2003]). Such relief may still be properly granted so as not to "defeat substantive fairness" (*Garner*, at 211, quoting *Metcalf v City of New York*, 223 AD2d 410, 411 [1st Dept. 1996] [citation omitted]). Given that plaintiff has responded to the court's objections and provided sufficient documentation, the branch of plaintiff's motion seeking leave to renew its motion is granted.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Plaintiff establishes that Cinematrec Ltd. entered into two lease agreements with plaintiff's predecessor in interest, Apple Financial Services, on about May 1, 2007, for certain equipment which was to be delivered to two different addresses in New York City, for which

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monthly payments were owed for a period of 36 months, the payments of which were guaranteed by Herbert Rector, the company's president. Under one agreement, Cinematrec leased equipment at a monthly rate of \$260.30 for 36 months. Under the second agreement, Cinematrec leased equipment at a monthly rate of \$516.20 for 36 months. The agreements provided for the calculation of late charges as liquidated damages, and that upon default, all payments would be accelerated, the equipment would be immediately repossessed, and all costs of collection, including attorney's fees, would be owed by the lessees. According to plaintiff, Cinematrec defaulted on one lease agreement as of July 1, 2007, and on the other as of June 26, 2007. (Boddicker Aff. ¶ 16). By letters dated October 31, 2007, plaintiff demanded receipt of the past due payments within seven days or, under the terms of agreement, it would demand immediate accelerated payments and immediate repossession of the equipment (Mot. Ex. B). After litigation commenced, defendants remitted \$2,118.63, and was given credit for that amount (Boddicker Aff. ¶ 17). Plaintiff calculates it is owed a total of \$36,837.78 for both leases, plus interest (Boddicker Aff. ¶ 18). As to the first and fourth causes of action alleging breach of contract, it seeks an entry of judgment against both defendants in the amount of \$36,837.78 through December 31, 2008, plus interest. As to the second cause of action, plaintiff seeks the immediate possession of the equipment. As to the third and fifth causes of action, it seeks attorney's fees in the amount of \$3,398.00 and costs of \$935.00 against both defendants.

Here, the corporate defendant is deemed to have defaulted, as it continues to fail to appear through an attorney in violation of CPLR 321 (a). The individual defendant, the guarantor, is represented by his son Tabone Rector who has power-of-attorney. He does not submit any evidence in opposition to the motion for summary judgment that raises a question of fact.

Contrary to his arguments, the documentary evidence now submitted by plaintiff establishes its *prima facie* entitlement to summary judgment as a matter of law. The March 2007 answer filed by defendant offers only a general denial of the claims, without affirmative defenses, and he proffers nothing that raises a question of fact. Accordingly, the branch of the motion for summary judgment is granted as against defendant Herbert Rector. However, as the calculations of the amounts owed are not clearly explained, in particular as to the number of payments made and the number remaining, as well as the other terms, the proper amount of damages, in addition to the determination of reasonable attorney's fees, will need to be established at a hearing.

Plaintiff also seeks return of the equipment leased or an order allowing it to enter the premises and take possession and remove the equipment. According to the terms of the lease, the plaintiff has an explicit right to re-take possession of the leased equipment immediately, in case of default. CPLR 7102, which governs actions for the recovery of chattel, requires that "application for an order of seizure...be supported by an affidavit," which in addition to clearly identifying the chattel, shall, in relevant part, state: 1) "that the plaintiff is entitled to possession"; 2) that the defendant is in wrongful possession of the chattel; 3) the status of any other actions brought by plaintiff to recover the chattel; 4) the value and class of the chattel in question; 5) proof, if the plaintiff seeks an order allowing the sheriff to forcibly enter and search for the chattel, of the location as well as "facts sufficient to establish probable cause to believe that the chattel is located at that place"; and 6) that "no defense to the claim is known to the plaintiff." (CPLR 7102[c]).

Plaintiff's affidavit does not clearly identify the chattel, the value, or proof of the location of the equipment. The "Schedule A" attached to the verified complaint (Mot. Ex. C), contains an

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apparent description of the various pieces of equipment, but without their value or delivery location. Although the lease provides that defendant is not to remove the equipment from the premises once delivered, and allows for immediate repossession of the equipment by plaintiff, there is no clause explicitly allowing plaintiff the right to re-enter the premises of defendant to repossess the leased equipment. Therefore, as plaintiff has not satisfied the CPLR 7102 requirements, the branch of the motion seeking an order for defendants to return the equipment, or for the right to scize the chattel, cannot be granted at this time.

Defendant's cross-motion seeking sanctions based on plaintiff's counsel's non-appearance in court on November 12, 2008, and the two subsequent adjournments of the motion, is denied, as the two adjournments in question were due to defendants' late service of papers. It is

ORDERED that the motion to vacate the dismissal of the action on November 12, 2008, is granted and upon vacatur, the motion to renew the motion denied on October 23, 2008, is granted, and upon renewal, the motion for summary judgment is granted to the extent that Cinematrec, Ltd., which has defaulted in appearance inasmuch as a corporation must appear by counsel, and Herbert Rector, who has appeared by Tabore Rector, who has power-of-attorney, are found liable and the matter set down for an inquest as to damages before a Special Referee; and is otherwise denied; and it is further

ORDERED that upon service of a copy of this order on the Referee Clerk (60 Centre St., Rm. 119), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate Special Referee's calendar for an assessment of the amounts owed under the two lease agreements, and for an assessment of

reasonable attorney's fees; and it is further

ORDERED that upon confirmation of the Special Referee's report, the Clerk of Court shall enter judgment in plaintiff's favor, together with attorney's fees, costs and disbursements as against both defendants.

This constitutes the decision and order of the court.

Dated: October 14, 1009
New York, New York



J.S.C.

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