SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

MANUFACTURERS AND TRADERS TRUST COMPANY,

Plaintiff,

INDEX No. 019571/08

MOTION DATE: Nov. 19, 2009
Motion Sequence # 005

-against-

C.D. AUTOS, INC. d/b/a MAZDA AUTOMOBILES OF GREAT NECK, ALL ISLAND CARS, LLC d/b/a BAYSIDE KIA, P&C MOTORS, LLC, DECHIUTIIS REALTY, LLC, CHILD REALTY CORP. and CLAUDI D'CHIUTIIS,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Affirmation/Affidavit in Support..... XX
Memorandum of Law..... XX
Reply Memorandum of Law..... X

This motion, by the attorneys for the plaintiff, for an order granting summary judgment to the plaintiff Manufacturers and Traders Trust Company (M&T Bank) against defendant All Island Cars, LLC d/b/a Bayside Kia (All Island Cars) on M & T Bank's first

cause of action for replevin of the collateral; and against defendants All Island Cars, P & C Motors, LLC, DeChiutiis Realty, Child Realty Corp. and Claudio D'Chiutiis, jointly and severally, on M & T Bank's second, third and fourth causes of action for breach of the Loan Documents, Forbearance Agreement and Guaranties (as defined in the Milliken Affidavit) in the amount of $1,914,304.30, consisting of the indebtedness owed under the Loan Documents, Guaranties and the Forbearance Agreement as of September 23, 2009, plus judgment as a matter of law for all actual costs, expenses and attorneys' fees which plaintiff has incurred in connection with defendants' defaults (including the actual costs, expenses and attorney's fees of this action), with the matter to be set for an inquest to determine that amount, is **granted**.

This is a loan collection case. The following facts are not in dispute: The plaintiff M&T Bank extended:

- (i) a $4,500.00 Revolving Floor Plan Line of Credit Loan (Floor Plan Loan) and a $250,000.00 Business Access Line of Credit Loan (BALOC) to defendant C.D. Autos, Inc. (C.D. Autos filed for bankruptcy in August 2009. This action is stayed as to C.D. Autos, but not as to the other defendants. C.D. Autos' indebtedness is unconditionally guaranteed by each of the other defendants, none of whom has filed for bankruptcy protection.)

- (ii) a $3,200,000.00 Floor Plan Loan and a $250,000.00 BALOC to defendant P&C Motors LLC;

- (iii) a $2,000,000.00 Floor Plan Loan to defendant All Island Cars, LLC.

Included among the Loan Documents are General Security Agreements between M & T Bank and each of the Dealership Defendants, pursuant to which their respective indebtedness and obligations owed to M & T Bank are secured by substantially all of their business assets. M & T Bank has a first lien on the collateral, which it has perfected by filing UCC-1 financing statements. In addition, the respective indebtedness and obligations of the dealership defendants were guaranteed, without limitation, under Guaranties executed by each of the other dealership defendants and the Guarantors. Pursuant to the Loan Documents, when the dealership defendants sold any motor vehicle inventory, they were obligated to immediately remit the proceeds to M & T Bank to the extent of the amount M & T Bank financed with respect to such vehicle inventory. Failure to do so was a default under the Loan Documents and entitled M & T Bank to immediately assert and enforce its

rights under the Loan Documents, including, without limitation, demanding immediate payment of all indebtedness and obligations owed to M & T Bank under the Loan Documents, and immediately taking possession of all of M & T Bank's Collateral. Plaintiff asserts and defendants do not refute, that, commencing in or about October 2007, the dealership defendants engaged in conduct that caused them to be in default on their obligations to M & T Bank under the Loan Documents. Among other things, the dealership defendants sold motor vehicle inventory without remitting the proceeds to M & T Bank as required by the loan obligations. In the automobile business, the dealership defendants' conduct is described as, and renders them "**Out of Trust**" on their obligations to M & T Bank under the Loan Documents. Plaintiff also asserts the dealership defendants denied M & T Bank access to inventory reports and other financial information despite repeated requests from M & T Bank. M & T Bank demanded that the dealership defendants immediately satisfy their respective Out of Trust Obligations, but despite such demands and the dealership defendants' promises to comply with them, the dealership defendants not only failed to satisfy, but continued to increase, their Out of Trust Obligations. On August 4, 2008, M & T Bank and the defendants entered into a Forbearance Agreement. Pursuant to the terms of the Forbearance Agreement, the defendants paid approximately $1.2 million to M & T Bank towards their outstanding indebtedness. In the Forbearance Agreement, the defendants acknowledged that they were in default on their respective obligations to M & T Bank for various reasons, including, without limitations, that the dealership defendants were Out of Trust. The defendants also confirmed their respective obligations under the Loan Documents and Guaranties, and agreed that the dealership defendants would cease their Out of Trust conduct and satisfy their Out of Trust Obligations as provided for in the Forbearance Agreement. The defendants further acknowledged the amounts owed by the dealership defendants; and that, but for its agreement to forbear, M & T Bank would be immediately entitled to exercise an enforce various rights, remedies and recourse under the Loan Documents and Guaranties and applicable law with respect to the defendants and the Collateral.

Plaintiff contends that despite their agreeing not to do so in the Forbearance Agreement, the dealership defendants continued to sell vehicles Out of Trust, thereby increasing the Out of Trust Obligations. On October 17, 2008, M & T Bank (through its counsel) issued a Demand Letter to the defendants (through their counsel). The Demand Letter cited the dealership defendants' continued Out of Trust vehicle sales of at least 22 additional vehicles and demanded immediate payment of all of the outstanding indebtedness then owed to M & T Bank under the Loan Documents, Guaranties and Forbearance Agreement. This included not just the Out of Trust debt, but all of the amounts that had been

drawn down under the floor Plan Loans, the amounts due under the BALOC Loans, and the amounts due under the Forbearance Agreement. In the absence of immediate satisfaction of all indebtedness owed to M & T Bank under the Loan Documents, the Demand Letter demanded that the defendants turn over the Collateral to M & T Bank. It is not disputed that the defendants remain in default under the parties' various agreements.

On October 28, 2008 M & T Bank commenced this action seeking: (i) replevin of the Collateral in the possession of C.D. Autos and All Island Cars, and (ii) judgment in favor of M & T Bank and against each of the defendants, respectively, in the amount of the indebtedness owed under the Loan Documents, Guaranties and the Forbearance Agreement, including all actual costs, expenses and attorneys' fees which M & T Bank has incurred in connection with defendants' defaults (including the actual costs, expenses and attorney's fees incurred in connection with this action).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (***Sillman v Twentieth Century Fox Films Corp.***, 3 NY2d 395, 404) . A ***prima facie*** showing of a right to judgment is required before summary judgment can be granted to a movant. (***Alvarez v Prospect Hospital***, 66 NY2d 320; ***Winegrad v New York University Medical Center***, 64 NY2d 851; ***Fox v Wyeth Laboratories, Inc.***, 129 AD2d 611; ***Royal v Brooklyn Union Gas Co.***, 122 AD2d 133). The plaintiff M & T Bank has made an adequate ***prima facie*** show of entitlement to summary judgment.

Once a movant has shown a ***prima facie*** right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (***Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.***, 46 NY2d 1065). Conclusory statements are insufficient. (***Sofsky v Rosenberg***, 163 AD2d 240, *aff'd* 76 NY2d 927; ***Zuckerman v City of New York***, 49 NY2d 557; *see* ***Indig v Finkelstein***, 23 NY2d 728; ***Werner v Nelkin***, 206 AD2d 422; ***Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides***, 80 AD2d 781, *app dism.* 53 NY2d 1028; ***Jim-Mar Corp. v Aquatic Construction, Ltd.***, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition to the motion for summary judgment the defendants assert that when they signed the forbearance agreement and the mortgage they were to receive a payment of $1 million from the plaintiff to be utilized to reduce the defendants' indebtedness. Further, defendants contend that they signed the forbearance agreement based on the affirmative

representations of the plaintiff that it would not seek to enforce its rights under the agreement until the consummation of either the sale of the dealership by the defendants or the real property which was mortgaged to the plaintiff. There is no documentary support for any of the defendants' arguments in opposition to the motion.

When the parties set forth their entire agreement in a writing, a party may not introduce extrinsic evidence or prior or contemporaneous statements to establish that a different oral agreement exists. *(See e.g.* ***W.W.W. Associates, Inc. v Giancontieri***, 77 NY2d 157, 162) ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add or vary the writing."; ***Braten v Bankers Trust Co.***, 60 NY2d 155) (refusing to enforce oral agreement that contradicted the terms of the parties' written agreement; ***Harris v Hallberg***, 36 AD3d 857, 2nd Dept., 2007). Plaintiff's argument is contradicted by the express wording of the forbearance agreement that states the agreement is effective as of the date of the agreement. It defies logic that business people with the acumen and experience of the defendants would think they were signing a "mortgage" rather than a collateral mortgage. There is not one iota of documentary evidence to support the defendants' claim that when the collateral mortgage and forbearance agreements were signed it was contemplated that there would be an advance of an additional $1 million. Nor is there any factual basis to support the defense of "equitable estoppel." There was nothing in the forbearance agreement that was "unconscionable" or caused injury to the defendants. Had the defendants not signed the forbearance agreement, the plaintiff had every right under the law to enforce the Loan Documents and the Guaranties. Averments merely stating conclusions of fact or law are insufficient to defeat summary judgment motions. *(****Banco Popular North America v Victory Taxi Management***, 1 NY3d 381).

Plaintiff is **granted** judgment on the first cause of action. Plaintiff shall submit an order on notice directing the sheriff to seize the collateral. Movant must include a list identifying with specificity the collateral to be seized (see Article 7 of the CPLR).

Plaintiff is **granted** judgment on the second, third and fourth causes of action in the amount of $1,914,304.30 plus costs and attorney's fees.

A hearing is necessary on the issue of attorney's fees. The hearing on the issue of attorney's fees is referred to the Calendar Control Part on February 24, 2010 for assignment, in the discretion of the Justice presiding, to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee.

MANUFACTURERS AND TRADERS TRUST CO. **Index no. 019571/08**

Movant is directed to file a Note of Issue no later than ten (10) days prior to such date accompanied by a copy of this Order. A copy of the Note of Issue and this Order shall be served on the Clerk of the Calendar Control Part when the Note of Issue is filed.

If the reference is assigned to a Judicial Hearing Officer or a Court Attorney/Referee, it shall be to hear and report unless the parties agree otherwise. In that connection counsel's attention is directed to the transcript requirements of 22 NYCRR §202.44. The cost of such transcript shall be borne equally by the parties with the right of the prevailing party to seek to recover the expense as a disbursement.

This decision is the order of the Court.

Dated JAN 07 2010

J.S.C.

ENTERED

JAN 13 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE