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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice,

TRIAL/IAS PART 8

THE CIT GROUP/EQUIPMENT FINANCING INC.,

Plaintiffs,

-against-

AMERICA'S IMAGING CENTER INCORPORATED d/b/a "EMPIRE IMAGING" and DR. PAYAM TOOBIAN,

Defendant.

INDEX NO.: 015466/2008
MOTION DATE: 02/26/2010
MOTION SEQUENCE: 004 and 005

The following papers read on this motion:

Notice of Motion, Affidavit, and Exhibits Annexed	1
Notice of Cross-Motion, Affidavit and Exhibits Annexed	2
Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment	3
Plaintiff's Reply Memorandum of Law	4
Reply Affidavit in Further Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Cross Motion	5
Affirmation in Response to Plaintiff's Reply Affidavit	6

PRELIMINARY STATEMENT

Plaintiff, The CIT Group/Equipment Financing Inc. ("CIT"), has moved for an Order pursuant to CPLR 3212 granting summary judgment on each of plaintiff's causes of action, and dismissing defendants' affirmative defenses and counterclaim.

Defendants, America's Imaging Center Incorporated("AIC") and Dr. Payam

Toobian("Toobian"), have cross-moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint, on the basis of defenses founded on documentary evidence and failure to state a cause of action, and an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint on the ground that the claims and causes of action have no merit.

BACKGROUND

Toobian is the owner of AIC. AIC provides medical imaging services. Plaintiff, CIT, is in the business of financing equipment purchases. In 2003, Toobian decided AIC should acquire an MRI machine manufactured by Hitachi. Toobian turned to plaintiff, CIT, to finance this purchase.

On November 19, 2003, Toobian, on behalf of AIC, executed a Master Lease Agreement and two accompanying equipment schedules.(Godish Affidavit, Exhibits F, G, & H) Additionally, on the same day, Toobian executed a personal guaranty.(Godish Affidavit, Exhibit K) The Master Lease Agreement is signed by Melissa Godish("Godish"), Assistant Vice President of CIT, but Godish joined CIT in August 2005.

Ultimately, AIC never acquired the MRI machine. Nonetheless, based on the parties' agreements, CIT wired $387,000.00 to AIC on December 3, 2003. The parties do not dispute that this money was wired to AIC, but they do dispute the nature of the money transfer and the terms for repayment. Since the transfer on December 3, 2003, AIC did make repayments to CIT. The parties do not dispute that the remaining principal balance is $172, 278.07.(Godish Affidavit, Paragraph 32, and Toobian Affidavit, page 18, lines 7-10).

On January 30, 2006, Toobian signed an "Evidence of Acceptance" agreement on behalf of AIC in his capacity as president.(see Godish Affidavit, Exhibit J). This agreement states that

> "THIS EVIDENCE OF ACCEPTANCE ("Acceptance") is executed and delivered by [AIC] ("Lessee") in respect of the Equipment(as hereinafter defined) leased by Lessee from [CIT] ("Lessor") pursuant Equipment Schedule No. 2, dated as of 11/19/2003 ..., executed pursuant to, and incorporating therein the terms and conditions of, the Master Lease Agreement dated as of 11/19/2003 ..., between Lessor and Lessee. *Id.*

It further states:

"The Equipment covered by this Acceptance (the "Equipment") consists of the following item(s):

> Together with all attachments, fixtures, leasehold improvements, replacements, substitutions, additions and accessories incorporated therein and/or affixed thereto,..." *Id.*

It also states that "The final aggregate cost of Equipment is $335,189.09."*Id.* The agreement provides that the lease will commence on January 31, 2006 and end on March 1, 2009.*Id.*

Paragraph F states:

> "The Basic Rent during the Initial Term shall be the aggregate amount of $335,186.09, payable as follows: (a) the sum of $0.00 on the Commencement Date and (b) the sum of $10,475.70 on 3/1/06 and on the first day of each of the next 35 months thereafter, plus any taxes required to be paid by Lessee pursuant to the Master Lease. *Id.*

The agreement also provides:

> "By this reference, this Acceptance shall become part of the Schedule as if set forth therein in its entirety. In the event of any inconsistency between the provisions of this Acceptance and those of the Schedule, the provisions of this Acceptance shall take precedence and govern."*Id.*

Plaintiff's amended complaint asserts the following six causes of action:

1) Breach of Contract
2) Reasonable Attorneys' fees pursuant to lease agreement
3) Money had and received
4) Quantum meruit
5) Breach of Guaranty
6) Reasonable attorneys' fees, court costs and expenses, pursuant to guaranty

Defendant AIC argues that the $172,278.07 remaining principal balance is not currently due and AIC never defaulted on that debt. Defendants argue plaintiff "improperly and unjustifiably declared this loan in default and without authority, they are seeking ... default interest, legal fees and the imposition of personal liability on the defendant, Peyam Toobian."(Toobian Affidavit, pg 18, lines 15-18). Toobian states: "While defendant AIC does

not deny receipt from CIT in December 2003 of the sum of $387,353 for leasehold improvements, or that there is a remaining balance owed to plaintiff in the amount of $172,278.07, defendants do verily deny that this balance is now due and owing to plaintiff or that defendants have defaulted in any of their obligations to plaintiff."(*Id* at lines 7-10). Defendant argues that the equipment could not be delivered and the lease was canceled.(*Id.* at pg. 17, lines 19-20). Defendant further argues that the master lease agreement, Toobian's personal guaranty and the related lease documents do not "reflect the actual agreement or understandings of the parties relative to the repayment of the monies advanced by plaintiff to AIC for leasehold improvements."(*Id.* at pg 17,lines 21-24, & pg 18, lines 1-6).

DISCUSSION

Summary Judgment is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept.1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept.1965]). It will only be granted if it is clear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). In considering such a motion, the court's function is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449-450 [1st Dept.1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]). The evidence is considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept.1964]).

Once the plaintiff establishes a prima facie case the burden shifts to the defendant to "establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense"(*Verela v. Citrus Lake Development, Inc.* 53 A.D.3d 574, 575 [2d Dept 2008]). The defendants have the burden to "demonstrate the existence of a bona fide defense by evidentiary facts, and not one based upon conclusory allegations" (*Layden v. Boccio* 253 A.D.2d 540 [2d Dept 1998]). The non-movant must "come forward to lay bare his proof" (*S & H Bldg. Material Corp. v Riven*, 176 AD2d 715, 717 [2d Dept 1991]), and the failure to do so may lead the court to believe that there is no triable issue of fact.(*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562

[1980]). Such proof must be by the affidavit of an individual with personal knowledge, or with an attorney's affirmation to which material is appended in admissible form. *Id.* To establish a "real defense requiring a trial" the non-movant defendant must put forth more than merely bare, conclusory averments. (*RCA Corp. v. American Standards Testing Bureau, Inc.*, 121 A.D.2d 890 [1st Dept 1986]).

Defendants' motion sought an order dismissing plaintiff's complaint pursuant CPLR 3211 and also moved for an order granting summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212. In deciding defendants' motion, this Court will treat defendants' motion as a motion for summary judgment pursuant to CPLR 3212.

To state a cause of action for breach of contract, the plaintiff must plead the terms of the contract, the consideration, performance by the plaintiff and breach by the defendant causing plaintiff to sustain damages. (*Furia v. Furia*, 116 A.D.2d 694 [2nd Dept 1986]). GOL 5-1105 governs written promises expressing past consideration. It states that "a promise in writing and signed by the promisor ... shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed." GOL 5-1105.

Here, plaintiff has attached the acceptance agreement as well as the incorporated master lease agreement and equipment schedules.(See Godish Affidavit, Exhibits F, G, H, & J). Toobian signed these documents on behalf of AIC. "Equipment" is defined by the acceptance agreement to include "leasehold improvements."*Id at Exhibit J.* CIT transferred $387,353.00 to AIC on December 3, 2003. Toobian acknowledges these funds were used for "leasehold improvements." (Toobian Affidavit, pg. 18, lines 7-9). The acceptance agreement, signed by Toobian over two years later on January 30, 2006, evidences AIC's acceptance of "Equipment" worth $335, 186.09. (*Id.* at Exhibit J). Under GOL 5-1105, past consideration is adequately plead because this past consideration was properly acknowledged in the signed agreement. Plaintiff alleges that AIC made payments in amounts equal to, or multiples of, the amounts stated in the acceptance agreement, but AIC stopped making payments starting with the payment due October 1, 2007. Because of AIC's failure to pay, plaintiff alleges AIC breached the contract and

is owed $172,278.07 of principal and interest at the rate of 7.82% per annum. Plaintiff has established a prima facie case for breach of contract as against AIC.

To establish a prima facie cause of action to recover on a guaranty of payment, the plaintiff is "required to present proof of the existence of the guaranty in question and nonpayment according to its terms" (*Gateway State Bank v. Intrabartolo*, 172 A.D.2d 802 [2d Dept 1991]). Plaintiff attached the guaranty, dated November 11, 2003 and signed by Toobian in his individual capacity.(Godish Affidavit, Exhibit K). It states, in part, "[Toobian] requests you to extend credit to ... or otherwise to do business with [AIC] ... and to induce you so to do and in consideration thereof and of benefits to accrue to [Toobian] therefrom, ... as a primary obligor ... unconditionally guarantees to you that [AIC] will fully and promptly pay and perform all its present and future obligations to you ... and agrees ... to pay on demand all sums due and to become due to you from AIC and all losses, costs, attorneys' fees or expenses which may be suffered by you by reason of AIC's default." *Id.* It further states "this guaranty is an unconditional guarantee of payment and performance." Toobian admits that there remains a balance owing to plaintiff of $172,278.07.(Toobian Affidavit, pg 18, lines 15-18). Plaintiff has established a prima facie case for breach of the guaranty agreement as against Toobian.

The acceptance agreement states that it was "executed pursuant to, and incorporating therein the terms and conditions of, the master lease agreement"(Godish Affidavit, Exhibit J) Section 15 "Remedies on Default", part (e) of the master lease agreement, provides in part, that upon default, the lessor may "declare immediately due and payable ... (iii)... all court costs and reasonable attorneys' fees incurred by [CIT] relating to the enforcement of its rights under the Lease."(Godish Affidavit, Exhibit F, pg 6). The guaranty provides that Toobian "agrees ... to pay on demand all sums due and to become due to [CIT] from [AIC] and all losses, costs, attorneys' fees or expenses which may be suffered by [CIT] by reason of [AIC's] default."(Godish Affidavit, Exhibit K) The acceptance agreement and the guaranty provided for attorneys' fees and costs. Plaintiff has made out a prima facie case to recover on its fifth and sixth causes of action to recover attorneys' fees and costs from AIC and Toobian.

Defendants' verified amended answer contains the following eight affirmative defenses:

1) Failure to state a cause of action

2) Barred by statute of limitations
3) Barred by latches and estoppel
4) Failure of consideration
5) Lack of jurisdiction
6) Barred statute of frauds
7) Dr. Toobian has no personal liability because he acted merely as an agent for disclosed principal AIC
8) Expenses for legal fees, costs and disbursements resulting from defending this action

These eight affirmative defenses are wholly conclusory and unsupported. Defendants' eight affirmative defenses are hereby dismissed. To the extent, defendants' eighth affirmative defense attempts to assert a cause of action, it is dismissed because the court finds it is wholly conclusory and unsupported.

In response to plaintiff's motion, Toobian makes several arguments. First, Toobian argues plaintiff improperly declared a default and in support he attaches two e-mails internal to CIT. These e-mails were sent on January 6, 2006, many days before the acceptance agreement was signed. This argument fails to create an issue of fact because Toobian fails to show any evidence that supports his claim that CIT improperly declared a default. Toobian impliedly argues the original transfer of money, made under the master lease agreement, precluded a modification such as the acceptance agreement. He cites the language of the master lease agreement which stated "the lease may not be altered, modified, terminated or discharged except by a writing signed by the party against whom such alteration, modification, termination or discharge is sought."(Toobian Affidavit, pg 16, line 24, & pg 17 lines 1-3). This argument is without merit. The acceptance agreement was signed by AIC(by Toobian), the party against whom such alteration or modification was sought.

Toobian also argues the $172,278.07 principal amount is not currently due because AIC hasn't defaulted on any obligations to AIC, and therefore plaintiffs have "improperly and unjustifiably declared this loan in default and without authority." (Toobian Affidavit, pg. 18, lines 7-15). This argument is without merit. The acceptance agreement is a valid contract. Defendants have not supplied evidence that creates a triable issue of fact on the issue of whether the loan was declared in default improperly.

CIT has made a prima facie showing that AIC is in default of the terms of the acceptance

agreement. Defendants have not met their burden to establish that there is a triable issue of fact. Defendants motion for summary judgment is dismissed.

Plaintiff's motion for summary judgment is granted as to its first, second, fifth and sixth causes of action on the issue of liability. Plaintiff's third and fourth causes of action are dismissed.

AIC does not dispute that it owes the principal amount of $172,278.07 to CIT. Pursuant to the guaranty, Toobian is jointly liable for this debt. Applying the terms of the contract, this amount is currently due.

AIC and Toobian are hereby jointly Ordered to pay CIT $172,278.07.

The parties are directed to appear before Court Attorney/Referee Thomas Dana, Room 206, Second Floor, on July 7, 2010, at 10:00 A.M., to determine damages due plaintiff pursuant to this decision.

This constitutes the Decision and Order of the Court.

Dated: May 14, 2010

J.S.C.