

**Ford Motor Credit Co. LLC v Queens Blvd.
Lincoln-Mercury, Inc.**

2010 NY Slip Op 31786(U)

June 29, 2010

Supreme Court, Queens County

Docket Number: 16678/09

Judge: Orin R. Kitzes

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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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FORD MOTOR CREDIT COMPANY LLC,
Plaintiff,

-against-

Index No. 16678/09
Motion Date: 6/23/10
Motion Cal. No. 29

QUEENS BOULEVARD LINCOLN-MERCURY,
INC., ANTHONY GIORGIANNI and DOROTHY
GIORGIANNI,

Defendants.

Dated: June 29, 2010

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Plaintiff's motion for an Order pursuant to CPLR 3212 awarding summary judgment in favor of plaintiff and against defendants is granted, to the following extent:

In this action, plaintiff **FORD MOTOR CREDIT COMPANY LLC** ("Ford Credit"), seeks judgment in the amount of at least \$2,205,432.96 as a result of defendants' defaults on their obligations to plaintiff under certain financing agreements, security agreements and personal guaranties that they executed and delivered to plaintiff. According to plaintiff, there exists no defense to defendants' defaults and plaintiff is entitled to summary judgment on its Complaint.

Defendants oppose this motion, claiming, *inter alia*, that defendant Queens Boulevard has filed for bankruptcy protection and most of the issues of the alleged defaults and value of the vehicles will be resolved in that proceeding and the attempt to seize the vehicle is inappropriate since plaintiff does not have a lien on this vehicle, which is used by the Giorgianni's for personal use. Moreover, defendants claim that there are no outstanding payments due for this vehicle.

In support of its motion, plaintiff has submitted various agreements between the parties and an affidavit of Cabot Suggs, the Regional Manager for the New York Region, East Market Area for plaintiff Ford Credit. The documentary evidence submitted by Ford Credit establishes that defendant **QUEENS BOULEVARD LINCOLN-MERCURY, INC.** ("Queens Boulevard") executed the Wholesale Financing Agreement, the 1995 Assignment, the 2007 Assignment, the 1986 Security Agreement, the 1995 Security Agreement, the Master Loan Agreement, the Loan Supplement, and the Cross-Default Agreement in favor of Ford Credit. Pursuant to the Wholesale Financing Agreement, Queens Boulevard promised to

pay to Ford Credit the balance of any advance made by Ford Credit on Queens Boulevard's wholesale line of credit, plus unpaid interest and flat charges with respect to any financed motor vehicle at or before the date on which it was sold. Pursuant to the 1995 Assignment, Queens Boulevard assigned to Ford Credit various receivables due to Queens Boulevard and various other rights derived from such receivables. In this 2007 Assignment, Queens Boulevard reaffirmed its assignment to Ford Credit of various receivables due to Queens Boulevard and various other rights derived from such receivables. Pursuant to the 1986 Security Agreement and the 1995 Security Agreement (collectively the "Security Agreements"), Queens Boulevard granted in favor of Ford Credit a security interest in the Collateral as defined therein.

Regarding the individual defendants, Giorgianni and D. Giorgianni executed and delivered the 1984 Guaranty to Ford Credit on February 6, 1984. They also executed and delivered the 1995 Guaranty to Ford Credit on August 7, 1995. Pursuant to the 1984 Guaranty and the 1995 Guaranty (collectively the "Guaranties"), the individual defendants jointly and severally, unconditionally guaranteed to Ford Credit that Queens Boulevard would fully, promptly and faithfully perform, pay and discharge its present and future obligations to Ford Credit, and that they jointly and severally, agreed to pay, on demand, all sums due and to become due from Queens Boulevard to Ford Credit, and "all losses costs, attorneys' fees or expenses" incurred by Ford Credit as the result of Queens Boulevard's default. Pursuant to the 1995 Agreement, Ford Credit was given a security interest in certain collateral, including, but not limited to, the following: All furniture, fixtures, machinery, supplies and other equipment; all motor vehicles, tractors, trailers, implements, service parts and accessories and other inventory of every kind; and all accounts, contract rights, chattel paper and general intangibles.

Queens Boulevard also executed and delivered the Master Loan Agreement to Ford Credit on February 7, 2007. Pursuant to the Master Loan Agreement, Queens Boulevard granted in favor of Ford Credit a security interest in the collateral defined therein. The Master Loan Agreement defines default as, among other things, Queens Boulevard's "default in the due and punctual payment of all or any portion of any installment of the Indebtedness and such default shall continue for a period of ten days after written notice thereof . . .;"

Queens Boulevard also executed and delivered the Loan Supplement to Ford Credit on February 7, 2007. Giorgianni and D. Giorgianni executed and delivered the Master Loan Guaranty to Ford Credit on February 7, 2007. Pursuant to the Master Loan Guaranty, the Guarantors guaranteed in favor of Ford Credit "the due and punctual payment of the

Indebtedness now or hereafter arising” and further agreed that they would “[i]mmediately upon the occurrence of an Event of Default and written demand by [Ford Credit], Guarantor shall pay to [Ford Credit] the Indebtedness and shall do and perform each of the Obligations. . .;” The Defendants executed and delivered the Cross-Default Agreement to Ford Credit on February 7, 2007. This Agreement applied to the loans and indebtedness under the agreements already in effect, and any loans “now or hereafter outstanding made by [Ford Credit] to any Obligor, and any and all extensions, increases, amendments, renewals and modifications” of then-existing loans.

An audit subsequent to Ford Credit’s discovery in May of 2009 that Queens Boulevard was potentially in default under the various agreements and other security documents determined that Queens Boulevard was out of trust, and had sold vehicles financed by Ford Credit without making the payments to Ford Credit that were required under the agreements and other security documents. The audit determined that Queens Boulevard’s indebtedness for vehicles sold out of trust (“SOT”) was, at that time, believed to be \$549,676.82. Despite various written demands made by Ford Credit to the defendants, defendants have failed to offer payment in full or any portion thereof, to Ford Credit.

Plaintiff also refers to defendants Answer, which, upon review, reveals that defendants have admitted all of the foregoing facts regarding the execution of the various agreements, security agreements, and guaranties. Based on Mr. Suggs’s Affidavit, defendants’ have defaulted under the various agreements, security agreements and guaranties, and there is now due and owing from defendants to Ford Credit the total sum of \$2,205,432.96.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side’s papers do not suggest any issue exists. Moreover, on this motion, the court’s duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312,317 (2d Dept. 1989), “Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied. The proof submitted by plaintiff is sufficient to establish plaintiff’s initial burden of demonstrating its entitlement to judgment as a matter of law. *Sacco v Sutera*, 266 AD2d 446, (2d Dept 1999.)

Therefore, it became incumbent upon the defendant to demonstrate, by admissible

evidence, the existence of a triable issue of fact with respect to a bona fide defense. *Id.* Defendants have submitted their attorney's affirmation and an affidavit of Anthony Giorgianni. According to them, plaintiff has failed to include in its calculations certain vehicle sales used to satisfy, in part the outstanding amount for vehicle's "sold out of trust". Nor has plaintiff included in its calculations the value of certain repossessed vehicles. Moreover, they claim the parties have entered into an agreement regarding the individual defendants' vehicle, in which a payment plan was made and defendants are current in payment. Finally, both assert through the Bankruptcy proceedings, plaintiff and defendants have agreed upon the voluntary surrender of the vehicles and other chattel at issue and a settlement of the instant issues has been reached.

In reply, plaintiff has submitted an affidavit of Cabot Suggs, Orders of the United States Bankruptcy Court, Eastern District of New York, and various loan documents and security Agreements regarding the individual defendants' personal vehicle, the 2006 Bentley Continental. This evidence shows that on September 16, 2009 Queens Boulevard filed a voluntary petition with the United States Bankruptcy Court of the Eastern District of New York for relief under Chapter 11 of the Bankruptcy Code, commencing Case No. 09-47973, which remains currently pending ("Bankruptcy Case"). Queens Boulevard initially operated during the course of its Bankruptcy Case as a debtor in possession, in hopes of selling its assets as a going concern. It was allowed to continue to sell and service vehicles, and utilize and replenish its parts inventory via cash on delivery. Each time a motor vehicle was sold, Queens Boulevard was required to remit the vehicle financed amount to Ford Credit. This was authorized pursuant to interim order entered in the Bankruptcy Case. Pursuant to the second interim Order entered in the Bankruptcy Case, Queens Boulevard was provided until January 15, 2010 to sell all of its motor vehicle inventory or turn it over to Ford Credit, and until March 15, 2010 to sell the Dealership or turn its remaining assets over to Ford Credit. Queens Boulevard's motor vehicle Collateral was ultimately turned over to Ford Credit and fully liquidated. However, Queens Boulevard has not turned over the remaining Collateral to Ford Credit as required under the Second Interim Order. The Bankruptcy Court entered a third order to deal with the remainder of the Collateral (other than the Bentley); which has not been complied with by Queens Boulevard.

According to Mr. Suggs's calculations, based upon reviewing the applicable documents and records, and Bankruptcy Court Orders and Agreements, the following amounts remain due and owing to Ford Credit by Queens Boulevard and the Defendants pursuant to the Loan Documents:

Wholesale Financing Agreement

Wholesale Charges	\$121,512.43
Wholesale Expenses (transportation of vehicles to auction, etc.)	7,327.25
Loss on Sale of Inventory	107,564.50
Sold Out of Trust	482,835.62
Lease Dealer Proceeds Withheld	23,532.55

Master Loan Agreement

Capital Loan Principal	179,450.76
Capital Loan Interest	14,219.86

Bentley Contract

Balance	73,495.51
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Other

On Site Containment Expenses	224,026.08
Legal Fees through 1/30/10	<u>127,230.77</u>
	\$1,361,195.33

The Court finds that Defendants have not submitted sufficient evidence in admissible form to support its claims. Defendants have not submitted any document, invoice or statement that indicates any agreement has been reached between the parties. Accordingly, the defendants have failed to establish that a triable issue of fact exists as to plaintiff's claims regarding the amounts owed to plaintiff by defendants. *See generally, McCann v Cronin, 276 AD2d 472 (2d Dept 2000.)* Consequently, plaintiff's motion for summary judgment pursuant to CPLR 3212 in its favor and against defendant is granted. However, while the Court grants the branch of the motion seeking attorney's fees, a proceeding must be conducted to determine the amount of such fees. Plaintiff shall contact the Clerk of Part 17 to schedule such proceeding. Based on the reduction of attorney's fees, the amount of the judgment shall be in the amount of one million two hundred thirty three thousand nine hundred sixty four dollars and fifty six cents (\$1,233,964.56) , plus any appropriate statutory interest.

SETTLE JUDGMENT

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ORIN R. KITZES, J.-S.C.