SHORT FORM ORDER

Index Number: 43268-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-19-2010
Motion Submit Date: 05-04-2010
Motion Sequence .: 001 RRH

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TD BANK EQUIPMENT FINANCE INC., SUCCESSOR BY MERGER TO COMMERCE COMMERCIAL LEASING,

Plaintiff,

-against-

R.I. INDUSTRIES OF NY INC., R.L. MATERIALS, INC., R.L. INDUSTRIES INC., F.P.L. CONSTRUCTION CORP., RALPH LUNATI, JR., AND ROCCO LOGOZZO, individually,

Defendants.
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Attorney for Plaintiff
Platzer Swergold Karlin Levine
Goldberg & Jaslow LLP
1065 Avenue of the Americas, 18th Floor
New York, New York 10018

Attorney for Defendants
Weinberg, Gross & Pergament, LLP
400 Garden City Plaza, Suite 403
Garden City, New York 11530

Attorney for Defendants FPL Const and Logozzo
Gregory Bellantone, Esq.
Dubi Bellantone, PC
9 Cedar Ridge Lane
Dix Hills, New York 11746

ORDERED, that the motion (motion sequence number 001) by plaintiff pursuant to CPLR §3212 for summary judgment and dismissing defendants' affirmative defenses is granted; and it is further

ORDERED, that a hearing on counsel fees is scheduled for September 13, 2010 at 9:30 a.m. before the undersigned.

This is an action by plaintiff seeking to recover under three Master Equipment Lease Agreements (and Schedules thereto) and Surety Agreements entered into with defendants as described more particularly below. Plaintiff commenced this action by the filing of a Summons and Verified Complaint in or about October 2009. Issue was joined as to defendants F.P.L. Construction Corp. ("FPL") and Rocco Logozzo ("Logozzo) by the filing and serving of a Verified Answer dated January 21, 2010. Issue was joined as to defendants R.L. Industries of NY, Inc. ("RLI NY"), R.L. Materials, Inc. ("RLM"),

R.L. Industries, Inc. ("RLI") and Ralph Lunati a/k/a Ralph Lunati, Jr. a/k/a Ralph E. Lunati, Jr. ("Lunati"), by the filing and serving of a Verified Answer dated January 22, 2010. Plaintiff served a Reply to the counterclaims dated February 9, 2010. As this action involves three separate Master Equipment Lease Agreements with different defendants, the Court will discuss the common provisions of each ~~and then~~ of them *seriatim*.

THE COMMON PROVISIONS OF THE MASTER EQUIPMENT LEASE AGREEMENTS, SCHEDULES AND SURETY AGREEMENTS

The submissions reflect that (1) on or about August 28, 2003, RLI NY entered into a Master Equipment Lease Agreement (the "Agreement") with plaintiff[1]; (2) on or about September 28, 2004, RLM entered into an Agreement with plaintiff; and (3) on or June 7, 2005, FPL entered into an Agreement with plaintiff for the financing of certain equipment. These essentially identical Agreements all established the:

> general terms and conditions under which Lessor may from time to time lease equipment and other property to Lessee. The terms of this Agreement shall be deemed to form a part of each Schedule executed by Lessee which references this Agreement. "Equipment" shall mean all items of equipment and other property described on any "Schedule". Each Schedule shall constitute a separate lease agreement ("Lease") incorporating all of the terms and conditions of this Agreement. In the event of a conflict between the provisions of any Lease and the provisions of this Agreement, the provisions of the Lease shall prevail.

The Agreements further provided that:

> Lessee's obligation to pay the Lease payments and other lease obligations is absolute and unconditional and is not subject to cancellation, defense, deduction, recoupment, reduction, setoff, claim or counterclaim. This Agreement and all leases are non-cancellable.

Additionally, the Riders to the Schedules gave defendant lessees the options to either purchase the equipment at fair market value or renew the leases, provided defendants were not in default and gave 180 days written notice of their intent to exercise one of these options. Pursuant to the terms of the Schedules and Riders, plaintiff would determine the fair market value of the equipment at the end of the Lease term. A default was defined as failure to pay any Lease payment within ten (10) days of its due date or failure to perform any other term or condition of the Agreement. In the event of a default, plaintiff was entitled to cancel the Agreement and declare the entire balance due and owing

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[1]According to the Complaint, plaintiff is the successor by merger to Commerce Commercial Leasing, LLC, ("Commerce") the named lessor on the Master Lease Agreements. The reference to "plaintiff" herein shall refer to named plaintiff and/or Commerce.

under the Agreement.

Pursuant to the Agreements, the parties then entered into certain Schedules (described in more detail below), wherein specific equipment was leased to defendants in return for payment of monthly amounts.

Turning to the Surety Agreements, on or about August 28, 2003, Lunati executed a Surety Agreement guaranteeing the payment under the RLI NY Agreement; on or about September 28, 2004 Lunati executed a Surety Agreement guaranteeing the payment under the RLM Agreement both individually and on behalf of RLI and on or about March 8, 2007, Logozzo executed a Surety Agreement also guaranteeing payment under the RLM Agreement; and on or about June 7, 2005, Logozzo executed a Surety Agreement guaranteeing the payment under the FPL Agreement. In the Surety Agreements, the respective guarantors agreed that:

> To induce you to establish and/or continue financing and/or leasing arrangements with and consider making or continuing to extend credit from time to time to [Lessee], the Undersigned, jointly and severally, intending to be legally bound, hereby guarantees and becomes surety for the unconditional and prompt payment and performance to you of all of the now existing or hereafter arising debts, obligations, covenants, and duties of payment or performance of every kind, matured or unmatured, direct or contingent, owing, arising, due or payable to you from Lessee ("Obligations"). The Undersigned shall also pay or reimburse you on demand for all costs and expenses, including, without limitation, reasonable attorneys' fees, incurred by you at any time to enforce, protect, preserve, or defend your rights hereunder and with respect to any property securing this Surety Agreement.

The Security Agreements further provided that the liability of the guarantors was "absolute and unconditional". Additionally, the Security Agreements contained a cross-default provision which defined a default to include if the "Lessee or any guarantor is in default under *any other agreement with Lessor* or any affiliate of Lessor (including without limitation Commerce Bank, N.A....) (Emphasis Added). In the event of a default, interest accrues at the rate of 18% per annum.

THE RLI NY SCHEDULES

On or about August 28, 2003, RLI NY executed a Master Lease Schedule No. 1 (" RLI NY Schedule 1"), wherein RLI NY leased a Volvo G720B Grader for the amount of $120,000.00, payable in sixty (60) equal monthly payments of $2,132.91, commencing September 1, 2003. Thereafter, on or about November 10, 2003, RLI NY executed Master Lease Schedule No. 2 ("RLI NY Schedule 2") wherein RLI NY leased a Komatsu WA450-3L for the amount of $65,000.00, payable in sixty (60) equal monthly installments of $1,261.50, commencing December 1, 2003.

Plaintiff alleges that on or about February 5, 2008 it sent RLI NY written notice that the August 28, 2003 Schedule was set to expire in September of 2008 and that on or about May 6, 2008 sent RLI NY a written notice that the November 10, 2003 Schedule was set to expire but RLI failed to respond to these notices. Plaintiff states that RLI NY defaulted by failing to make payments as required since March/April of 2009 and further failing to disclose the location of the equipment. Further, plaintiff alleges that Lunati is liable under the Security Agreement and has also failed and refused to pay the obligations of RLI NY.

THE RLM SCHEDULES

On or about September 28, 2004, RLM executed a Master Lease Agreement Schedule No. 1 ("RLM Schedule 1") wherein RLM leased a portable 4054 Crushking Impact Crushing and Screening Plant in the amount of $468,000.00, payable in eighty-four (84) equal monthly installments of $4,203.57, plus one additional final payment of $150,000.00, commencing October 1, 2004. Subsequently, on or about February 22, 2007, RLM executed Master Lease Agreement Schedule No. 2 ("RLM Schedule 2") in which it leased an Extec E-7 Screening Plant for the sum of $150,000.00 payable in sixty (60) equal monthly installments of $3,004.17, commencing March 1, 2007.

Plaintiff alleges that since Lunati defaulted pursuant to the terms of the RLI NY Security Agreement, that pursuant to the cross-default provision referenced above, RLM was considered in default of the Agreement. Further, pursuant to the Security Agreements, Lunati, Logozzo and RLI were all in default and have failed and refused to pay the sums due and owing.

THE FPL SCHEDULES

On or about June 7, 2005, FPL executed a Master Lease Agreement Schedule No. 1 ("FPL Schedule 1"), wherein FPL leased an Extec C10 Track Jaw Crusher for the amount of $310,000.00, payable in eighty-four (84) equal monthly installments of $4,612.44, commencing July 1, 2005. Plaintiff alleges that since Logozzo defaulted under the terms of his Surety Agreement pertaining to the RLM Agreement, pursuant to the cross-default provision referenced above, FPL is in default of the instant Agreement. Additionally, pursuant to the Security Agreement, Logozzo has failed and refused to pay the sums due and owing.

THE MOTION FOR SUMMARY JUDGMENT

Plaintiff now moves for summary judgment in its favor and dismissing the affirmative defenses interposed by defendants. Plaintiff argues that these Agreements are statutory finance leases under Article 2-A of the Uniform Commercial Code, defendants' obligations thereunder are enforceable as defendants' accepted the equipment that was the subject of the Agreements and failed to offer any evidence that they rejected same. Similarly, the Surety Agreements established absolute and unconditional liability on the part of the guarantor defendants and these defendants have never revoked, denied or disputed that they executed said Surety Agreements.

Turning to the affirmative defenses/counterclaims, in the Answer by RLI NY, RLM, RLI and Lunati, they raise the affirmative defenses/counterclaims of fraud and violation of General Business Law §349. Specifically, these defendants claim they were fraudulently induced to enter into the Agreements based upon a representation by plaintiff that they could purchase the subject equipment at the end of the Leases with only a dollar buy-out. Plaintiff argues that these affirmative defenses must be dismissed for failure to comply with the pleading requirements of CPLR §3013 and §3016 in that defendants have failed to plead these claims with specificity and failed to give notice of the specific transactions and occurrences to be proved. Thus, plaintiff argues that these affirmative defenses/counterclaims must be dismissed.

Likewise, plaintiff asserts that the affirmative defenses raised by Lunati, Logozzo and RLI should be stricken as a matter of law because the plain and unequivocal language of the guarantees waived guarantors rights to assert any defenses. Such provision, plaintiff argues, is enforceable and must be upheld by this Court.

Based on the foregoing, plaintiff urges the Court to grant it summary judgment and dismiss the affirmative defenses/counterclaims of defendants.

Defendants RLI NY, RLM, RLI and Lunati have failed to submit any opposition to the motion. Defendants FPL and Logozzo oppose the motion by affirmation of counsel and affidavit by Logozzo. FPL and Logozzo assert that the motion should be denied as premature pursuant to CPLR §3212(f) on the ground that no discovery has been exchanged and that if summary judgment is granted it will be denied the opportunity to "question the plaintiff's witnesses about the documents, their business practices, and the negotiations that took place at the time the alleged lease agreements and guarantees were signed." Logozzo, president of FPL states in his affidavit that plaintiff is holding a $150,000.00 security deposit that should be credited against any amounts due and owing

and that he was induced to sign the Agreements based upon representations that the purchase option amount would only be $1.00. Therefore, FPL and Logozzo ask the Court to deny the motion for summary judgment.

Plaintiff submits a reply affirmation by counsel wherein it argues that defendants' claim that summary judgment is premature is without merit. Plaintiff asserts that defendants have failed to demonstrate the likelihood that discovery will lead to evidence sufficient to defeat summary judgment and the mere hope that such discovery may be uncovered is not enough. Plaintiff further asserts that it would be prejudiced by the added expense of additional discovery since there are no issues of fact in this case. Plaintiff challenges answering defendants' assertions that they were induced into entering the Agreements based upon a representation regarding a dollar buy out provision based upon the plain language of the Agreements which provided all no agreements or understandings were binding unless in writing signed by the parties. With regard to Logazzo's claim that plaintiff was holding $150,000.00 security deposit, plaintiff asserts that such amount has been credited by plaintiff toward the amount due and owing. Thus, plaintiff reiterates that FPL and Logazzo have failed to raise any triable issues of fact, the motion for summary judgment must be granted and the affirmative defenses/counterclaims dismissed.

DISCUSSION

The law is well settled, that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Goldberger v. Brick & Ballerstein, Inc.,*** **217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995)** (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. ***Zayas v. Half Hollow Hills Cent. School Dist.,*** **226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996).** Unsupported and conclusory allegations are insufficient to defeat a motion for summary judgment. ***Gangi v. Solgar Co., Inc.,*** **267 A.D.2d 350, 699 N.Y.S.2d 922 (2d Dept. 1999)**. Moreover, claims of fraud must be plead with specificity and consist of more than conclusory allegations. ***Thaler & Gertler, LLP v. Weitzman,*** **282 A.D.2d 522, 722 N.Y.S.2d 891 (2d Dept. 2001).** ***See also, CPLR §3016(b).***

Although summary judgment may be denied as premature, "to speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on a summary judgment motion." ***Orange County-Poughkeepsie Limited Partnership v. Bonte,*** **37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept. 2007),** quoting, ***Gateway State Bank v.***

***Shangri-La Private Club*, 113 A.D.2d 791, 493 N.Y.S.2d 679, 490 N.E.2d 546.** *See also,* ***Binyan Shel Chessed, Inc., v. Goldberger Insurance*, 18 A.D.3d 590, 795 N.Y.S.2d 619 (2d Dept. 2005)**(mere possibility of a factual issue is insufficient to defeat summary judgment and permit additional discovery); ***Greenberg v. McLaughlin*, 242 A.D.2d 603, 662 N.Y.S.2d 100 (2d Dept. 1997).**

In the case at bar, plaintiff has met its prima facie burden by the submission of the Agreements and Leases (Schedules) and an affidavit of nonpayment pursuant to the terms thereof. ***Advanta Leasing Services, v. Laurel Way Spur Petroleum Corp.*, 11 A.D.3d 571, 782 N.Y.S.2d 677 (2d Dept. 2004)**. In opposition, defendant has failed to raise a triable issue of fact warranting a trial. In fact, RLI NY, RLM and Lunati have not opposed the motion. The opposition by FPL and Logazzo consists merely of conclusory allegations that are belied by the plain and unambiguous language of the parties' various writings. Moreover, they have failed to demonstrate that discovery would lead to sufficient evidence to warrant denial of the motion.

Additionally, defendant's claims regarding fraud by plaintiff, and/or plaintiff's predecessor in procuring the Agreements, are without merit under the clear and unambiguous terms of the Agreements and Leases and UCC §2-A-407. That section provides as follows:

> Irrevocable Promises: Finance Leases
>
> (1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.
>
> (2) A promise that has become irrevocable and independent under subsection (1):
>
> (a) is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and
>
> (b) is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

"This is the statutory 'hell or high water' clause that makes a lessee's obligations under a finance lease irrevocable upon acceptance of the goods, despite what happens to the goods afterwards." ***General Electric Capital Corp., v. National Tractor Trailer School*, 175 Misc.2d 20, 667 N.Y.S.2d 614 (Sup. Ct. Onondoga Co. 1997).**

Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract." ***Dunkin' Donuts v. Liberatore,*** 138 A.D.2d 559, 526 N.Y.S.2d 141 (2d Dept. 1988). ***See also, Chrysler Credit Corp. v. Kosal,*** 132 A.D.2d 686, 518 N.Y.S.2d 162 (2d Dept. 1987). Where a guaranty clearly indicates that the signatory would "unconditionally guarantee" the performance of the corporation and is unambiguously identified as a "guaranty" it will be enforceable against the guarantor. ***Suffolk Cement Products, Inc., v. Empire Concrete Enterprises, Inc.,*** 234 A.D.2d 447, 650 N.Y.S.2d 801 (2d Dept. 1996); ***Dunkin Donuts, supra.***

In the case at bar, plaintiff has met its prima facie burden by submission of the Agreements, Leases and guaranties and affidavit establishing the defaults and amounts due and owing. ***Agai v. Diontech Consulting, Inc.,*** **64 A.D.3d 622, 882 N.Y.S.2d 503 (2d Dept. 2009);** ***Cutter Bayview Cleaners, Inc., v. Spotless Shirts, Inc.,*** **57A.D.3d 708, 870 N.Y.S.2d 395 (2d Dept. 2008)**. In opposition, defendants have failed to raise a triable issue of fact. The guaranty establishes defendant guarantors' unconditional obligation to pay the debts and they have failed to do so.

Based on the foregoing, plaintiff's motion for summary judgment is granted in its entirety and the affirmative defenses and counterclaims are dismissed. This matter is set down for a hearing on counsel fees on September 13, 2010 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 14, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.