

**Studebaker-Worthington Leasing v Authentic Mexican, Inc.**

2010 NY Slip Op 33339(U)

November 23, 2010

Supreme Court, Nassau County

Docket Number: 007380-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**STUDEBAKER-WORTHINGTON LEASING, A**  
**Division of Main Street Bank,**

**TRIAL/IAS PART: 22**  
**NASSAU COUNTY**

**Plaintiff,**

**- against**

**Index No: 007380-10**  
**Motion Seq. Nos: 1**  
**Submission Date: 9/27/10**

**AUTHENTIC MEXICAN, INC., FRANK CASCIARI**  
**and KENNETH BOLSCH,**

**Defendants.**

-----X

**The following papers have been read on this motion:**

- Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits.....X**
- Plaintiff's Rule 19-a Statement.....X**
- Affirmation in Opposition and Exhibits.....X**
- Defendant's Rule 19-a Counter-Statement.....X**
- Defendant's Objections to Plaintiff's Rule 19-a Statement.....X**
- Defendant's Memorandum of Law in Opposition.....X**
- Reply Affirmation in Further Support,**
- Reply Affidavit in Further Support and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Plaintiff Studebaker-Worthing Leasing, a Division of Main Street Bank ("Plaintiff" or "Studebaker") on August 2, 2010 and submitted on September 27, 2010. For the reasons set forth below, the Court 1) grants the motion, and refers this matter to an inquest on the issues of interest, counsel fees and costs; and 2) directs that the action against Defendant Authentic Mexican, Inc., which is stayed as a result of its bankruptcy petition, is severed and shall continue.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3212(a), granting Plaintiff summary judgment against Defendant Frank Casciari (“Casciari”) in the amount of \$144,594.69, plus interest from April 14, 2010, representing the amounts due on the third and sixth causes of action of the Verified Complaint (“Complaint”) and dismissing the Answer and affirmative defenses interposed by Casciari; 2) pursuant to CPLR § 3212(a), granting Plaintiff judgment in the amount of \$144,594.69, plus interest from April 14, 2010, against Kenneth Bolsch (“Bolsch”) on the third and sixth causes of action of the Complaint on the grounds that he has defaulted in appearing in this case; 3) on the seventh cause of action, granting Plaintiff judgment as to liability against Casciari and Bolsch and scheduling a hearing to determine the reasonable attorney’s fees to be awarded to Plaintiff pursuant to the applicable guaranties executed by Defendants Casciari and Bolsch, guaranteeing the obligations of Defendant Authentic Mexican, Inc. (“Authentic Mexican”); and 4) severing and continuing all claims against Authentic Mexican.

### B. The Parties’ History

The Complaint (Ex. 9 to Campisciano Aff. in Supp.) alleges as follows:

Studebaker is a division of Main Street Bank, a bank chartered under the laws of Texas, with an office in Jericho, Nassau County, New York. Studebaker is a representative office of Main Street Bank which has been registered with the New York State Banking Department.

Defendant Authentic Mexican is a New York corporation of which Defendants Casciari and Bolsch are officers. Defendants consented to the jurisdiction of this Court in the lease and guaranties that are the subject of this action.

#### First Cause of Action

On or about February 25, 2008 Studebaker-Worthington Leasing Corp. (“SWLC”), as lessor, and Authentic Mexican, as lessee, entered into a written equipment lease (“Lease I”) for a term of sixty (60) months beginning March 1, 2008 (Ex. 1 to Campisciano Aff. in Supp.). Pursuant to the terms of Lease I, Authentic Mexican leased from SWLC certain personal property (“Conveyor Equipment”) and was required to make 60 consecutive monthly payments of

\$1,124.55. In connection with Lease I, Bolsch, on behalf of Authentic Mexican, executed a Certificate of Acceptance (Ex. 2 to Campisciano Aff. in Supp.) certifying that the leased equipment was in good working order.

On February 25, 2008, Casciari and Bolsch executed a guaranty ("Guaranty 1") (Ex. 3 to Campisciano Aff. in Supp.) that absolutely and unconditionally guaranteed the obligations of Authentic Mexican under Lease I. Authentic Mexican has defaulted in making the payments due under Lease I, as amended, on or before February 1, 2010 and each payment thereafter. Pursuant to paragraph 22(a) of Lease I ("Default Provision"), upon the default of Authentic Mexican, Plaintiff may recover 1) the total rent and other amounts due and owing, 2) an amount equal to the present value, discounted at the rate of 6%, of all rent payable by the lessee to the date of expiration of the term of the lease, and 3) the anticipated residual value of the equipment, plus sales and other taxes due. Despite due demand, Authentic Mexican failed to make all payments due under Lease I and its amendment. As a result of Authentic Mexican's defaults, Studebaker accelerated all payments due. As of April 13, 2010, Authentic Mexican owes the sum of \$43,899.58, and continues to be obligated for amounts due under Lease I and the Lease I Amendment, including interest.

#### Second Cause of Action

Plaintiff alleges that, in light of the default by Authentic Mexican and pursuant to the terms of Lease I, Plaintiff is entitled to immediate possession of the Conveyor Equipment.

#### Third Cause of Action

Plaintiff seeks judgment against Casciari and Bolsch, pursuant to the Guaranties and in light of the default of Authentic Mexican, in the sum of \$43,899.58, plus additional sums and interest owing since April 13, 2010.

#### Fourth Cause of Action

On or about December 5, 2008, SWLC and Authentic Mexican entered into a second written equipment lease ("Lease II) with respect to certain property ("Oven Equipment"). As with Lease I, 1) Bolsch executed Certificates of Acceptance regarding the Oven Equipment; 2) Casciari and Bolsch executed guaranties ("Guaranty II); 3) Lease II and its related instruments were assigned to Studebaker when Main Street Bank purchased substantially all of the assets of

SWLC on or about June 2, 2008; and 4) the terms of Lease II were amended by a document dated September 30, 2009 (“Lease II Amendment”).

Plaintiff alleges that, under the terms of Lease II and its Amendment, Authentic Mexican has defaulted in making payments due on or before February 5, 2010 and every month thereafter, despite due demand. Lease II contains an identical Default Provision as Lease I. As a result of Authentic Mexican’s defaults, Studebaker has accelerated all payments due. As of April 13, 2010, Authentic Mexican owes the sum of \$100,695.11 and continues to be obligated for amounts due under Lease II, with interest.

#### Fifth Cause of Action

Studebaker submits that it is entitled to immediate possession of the Oven Equipment in light of the default of Authentic Mexican and pursuant to the terms of Lease II.

#### Sixth Cause of Action

Plaintiff submits that it is entitled to judgment against Casciari and Bolsch pursuant to Guaranty II, in light of the default of Authentic Mexican, and seeks judgment of \$100,695.11 plus additional sums owing, with interest.

#### Seventh Cause of Action

Plaintiff seeks reasonable attorney’s fees from the Defendants pursuant to the applicable provisions of the Leases and Guaranties.

In his Affidavit in Support, Anthony Campisciano (“Campisciano”), the Vice President of Studebaker, affirms that Lease I, Guaranty I, the equipment and all related documents were subsequently assigned to Studebaker when Main Street Bank purchased substantially all of the assets of SWLC on or about June 2, 2008. On or about September 30, 2009, at the request of Authentic Mexican, the payment terms of Lease I were amended and modified pursuant to a document titled Amendment and Modification of Payment Terms (Ex. 4 to Campisciano Aff. in Supp.). Under the terms of the Lease I Amendment, Authentic Mexican agreed to make the following payments to Studebaker: 1) beginning October 1, 2009, three (3) monthly payments of \$250.00, due on the first of each month, 2) beginning January 1, 2010, one (1) monthly payment of \$1,085.41 due on the first of each month, and 3) beginning February 1, 2010, forty-three (43) monthly payments of \$1,124.55, due on the first of each month.

Authentic Mexican defaulted in making the required payment due under Lease I and the Lease I Amendment on or before February 1, 2010, and each payment thereafter.<sup>1</sup> As of April 13, 2010, the amounts due totaled \$43,899.58.

Campisciano also outlines the execution and terms of the Lease II, Lease II Amendment and corresponding Guaranty, and the parties' default under those instruments after due demand. Campisciano affirms that as of April 13, 2010, the sum of \$100,695.11 is owed with respect to Lease II. On May 26, 2010, Authentic Mexican filed for bankruptcy, thereby staying the instant action against that Defendant ("Stay").

In his Verified Answer dated June 9, 2010, Casciari denied many of the allegations in the Complaint and asserted six (6) affirmative defenses: 1) Plaintiff is not authorized to do business in New York State; 2) Plaintiff's claims are barred by documentary evidence; 3) the Court lacks personal and subject matter jurisdiction over this matter and the parties; 4) it is the wrong party plaintiff; 5) Plaintiff's claims are barred by the Statute of Frauds; and 6) Plaintiff's claims are barred, compromised or stayed by the bankruptcy of one or more of the defendants.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment against Defendants Casciari and Bolsch by establishing that 1) Authentic Mexican defaulted under the Leases and owes Studebaker the aggregate sum of \$144,594.69; 2) Casciari and Bolsch are liable to Studebaker pursuant to their unconditional and absolute guaranty of the obligations of Authentic Mexican to Studebaker; 3) the affirmative defenses interposed in Casciari's Answer do not create an issue of fact; 4) Plaintiff served Bolsch with the Complaint, and mailed an additional copy to him in compliance with CPLR § 3215(g)(3), and Bolsch has not appeared or answered the Complaint, and his time to do so has expired; and 5) Studebaker is entitled to attorney's fees and expenses pursuant to the applicable provisions in the Leases and Guaranties. Plaintiff also submits that, as it may not proceed against Authentic Mexican in light of the Stay, the Court should sever and continue this Action against Authentic Mexican until Plaintiff is able to proceed against that entity.

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<sup>1</sup> Pursuant to paragraph 2 of the Lease I Amendment, the remaining terms, provisions and conditions of Lease I remained and continued in full force and effect, including the Default Provision.

With respect to Casciari's affirmative defense that Studebaker is not authorized to do business in the State of New York, Plaintiff affirms that Studebaker is a representative office of Main Street Bank, a bank chartered under the laws of Texas. Studebaker operates a representative office of Main Street Bank from its office in Jericho, New York. As required by the New York State Banking Department ("Banking Department"), Main Street's representative office has been registered with the Banking Department, as reflected by a letter ("Letter") dated May 14, 2008 (Ex. 11 to Capobianco Aff. in Supp.). Thus, Plaintiff argues, Studebaker is authorized to do business by the Banking Department, and may commence this action.

With respect to Casciari's affirmative defense regarding the "wrong party plaintiff," Plaintiff affirms that on or about June 2, 2008, Main Street Bank purchased substantially all of the assets of SWLC, which at that time was a subsidiary of State Bank of Long Island pursuant to an Asset Purchase Agreement. The assets purchased by Main Street Bank included the Lease and Guaranties at issue. In connection with that Asset Purchase Agreement, SWLC executed a Bill of Sale and Assumption Agreement (Ex. 12 to Capobianco Aff. in Supp.), pursuant to which it assigned, transferred and conveyed and delivered to Main Street Bank all of its right, title and interest in assets including the Leases and other loan documents at issue. Exhibit C to the Bill of Sale and Assumption Agreement makes reference to the Lease with Authentic Mexican.

In his Counter-Statement of Facts, Casciari submits, *inter alia*, that Lease I was signed by Studebaker-Worthington Leasing Corp., as lessor, whose current name is S.B. Equipment Leasing Corporation. Counsel for Casciari provides a record from the New York State Department of State website reflecting that Studebaker-Worthington Leasing Corp., which is not the Plaintiff in this action, is an active Delaware corporation, and has changed its name to SB Equipment Leasing Corp. (Ex. A to Xanthos Aff. in Opp.). Casciari submits, *inter alia*, that 1) Plaintiff has not submitted documentation establishing an obligation running from Casciari to Plaintiff, or the assignment of the Guaranties to Plaintiff; and 2) the Letter constitutes inadmissible hearsay which may not support a motion for summary judgment.

In its Reply Affirmation, Plaintiff provides a copy of a decision by the Honorable Stephen A. Bucaria in *Studebaker-Worthington Leasing, A Division of Main Street Bank v. Angelo Cervera*, Nassau County Supreme Court Index Number 024177-09 (Ex. 16 to Reply Aff. in

Supp.) (“Related Decision”). The Related Decision addressed a motion by plaintiff for summary judgment on a written guaranty, and cross motion by the defendant to dismiss the complaint for lack of capacity. Specifically, defendant moved for dismissal on the ground that plaintiff lacked capacity to sue because it was an unauthorized foreign corporation. In opposition, plaintiff argued that it was exempt from the requirements of Business Corporation Law (“BCL”) § 1312 and provided a letter from the Banking Department reflecting that 1) Main Street Bank intended to establish a representative office in Jericho, New York; 2) the representative office was registered with the Banking Department; and 3) a representative office may not disburse and/or transmit funds, except loan payments, or accept or contract for deposits or deposit-type liabilities on behalf of a banking institution (Related Decision at p.3).

Justice Bucaria held that:

Foreign corporations which are formed for banking purposes and carry on banking business in this state are excluded from the application of the [BCL] (**Commonwealth Bank & Trust v Tioga Mills, Inc.**, 78 AD2d 953 [3d Dept 1980]). An unlicensed foreign banking corporation that maintains a representative office in New York may maintain an action in our courts, provided the office is properly registered (See **Banque Arabe v. One Times Square Assoc.**, 193 AD2d 387 [1<sup>st</sup> Dept 1993]). The court concludes that a nonbanking division of a foreign banking corporation may similarly maintain an action, provided that it is engaged in a kind of business which may be performed lawfully under the Banking Law. Defendant has failed to establish that plaintiff’s leasing operation may not be performed lawfully under the Banking Law. Accordingly, defendant’s cross-motion to dismiss the complaint for lack of capacity to sue is **denied** [emphasis in original].

*Id.*

## RULING OF THE COURT

### A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of

fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

#### B. Effect of Bankruptcy of Authentic Mexican

It is well settled that the automatic stay under Section 362(a) of the United States Bankruptcy Code ordinarily applies only to the debtor and not to co-defendants. *Matthews v. Castro*, 35 A.D.3d 403 (2d Dept. 2006), quoting *Trustees of the Sickness & Acc. Fund of Local One-L v. Klein*, 2005 U.S. Dist. LEXIS 1527 (S.D.N.Y. 2005).

#### C. Guarantees

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept. 2001), *app. dismissed*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

#### D. Attorney's Fees

Provisions or stipulations in contracts for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977). Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit

resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

E. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for summary judgment against the Defendants Frank Casciari and Kenneth Bolsch in the amount of \$144,594.69, plus interest from April 14, 2010, attorney's fees and costs to be determined an inquest. Plaintiff Studebaker-Worthington Leasing as A Division of Main Street Bank has established its entitlement to summary judgment by establishing a *prima facie* case via the submission of proof of the existence of the obligations of Authentic Mexican pursuant to the Leases, the Guaranties and Authentic Mexican's failure to make payment in accordance with the terms of its obligations. The burden accordingly shifts to the defendants Casciari and Bolsch to establish the existence of a material issue of fact.

The Court adopts Justice Bucaria's reasoning in the Prior Decision, and concludes that Plaintiff Studebaker-Worthington Leasing Corporation as A Division of Main Street Bank may maintain this action. None of its activities have been shown to be violative under the Banking Law.

The Court also rejects Casciari's argument that Studebaker-Worthington Leasing as A Division of Main Street Bank lacks standing because it did not enter into the lease agreement with Authentic Mexican. Given that it acquired Studebaker-Worthington Leasing Corporation's assets, which included the February 25, 2008 Lease and Guaranties, the Court concludes that it has standing to pursue this action.

In light of the foregoing, and the Court's consideration of Casciari's remaining affirmative defenses, the Court concludes that the Defendants have failed to demonstrate the existence of any material issues of fact and dismisses the Answer and affirmative defenses interposed by Casciari.

The Court concludes that Plaintiff has demonstrated its right to counsel fees, in light of

the applicable provisions of the Leases and Guaranties, but has an insufficient record on which to base a counsel fee award. The Court, therefore, refers that issue to an inquest.

The Court also grants Plaintiff's application to sever this matter against Defendant Authentic Mexican, Inc. and directs that this action shall continue against that entity.

Accordingly, it is hereby

ORDERED, that Plaintiff have judgment against Defendants Frank Casciari and Kenneth Bolsch in the sum of \$144,594.69, plus interest from April 14, 2010, attorney's fees and costs to be determined at an inquest; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the determination of interest, attorney's fees and costs on January 6, 2011 at 9:30 a.m.; and it is further

ORDERED, that counsel for Plaintiff shall serve upon 1) counsel for Defendant Casciari, by regular mail, and 2) Defendant Kenneth Bolsch via certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before December 17, 2010; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendants Frank Casciari and Kenneth Bolsch in accordance with the decision of the Special Referee.

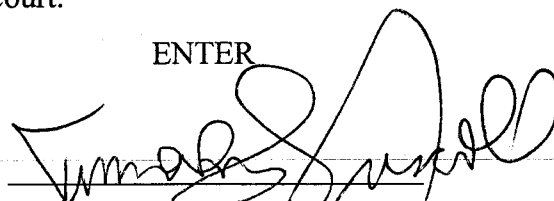
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

November 23, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

**NOV 29 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**