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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

SOVEREIGN BANK,

Plaintiff,

INDEX NO.: 005118/2009
MOTION DATE: 11/12/10
MOTION SEQUENCE: 02 and 03

-against-

CRAZY FREDDY'S MOTORSPORTS, INC., FREDERICK L. IPPOLITO, SOUTH SHORE MOTORSPORTS, LLC, FATHER AND SON 170 ATLANTIC AVENUE CAR CORP., GUCCI SERVICES, INC., HEROLD MOTOR CARS, INC., AUTOEXPO ENT. INC., d/b/a GREAT NECK SUZUKI, RALLYE AUTOPLAZA, INC., BAY RIDGE SUZUKI, BARD WHOLESALERS, INC., DEALERS LEASING CORP., BARON AUTO OUTLET, INC., AUTO WORLD KIA SUZUKI and JOHN DOES 1-10 being fictitious and unknown to plaintiff, the person or parties intended being those in possession of, or claiming an interest in, if any the collateral described in the complaint,

Defendants.

The following papers read on this motion:

Plaintiff's Notice of Motion for Summary Judgement, O'Hara Affidavit, and Exhibits.... 1
Plaintiff's Memorandum of Law, Crazy Freddy's Motorsports, Inc. and Ippolito's Notice of Cross-Motion for Summary Judgment..... 2
Vizzi Affirmation and Exhibits..... 3

PRELIMINARY STATEMENT

Plaintiff, Sovereign Bank, moves, for an Order of this Court, pursuant to CPLR 3212: (1) granting it summary judgment on its first, second, third, seventh and eighth causes of action as asserted against defendants Crazy Freddy's Motorsports, Inc. and Frederick Ippolito, and (2) dismissing said defendants' affirmative defenses. The motion is granted.

Defendants, Crazy Freddy's Motorsports, Inc. and Frederick L. Ippolito, cross move, for an Order of this Court, *inter alia*, pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint as asserted against them. The cross motion is denied.

This action is predicated upon a dealer financing transaction. At the heart of this action is a dealer "floor plan" loan.

BACKGROUND

It is worth noting that car dealers buy cars from the manufacturer, usually with large "floor-plan" loans from a bank or finance company. The bank charges dealers interest on these loans. Dealers have to sell cars to pay off these loans with associated interest. Defendant, Crazy Freddy's Motorsports, Inc. ("Crazy Freddy's) is a car dealer. Defendant, Frederick L. Ippolito ("Ippolito") is its President. Together, Crazy Freddy's and Ippolito are referred to herein as the "Floor Plan Defendants." The remaining defendants are collectively referred to as the Dealer Defendants.

On or about September 18, 2007, Crazy Freddy's entered into a Demand Note and a Dealer Floor Plan Agreement with plaintiff Sovereign Bank ("Sovereign") in the

amount of $3,500,000.00. On the same date, as security for the Note, Crazy Freddy's also entered into a Security Agreement with Sovereign. Simultaneous with the execution of the Note and the Security Agreement, defendant Ippolito executed a Commercial Guarantee in which he guaranteed the obligations of Crazy Freddy's to Sovereign.

Together, the Demand Note, the Dealer Floor Plan Agreement, the Security Agreement and the Commercial Guarantee are referred to herein as the "Floor Plan Documents."

Pursuant to the terms of the Floor Plan Documents, Crazy Freddy's incurred obligations from Sovereign totaling $3,500,000.00 which obligations were secured by certain automotive vehicles (the "Vehicle Collateral"), accounts receivable, contract rights, and other property and proceeds and products.

Specifically, the Note, in pertinent part, provides as follows:

DEMAND NOTE. THIS NOTE IS AND SHALL BE CONSTRUED AS A "DEMAND INSTRUMENT" UNDER THE NEW YORK COMMERCIAL CODE. BANK MAY DEMAND PAYMENT OF THE INDEBTEDNESS OUTSTANDING UNDER THIS NOTE OR ANY PORTION THEREOF AT ANY TIME.

BANK'S REMEDIES. In the event that any payment hereunder is not made when due or demanded, Bank may, immediately or any time thereafter, exercise any or all of its rights hereunder or under any agreement or otherwise under applicable law against Borrower, against any person liable, either absolutely or contingently, for payment of any indebtedness evidenced hereby, and in any collateral, and such rights may be exercised in any order and shall not be prejudiced by any delay in Bank's exercise thereof.

The Security Agreement, in pertinent part, provides as follows:

DEFAULT PROVISIONS:

Debtor hereby agrees that:

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2. Debtor shall be in default under this Agreement upon the happening of any one of the following events or conditions:

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a. Failure to make any payment of principal or interest or any other sums when due on any of the Obligations.

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c. Breach of or failure in the due observance or performance of any covenant, condition, or agreement on the part of the Debtor to be observed or performed pursuant to this Agreement.

d. Breach by Debtor or any other party liable with Debtor or any guarantor of Debtor's Obligations (a "Guarantor") of any other agreement with Secured Party.

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4. Upon the happening of any event of default specified above, Secured Party shall have the right to declare all obligations immediately due and payable and in addition to its rights hereunder, shall have all of the remedies of a secured party under the Uniform Commercial Code or any other applicable law, and further, Secured Party may sell and deliver any or all Accounts an any or all other security and collateral held by Secured Party or for Secured Party at public or private sale, for cash, upon credit or otherwise, at such prices and upon such terms as Secured Party deems advisable, at Secured Party's sole discretion. In the event Debtor commits a breach of any provision of this Agreement, in addition to all other sums due Secured Party, Debtor will pay Secured Party all costs and expenses incurred by Secured Party, including an allowance for attorneys' fees, to obtain or enforce payment of Accounts or Obligations, or in the prosecution or defense of any action or proceeding either against Secured Party or against Debtor concerning any matter arising out of or connected with this Agreement or the Accounts or Obligations and supplements and amendments hereto, if any...

5. Upon default, Secured Party shall have the right to take possession of its Collateral and to maintain such possession on Debtor's premises or to remove the Collateral or any part thereof to such places as it may desire. If Secured Party exercises its right to take possession of its Collateral, Debtor will, upon Secured Party's demand, assemble the Collateral and make it available to Secured Party at a place reasonably convenient to both parties.

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AGREEMENTS AND WAIVERS:

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4. Debtor hereby waives such rights as it may have to notice and/or hearing under any applicable federal or state laws pertaining to the exercise by Secured Party of such rights as the Secured Party may have regarding the right to seek prejudgment remedies and/or deprive Debtor or any Guarantor of or affect the use of or possession or enjoyment of Debtor's property prior to the rendition of a final judgment against the Debtor. The Debtor further waives any right it may have to require Secured Party to provide a bond or other security as a precondition to or in connection with any prejudgment remedy sought by Secured Party, and waives any objection to the issuance of such prejudgment remedy based on any offsets, claims, defenses or counterclaims to any action brought by the Secured Party.

Additionally, the Ippolito Commercial Guaranty provides, in pertinent part, as follows:

> **CONTINUING LIMITED GUARANTY. For good and valuable consideration, Frederick L. Ippolito ("Guarantor"), absolutely and unconditionally, guarantees and promises to pay to Sovereign Bank ("Lender") or Lender's order, in legal tender of the United States of America, the Indebtedness...of Crazy Freddy's Motorsports, Inc. ("Borrower") to Lender on the terms and conditions set forth in this Guaranty. Under this Guaranty, the liability of Guarantor is unlimited and the obligations of the Guarantor are continuing.**
> ***
> **NATURE OF GUARANTY**. Guarantor's liability under this Guaranty shall be open and continuous for so long as this Guaranty remains in force. Guarantor intends to guarantee at all times the performance and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of all Indebtedness. Accordingly, no payments made upon the Indebtedness will discharge or diminish the continuing liability of Guarantor in connection with any remaining portions of the Indebtedness or any of the Indebtedness which subsequently arises or is thereafter incurred or contracted.

In commencing this action against the Floor Plan Defendants and others, plaintiff maintains that as a result of the Floor Plan Defendants' default on the Note, it has the right to take possession of its Vehicle Collateral under the Floor Plan Agreements and Article 9 of the UCC. Said Vehicle Collateral, however, remains in possession and

control of the Floor Plan Defendants and others, to the complete exclusion of Sovereign. In their Answer, the Floor Plan Defendants set forth four affirmative defenses: (1) Statute of Frauds; (2) failure of consideration; (3) equitable estoppel, waiver and laches; and, (4) an alleged failure to mitigate damages.

Both parties move for judgment as a matter of law.

DISCUSSION

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt. Inc. v. Gincherman*, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

The determination as to whether Crazy Freddy's is in default under the terms of the Floor Plan Documents is to be determined by the terms of said documents (UCC 2-a-501[1]). Failure to make payment of any sum due under the terms of the Floor Plan Documents would constitute a default by Crazy Freddy's. In support of it's instant motion for summary judgment, plaintiff Sovereign submits the sworn affidavit of its Senior Vice President, Robert E. O'Hara, who states that defendant Crazy Freddy's has defaulted in its obligations under the Floor Plan Documents by failing to make the payments thereunder. O'Hara states that Crazy Freddy's has failed to pay all amounts due under the aforesaid Floor Plan Documents and that all sums due under the Floor Plan Documents are immediately due and payable pursuant to its express rights under the Floor Plan Documents. Specifically, plaintiff submits that as of March 17, 2009, defendants Crazy

Freddy's and Ippolito were obligated to pay to it the sum of $3,584,263.01, plus interest, late charges, fees, expenses and attorneys' fees under the governing documents. However, since the commencement of this action, Sovereign learned that 114 vehicles, which constituted a portion of the Vehicle Collateral, were sold out of trust. Subsequently, it took possession and sold 100 vehicles, which constituted the remainder of the Vehicle Collateral, in Crazy Freddy's possession. Sovereign received $1,591,820.20 for the sale of the Sold Vehicle Collateral, and said amount has been credited to the amount due and owing from the Floor Plan Defendants to Sovereign. Consequently, plaintiff maintains that there currently remains due and owing from the Floor Plan Defendants to Sovereign the sum of $1,992,442.21. Since the affidavit submitted in support of the motion establishes a breach of the Floor Plan Documents, to wit, Crazy Freddy's alleged failure to make the payments due under the Floor Plan Documents, Sovereign has established a prima facie entitlement to judgment as a matter of law.

The burden thus shifts to Crazy Freddy's to establish that material issues of fact remain, or that it has a meritorious defense.

In opposition, and in support of their own cross motion for summary judgment, counsel for the defendants maintains that having failed to set forth admissible evidence as to when the default specifically occurred or the manner in which the damages alleged by the plaintiff were calculated, plaintiff has failed to demonstrate its prima facie entitlement to judgment as a matter of law. In addition, defendants submit that with respect to the Ippolito Guarantee, since plaintiff has failed to establish that the Guarantee allegedly executed by Ippolito was supported by adequate consideration, the guarantee cannot be held to be binding upon the guarantor. These arguments are all unsubstantiated and unavailing.

The affidavit of Robert E. O'Hara confirms the details of the Floor Plan Defendants' default under the Floor Plan Documents– to wit, that the Floor Plan

Defendants sold and/or transferred a portion of the Vehicle Collateral under the Floor Plan Documents "outside the ordinary course of business and for less than their true value and have concealed any and all proceeds from said sales from Sovereign." Plaintiff also proffers the defendants' Notice of Voluntary Termination of the Financing Agreement dated March 12, 2009, in which Ippolito as President of Crazy Freddy's terminated the Floor Plan Agreement in direct contravention of the Financing Agreement. The voluntary termination of the Floor Plan Documents is an exclusive right of Sovereign. Therefore, this Court finds that the Floor Plan Defendants have failed to establish a meritorious defense to their default.

Furthermore, the plain language of the Commercial Guarantee, signed by Ippolito, confirms that the "CONTINUED UNLIMITED GUARANTY" is "for good and valuable consideration" and that Ippolito "acknowledges having read all the provisions of this Guaranty and agrees to its terms."

Finally, the Floor Plan Defendants' arguments that Sovereign failed to serve a notification of disposition of the Vehicle Collateral, and failed to dispose of the Vehicle in a commercially reasonable manner, are also unavailing. First, pursuant to paragraph 4 of the subsection entitled "Agreements and Waivers" in the Security Agreement, Crazy Freddy's waived any right it may have had to notice and/or hearing under any laws pertaining to Sovereign's rights to seek prejudgment remedies. Second, it is well settled that a sale is commercially reasonable if the method used to sell the collateral was designed to obtain the best price and the sale was conducted in a procedurally appropriate manner (*Bankers Trust Co. v. Dowler & Co.*, 47 NY2d 128 [1979]); *Federal Deposit Ins. Co. v. Herald Square Fabric Corp.*, 81 AD2d 168 [2nd Dept. 1981]). The secured party must demonstrate that it acted in good faith and in the mutual best interest of both the secured party and the debtor (*108th Street Owners Corp. v. Overseas Commodities Limited*, 238 AD2d 324 [2nd Dept. 1997]). The secured party has the burden of establishing that the collateral was sold in a commercially reasonable manner (*Associates*

Commercial Corp. v. Liberty Truck Sales & Leasing, Inc., 286 AD2d 311 [2nd Dept. 2001]); *Federal Deposit Ins. Co. v. Dowler & Co.*, supra).

In this case, the secured party, Sovereign, has established that the sale of the Vehicle Collateral was commercially reasonable. The Floor Plan Defendants admit they returned approximately half of the Vehicle Collateral to Sovereign, after they sold 114 vehicle, out of trust and out of the ordinary course of business. In monetary terms, Sovereign obtained Vehicle Collateral securing 47% of the $3,584,263.01 owed from the Floor Plan Defendants– or, $1,684,603.61. In actuality, Sovereign received $1,591,820.80 for their sale. Thus, Sovereign received recovery of 47% of the owed funds for selling roughly the same percentage of the Vehicle Collateral. Thus, its recovery to date has been reasonable, and the Floor Plan Defendants have been properly credited for their sale. The Floor Plan Defendants, on the other hand, have failed to substantiate their claim with admissible evidence that said sale was not commercially reasonable.

Relying upon the Second Department's decision in *Florida Services v. Alder Surgical Co.*, (23 AD3d 614[2d Dept 2005]) the defendants argue that the plaintiff failed to submit any documentary evidence establishing how damages were calculated and that therefore, plaintiff has failed to meet its burden in establishing the amount of said damages. This argument also falls short of raising a bona fide issue of fact. The fact is that at this juncture, the motion for summary judgment is for a determination as to liability. In *Florida Services*, the Court determined that the plaintiff had failed to demonstrate its entitlement as a matter of law as to its damages. Nevertheless, the Court granted judgment as to liability and remitted the matter for a determination of damages. Here, there is little dispute as to liability, and in fact Sovereign has submitted evidence detailing its damages due on the Note, and it has reduced the amount owing by the amount recouped from sale of the vehicle collateral. Defendant's argument that Sovereign's motion must be denied absent a calculation of damages is meritless.

The Floor Plan Defendants' affirmative defenses do not praise any meritorious

defense which would preclude summary judgment for the plaintiff. The Floor Plan Defendants have set forth four affirmative defenses in their Answer: (1) statute of frauds; (2) the personal guaranty is not supported by adequate consideration; (3) equitable estoppel, waiver and laches; and (4) plaintiff failed to mitigate its damages. These defenses are all belied by the fact that Crazy Freddy's has admittedly been operating under the Floor Plan Documents and has made numerous payments under these agreements. The Floor Plan defendants' continued payments constitute ratification of the Floor Plan Documents thereby rendering their defenses unsupportable as a matter of law. (Restatement [Third] of Agency § 4.01 [2006]). Moreover, in light of Crazy Freddy's acknowledgment that the Note "is an unconditional obligation of "Crazy Freddy's," the Floor Plan Defendants' obligations are not subject to any defenses. Further, Ippolito executed the Commercial Guaranty with an express acknowledgment that Ippolito "absolutely and unconditionally guarantees and promises to pay to Sovereign...the Indebtedness...of Crazy Freddy's ...to [Sovereign]..." Contractual waivers of defenses and counterclaims are uniformly enforced (*Theodore & Theodore Assoc., Inc. v. A.I. Credit Corp.*, 172 AD2d 824 [2nd Dept. 1991]).

In any event, the fact that the Floor Plan Documents are admittedly all in writing, signed by the Defendants, and the Defendants have admitted to their existence, renders their Statute of Frauds defense entirely meritless (General Obligations law §5-701[a][10]). Next, as the Commercial Guarantee specifically provides that the Unlimited Commercial Guarantee is "for good and valuable consideration," defendants' second affirmative defense is also entirely meritless. In addition, inasmuch as Sovereign is seeking legal relief (i.e., monetary damages) based on its causes of action at law (i.e., breach of contract), the defenses of estoppel and laches, which only apply to equitable claims, are also dismissed (*Vasquez v. Zambrano*, 196 AD2d 840 [2nd Dept. 1993]; *Coger v. Cusumeno*, 191 AD2d 493 [2nd Dept. 1993]). Finally, the Floor Plan Defendants' fourth defense is also dismissed for its failure to allege any factual support for its conclusory

allegation (*R.C.A. Corp. v. American Standards Testing Bureau, Inc.*, 121 AD2d 890 [1st Dept. 1986]). The fourth affirmative defense is also dismissed on the grounds that the Guarantee specifically states that "[Ippolito] further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim or setoff, counterclaim, counter demand, recoupment, or similar right, whether such claim demand, or right may be asserted by [Crazy Freddy's], [Ippolito], or both." Therefore, said defenses also fail to set forth any genuine triable issue of fact sufficient to defeat plaintiff's motion for summary judgment.

CONCLUSION

For these reasons, plaintiff's motion for summary judgment on its first, second, third, seventh and eighth causes of action, as against defendants Crazy Freddy's Motorsports, Inc. and Frederick Ippolito, is granted. Accordingly, defendants Crazy Freddy's Motorsports, Inc's and Frederick L. Ippolito's, cross-motion for summary judgment dismissing the plaintiff's complaint as to them, is denied.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

Accordingly, upon the service and filing of a Note of Issue, together with a copy of this Order, it is the Order of this Court that the issue of damages is referred to the Calender Control Part (CCP) for an Inquest.

Subject to the approval of the Justice there presiding, and provided that the above directed service and filing of a Note of Issue has been so served and filed with the Calender Clerk at least ten (10) days prior thereto, this matter shall appear on the Calender of CCP for 9:30 a.m. on Monday, March 28, 2011.

The failure to file a Note of Issue or to appear as directed may be deemed an abandonment of the First, Second, Third, Seventh and Eighth causes of action asserted by the plaintiff against the defendants Crazy Freddy's Motorsports, Inc. and Frederick Ippolito.

The directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer this matter to another Justice, Judicial Hearing Officer, or a Court Attorney Referee, as he or she deems appropriate.

This shall constitute the decision and order of this Court.

Dated: February 23, 2011

J.S.C.