

Hirani Eng'g & Land Surveying, P.C. v Long Is. Bus. Solutions, Inc.
2011 NY Slip Op 30970(U)
April 1, 2011
Supreme Court, Nassau County
Docket Number: 22557/08
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

HIRANI ENGINEERING & LAND SURVEYING, P.C.,	TRIAL/IAS PART 32 NASSAU COUNTY
Plaintiff,	Action No. 1
- against -	Index No.: 22557/08
LONG ISLAND BUSINESS SOLUTIONS, INC.,	
Defendant.	

KEY EQUIPMENT FINANCE INC.,	Action No. 02
Plaintiff,	Index No. 2875/09
- against -	Motion Seq. Nos.: 03, 04
	Motion Date: 12/22/10
	02/03/11
HIRANI ENGINEERING & LAND SURVEYING, P.C. and LONG ISLAND BUSINESS SOLUTIONS, INC.,	
Defendants.	

The following papers have been read on these motions:

<u></u>	<u>Papers Numbered</u>
<u>Action No. 02 Defendant Hirani Engineering & Land Surveying, P.C.'s</u>	
<u>Notice of Motion (Seq. No. 04), Affirmation and Exhibits and</u>	
<u>Affidavit in Support and Exhibits</u>	<u>1</u>
<u>Action No. 02 Plaintiff Key Equipment Finance Inc.'s Notice of</u>	
<u>Cross-Motion (Seq. No. 03), Affirmation and Exhibits, Affidavit and Exhibits</u>	
<u>and Memorandum of Law</u>	<u>2</u>
<u>Action No. 02 Defendant Hirani Engineering & Land Surveying, P.C.'s Reply</u>	
<u>Affirmation in Further Support and Opposition to Key's Cross-Motion</u>	
<u>and Exhibit</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Hirani Engineering & Land Surveying, P.C. (“Hirani”) moves (Motion Seq. No. 04), pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff Key Equipment Finance Inc.’s (“Key”) breach of lease agreement claims and its collateral claims, for an order granting it summary judgment in its counterclaim against plaintiff Key and for an order awarding defendant Hirani reasonable attorneys’ fees. Plaintiff Key opposes defendant Hirani’s motion and cross-moves (Motion Seq. No. 03), pursuant to CPLR § 3212, for an order granting it summary judgment against defendant Hirani. Defendant Hirani opposes plaintiff Key’s cross-motion.

Defendant Hirani is a small civil/structural engineering and land surveying firm located in Jericho, County of Nassau, State of New York. Plaintiff Key is a foreign corporation, organized under the laws of the State of Michigan, and engaged in the business of leasing equipment. In Action 2, plaintiff Key alleges that defendant Hirani defaulted under Lease Number 1298445 for two digital copy machines - a Panasonic Model DP-806, Serial Number LPF50Q00281 (“Copier A”) and a Panasonic Model DP-190, Serial Number A9E4WL00116 (“Copier B”), and is seeking damages for the accelerated balance on said Lease in the amount of \$99,428.96. In its Answer with Counterclaims in said Action, defendant Hirani alleges that plaintiff Key, through their own agents, representatives or third party salesmen, fraudulently induced defendant Hirani, among other things, into signing one lease with plaintiff Key (Lease Number 1298445) covering Copier A and Copier B and, unknown to defendant Hirani, it was presented with and signed another lease (Lease Number 2284474) from another lessor, Bank of America Leasing & Capital, LLC (“BOA”) for the identical equipment - Copier A and Copier B.

Defendant Hirani brought Counterclaims for fraud, negligent misrepresentation, breached of implied covenant of good faith and fair dealing, breach of contract and unjust enrichment, for which violations plaintiff Key is allegedly liable to pay damages, including attorneys' fees and costs, to defendant Hirani.

In Action 2, plaintiff Key served its Amended Verified Complaint on or about December 15, 2009. Defendant Hirani joined issue on or about December 16, 2009.

Defendant Hirani asserts that, on or about May 14, 2007, co-defendant Long Island Business Solutions ("LIBS") engaged defendant Hirani to lease the aforementioned Copier A and Copier B. Defendant Hirani claims that it executed what appeared to be a standard-form three-page Lease Agreement for Copier A and Copier B. However, it turned out that there were two separate Lease Agreement contracts-one Lease Agreement contract for Copier A and Copier B with BOA and another Lease Agreement contract for Copier A and Copier B with plaintiff Key. Defendant Hirani states that it was unaware of the fact that there were in fact two Lease Agreements. Defendant Hirani submits that, as a result of lease payment demands from plaintiff Key for Copier A and Copier B, it made total lease payments to plaintiff Key in the sum of \$21,588.76. Defendant Hirani argues that it did not make duplicative lease payments to BOA as there were no separate and distinct payments demands received from BOA. As a result of defendant Hirani not making any payments to BOA, in 2007, BOA commenced litigation against defendant Hirani in the State of Michigan for breach of the BOA lease for Copier A and Copier B. On or about October 18, 2007, BOA filed a Motion for Summary Disposition with respect to its breach of lease claim against defendant Hirani. On September 30, 2008, defendant Hirani argued against BOA's Motion for Summary Disposition and stated in oral arguments the

issues that are now before this Court in the instant matter regarding the alleged leasing of identical equipment under the auspices of two separate leases. On November 20, 2008, the Michigan court awarded BOA summary adjudication on the validity of the BOA lease and ordered a judgment for BOA against defendant Hirani in the amount of \$95,886.91. On or about April 24, 2009, BOA filed an action in Nassau County Supreme Court to enforce the Michigan Judgment against defendant Hirani. In said matter, Nassau County Supreme Court Justice Stephen A. Bucaria determined that there were no issues of material fact with the Michigan Judgment, recognized the valid sister state judgment of Michigan and held that the Michigan Judgment was entitled to full faith and credit in New York. As a result, on November 18, 2009, defendant Hirani satisfied the BOA's Michigan Judgment in the amount of \$96,336.91.

Defendant Hirani now argues that Justice Bucaria's decision to recognize the Michigan Judgment and give it full faith and credit in New York constituted Justice Bucaria recognizing the BOA lease "as the *only* valid lease for Copier A and Copier B." Defendant Hirani states that "[b]oth the Michigan and New York State Courts have duly recognized only one valid lease agreement for Copier A and Copier B - the Banc (*sic*) of America Lease....as both the Michigan and New York Courts have determined that there is only one valid lease agreement for Copier A and Copier B, Hirani is entitled to recuperate \$21,588.76 from Key Equipment for payments already made for Copier A and Copier B. Key Equipment has been unjustly enriched in the sum of \$21,588.76. Hirani would be unjustly and irreparably harmed and damaged should it be required to make double payments for the same equipment - Copier A and Copier B....With respect to the Michigan Judgment concerning the Banc (*sic*) of America Lease and the Key Equipment Lease involving Copier A and Copier B, as no issue of material fact remains for trial because the Michigan Judgment is a valid sister State judgment and is entitled to full faith and

credit in New York...” Defendant Hirani further argues that “the Michigan Court, in *Banc of America Leasing & Capital, LLC v. Hirani Engineering & Land Surveying, P.C.*, Case No. 07-086921-CK, determined, on the merits, the validity of *only* the Banc (*sic*) of America Lease for Copier A and Copier B in an amount of \$95,886.91. Stated differently, the Michigan Court determined that the Key Equipment Lease was not enforceable....As both the Michigan and New York Courts have determined that there is only one valid lease agreement for Copier A and Copier B, Hirani is entitled to recover \$21,588.76 plus interest from June 10, 2007 from Key Equipment for mistaken payments made for Copier A and Copier B under the Key Equipment Lease. There can only be one valid lease for Copier A and Copier B - the Banc (*sic*) of America Lease.”

In opposition to defendant Hirani’s motion, plaintiff Key argues that “Hirani’s motion for summary judgment is precluded by the numerous and undeniable issues of fact it has raised concerning (a) how many lease agreements it signed or entered into and for which equipment, (b) how many pieces of equipment it received pursuant to each lease agreement, (c) Hirani’s inability to prove that it did not, in fact, receive all of the equipment it leased pursuant to the multiple lease agreements, and (d) LIBS’ claim that Hirani entered into separate lease agreements for separate equipment, all of which LIBS delivered. Hirani’s motion for summary judgment is also precluded, notwithstanding its argument that the Court should give ‘full faith and credit’ to a Michigan judgment, because the Michigan Court did not adjudicate the rights of Key or the validity or enforceability of Key’s Lease with Hirani, where Key was not even a party to or given notice of that action.” Plaintiff Key further argues that its cross-motion (Motion Seq. No. 03) should be granted because it “has proven (a) the existence of a lease agreement between Key and Hirani, which Hirani alleged and admitted signing, and (b) Hirani’s ratification of the

lease agreement by making payments to Key of over \$20,000.00 and continuing to possess and use the equipment. In addition, Hirani acknowledged that it received the three pieces of equipment that were listed on the Key lease agreement.”

Plaintiff Key contends that defendant Hirani leased three pieces of equipment - a Panasonic DP-190 digital copy machine, a Panasonic DP-8060 digital copy machine and a Panasonic KV-53085C hi-speed scanner by obtaining financing pursuant to Key Lease Agreement No. 1298445 under which plaintiff Key retained a security interest in the collateral and defendant Hirani agreed to make monthly lease payments to plaintiff Key. Under said Lease Agreement, defendant Hirani promised and became obligated to deliver to plaintiff Key sixty (60) lease payments in monthly installments of \$1,834.00, plus taxes. After making payments to plaintiff Key amounting to \$20,846.42 (one payment in the amount of \$10,703.24 on October 31, 2007 and another payment in the amount of \$10,143.18 on March 21, 2008, which due to insurance credits of \$501.27, the total amount credited towards the balance due on Hirani’s account equaled \$21,347.69), defendant Hirani ceased making payments to plaintiff Key. Due to the clause in the Lease Agreement with respect to an “Event of Default,” plaintiff Key accelerated the balance due under the Lease Agreement and thereafter brought the instant action to recover for the unpaid balance and take possession of the collateral.

Plaintiff Key further submits that defendant LIBS’ Verified Answer to plaintiff Key’s Amended Complaint denied defendant Hirani’s allegations of fraud and asserted that defendant LIBS entered into two separate Lease Agreements with defendant Hirani - one with plaintiff Key and one with BOA- for different copy equipment. It also asserted that defendant LIBS delivered to defendant Hirani different copy equipment pursuant to each Lease Agreement and acknowledged that a clerical error caused the listing of two similar serial numbers on each lease.

Plaintiff Key submits as evidence a LIBS Order Form which was served by LIBS with its Response to plaintiff Key's Combined Discovery Demands. Said Order Form is addressed to plaintiff Hirani, lists plaintiff Hirani's Federal Tax ID Number and allegedly bears a signature on behalf of plaintiff Hirani. Said Order Form lists defendant Hirani's order of six pieces of copy equipment including two Panasonic Model DP-806 and two Panasonic Model DP-190. The Order Form states that LIBS "will cut a check to Hirani Engineering for \$58,387.00 to satisfy current and prior lease agreement and we will return equipment back to leasing company at no additional charge."

Plaintiff Key contends that defendant Hirani's argument that this Court should give full faith and credit to the Michigan Judgment and thus dismiss plaintiff Key's action is wholly without merit. Plaintiff Key states that defendant Hirani "entirely misrepresents the holding of the Michigan Court which granted BOA a Judgment and Nassau Co. Supreme Court (Justice Bucaria) which enforced the Michigan Judgment. There is absolutely no proof in the record, and indeed no proof exists, that either Court declared the 'BOA lease as the only valid lease' as Mr. Hirani and his counsel both represent....Hirani further fabricates a claim that 'Justice Bucaria held that the Key Equipment Lease for Copier A and Copier B was unenforceable' ..., which appears **nowhere** in the record. The only proof that does exist in the record is that the Michigan Court gave **no** weight to Hirani's claims (after reading Hirani's papers and hearing its oral arguments) because it granted a Judgment to BOA on the BOA Lease....The Nassau Co. Supreme Court likewise gave no weight to Hirani's claims because Justice Bucaria refused to sign Hirani's application for an Order to Show Cause restraining the execution of the Michigan Judgment. There has been no determination on the merits by any court as to the validity or enforceability of the Key Lease. Therefore, Key cannot be bound by the Judgment of the

Michigan Court, and Hirani lacks any basis for requesting that this Court grant 'full faith and credit' to the Michigan Judgment."

With respect to defendant Hirani's counterclaims, plaintiff Key submits that defendant Hirani's counterclaim that it was defrauded by plaintiff Key is "disingenuous and unsupported, and cannot form the basis for the requested relief of a money judgment against Key. There is no **proof** in the record that Hirani was defrauded, and the facts show otherwise. Mr. Hirani admitted signing the Key Lease (both in his deposition and over twenty times in three pleadings), receiving the equipment from LIBS (that was listed on the Key Lease) and then paying Key over \$20,000 pursuant to the Key Lease agreement."

Plaintiff additionally argues that its cross-motion for summary judgment should be granted because it has proven the existence of the Lease Agreement between itself and defendant Hirani which defendant Hirani admitted signing and has proven defendant Hirani's ratification of the Lease Agreement by making payments to plaintiff Key of over \$20,000.00 and continuing to use the equipment in issue.

In opposition to plaintiff Key's cross-motion, defendant Hirani contends that "there can *only* be one lease agreement for the exact same digital copy machines and unfortunately, Key lost the proverbial 'race to the courthouse.'" Defendant Hirani adds that "Key's *sole* basis for defeating Hirani's motion for summary judgment is based on two (2) inadmissible hearsay documents by defaulting defendant LIBS and other hearsay claims by LIBS that feignedly suggest Hirani received two Panasonic Model DP-806, Serial Number LPF50Q00281 and two Panasonic Model DP-190, Serial Number A9E4WL00116."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient

evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

When faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *See Miller v. Journal-News*, 211 A.D.2d 626, 620 N.Y.S.2d 500 (2d Dept. 1995). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact

exist. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts. See *Lelekakis v. Kamamis*, 41 A.D.3d 662, 839 N.Y.S.2d 773 (2d Dept. 2007); *Pedone v. B&B Equipment Co., Inc.*, 239 A.D.2d 397, 662 N.Y.S.2d 766 (2d Dept.1997).

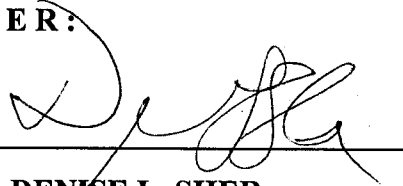
Based upon the evidence and legal arguments provided in both defendant Hirani's and plaintiff Key's motions as detailed above, the Court finds that neither defendant Hirani nor plaintiff Key have established *prima facie* entitlement to judgment as a matter of law. Both defendant Hirani and plaintiff Key have failed to provide sufficient evidence to demonstrate the absence of material issues of fact. Instead, both sides have raised several issues of fact within their own papers. Accordingly, the Court finds that there are numerous factual issues with respect to the claims made by plaintiff Key and the counterclaims made by defendant Hirani.

Therefore, defendant Hirani's motion (Motion Seq. No. 04) is hereby denied. Plaintiff Key's cross-motion (Motion Seq. No. 03) is also hereby denied.

All parties shall appear for a Pre-Trial conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on April 28, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
April 1, 2011

ENTERED

APR 07 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**