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SCANNED ON 7/13/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos Justice

PART 53

General Electric

- v -

Miron Lumber

INDEX NO. 650728/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ▲ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

FILED

JUL 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 8, 2011

CHARLES E. RAMOS J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GENERAL ELECTRIC CAPITAL CORPORATION,

Plaintiff,

Index No.: 650728/10

-against-

MIRON LUMBER CO. INC., DEREK MESSING and BERND MESSING,

Defendants.

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HON. Charles Edward Ramos, J.S.C.:

Plaintiff, General Electric Capital Corporation ("Plaintiff" or "GE Capital") moves, pursuant to CPLR 3212, for summary judgment dismissing and striking defendants' counterclaim and affirmative defenses, respectively, and in support of its own claims for breach of contract, breach of guaranty, delinquency penalties, attorneys' fees, and related costs/disbursements. Defendants, Miron Lumber Co. Inc., Derek Messing and Bernd Messing (together, "Miron Lumber," "Miron," or the "Defendants"), oppose the motion.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the

sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Amatulli v Delhi Construction Corporation*, 77 NY2d 525, 533 [1991]).

Background

This is an action involving a commercial loan and guaranty. On June 9, 2009, the corporate parties entered into an agreement (the "2009 Agreement") by which GE Capital provided financing to Miron Lumber for the purpose of Miron acquiring certain equipment. Pursuant to the 2009 Agreement's terms, GE was given a security interest in the equipment (the "Collateral"), and Miron agreed to pay GE Capital the sum of $820,306.08 in forty eight (48) consecutive monthly installments of $17,089.71. On June 9, 2009, the Collateral was delivered to Miron Lumber and it began making monthly payments to GE Capital in accordance with the schedule of payments.

Concurrent with the 2009 Agreement, the individual defendants executed a guaranty (the "2009 Guaranty") pursuant to which they jointly and severally agreed to guarantee all of the obligations of Miron Lumber to GE Capital contained in the 2009 Agreement. Miron made the required payments through October 2009

before defaulting on their obligations in November 2009, by failing to tender a full payment.[1] Upon default, GE Capital elected, (as is their right, see 2009 Agreement at ¶ 5.2), to accelerate Miron's obligations, making full payment immediately due and payable.

Subsequent to the default, GE Capital, at Miron Lumber's request, sold the Collateral to a third-party netting $340,000 that has been applied to the outstanding balance due and owing under the 2009 Agreement and 2009 Guaranty resulting in a $354,003.54 principal balance. Miron Lumber has made no further payment and remains in default under both the 2009 Agreement and the 2009 Guaranty. This action followed.

Discussion[2]

Copies of the fully executed 2009 Agreement and 2009 Guaranty submitted in support of Plaintiff's motion for summary judgment, along with the accompanying affidavits, is evidence sufficient to establish a prima facie entitlement to judgment as a matter of law (see *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209

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[1] Miron Lumber made partial payments in the amount of $7588.74 from November 2009 through March 2010.

[2] It should be noted that both attorneys on this motion are in violation of Part 53's Practice Rule #7 which clearly states: "Memos of Law ARE REQUIRED on ALL motions. Failure to submit separate memos of law (not incorporated into attorney affirmations) may result in the denial of the motion" (emphasis in original). Both plaintiff and defendant have failed to submit legal memoranda separate from arguments advanced in the attorneys' affirmations.

[1st Dept 2007], *lv dismissed*, 10 NY3d 741 [2008], *lv denied*, 13 NY3d 709 [2009]).

In opposition, Miron argues that unlike the "original" 2005 and 2006 lease agreements by and among the parties,[3] the purported June 9, 2009 "renegotiated" lease agreement (here, the 2009 Agreement) was not personally guaranteed (see Affirmation in Opposition at ¶ 3). However, Defendants' position is belied by the documentary evidence, to which they fail to adequately contest (see Notice of Motion, Exhibit A).[4] The 2009 Guaranty produced by GE Capital speaks for itself. Miron does not controvert its existence and raises no issue of fraudulent conduct. Counsel for Miron's representation that the copy of the 2009 Agreement he received from his clients did not contain a guaranty is not sufficient to raise an issue of fact as to

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[3] Although Miron refers to lease agreements entered into by the parties in 2005 and 2006, they are not subject to this action, are irrelevant, and will not be addressed.

[4] In opposing GE Capital's motion for summary judgment, Miron does not submit an affidavit of a person with actual knowledge of the facts. Although not fatal in all circumstances, it is here. An affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of "evidentiary proof in admissible form," e.g., documents, transcripts (*Zuckerman v New York*, 49 NY2d 557, 564 [1980]). Such an affirmation could also be accepted with respect to admissions of a party made in the attorney's presence (Id). Here however, the attorney affirmation does not make a representation that his clients deny signing the 2009 Guaranty on June 9, 2009, and offers nothing by way of documentary proof sufficient to raise an issue of fact or otherwise defeat summary judgment.

whether one was executed, particularly in the absence of testimonial evidence of the individual defendants.

Affirmative Defenses

Miron's two affirmative defenses interposed in its Answer to the Complaint (failure to state a cause of action and the lack of personal jurisdiction) must be struck. Miron, in its unusually bare affirmation in opposition,[5] fails to address GE Capital's motion to strike these affirmative defenses, and has therefore indicated an intention to abandon them (see e.g. *Gary v Flair Beverage Corp.*, 60 AD3d 413 [1st Dept 2009]).

In lieu of addressing its affirmative defenses actually pled in the Answer (disposed above), Miron improperly seeks to present a new affirmative defense here, in opposition. Notwithstanding the procedural folly, the Court will address it.

Miron argues that the 2009 Agreement (minus the 2009 Guaranty), is an unenforceable contract of adhesion.

Generally, contract law presumes that a written agreement is valid and that it accurately reflects the intention of the parties, and imposes a heavy burden on the party seeking to disprove those presumptions *(Chimart Associates v Paul*, 66 NY2d 570, 574 [1986]).

Contracts of adhesion, which are common in the marketplace,

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[5] Miron's opposition affirmation contains legal arguments barely in excess of one page.

are typically form contracts offered by business entities (i.e. insurance companies) to unrepresented individuals on a take-it-or-leave-it basis, with no opportunity to change any of the contract's terms (see *Klos v Polskie Linie Lotnicze*, 133 F3d 164, 168 [2d Cir 1997]). To be considered an unenforceable contract of adhesion, the contract must also inflict substantive unfairness on the weaker party, because its terms are not within the reasonable expectations of that party, or because its terms are unduly oppressive, unconscionable, or contrary to public policy (*Aviall, Inc. v Ryder System*, 913 F Supp 826, 831 [SDNY 1996], *aff'd*, 110 F3d 892 (2d Cir 1997); *Gelbman v Valleycrest Productions Ltd.*, 189 Misc 2d 403, 407 [Sup Ct, NY County 2001]).

Here, Miron argues two distinct points. One, that there is a disparity of bargaining position between the parties, and that the Defendants were not represented by counsel (two facts that are undisputed). And two, that the interest rate and payment schedule is usurious and against public policy.

Inequality of bargaining power alone does not invalidate a contract as one of adhesion when the purchase can be made elsewhere (see *RE Corp. v New York Energy Savings Corp.*, 78 AD3d 546, 547 [1st Dept 2010]). Furthermore, "there is, certainly, no requirement in the law that consultation with a lawyer must occur in order to render a contractual obligation enforceable...so long as the agreement has been knowingly and voluntarily entered into"

(*Skluth v United Merchants & Manufacturers, Inc.*, 163 AD2d 104, 107 [1st Dept 1990], *lv granted,* 76 NY2d 711, *appeal withdrawn,* 79 NY2d 976 [1992]). Therefore, to defeat summary judgment, Miron must demonstrate that the terms contained in the 2009 Agreement are usurious and against public policy.

To this end, however, Miron sets forth arguments and assertions that are indiscernible, nonsensical, and unsubstantiated (see Affirmation in Opposition at ¶ 4). The 2009 Agreement sets forth an interest rate of 9.75% per annum, a level that is well within the laws governing usury (see General Obligations Law § 5-501, 5-511, [setting a maximum interest rate in New York State at 16% per annum]). Consequently, Miron fails to set forth proof sufficient to raise a material question of fact, or any other basis sufficient to defeat GE Capital's entitlement to summary judgment as a matter of law. Accordingly, Miron Limber's affirmative defense that the 2009 Agreement is an unenforceable contract of adhesion is rejected and struck.

Counterclaim

Miron Lumber's counterclaim for attorneys' fees must be dismissed. Putting aside the fact that Miron fails to even address its purported right to attorneys' fees in its affirmation in opposition, Miron (the non-prevailing party) has no conceivable basis to recover attorneys' fees in this matter (see *TAG380, LLC v Commet 380, Inc.*, 10 NY3d 507, 515 [2008], *rearg*

denied, 11 NY3d 753, *mod on other grounds*, 82 AD3d 673 (1st Dept 2011)("in a breach of contract case, a prevailing party may not collect attorneys' fees from the non-prevailing party unless such award is authorized by agreement between the parties, statute or court rule").

Accordingly, it is

ORDERED that Defendants' counterclaim and affirmative defenses are dismissed and stricken, respectively; and it is further;

ORDERED that Plaintiff's motion for summary judgment is granted in all respects as to liability; and it is further

ORDERED that the calculation of Plaintiff's damages (including contractual, delinquency, attorneys' fees, and costs/disbursements) is hereby referred to a Special Referee to hear and determine in accordance with CPLR 4301; and it is further

ORDERED that the Plaintiff is directed to serve a copy of this Decision and Order, with notice of entry, on the Clerk of the Judicial Support Office to facilitate assignment of the remainder of this action to a Special Referee for the purposes described above.

Dated: July 8, 2011

J.S.C.
CHARLES E. RAMOS