

Weiss v North Shore Motor Group, Inc.
2011 NY Slip Op 32488(U)
September 13, 2011
Supreme Court, Nassau County
Docket Number: 12622-10
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
**MICHAEL S. WEISS and JONATHAN M.
WEISS,**

Plaintiffs,

-against-

**NORTH SHORE MOTOR GROUP, INC.,
R.A. COHEN a/k/a RICK COHEN,
BANK OF AMERICA,
DCFS USA LLC d/b/a
MERCEDES-BENZ FINANCIAL,
DAIMLER FINANCIAL SERVICES,
DAIMLER FINANCIAL and/or
DAIMLER TRUCK FINANCIAL,
GENERAL MOTORS ACCEPTANCE CORP. d/b/a
GMAC FINANCIAL SERVICES,
BMW FINANCIAL SERVICES NA, LLC d/b/a
BMW BANK OF NORTH AMERICA and
VW CREDIT, INC. d/b/a
VOLKSWAGEN CREDIT, INC.,
AUDI FINANCIAL SERVICES and/or
BENTLY FINANCIAL SERVICES,**

Defendants.,

**CLEAN CORP. (NY), NSMG LLC,
CDMS, INC., CORTNEY RHEN DUBIE,
and KATHLEEN GIBSON HAMBURGER,**

Cross-Claim Defendants.

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 12622-10
Motion Seq. No. 4
Submission Date: 8/5/11**

The following papers have been read on this motion:

**Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Affirmation in Partial Opposition.....x**

This matter is before the Court for decision on the motion filed by Defendant BMW Financial Services NA, LLC on July 13, 2011 and submitted on August 5, 2011. For the reasons set forth below, the Court grants the motion and refers the matter to an inquest on the issues of interest, costs, expenses and attorney's fees.

BACKGROUND

A. Relief Sought

Defendant BMW Financial Services NA, LLC and its related entities BMW Bank of North America, Inc. and Alphera Financial Services (collectively "BMW FS") moves for an Order, pursuant to CPLR § 3215, awarding BMW FS judgment on its Verified Answer with Cross Claims, against the Defendants North Shore Motor Group, Inc. ("North Shore"), R.A. Cohen a/k/a Rick Cohen ("Cohen"), and Rick Cohen d/b/a Clean Corp. (NY). ("Clean Corp."), the alter ego of Cohen, on the First Cross Claim (breach of contract), Sixth Cross Claim (attorney's fees), Twelfth Cross Claim (bounced checks) and Thirteenth Cross Claim (closed accounts).

Defendants VW Credit, Inc. d/b/a Volkswagen Credit, Inc. and Audi Financial Services have submitted an affirmation in partial opposition on the ground that the instant motion is "ambiguous" (McGovern Aff. at ¶ 3) as to which parties BMW FS seeks relief against, and it may be construed as seeking relief against VW Credit. In light of the Court's conclusion that the instant motion does not seek relief against VW, the Court will not further address VW's partial opposition.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated September 13, 2010 ("2010 Decision") in which the Court denied Plaintiffs' application for injunctive relief, and the Court incorporates the 2010 Decision herein by reference. As noted in the 2010 Decision, in the Complaint, Plaintiffs allege certain improprieties by Defendants in connection with Plaintiffs'

leasing and purchase of certain vehicles including but not limited to 1) submitting forged documents; and 2) entering into agreements, purportedly on behalf of Plaintiffs, without Plaintiffs' consent or authority. The first through tenth causes of action are asserted against Defendants Cohen and North Shore only. In the eleventh cause of action, Plaintiffs seek a declaratory judgment holding, *inter alia*, that there are no monies due and owing from Michael S. Weiss ("Michael") on the 2005 Mercedes. In the twelfth cause of action, Plaintiffs seek a declaratory judgment holding, *inter alia*, that Jonathan M. Weiss ("Jonathan") is the lawful owner of the 2010 Audi.

BMW FS seeks judgment against North Shore, Cohen and Clean Corp. ("Cohen Co-Defendants") on the first, sixth, twelfth, and thirteenth cross-claims (Rosenberg Aff. in Supp. at pp. 3-5). Those cross claims are contained in BMW FS' Verified Answer with Cross Claims (Ex. 3 to Rosenberg Aff. in Supp.) and allege as follows:

First Cross Claim

This cross claim is based on breach of contract, specifically Motor Vehicle Lease Agreements and/or Motor Vehicle Retail Installment Purchase Agreements ("Agreements") (Exs. A1 through A6 of Verified Answer with Cross Claims), by North Shore, Cohen and Clean Corp. who received the vehicles ("Vehicles") that are the subject of the Agreements and failed to make payments for those Vehicles pursuant to the terms of the Agreements. The sum of \$491,028.18, plus interest, is due and owing to BMW FS.

Sixth Cross Claim

BMW FS seeks Attorney's Fees, pursuant to the terms of the Agreements, incurred by BMW FS in connection with its exercise of its rights and remedies under the Agreements in light of the default of North Shore, Cohen and Clean Corp.

Twelfth Cross Claim

This cross claim is based on North Shore, Cohen and Clean Corp.'s delivery of checks in the sum of \$201,424.31 (Exs. C1 through C9 of Verified Answer with Cross Claims) to BMW FS which presented those checks were payment, which payment was dishonored. Notice of presentment and refusal of payment was given to North Shore, Cohen and Clean Corp. The sum of \$201,424.31, plus interest, is due and owing to BMW FS.

Thirteenth Cross Claim

This cross claim is based on North Shore, Cohen and Clean's delivery of checks in the sum of \$194,881.98 (Exs. D1 through D6 of Verified Answer with Cross Claims) to BMW, which presented the checks for payment, which payment was refused because the checks were drawn on closed accounts. Notice of presentment, dishonor and refusal of payment was given to North Shore, Cohen and Clean Corp. The sum of \$194,881.98, plus interest, is due and owing to BMW FS.

David Belu ("Belu"), the National Collections Manager for BMW FS, affirms the truth of the allegations in the Answer with Cross Claims, and provides documentation (Ex. 1 to Belu Aff. in Supp.) in support of movant's request for damages in the sum of \$491,028.18 as a result of the Cohen Defendants' failure to make payment under the Agreements.

Counsel for BMW FS affirms that BMW FS served and filed its Verified Answer with Cross Claims on or about December 16, 2010 and that the Cohen Co-Defendants failed to appear, answer or otherwise move with respect to BMW FS' Verified Answer with Cross Claims. An additional copy of the Verified Answer with Cross Claims was mailed to the Cohen Co-Defendants on or about May 27, 2011, pursuant to CPLR § 3215, as reflected by the documentation provided (Ex. 4 to Rosenberg Aff. in Supp.).

BMW FS requests judgment 1) on its First Cross Claim in the sum of \$491,028.18, plus interest, costs, expenses and attorney's fees, 2) on its Sixth Cross Claim for attorney's fees representing 10% of the amount due and payable under the Agreements, pursuant to paragraph 16 of the Agreements, as well as costs and expenses, 3) on its Twelfth Cross Claim in the sum of \$201,424.31, plus interest, and 4) on its Thirteenth Cross Claim in the sum of \$194,881.98, plus interest, costs, expenses and attorney's fees

C. The Parties' Positions

BMW FS submits that it has demonstrated its right to the requested relief by presenting 1) proof of service of its Answer with Cross Claims on the Defendants and Cross Claim Defendants against whom they seek relief, 2) proof of the claims, 3) the default of the Cohen Co-Defendants, and 4) the amount due.

The Cohen Co-Defendants have not answered or moved in this action with respect to the Answer, or submitted any response to BOA's motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' 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).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

C. Application of these Principles to the Instant Action

The Court grants BMW FS' motion, based on the Court's conclusion that 1) BOA has provided proof of service of its Verified Answer with Cross Claims, 2) the documentation submitted demonstrates BMW FS' entitlement to judgment; and 3) the parties against whom

BMW FS seeks judgment have defaulted in this action.

The Court determines, however, that it cannot base a counsel fee award on the record before it and, accordingly, refers this matter to an inquest on the issues of interest, costs, expenses and attorney's fees.

In light of the foregoing, it is hereby

ORDERED, that the motion of BMW Financial Services NA, LLC and its related entities BMW Bank of North America, Inc. and Alphera Financial Services for a default judgment against North Shore Motor Group, Inc., R.A. Cohen a/k/a Rick Cohen and Rick Cohen d/b/a Clean Corp. NY is granted; and it is further

ORDERED, that BMW Financial Services NA, LLC and its related entities BMW Bank of North America, Inc. and Alphera Financial Services Plaintiff have judgment against North Shore Motor Group, Inc., R.A. Cohen a/k/a Rick Cohen and Rick Cohen d/b/a Clean Corp. NY 1) on its First Cross Claim in the sum of \$491,028.18, plus interest, costs, and expenses to be determined at an inquest, 2) on its Sixth Cross Claim for attorney's fees, to be determined at an inquest, 3) on its Twelfth Cross Claim in the sum of \$201,424.31, plus interest, costs and expenses to be determined at an inquest, and 4) on its Thirteenth Cross Claim in the sum of \$194,881.98, plus interest, costs and expenses 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 computation of interest, costs, expenses and attorney's fees on October 20, 2011 at 9:30 a.m.; and it is further

ORDERED, that BMW Financial Services NA, LLC and its related entities BMW Bank of North America, Inc. and Alphera Financial Services shall serve upon North Shore Motor Group, Inc., R.A. Cohen a/k/a Rick Cohen and Rick Cohen d/b/a Clean Corp. NY, by regular mail, 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 October 6, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of BMW Financial Services NA, LLC and its related entities BMW Bank of North America, Inc. and Alphera Financial Services and against North Shore Motor Group, Inc., R.A. Cohen a/k/a Rick Cohen and Rick Cohen d/b/a Clean Corp. NY, 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

September 13, 2011

ENTER

A handwritten signature in black ink, appearing to read 'Timothy S. Driscoll', is written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

SEP 19 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE