

**Cannon Financial Servs., Inc. v Business  
Intelligence Assoc., Inc.**

2013 NY Slip Op 30377(U)

February 19, 2013

Supreme Court, New York County

Docket Number: 0112176/2011

Judge: Cynthia S. Kern

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

*E 2/20/13*

**PRESENT:** \_\_\_\_\_  
*Justice*

**PART** \_\_\_\_\_

Index Number : 112176/2011  
CANON FINANCIAL SERVICES, INC.  
vs.  
BUSINESS INTELLIGENCE ASSOC,  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

RECEIVED

FEB 20 2013

RECEIVED CIVIL RIGHTS  
AND SUPREMACY DIVISION

**FILED**

FEB 21 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/19/13

109, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X

CANNON FINANCIAL SERVICES, INC.,

Plaintiff,

-against-

BUSINESS INTELLIGENCE ASSOCIATES, INC.  
d/b/a BUSINESS INTELLIGENCE ASSOCIATES INC.,

Defendant.

-----X

HON. CYNTHIA KERN, J.S.C.

Index No. 112176/2011

DECISION/ORDER

**FILED**

FEB 21 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover the allegedly unpaid amounts owed to it by defendant pursuant to a rental agreement and guaranty. Plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment against defendant on both its causes of action. For the reasons set forth below, plaintiff's motion is granted as to liability but is denied as to damages.

The relevant facts are as follows. On or about February 13, 2009, defendant entered into a "Non-Cancelable Rental Agreement" (the "Rental Agreement") with plaintiff for copier equipment. Pursuant to the Rental Agreement, defendant was required to remit to plaintiff thirty-

six (36) monthly installments, each in the minimum sum of eight hundred and thirty eight dollars (\$838.00) plus overage charges per copy utilized and any applicable late fees. Sometime thereafter, defendant defaulted under the Rental Agreement by failing to submit payments when they became due and owing.

Separate and apart from the Rental Agreement above, on or about March 10, 2009, defendant executed a "Company Guaranty" (the "Guaranty") in connection with an agreement entered into between plaintiff and non-party Limelight Development, LLC ("Limelight"). Pursuant to the Guaranty, defendant agreed that "if [Limelight] shall fail to pay or perform all or any part of the Liabilities when due, [defendant] agrees, upon demand, to pay any amounts which may be due from [Limelight]." Sometime thereafter, Limelight defaulted under the terms of the underlying agreement by failing to remit payment when it became due and owing. Plaintiff has made demands for payment for the amounts due and owing under both the Rental Agreement and Guaranty but, to date, full payment has not been received.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Here, plaintiff has established its *prima facie* right to summary judgment on liability but

not as to the amount of damages. Plaintiff established its *prima facie* as to liability by annexing the Rental Agreement and Guaranty to its moving papers and the Affidavit of Michael J. Quintus attesting to defendant's default under said agreements. In response, defendant does not dispute its liability under the agreements, but argues that plaintiff failed to make out its *prima facie* as to the amount of damages and that there still remains a material issue of fact as to the amount of damages plaintiff is entitled to. The court agrees as plaintiff failed to annex the account statements to its moving papers to substantiate the amounts due and owing under the agreements. Annexing the statements to its reply papers is insufficient as plaintiff must make out its *prima facie* in its initial moving papers. See *Dannasch v. Bifulco*, 184 A.D.2d 415 (1<sup>st</sup> Dept 1992).

However, defendant's assertion that summary judgment should be denied pursuant to CPLR § 3212 (f) because discovery remains outstanding is without merit. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Ruttore & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, defendant has not identified why further discovery would change the essential facts of the case, namely that there exists a valid Rental Agreement and Guaranty between plaintiff and defendant and that defendant has failed to pay the total amount due and owing under said agreements. Any information relating to what defendant has already paid to plaintiff would already be in defendant's possession.

Accordingly, plaintiff is granted summary judgment against defendant as to liability on its two causes of action and an inquest is hereby directed to determine the amount of damages to be awarded to plaintiff on a date to be set by the Calendar Clerk upon entry and service of a copy of this order together with payment of the appropriate fee. Thereafter, the Clerk is directed to enter

