

<b>Sheffield Fin., a Div. of Branch Banking &amp; Trust Co. v Mahmood</b>
2019 NY Slip Op 32285(U)
August 1, 2019
Supreme Court, New York County
Docket Number: 150794/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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**INDEX NO.** 150794/2017

SHEFFIELD FINANCIAL, A DIVISION OF BRANCH  
BANKING AND TRUST COMPANY,

Plaintiff,

**MOTION SEQ. NO.** 002

- v -

ABID MAHMOOD a/k/a ABID MAMOOD,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 72, 73 were read on this motion to/for SUMMARY JUDGMENT

In this breach of contract action, plaintiff Sheffield Financial, a Division of Branch Banking and Trust Company, moves, pursuant to CPLR 3212, for summary judgment against defendant Abid Mahmood a/k/a Abid Mamood. Defendant opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On or about September 5, 2015, plaintiff entered into a "Note & Security Agreement" with defendant ("the agreement") for the purchase of a 2015 Bobcat S570T4 ("the Bobcat" or "the collateral"), a machine used, among other things, to lift heavy objects such as loaded pallets. Doc. 51 at par. 7; Doc. 52. Pursuant to the agreement, plaintiff provided defendant financing for the purchase of the Bobcat in the amount of \$36,836, plus a finance charge of \$904.60, a total of \$37,740.60, and defendant agreed to repay plaintiff that amount in 60 equal monthly installments

of \$629.01. Doc. 51 at par. 8; Doc. 52. The first payment was to be made on October 10, 2015 and each subsequent payment was to be made on the same date of each month thereafter until payment was made in full. Doc. 51 at par. 8. The agreement provided that, in the event plaintiff had to pursue litigation in order to recover the monies owed pursuant thereto, it would be entitled to costs and attorneys' fees from defendant. Doc. 51 at par. 26; Doc. 52 at par. 7.

Pursuant to the agreement, defendant also granted a security interest in the collateral to plaintiff. Doc. 51 at par. 9; Doc. 52. The seller of the Bobcat, Equipment Rentals Inc. ("the dealer"), delivered the collateral to 16301 Witt Road, Brownville, New York, in accordance with defendant's instructions. Doc. 51 at par. 11.

At his deposition, defendant admitted that he signed the agreement and that he did not make any payments as required by the same. Doc. 50 at 34-35, 95; Doc. 67 at 36; Doc. 68 at 66-67. Although defendant maintained that the Bobcat was supposed to be delivered to the Abe Lamb and Goat Farm ("the farm") at 16301 Witt Road, Brownville, New York, which he owned (Doc. 50 at 97; Doc. 67 at 48; Doc. 68 at 69-70), he denied that it was ever delivered to him (Doc. 67 at 28-29; Doc. 68, at 56-57, 62, 67, 69) and insisted that he never took possession of the same. Doc. 69 at 83-84.

Plaintiff commenced the captioned action by filing a summons and verified complaint on January 25, 2017. Doc. 1. In the complaint, plaintiff alleged as a first cause of action that defendant breached the agreement and owes plaintiff a balance of \$37,198.26, plus interest from June 22, 2016. Doc. 1. As a second cause of action, plaintiff claimed that it was entitled to recover from defendant all costs and disbursements incurred as a result of defendant's default, as well as reimbursement of all reasonable attorneys' fees. Doc. 1.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendant on its breach of contract claim. In support of the motion, plaintiff argues, inter alia, that defendant admitted at his deposition and in a response to a notice to admit that he signed the agreement and never made any payments pursuant to the same. It also submits the affidavit of Timothy Meyer, a traveling salesman employed by the dealer, who represents that he was present when defendant purchased the collateral, and that he personally delivered the collateral to the farm on September 7, 2015. Ex. B to Doc. 37 at pars. 1, 3, 4, and 5. Specifically, Meyer states that approximately 9 workers were living in a house on the farm, that one of the workers “took delivery of the [c]ollateral”, and that he provided the worker with an invoice. Id. at pars. 7-8. Plaintiff maintains that Meyer’s affidavit is corroborated by an October 1, 2015 police report filed by an individual claiming to be defendant’s nephew, who represented, inter alia, that the Bobcat had been purchased by defendant from the dealer, that he was “still” in possession of both sets of keys for the Bobcat, that the machine had been on the farm for approximately three weeks, and that he had last seen it on September 28, 2015. Doc. 56.

Plaintiff also submits the affidavit of John Nicholson, plaintiff’s Senior Vice-President, who represents, inter alia, that plaintiff provided defendant with financing in the amount of \$37,740.60 for the purchase of the Bobcat and that defendant had not made any monthly installment payments in accordance with the agreement. Doc. 51. Thus, represents Nicholson, defendant is indebted to plaintiff in the amount of \$37,198.26, exclusive of attorneys’ fees and costs, plus interest from June 22, 2016. Id.<sup>1</sup> Plaintiff’s counsel represents in an affidavit that plaintiff is entitled to attorneys’ fees of \$2,660 plus costs in the amount of \$1,527. Doc. 58.

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<sup>1</sup> It is unclear from plaintiff’s motion why Nicholson states that defendant obtained financing from plaintiff in the amount of \$37,740.60, paid none of the monies owed to plaintiff, and subsequently owed plaintiff the lesser sum of \$37,198.26, plus attorneys’ fees, costs and disbursements. Doc. 51. Nevertheless, given Nicholson’s affidavit, as well as the fact that the wherefore clause of the motion seeks \$37,198.26, this Court will deem that to be the amount

In opposition, defendant argues that the motion must be denied because there was no consideration for the note. Docs. 64-65. Specifically, asserts defendant, the Bobcat was never delivered. Id. Defendant further asserts that, since it asserted as an affirmative defense that the dispute had to be arbitrated, plaintiff cannot maintain the captioned action. Doc. 64. Further, defendant maintains that plaintiff cannot be granted summary judgment because it failed to join the dealer as a necessary party pursuant to CPLR 1001(b). Id.

In reply, plaintiff reiterates that it has established its entitlement to summary judgment on its breach of contract claim. It further asserts that defendant's argument that plaintiff's claim must be arbitrated is without merit, since defendant failed to make a formal request for arbitration as required by the agreement.

#### LEGAL CONCLUSIONS:

On a motion for summary judgment, the movant bears the initial burden to tender proof in admissible form demonstrating entitlement to judgment as a matter of law and the absence of material issues of fact, at which point the burden shifts to the party opposing the motion to establish the existence of a triable issue of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will

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demand by plaintiff. Additionally, although defendant appears to have breached the agreement by failing to make his first monthly payment in late 2015, plaintiff inexplicably demands interest from the later date of June 22, 2016. Doc. 35.

be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) the plaintiff's performance thereunder; (3) the defendant's breach of the contract; and (4) resulting damages. *See Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Here, as plaintiff correctly asserts, it has satisfied all four of these criteria. A valid agreement existed between plaintiff and defendant, and defendant concedes that he signed the same. Plaintiff also performed under the agreement by providing financing for the defendant in the amount of \$37,740.60, the amount specified therein. Defendant breached the agreement by admittedly failing to pay plaintiff any of the money owed pursuant to the same. Finally, plaintiff was damaged as a result of defendant's failure to pay the money owed pursuant to the agreement.

Although defendant argues that the agreement must fail due to a lack of consideration, and that because the Bobcat was never delivered, plaintiff failed to perform pursuant to the agreement, these contentions are without merit. The agreement is silent regarding any obligation by plaintiff to deliver the Bobcat. It merely required plaintiff to provide defendant with financing so that the latter could purchase the Bobcat, which money defendant was to repay in monthly installments. Defendant does not deny that he received the financing, and he concedes that he failed to pay plaintiff pursuant to the agreement. Although defendant claims that he never received the Bobcat from the dealer, the payment of the dealer by plaintiff at defendant's request constituted consideration and performance of the agreement regardless of whether defendant actually received any benefit as a result of the transaction. *See Kansas State Bank of Manhattan v Harrisville Fire Dept., Inc.*, 66 AD3d 1409, 1410 (4<sup>th</sup> Dept 2009). Thus, although defendant's denial that he ever received the Bobcat contradicts Meyer's representation that he personally delivered the Bobcat to

the farm, this does not raise a material issue of fact since there is no evidence that delivery of the Bobcat would have been the responsibility of anyone other than the dealer.

Therefore, in light of the foregoing, it is hereby:

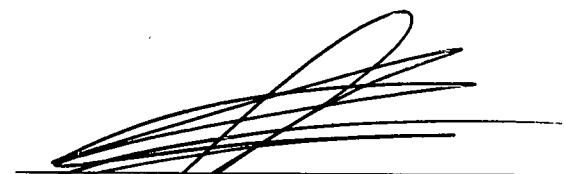
**ORDERED** that the motion by plaintiff Sheffield Financial, a Division of Branch Banking and Trust Company, for summary judgment against defendant Abid Mahmood a/k/a Abid Mamood pursuant to CPLR 3212 is granted; and it is further

**ORDERED** that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment in favor of plaintiff and against defendant in the amount of \$37,198.26, plus interest at 9% per annum from June 22, 2016, to be calculated by the Clerk of the Court, disbursements as taxed by the Clerk of the Court, as well as attorneys' fees of \$2,660 and costs in the amount of \$1,527; and it is further

**ORDERED** that this constitutes the decision and order of this Court.

8/1/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE