

**Hanmi Bank v Artaux LLC**

2019 NY Slip Op 32564(U)

August 27, 2019

Supreme Court, New York County

Docket Number: 651127/2018

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

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HANMI BANK,

Plaintiff,

- v -

ARTAUX LLC, JAMES MUIR

Defendant.

INDEX NO. 651127/2018

MOTION DATE 08/20/2018

MOTION SEQ. NO. 001

ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents:

Plaintiff seeks an Order granting it summary judgment as against Defendants pursuant to CPLR 3212 as well as dismissal of Defendant's first affirmative defense pursuant to CPLR 3211. Defendant did not submit opposition1. For the following reasons, Plaintiff's motion is granted in part. The request for attorneys' fees is granted, but the amount shall be determined by a Judicial Hearing Officer.

This is an action to recover money damages resulting from Defendant Artaux LLC d /b/a Artaux Catering Master's (hereinafter "Artaux") alleged default and breach of a written commercial equipment lease ("Lease") and Defendant James Muir's default and breach of a related written personal guaranty ("Guaranty").

1 An additional relief sought by Plaintiff's motion was to amend its Complaint nunc pro tunc. That arm of the motion was opposed by Defendants and was subsequently withdrawn by Plaintiff, as reflected in this Court's Interim Order dated September 10, 2018. (NYSCEF 24).653591 The Interim Order also invited Defendants to file substantive opposition to the motion for summary judgment which they declined to do.

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On or about December 15, 2014 Banc of California, N.A. (hereinafter "Banc of California") and defendant Artaux entered into an equipment lease agreement numbered 1805-BRO-4330 (hereinafter the "Lease"). (NYSCEF 7, ¶5). Pursuant to the Lease, Artaux agreed to lease the Equipment from Banc of California, and further agreed to pay to Banc of California sixty (60) consecutive monthly lease payments over the course of sixty (60) consecutive months, in the amount of \$1,469.27, plus applicable taxes thereon. *Id.*, ¶6.

On or before December 15, 2014, the Equipment was delivered to Artaux pursuant to the terms of the Lease. Thereafter, on or about October 27, 2016, Banc of California assigned all its rights, title and interest in the Equipment, the Lease and the payments due and to become due thereunder to Plaintiff, Hanmi Bank. Artaux made twenty-seven (27) monthly payments under the Lease through January 2017 totaling \$39,670.29, but, thereafter, failed to make the additional required payments. *Id.*, ¶8-9. Because of Artaux's default under the Lease, and at the election of Plaintiff pursuant to paragraph twelve (12) of the Lease, were accelerated and all the monthly obligations of Artaux, due and to become due under the Lease, became immediately due and payable. *Id.* ¶10. Upon acceleration of Artaux's obligations under the Lease, Artaux became indebted to Plaintiff for the sum of \$47,238.66, encompassing thirteen (13) past due payments totaling \$19,100.51, plus the \$28,138.15 accelerated balance of payments remaining due under the Lease. *Id.*, ¶11.

Plaintiff commenced this action against Defendants seeking the money due and owing under the Lease. In their Answers, Defendants asserted one affirmative defense, failure to mitigate. On the instant motion for Summary Judgment Plaintiff seeks dismissal of the affirmative defense and seeks judgment on its claims.

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### Analysis

The party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If such a showing has been made, the burden shifts to the opposing party to “produce evidentiary proof in admissible form” sufficient to establish the existence of material issues of fact which require a trial in the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In deciding the motion, the Court must view the evidence in the light most favorable to the non-movant. *Prine v. Santee*, 21 N.Y.3d 923, 925 (2013). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Here, it is undisputed that an unpaid balance remains on the lease. As the only defense offered by Defendants for their failure to remit payment is one based on mitigation, the Court will address that first.

Plaintiff has offered un rebutted evidence that it did, in fact, mitigate. Hanmi Bank contracted a company to repossess and remarket the equipment. The equipment was advertised for sale and was sold through an online auction. NYSCEF 7, 15. The burden thus shifts to Defendants to demonstrate that Hanmi Bank nevertheless failed to properly mitigate its damages, for which they offer no argument or support. NYSCEF 22.

As there are no other affirmative defenses offered, and there being no material issues of fact offered in opposition to Plaintiff’s motion, the Court finds Plaintiff is entitled to summary judgment on the unpaid balance of the Lease. Under the terms of the Lease,

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Plaintiff is entitled to recover from Defendants all costs and expenses incurred in collecting amounts due as well as reasonable attorneys' fees. The matter shall be referred to a Judicial Hearing Officer for a calculation and determination of reasonable costs and fees.

**Therefore, it is:**

**ORDERED** Plaintiff's Motion for Summary Judgment is Granted and Plaintiff is entitled to a judgment in the amount of \$47,238.66 plus 9% statutory interest from February 20, 2017; it is further

**ORDERED** that Hanmi Bank is awarded attorney's fees, payable by Defendants, in an amount to be determined by a Judicial Hearing Officer ("JHO"); it is further

**ORDERED** that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

**ORDERED** that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

**ORDERED** that counsel for Hanmi Bank shall serve a copy of this order with notice of entry on Defendants within five days and that counsel for Men of Steel shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the

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information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

**ORDERED** that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

8/27/2019  
DATE

  
JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" 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 checked="" type="checkbox"/> REFERENCE