

**Wells Fargo Commercial Distrib. Fin., LLC v
Fraser Equip. & Supply Co., Inc.**

2024 NY Slip Op 35159(U)

October 1, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 626650/2023

Judge: Maureen Liccione

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This opinion is uncorrected and not selected for official publication.

Short Form Order

Index No. 626650/2023

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:

Hon. Maureen T. Liccione

Justice Supreme Court

-----x
WELLS FARGO COMMERCIAL DISTRIBUTION
FINANCE, LLC,

Plaintiff,

-against-

FRASER EQUIPMENT & SUPPLY CO., INC.;
ROBERT FRASER; and JAMIE FRASER,

Defendants.
-----x

Mot. Seq. No. 001 – MotD
Orig. Return Date: 05/03/2024
Mot. Submit Date: 07/10/2024

PLAINTIFF’S ATTORNEY

REED SMITH, LLP
599 Lexington Avenue
New York, NY 10022

DEFENDANTS’ ATTORNEY

CARLINSKY DUNN &
PASQUARIELLO, PLLC
532 Broadhollow Road, Suite 129
Melville, NY 11747

Upon the reading and consideration of NYSCEF documents numbered 17 to 25, it is hereby:

ORDERED that the motion for partial summary judgment by plaintiff Wells Fargo Commercial Distribution Finance, LLC is granted without opposition on plaintiff’s first and second causes of action only, and the motion is otherwise denied; and it is further

ORDERED and **ADJUDGED** that a money judgment in favor of the plaintiff and against the defendant Fraser Equipment & Supply Co., Inc. is awarded on the first cause of action in the principal sum of \$60,877.17, plus interest thereon from January 26, 2023 to be calculated in accordance with the terms of the Amended and Restated Inventory Financing Agreement dated October 11, 2018, plus attorneys’ fees and costs; and it is further

ORDERED and **ADJUDGED** that a money judgment in favor of the plaintiff and against the defendants Robert Fraser and Jamie Fraser, jointly and severally, is awarded on the second cause of action in the principal sum of \$60,877.17, plus interest thereon from January 26, 2023 to

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be calculated in accordance with the terms of the Amended and Restated Inventory Financing Agreement dated October 11, 2018, and plus attorneys' fees and costs; and it is further

ORDERED that, within thirty (30) days of the date of this Order, plaintiff shall file, on notice, a proposed judgment in accordance with the above paragraphs, together with an attorney affirmation as to the attorneys' fees incurred and a bill of costs; and it is further

ORDERED that plaintiff shall serve a copy of this Order with a Notice of Entry upon the defendants no later than 15 days after the date of this Order, and shall file proof of service on NYSCEF no later than 20 days after the date of this Order.

This action was initiated by plaintiff Wells Fargo Commercial Distribution Finance, LLC (Plaintiff) against defendants Fraser Equipment & Supply Co., Inc. (Dealer), Robert Fraser, and Jamie Fraser (collectively Defendants). The complaint includes causes of action for breach of a financing agreement (first cause of action), breach of a guaranty (second cause of action), injunctive relief (third cause of action), and replevin (fourth cause of action). On January 4, 2024, an Answer was filed by "Fraser Construction, Inc.," through its attorneys Carlinsky, Dunn & Pasquariello, PLLC, as verified by Robert Fraser as the "President of Fraser Equipment & Supply Co. Inc." Fraser Construction Inc. is not a party in this action, and it is unclear whether the Answer was filed also on behalf of Robert and Jamie Fraser, as Carlinsky, Dunn & Pasquariello, PLLC signed the Answer as "attorneys for Defendants" (NYSCEF Doc No. 15).

In its complaint, Plaintiff alleges that on or about October 11, 2018, Plaintiff and the Dealer entered into an Amended and Restated Inventory Financing Agreement (IFA) pursuant to which the Plaintiff and the Dealer agreed that Plaintiff would from time to time extend credit to the Dealer to enable the Dealer to purchase inventory from Plaintiff-approved vendors and for other purposes. Under the IFA, the Dealer granted Plaintiff a security interest in the collateral as defined in Section 3 (b) of the IFA (Collateral). Plaintiff's security interest in the Collateral was perfected by the filing of a UCC financing statement in which the Collateral was described (UCC Financing Statement). Pursuant to the Plaintiff, on or about October 11, 2018, Robert Fraser and Jamie Fraser (the Frasers) delivered to Plaintiff a personal guaranty whereby they jointly, severally, and unconditionally guaranteed to Plaintiff the payment and performance of the Dealer's obligations to Plaintiff under the IFA (Guaranty). On October 4, 2021, Plaintiff and Dealer entered into an Amendment to the Financing Agreement, which modified the terms of the IFA.

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On or about January 26, 2023, Plaintiff notified the Dealer that a default had occurred under the IFA due to the Dealer's failure to make payment when due. On or about March 8, 2023, plaintiff notified the Defendants that, due to the Dealer's failure to cure the Initial Default, the IFA was terminated effective March 8, 2023 and the obligations under the IFA had been accelerated. Plaintiff argues that as of October 1, 2023, the Dealer is obligated to Plaintiff under the IFA in an amount of \$63,575.70, consisting of \$60,877.17 of principal, plus \$2,698.53 of accrued, unpaid interest, and late fees/charges, plus attorney's fees and costs. Plaintiff also claims that as of October 1, 2023, the Frasers are obligated to Plaintiff under the Guaranty in an amount of \$63,575.70, consisting of \$60,877.17 of principal, plus \$2,698.53 of accrued, unpaid interest, and late fees/charges, plus attorney's fees and costs.

Plaintiff moves for an Order granting it partial summary judgment pursuant to CPLR 3212 against the Defendants as to the first, second and fourth causes of action of the complaint. In support of its summary judgment motion, plaintiff included the verified complaint with various exhibits, and the affidavit of Douglas A. Wheat, Plaintiff's credit risk specialist. No opposition to the motions was filed.

Summary Judgment as to the First and Second Cause of Action

Plaintiff seeks an Order for summary judgement against Defendants with respect to its claim for breach of the IFA and Guaranty (the first and second cause of action).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issues of fact are presented (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 403 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such proof has been offered, the burden then shifts to the opposing party, which, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's

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breach of its contractual obligations, and damages resulting from the breach” (*IPFS Corp. v Manetta Enterprises, Inc.*, 160 AD3d 706, 707 [2d Dept 2018]; *Alliance Natl. Ins. Co. v Absolut Facilities Mgt., LLC*, 140 AD3d 810, 810 [2d Dept 2016]).

Here, Plaintiff established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating the existence of the IFA and the Guaranty and the Defendants’ default thereunder (*IPFS Corp.*, 160 AD3d at 707). Mr. Wheat affirmed that despite Plaintiff’s demand for payment, Defendants have failed or refused to pay the amounts due under the IFA or the Guaranty. Additionally, as a consequence of Defendants’ failure to perform, Plaintiff has suffered damages. As Defendants have not opposed this motion, Plaintiff is granted summary judgment on the first and second causes of action.

As to the prejudgment interest requested by Plaintiff, New York courts have long held that when an agreement involving an indebtedness “provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment” (*NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). Thus, Plaintiff is entitled to prejudgment interest on the principal, which is to be calculated in accordance with Section 9 of the IFA titled “Calculation of Charges” (NYSCEF Doc No. 21) from January 26, 2023.

Pursuant to the terms of the IFA and Guaranty, in addition to the principal amount due and the interest and charges, Plaintiff is entitled to reasonable attorneys’ fees and costs and legal expenses in connection with enforcing its lien on the Collateral and collecting any obligations. “[G]enerally, 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” (*Integrity Real Est. Consultants v Re/Max of New York, Inc.*, 213 AD3d 815, 819 [2d Dept 2023], quoting *TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 515 [2008]). Contractual provisions permitting the prevailing party to recover an award of legal fees must be strictly construed (*Integrity Real Est. Consultants*, 213 AD3d at 819). Plaintiff shall submit with the proposed judgment, proof of the reasonableness of the attorneys’ fees incurred and a bill of costs.

Summary Judgment as to the Fourth Cause of Action

Plaintiff failed to establish that it is entitled to summary judgment on its fourth cause of action for replevin. “The action of replevin is essentially possessory in its nature” (*Melrose Credit*

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Union v Matatov, 187 AD3d 1009, 1012 [2020] [internal quotation omitted]). “A cause of action sounding in replevin must establish that the defendant is in possession of certain property of which the plaintiff claims to have a superior right” (*Westbury Recycling, Inc. v Westbury Transfer & Recycling, LLC*, 209 AD3d 929, 932 [2d Dept 2022] [internal quotation omitted]; *Melrose Credit Union*, 187 AD3d at 1012; *Batsidis v Batsidis*, 9 AD3d 342, 343 [2d Dept 2004]).

As Mr. Wheat stated in his affidavit that “upon information and belief, Dealer may have already sold various items of Plaintiff’s Inventory. That is, Dealer may have sold valuable items of Inventory without remitting the proceeds to Plaintiff, as required by the IFA” and identified the “Inventory” as being the Collateral (NYSCEF Doc No. 18), Plaintiff failed to establish that the Dealer is in possession of the Collateral of which the Plaintiff claims to have a superior right.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: October 1, 2024
Riverhead, NY



HON. MAUREEN T. LICCIONE, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION