

**Fleetwood Fin., A Div. of IDB Leasing, Inc. v Walter
J. Dowd, Inc.**

2012 NY Slip Op 31506(U)

May 31, 2012

Sup Ct, NY County

Docket Number: 113484/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 113484/2011
FLEETWOOD FINANCIAL
vs.
WALTER J. DOWD, INC.
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). 1
Answering Affidavits — Exhibits _____ No(s). 2, 3
Replying Affidavits _____ No(s). 4

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**


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

FILED

JUN 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/12

 _____, J.S.C.

HON. EILEEN A. RAKOWER

- 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 15

-----X
FLEETWOOD FINANCIAL, A DIVISION OF IDB
LEASING, INC.,

Plaintiff,

Index No.
113484/2011

FILED

Mot. Seq. No. :
001

- against -

JUN 07 2012

Decision and
Order

NEW YORK
COUNTY CLERK'S OFFICE

WALTER J. DOWD, INC. AND GORDON CHARLOP,

Defendants.

-----X
GORDON CHARLOP,

Third Party Plaintiffs,

Index No.
590096/2012

-against-

DME SECURITIES LLC, MICHAEL BERGER,
JOHN COLVIN AND WARREN MEYERS,

Third Party Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action seeking payments allegedly due pursuant to an equipment lease for computer equipment and furniture, entered into by Walter J. Dowd Inc. ("Dowd"), the corporate defendant, and Gordon Charlop ("Charlop"),

the guarantor, in 2007. Plaintiff makes this motion for an Order (1) pursuant to CPLR §3215 granting plaintiff a default judgment against Dowd, and (2) pursuant to CPLR §3212 granting summary judgment in favor of Plaintiff and against Charlop for the relief demanded in the Complaint and dismissing Charlop's Verified Answer containing unsubstantiated affirmative defenses on the grounds that there are no triable issues of fact and that summary judgment is warranted as a matter of law.

Plaintiff entered into an agreement with Dowd on June 4, 2007. In connection with the above-mentioned lease-agreement, Charlop executed a personal guaranty dated June 11, 2007. The guaranty set forth,

In order to induce Fleetwood Financial, a division of IDB Leasing, Inc. ("Fleetwood"), to enter into one or more personal property leases, installment sales contracts, and/or notes and security agreement collectively called the Agreements with Walter Dowd, Inc., hereinafter called the Debtor, or otherwise extend financial accommodations in favor of the Debtor, the undersigned does hereby unconditionally guarantee to Fleetwood; (a) the prompt payment of any and all indebtedness or obligations of every kind or nature; now or hereafter owing by the Debtor to Fleetwood however arising.

Plaintiff alleges that Dowd stopped making payments on June 2, 2011. Plaintiff asserts that pursuant to the contract, Dowd, the corporate defendant, and Charlop, as guarantor, owe \$50,547.97, with interest.

Charlop does not deny that he executed a personal guaranty in connection with the Lease Agreement between Plaintiff and Dowd. However, he asserts three affirmative defenses: (1) Plaintiff knowingly permitted the equipment to be used without payment by a third party, thereby discharging the guaranty as a matter of public policy; (2) Plaintiff is estopped from taking advantage of the clauses in the Lease Agreement precluding the Guarantor from asserting discharge of the Guaranty; (3) Plaintiff has waived the clause of the lease agreements precluding the guarantor from asserting discharge of the guaranty.

On February 7, 2012, Charlop filed a third-party summons against DME Securities LLC, Michael Berger, John Colvin and Warren Meyers ("Third Party

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Defendants”) alleging inter alia, that DME Securities LLC has taken possession of the equipment that is the subject of this litigation and that each of the Third Party Defendants are personally responsible for payment of 25 % of all unpaid costs and expenses under the Lease Agreements.

Plaintiff annexes a copy of its summons and complaint along with an affidavit of service attesting to personal service of the summons and verified complaint upon Dowd on December 13, 2011, and Charlop on December 12, 2011, as well as second mailings of the complaint. Charlop submitted an Answer on February 6, 2012, and filed a third-party summons on February 8, 2012. Dowd failed to Answer the complaint or otherwise appear in this action.

Plaintiff submits the affidavit of Richard Miller, the First Vice President of IDB Leasing, Inc., which establishes that Dowd owes \$50,547.97. Thus, the court finds that Plaintiff is entitled to default judgment pursuant to CPLR §3215(a), against Dowd in the amount of \$50,547.97, with interest, due to his failure to answer the complaint, this motion, or otherwise appear.

With regard to Plaintiff’s summary judgment motion, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The guaranty, signed by Gordon Charlop, states in pertinent part,

This guaranty is a continuing guaranty. Nothing shall discharge or satisfy the undersigned’s liability hereunder except the full performance and payment of all of the Debtor’s obligations to Fleetwood, with interest.... The instrument shall continue in full force and effect until terminated by actual receipt by Fleetwood, by

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registered or certified mail, or written notice of termination from the undersigned.

In opposition to the motion for summary judgment, Charlop provides his own affidavit which fails to demonstrate that a factual issue remains regarding the ongoing obligations under the guaranty. Based on such obligations under the guaranty, Charlop is hereby obligated to make the payments owed.

Wherefore, it is hereby,

ORDERED that plaintiff's motion for default against Defendant Walter J. Dowd is granted without opposition, and it is further,

ORDERED that plaintiff's motion for summary judgment against Defendant Gordon Charlop is granted; and it is further,

ORDERED that the Clerk enter judgment in favor of plaintiff against defendants Walter J. Dowd, Inc., and Gordon Charlop in the amount of \$50,547.97, together with interest as prayed for allowable by law (at the rate of 9% per annum from June 2, 2011) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 31, 2012


EILEEN A. RAKOWER, J.S.C.

FILED

JUN 07 2012

NEW YORK
COUNTY CLERK'S OFFICE