

<b>De Lage Landen Fin. Servs., Inc. v Kopy Kween, Inc.</b>
2012 NY Slip Op 31607(U)
June 12, 2012
Sup Ct, New York County
Docket Number: 103580/11
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 : 103580/2011  
DE LAGE LANDEN FINANCIAL  
VS.  
KOPY KWEEN, 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  
Replying Affidavits \_\_\_\_\_ | No(s). 3

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

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

**FILED**

JUN 19 2012

NEW YORK  
COUNTY CLERK'S OFFICE J.S.C.

**HON. EILEEN A. RAKOWER**

Dated: 6/12/12

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

- 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  
DE LAGE LANDEN FINANCIAL SERVICES, INC.,  
AS ASSIGNEE OF OCE FINANCIAL SERVICES, INC.,  
Plaintiff,

Index No.  
103580/11

- against -

DECISION  
and ORDER

KOPY KWEEN, INC. D/B/A KOPY KWEEN INC.,  
D/B/A SUPERIOR GLACIER,  
Defendant.

Mot. Sec. 001

**FILED**

JUN 19 2012

-----X  
Plaintiff De Lage Landen Financial Services, Inc. ("Plaintiff"), assignee of  
Oce Financial Services, Inc. ("Oce"), commenced this action in March 2011 against  
defendant Kopy Kween Inc. D/B/A Kopy Kween Inc. D/B/A Superior Glacier  
("Defendant") to recover \$31,862.62, plus interest from January 15, 2010 to the date  
of entry of judgment herein, reasonable attorney's fees, late charges, costs and  
expenses for the breach of a commercial equipment lease agreement.

NEW YORK  
CLERK'S OFFICE

Presently before the Court is Plaintiff's motion for summary judgment which  
Defendant opposes. In support of its motion, Plaintiff submits an attorney affirmation  
of Jaclyn Thomas, Esq. ("Thomas"), and the Affidavit of Russell A. Bender  
("Bender"), Plaintiff's Litigation Specialist. Attached to Bender's Affidavit is a copy  
of the pleadings, the lease agreement entered between Defendant and Oce, Plaintiff's  
assignor, to lease certain equipment on January 24, 2006 (the "Lease Agreement"),  
a Statement of Account, and a February 10, 2011 letter from Plaintiff's counsel to  
Defendant demanding payment. Annexed to Thomas' Reply Affirmation is a copy  
of the assignment between Oce and Plaintiff of the Lease Agreement. Defendant  
submits the affirmation of its counsel Richard A. Solomon, Esq., in opposition to  
Plaintiff's motion.

Pursuant to the terms of the Lease Agreement, Defendant leased certain  
equipment and agreed to remit certain payments. Paragraph 16 of the Lease  
Agreement entitled "Finance Lease" provided:

Your obligation to pay all amounts under this contract is absolute and  
unconditional. This contract is a "finance lease" under the Uniform

Commercial Code ("UCC") . . . You waive any and all rights and remedies you may have under UCC 2A-50B through 2A-522; including any right to: (a) cancel this contract; (b) reject tender of the equipment; (c) revoke acceptance of the equipment; (d) recover damages for any breach of warranty; (e) make deductions for any breach of warranty; and (e) make deductions or-set offs, for any reason, from amounts due as under this contract. If any part of this contract is inconsistent with UCC 2A, the terms of this contract will govern.

Paragraph 3(c) provides that Defendant is obligated to "reimburse [Oce, Plaintiff's assignor] for all costs and expenses (including reasonable attorneys' fees and court costs) incurred in enforcing this Contract." Paragraph 15, "Choice of Law," provides "[Defendant] hereto agree[s] that this Contract will be deemed for all purposes to be duly executed and performed in the State of Illinois and will be governed by Illinois law."

In his Affidavit, Bender states that Defendant ceased remitting payments pursuant to the terms of the Lease Agreement on or about January 15, 2010 and is currently in arrears in the amount of \$31,862.62. Bender states that Defendant never revoked, denied, nor disputed the existence of the Lease Agreement. Bender states that upon information and belief Plaintiff and/or its assignor never breached the Lease Agreement and fully performed all obligations.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law to defeat summary judgment. 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 Moniger 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]). "If it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Paragraph 16 of the Lease Agreement states that the parties' contract is a "finance lease" under the Uniform Commercial Code ("UCC"). As such, Plaintiff contends that the UCC governs the Lease Agreement. Relying upon paragraph 15 of the Lease Agreement, Defendant contends that Illinois law governs. Paragraph 15, "Choice of Law," provides "[Defendant] hereto agree[s] that this Contract will be deemed for all purposes to be duly executed and performed in the State of Illinois and will be governed by Illinois law."

"Forum selection clauses, which are prima facie valid . . . are enforced because they provide certainty and predictability in the resolution of disputes . . . and are not to be set aside unless a party demonstrates that the enforcement of such would be unreasonable and unjust . . ." (*Sterling National Bank as Assignee of Norvergence, Inc. v. Eastern Shipping Worldwide, Inc.*, 35 A.D. 3d 222 [1st Dept. 2006]). Illinois Courts enforce finance lease agreements under Article 2A of the UCC such as the one entered by Oce, Plaintiff's assignor. (See *AEL Fin. LLC v. City Auto Parts of Durham, Inc.*, 2009 U.S. Dist. LEXIS 77570, \*12 [N.D. Ill. 2009]; *Trans. Leasing Int'l v. Schmer*, 194 Ill. App. 3d. 70 Ill. App. Ct. [1st Dept. 1990]; *Dillman & Associates, Inc. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335 [Ill. App. Ct. 4th Dist. 1982]).

Here, the Court finds that Plaintiff is entitled to judgment as a matter of law and that Defendant has not raised triable questions of fact. It is undisputed that, pursuant to the terms of the Lease Agreement, Defendant leased certain equipment from Oce, Plaintiff's assignor, accepted the equipment, was obligated to remit certain payments, ceased making the payments, and is currently in arrears.

While Defendant advances several arguments in opposition to the motion, the Court finds them unavailing. Defendant claims that this action should have been brought in Illinois and Illinois law should be applied. Defendant refers to the "VENUE" provision of the Lease Agreement which provides: "[Defendant] hereto agree[s] that this Contract will be deemed for all purposes to be duly executed and performed in the State of Illinois and will be governed by Illinois law." This provision, however, does not require exclusive jurisdiction in the State of Illinois and does not preclude adjudication in New York. Furthermore, Defendant does not allege that application of Illinois law would alter Defendant's obligation to remit payments under the Lease Agreement. Defendant also claims that standing is an issue because there is no "documentary evidence" of an assignment between Oce and Plaintiff with respect to the Lease Agreement. Annexed to Thomas's Reply Affirmation is documentation

[\* 5]

of the assignment. Thomas states that the documentation, while referenced in Bender's Affidavit, was inadvertently omitted as an exhibit. Furthermore, pursuant to paragraph 12 of the Lease Agreement, Oce was permitted to assign the Contract without notification to Defendant. Defendant also claims that Plaintiff "has ignored the existing UCC lien of Bridge Solutions" on Defendant's assets. Plaintiff's claim is not precluded by the lien of Bridge Solutions and such a lien is irrelevant to a judgment in this case. Lastly, Defendant claims "discovery of the correspondence between Oce and defendants is required as plaintiff does not know whether defendants complained about the equipment and cannot represent to the Court that there were no complaints made to Oce." While Defendant has requested that the motion be denied pending completion of discovery, it has not demonstrated the likelihood that discovery will lead to evidence sufficient to defeat summary judgment. Whether Defendant "complained about the equipment" would certainly be known to Defendant and the issue was not raised in Defendant's opposition to Plaintiff's motion.

While Plaintiff requests attorneys' fees incurred in commencing this action to enforce the Lease Agreement, no accounting has been provided. As such, Plaintiff's request for attorneys' fees is denied.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further,

ORDERED that the Clerk enter judgment in favor of Plaintiff in the amount of \$31,862.62, together with interest as prayed for allowable by law (at the rate of 9% per annum from January 15, 2010) 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; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

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

Dated: 6/12/12

  
EILEEN A. RAKOWER, J.S.C.

**FILED**

JUN 10 2012

NEW YORK  
COUNTY CLERK'S OFFICE