SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ORIX FINANCIAL SERVICES, INC.
formerly known as ORIX CREDIT ALLIANCE, INC.,

Index No. 104894/2004

Plaintiff,

DECISION/ORDER

-against-

TALBERT ENTERPRISING, LTD. d/b/a LIMOUSINES
BY TALBERT and KEITH TALBERT,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Orix Financial Services, Inc. formerly known as Orix Credit Alliance, Inc. ("plaintiff") moves for summary judgment in lieu of complaint pursuant to CPLR 3213 against defendants Talbert Enterprising, Ltd d/b/a Limousines by Talbert ("Talbert Enterprising") and Keith Talbert ("Mr. Talbert") (collectively "defendants") in the amount of $80,041.61, plus interest, and attorneys' fees, and costs and disbursements.

The following facts are taken from the affidavit of plaintiff's Vice-President, Robert G. Andrews II submitted in support of the motion:

1999 Note 1:

On April 15, 1999, Talbert Enterprising executed a conditional sale contract note ("Note 1") payable to JMRL Sales and Service ("Dealer 1") for $107,552.88 resulting from Talbert Enterprising's financing of a 1999 Lincoln Navigator Stretch Limousine (the "Lincoln Navigator"). Note 1 was assigned to Orix Credit Alliance, Inc. ("OCA") on April 15, 1999 (the "Assignment"). Also on April 15, 1999, Talbert Enterprising executed a Delivery/Installation

Certificate, Waiver and Agreement acknowledging complete and satisfactory delivery of the Lincoln Navigator, and waiver of any defenses, offsets or counterclaims, by Talbert Enterprising as against OCA (the "Waiver Agreement"). Mr. Talbert executed a personal "Guaranty," dated April 15, 1999, agreeing to be personally obligated for the due performance of all of Talbert Enterprising's obligations past, present, and future.

On September 26, 2000, OCA changed its name of record to Orix Financial Services, Inc. plaintiff herein, resulting in plaintiff succeeding to the rights of OCA under Note 1, the Assignment, and any agreements relating thereto.

On March 15, 2002 after Talbert Enterprising defaulted in payments under Note 1, plaintiff accelerated the balance and subsequently took possession of the Lincoln Navigator. On September 30, 2003, upon prior written notice to defendants, plaintiff sold the Lincoln Navigator, which resulted in a credit applied to Talbert Enterprising 's account, after deductions for costs and expenses of the sale, in the amount of $35,092.04. Default interest for unpaid scheduled payments for the period prior to the date of default amounts to $839.08, and default interest from the date of default through and including the date of the sale (September 30, 2003) amounts to $16,178.34. Thus, plaintiff alleges, there is due and owing from defendant $43,866.58, less the resale credit, for a total of $8,773.84, plus default interest from March 15, 2003 to September 30, 2003 in the amount of $16,178.34, totaling a sum of $24,952.18 and attorneys' fees[1] in the amount of $4,990.44 (20% of the total balance under the Conditional Sale Contract Note), which has been demanded but remains unpaid.

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[1] Note 1, the Guaranty, Lease, and Note 2 provide for attorneys' fees in the amount of "20%" of any deficiency.

The 2000 Lease Agreement

Pursuant to a lease agreement dated May 6, 2000 (the "Lease Agreement"), Talbert Enterprising leased a 2000 Lincoln Town Car Destiny Millennium ("Lincoln Millennium") from Destiny Ltd. ("Dealer 2") On May 8, 2000, Talbert Enterprising executed a "Delivery/Installation Certificate, Waiver and Agreement", with the same acknowledgments contained in the aforementioned Waiver Agreement. When Talbert Enterprising failed to make payments under the Lease Agreement on January 5, 2002, the balance was accelerated. Applying the Federal Reserve Discount Rate, the present value of the total amount due, plus reversionary interest in the Lincoln Millennium, totaled $40,788.28. Plaintiff took possession of the Lincoln Millennium, and on March 25, 2003, upon prior written notice to defendants, sold the Lincoln Millennium. A credit of $24,063.16, representing the resale price less costs and expenses, was applied to Talbert Enterprising's account. Prior to the date of default interest accrued on unpaid scheduled payments in the sum of $1,056.65, and during the period from the date of default (January 5, 2002) through and including the date of the sale of the Lincoln Millennium on March 25, 2003 default interest accrued on the pre-sale balance in the amount of $12,073.33. Therefore, as of March 25, 2003, there is due and owing from Talbert Enterprising $41,844.93 less the resale credit for a total of $17,781.77, plus default interest from January 5, 2002 to March 25, 2003 in the amount of $12,073.33 totaling $29,855.10, plus sales tax of $2,447.30, totaling $32,302.40 and attorneys' fees in the amount of $6,460.48, plus interest from March 26, 2003, which has been demanded but remains unpaid. Under the Guaranty, Mr. Talbert is liable for this amount as well.

2000 Promissory Note

On June 22, 2000, Talbert Enterprising executed a "Promissory Note" in the amount of $118,350.00 payable to OCA in consideration for Talbert Enterprising 's indebtedness resulting from its financing of a 2000 Ford Excursion 220 Craftman Limousine ("Ford Excursion"). On July 7, 2000, Talbert Enterprising executed another waiver agreement essentially identical to the ones previously signed. When defendant defaulted in payments on February 5, 2002, plaintiff accelerated the balance, took possession of the Ford Excursion, and upon prior written notice, sold it on March 25, 2003. A credit in the amount of $48,549.41, representing the resale amount less costs and expenses of the resale, was applied to Talbert Enterprising's account. Prior to the date of default, interest accrued on unpaid scheduled payments in the sum of $990.70, and during the period from the date of default (February 5, 2002) through and including the date of the resale, default interest accrued on the pre-sale balance in the total amount of $16,914.16. Therefore, it is alleged, the amount due and owing to plaintiff is $62,422.28 less the resale credit, for a total of $13,872.87, plus default interest in the amount of $16,914.16 totaling the sum of $30,787.03 and attorneys' fees in the amount of $6,157.41, plus interest thereon from March 26, 2003, which has been demanded but remains unpaid.

Plaintiff further states that attorneys' fees in an amount equal to 20% of the total amount due, $17,608.32, are warranted under the respective documents.

In opposition, Mr. Talbert asserts numerous objections to the relief sought:[2] In asserting that he is not liable for Note 1 or Note 2 under the written guaranties, Mr. Talbert argues that (1)

[2] The Court notes that after giving Talbert Enterprising sufficient opportunity to obtain counsel on its behalf, it has not done so. Mr. Talbert opposed the motion on behalf of all defendants.

the guaranties, which are "Un-notorized," are inapplicable, as they pertain "[o]nly to vehicle (Note 1) purchased at that time, as evidenced by the dates of execution of each" and not to any other obligation (*see* ¶¶ 29 and 39 of Mr. Talbert's Response to Motion); (2) under CPLR 3218(b) and 3215(c), the respective three-year and one-year statute of limitations expired, as the guaranties were executed five years ago; (3) Mr. Talbert did not agree to be personally liable financially, but agreed to merely oversee performance of the corporation; and (4) performance of the guaranties were obstructed by plaintiff in that the taking of the vehicles inhibited his ability to perform under the contract, and that the acts taken by plaintiff are predatory.

Mr. Talbert also asserts that this court lacks jurisdiction over the matter, and that venue of this action in New York is improper under Michigan Law, UCC MCL 440.2806; that the case should be removed pursuant to CPLR 325 for mistake in choice of forum; that under CPLR 327, his financial inability to appear in New York, coupled with fact that the vehicle was registered, titled, and used in Michigan, and that the proceedings undertaken by plaintiff started in Michigan, render New York an inconvenient forum; and that the Security Agreement provides that plaintiff waived any right to transfer venue to New York.

Mr. Talbert also points out that there is no proof of the name change from OCA to plaintiff herein. Furthermore, it is alleged that the bank records demonstrate that the date of the alleged default is incorrect, and that the Federal Reserve Discount Rate for the District of lessee's place of business is not known; nor is there a basis for the reversionary interest claimed, and that he was not informed of the acceleration of the balance for the vehicle under Note 1.

As to the sale, Mr. Talbert claims that the notice of the sale does not indicate who received notice, that the notice was delivered to Talbert Enterprising after the sale, and that the

sale of the vehicle under Note 1 a year after the default, and waiting an additional year to commence proceedings was unjustified, rendering the interest accrued on unpaid scheduled payments unjust. Also, the vehicles were sold at "House of Trucks" and since the vehicles are limousines, they were not sold at a "place of like vehicles." Mr. Talbert also claims that there is no basis for the purchase price or cost of the sale of both vehicles. Furthermore, the attorneys' fees are outrageous.

Mr. Talbert asserts that a jury may find that he was not permitted to mitigate any damages because his contracts are "linked together" and no remedy presented in the contracts are available.

In reply, plaintiff contends that the choice of forum clause in the two Notes and the Lease provides for venue within the State and County of New York, and is valid. Plaintiff also points out that Michigan Law MCL 440.2806 is limited to consumer leases, and not the financing transactions at issue.

In response to the claim of lack of personal jurisdiction, plaintiff claims that according to the Conditional Sale Contract notes, Lease, Promissory Note and Guaranty, defendants appointed C-A Credit Corp. of New York, as their designated agent for service of process, which is required to send a copy of the summons and complaint to defendants at their last known address. Also according to these documents, plaintiff was required to send a copy of the summons and complaint to defendants to their last known address within three days thereafter. Plaintiff asserts that service was performed pursuant to these methods.

In response to Mr. Talbert's claim of undue delay and interest, plaintiff asserts that while he is correct in stating that he defaulted on all three financing agreements in Spring 2002,

plaintiff was not able to repossess all three of these vehicles until on or about January 22, 2003. Plaintiff claims that since Mr. Talbert did not cooperate and voluntarily return the vehicles to plaintiff, plaintiff had to retain the services of a repossession company to obtain the vehicles. The Destiny Millennium and Ford Excursion were sold within two months of repossession. However the Lincoln Navigator was not sold until September 30, 2003 because plaintiff had substantial trouble in clearing and obtaining the necessary title for the public sale. Plaintiff points out that Mr. Talbert acknowledges this problem when he states that "Plaintiff had to apply to Michigan to get title released." Plaintiff also contends that in order to eliminate this issue, plaintiff is willing to reduce the default interest on Note 1 from March 15, 2003 to the date the other two vehicles were sold, March 25, 2003 (instead of September 30, 2003), resulting in a reduction of the default interest thereon from $16,178.34 to $9,015.00. Therefore, under Note 1, plaintiff seeks the principle balance of $8,773.84; interest of $9,015.00, totaling a sum of $17,788.84, plus attorneys' fees in the amount of $3,557.77, plus interest thereon from March 26, 2003.

Analysis

CPLR 3213 provides: "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (CPLR 3213). The purpose of CPLR 3213 is to provide quick relief on documentary claims so presumptively meritorious that "a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless" (1st Prelim Report of Advisory Comm. on Practice and Procedure, 1957 N.Y.Legis Doc No. 6[b], at 91).

CPLR 3213 begins with the seemingly straightforward--though stringent-- requirement that the action be based on "an instrument for the payment of money only or a judgment." The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money--an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time (see, 4 Weinstein-Korn- Miller, N.Y.Civ.Prac. ¶ 3213.04, at 253). In fact, the remedy has proved an effective one, particularly for financial institutions recovering on promissory notes and unconditional guaranties (*see*, Cozier, Summary Judgment § 25.4, at 830, in 2 Commercial Litigation in New York State Courts [Haig ed.]). Ironically, however, the threshold requirement has also generated a spate of litigation, leading one commentator to note that there have been "so many invocations of CPLR 3213 over the years in which the result was a dismissal of the application for want of a proper 'instrument' * * * [so as] to point up the illusory advantages of CPLR 3213 when used so carelessly" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3213:1, at 497).

The Court of Appeals last spoke to the threshold requirement in *Interman Indus. Prods., v R.S.M. Electron Power* (37 NY2d 151, 154-155, 371 NYS2d 675, 332 NE2d 859), observing that cases within CPLR 3213 "have dealt primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness." Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable. Put another way, a document comes within CPLR 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*Interman*, 37 NY2d at 155, *supra*, *citing Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 295 NYS2d 752, *affd* 29 NY2d 617, 324 NYS2d 410, 273 NE2d 138). The

instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document (*see, e.g., Bank Leumi Trust Co., v Rattet & Liebman*, 182 AD2d 541, 582 NYS2d 707 [readily accessible interest rate]).

Plaintiff's action herein falls well within satisfying the CPLR 3213 threshold requirement. Plaintiff has provided all of the written instruments indicating defendant Talbert Enterprising's explicit obligation to make a required payment of a sum certain (*see Interman*, 37 NY2d at 156, 371 NYS2d 675, 332 NE2d 859). It is uncontested that the notes and leases at issue were executed by Mr. Talbert on behalf of Talbert Enterprising. The record demonstrates that, *inter alia*, defendants defaulted on payments due under the relevant lease, plaintiff rightfully repossessed the leased equipment, plaintiff properly notified defendants of the upcoming public sale of the equipment, and plaintiff properly served the summons and motion papers upon defendants (*see Orix Credit Alliance v Fan Sy Prods.*, 215 AD2d 113 [1st Dept 1995]). Furthermore, the Guaranty related to such documents were executed by the individual defendant, Mr. Talbert. To obtain a judgment to enforce a written guaranty "all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71, 681 NYS2d 251 [1st Dept 1998]). Having established that Mr. Talbert executed the absolute and unconditional guaranties, the underlying indebtedness of Talbert Enterprising, and Mr. Talbert's failure to perform under these guarantees, plaintiff has established entitlement to judgment as against both defendants.

With plaintiff having established a *prima facie* case for enforcement of the written guaranty, the burden shifts to Mr. Talbert to establish by admissible evidence the existence of a

triable issue of fact or a meritorious defense (*Bank Leumi Trust Co. v Rattet & Liebman*, 182 AD2d 541, 582 NYS 707 [1st Dept 1992]).

Mr. Talbert's argument that the "un-notorized" Guaranty applies only to Note 1 is without merit. A guaranty is a contract, and there is no requirement that a contract be notorized for enforceability. Further, a single, unlimited, continuing guarantee, supported by consideration given once and for all time, is not automatically terminated by a change in the parties' relationship. (*Chemical Bank v Sepler*, 60 NY2d 289, 457 NE2d 714, 469 NYS2d 609 [1983]). Unless the parties to a continuing guarantee provide otherwise in the writing, such a guarantee is not limited to the life of loans executed contemporaneously therewith, and generally cannot expire by mere conduct, change of circumstances, or lapse of time (*Chemical Bank v Sepler*, *supra*, citing *National Bank v Dogwood Constr. Corp.*, 47 AD2d 848, 849, 365 NYS2d 554, *Chemical Bank v PIC Motors Corp.*, 87 AD2d 447, 450, 452 NYS2d 41, *affd* 58 NY2d 1023, 462 NYS2d 438, 448 NE2d 1349; *Associated Food Stores v Siegel*, 20 Misc2d 952, 953, 193 NYS2d 500, mod. on other grounds and affd. 10 AD2d 1003, 205 NYS2d 208, *affd* 9 NY2d 816, 215 NYS2d 764, 175 NE2d 343; *Travelers Ind. Co. v Buffalo Motor & Generator Corp.*, 58 AD2d 978, 979, 397 NYS2d 257). Here, the parties expressly provided that the guarantee would apply to obligations "Security Obligations past, present and future" . . . and for the payment any and all debts and other obligations of [Talbert Enterprising] of whatever nature, whether matured or unmatured, whether absolute or contingent and *whether now or hereafter existing* or arising or contracted or incurred or owing to or acquired by you . . . ." Such language flatly contradicts the contention by Mr. Talbert that the Guaranty solely applies to Note 1. No clearer showing of intent to be personally responsible for the debts of Talbert Enterprising is required.(*see Chemical Bank v Sepler*, *supra*).

Further, CPLR 3218(b) and 3215(c) do not bar the instant action.

CPLR 3218(b), which pertains to judgments by confession, provides that

> "At any time within three years after the affidavit [of defendant] is executed, it may be filed with the clerk of the county where the defendant stated in his affidavit that he resided when it was executed or, if the defendant was then a non-resident, with the clerk of the county designated in the affidavit."

The action herein is not based upon any judgment by confession or affidavit executed in connection therewith by defendant relating to the sums due and facts out of which the debt arose; instead, this action is based upon financial instruments. Therefore CPLR 3218(b)'s three year limitation does not apply.

Further CPLR 3215(c) pertains to judgments sought to be entered against defendants who have failed to "appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." This action is not based on defendants' failure to appear, plead or proceed to trial, or other neglect to proceed in the action, but is based on the failures of defendants prior to the commencement of this action. Therefore, the one-year proscription in CPLR 3215(c) does not apply.

Therefore, the Guaranty applies to all of Talbert Enterprising's obligations sued upon herein.

Mr. Talbert failed to raise any issue of fact as to this Court's jurisdiction over defendants and the action. Pursuant to the language in the two Notes, Lease, and Guaranty executed by defendants, defendants agreed, in sum and substance, that

> . . . LESSOR, LESSEE, AND ANY GUARANTOR EXECUTING THIS LEASE AGREEMENT HEREBY EACH DESIGNATE AND APPOINT . . . C-A CREDIT CORP., . . . AS THEIR . . . AGENT FOR THEM . . . TO ACCEPT SERVICE OF ANY PROCESS WITHIN THE STATE OF NEW YORK, THE PARTY CAUSING SUCH PROCESS TO BE

SERVED AGREEING TO NOTIFY THE OTHER PARTY(IES) AT THEIR ADDRESS, BY CERTIFIED MAIL, WITHIN THREE DAYS OF SUCH SERVICE HAVING EFFECTED. LESSEE, LESSOR, AND ANY GUARANTOR HEREBY AGREE TO THE EXCLUSIVE VENUE AND JURISDICTION OF ANY COURT IN THE STATE AND COUNTY OF NEW YORK FOR ALL ACTIONS, PROCEEDINGS [AND] CLAIMS . . . . . IN ANY WAY RELATED TO THIS LEASE . . . .

The very point of a selection of forum clause is to avoid litigation over personal jurisdiction and disputes over the application of the long-arm statute (CPLR 302[a]) (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395 [1st Dept 1996]). As recently noted, "It is the policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams, supra*, citations omitted).

It is settled that a selection of forum clause affords a sound basis for the exercise of personal jurisdiction over a foreign defendant and renders the designated forum convenient as a matter of law (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams, supra*, citations omitted). Forum selection clauses "should be enforced 'absent a showing that they result from fraud or overreaching, that they are unreasonable or unfair, or that their enforcement would contravene some strong public policy of the forum'" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams, supra*). There is nothing in the record to indicate that the forum selection clause was the result of fraud or overreaching. Therefore, Mr. Talbert failed to raise an issue of fact as to the applicability of the forum selection clause herein.

Furthermore, method of service provided in the financing documents, has been upheld, and Mr. Talbert failed to raise any issue of fact as to the service of the summons and complaint by C-A Credit Corp. or plaintiff herein (*see Orix Credit Alliance v Fan Sy Prods., supra* [holding

that service upon a designated agent, pursuant to the terms of the lease and guaranties, clearly suffices]).

Mr. Talbert's contention that venue is improper under Michigan Law MCL 440.2806 is without merit. Michigan Law MCL 440.2806 is limited to "parties to a consumer lease" and therefore, does not apply to invalidate the choice of law provision in the financing documents at issue, as they are commercial leases.

Further, with respect to Mr. Talbert's general contention that the alleged date of default is incorrect based on inconclusive bank records is insufficient to raise an issue of fact as to the date of the defendants' default on the Notes and lease. Further, Mr. Talbert's conclusory allegation that he did not receive timely notice of the sale of the Lincoln Navigator is insufficient to overcome the proof in the record to the contrary.[3]

The Court has considered Mr. Talbert's remaining contentions, and find them to be without merit.

In light of the documentary evidence and the affidavits submitted in support of plaintiff's motion, summary judgment in lieu of complaint pursuant to CPLR 3213 is warranted (*see Orix Credit Alliance v Fan Sy Prods., supra*).

This constitutes the decision and order of the court.

Dated: August 23, 2004

Hon. Carol R. Edmead, J.S.C.

[3] Although two United States Postal Service "Track & Confirm" documents indicate that two Notices for Public Sales were delivered on October 10, 2003, a third Track & Confirm document indicates that a Notice of Public Sale pertaining to the Lincoln Navigator was delivered to Mr. Talbert on September 20, 2003 prior to the sale.