

Dakota Fin., LLC v Gibraltar Carting, LLC
2011 NY Slip Op 34094(U)
July 26, 2011
Sup Ct, Bronx County
Docket Number: 304701/09
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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DAKOTA FINANCIAL, LLC,

Plaintiff(s),

-against-

GIBRALTAR CARTING, LLC,

Defendant(s).
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Index No.: 304701/09

DECISION/ORDER

Present:
Hon. Howard H. Sherman
Justice

This action arises out of an Equipment lease Agreement effective August 15, 2008 entered into between plaintiff Dakota Financial, LLC as ("Dakota") as lessor and defendant Gibraltar Carting LLC ("Gibraltar") as Lessee of Equipment described therein as a 1998 Mack Garbage Truck. The lease was defined by its terms as a "Finance Lease" pursuant to California Commercial Code Section 10103(a)(7), and called for the payment of \$3,280.00 in monthly installments over the course of forty-four months.

This action was commenced in June 2009 asserting a breach of contract upon defendant's failure to remit monthly payments on or about October 15, 2008 and thereafter. Defendant interposed its answer¹ in November 2009 alleging "on information and belief" specific denials of the allegations of the complaint as well as fifty-one affirmative defenses.

Motion:

Plaintiff now moves for an award of summary judgment contending that as a matter of law defendant is in default under the terms of the agreement and defendant's answer raises no issues of fact requiring a trial on either the question of liability or damages. The

¹The answer is not verified by a member of the defendant limited liability company.

motion is supported by the affidavit of Michael Fernandez, the Assets and Collections Manager of Dakota.

Lease Agreement

The lease agreement incorporates the following acknowledgments by the Lessee.

Lessor has not selected, manufactured or supplied any Equipment used by Lessor to Lessee and that Lessor has acquired the Equipment and has the right to possession and use of the Equipment in connection with entering into this Lease with Lessee. Lessee further acknowledges that Lessee has received a copy of any contract or Supply Contract from the vendor, manufacturer or other Supplier (as defined by Cal. Com. C. §10103(a)(24)) is a condition to the effectiveness of the Lease. Lessee further acknowledges that before executing this Lease, it has received an accurate statement designating the policies and warranties, and any disclaimers or warranties, indications or modifications or remedies, or liquidated damages, including those of a third party, such as the manufacturer of the Equipment, provided to Lessor by the Supplier in connection with Supplier's part of the Supply Contract by which the Lessor acquired the Equipment and its right to possession and use of the Equipment. Lessee further acknowledges that Lessee is informed of the identity of the Supplier of the Equipment to Lessor and Lessee further has selected the Supplier and directed the Lessor to acquire the Equipment to obtain the right to possession and use of the Equipment from that Supplier. Lessee further acknowledges that is entitled under Division 10 of the Cal. Com. C to all promises and warranties, including those of any third party, provided to Lessor by the Supplier or manufacturers of the Equipment. Lessor and Lessee may communicate with Supplier of the Equipment.

With respect to the Lessee's selection of the Equipment, the lease provides the following:

SELECTION OF Equipment: DISCLAIMER OF WARRANTIES, Lessee has selected both the Equipment and the supplier from whom Lessor covenants to purchase the Equipment at Lessee's request. Lessee ACKNOWLEDGES THAT Lessor HAS NO EXPERTISE OR SPECIAL FAMILIARITY ABOUT OR WITH RESPECT TO THE Equipment. Lessee AGREES THAT THE Equipment LEASED HEREUNDER IS LEASED "AS IS" AND IS OF A SIZE, DESIGN AND CAPACITY SELECTED BY Lessee AND THAT Lessee IS SATISFIED THAT THE SAME IS SUITABLE FOR Lessee'S PURPOSES, AND THAT Lessor HAS MADE NO REPRESENTATION OR WARRANTY WITH RESPECT TO THE SUITABILITY OR DURABILITY OF SAID Equipment FOR THE PURPOSES AND USES OF Lessee, NOR ANY OTHER REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT THERETO, INCLUDING THE IMPLIED WARRANTIES OF

MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. If the Equipment is not properly installed, does not operate as represented or warranted by the supplier and/or manufacturer, or is unsatisfactory for any reason, Lessee shall make any claim on account thereof solely against the supplier and/or manufacturer, and shall not set up against Lessee's obligations any such claims as a defense, counterclaim, claim, cause of action, set off or otherwise. So long as Lessee is not in breach or default of this lease, Lessor hereby assigns to Lessee, solely for the purpose of making and prosecuting any such claim any rights, which Lessor may have against the supplier and/or manufacturer for breach of warranty or other presentation respecting any item of Equipment. All proceeds of any warranty recovery by Lessee from the supplier and/or manufacturer of any item of Equipment shall first be used to repair or replace the affected item of Equipment.

Lessee ACKNOWLEDGES THAT NEITHER THE SUPPLIER NOR ANY SALESMAN, EMPLOYEE, REPRESENTATIVE OR AGENT OF THE SUPPLIER ("SUPPLIER") IS AN AGENT OR REPRESENTATIVE OF Lessor OR VICE VERSA, AND THAT NO SUPPLIER IS AUTHORIZED TO WAIVE OR ALTER ANY TERM, PROVISION OR CONDITION OF THE LEASE, OR MAKE ANY REPRESENTATION OR WARRANTY WITH RESPECT TO THIS LEASE OR THE Equipment, Lessee AGREES AND ACKNOWLEDGES THAT SUPPLIER IS Lessee'S AGENT AND NOT Lessor'S AGENT WITH RESPECT TO THE Equipment, THE OPERATION AND ACQUISITION OF THE Equipment, AND ANY AND ALL REPRESENTATIONS AS TO THE Equipment. Lessee further acknowledges and agrees that Lessee, in executing this lease, has relied solely upon the terms, provisions and conditions contained herein and any other statements, warranties, or representations, if any, by the supplier, or any salesman, employee, representative or agent of the supplier have not been relied upon and shall not in any way affect Lessee's obligation to pay the rent and otherwise perform as set forth in this lease. TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, Lessee HEREBY WAIVES ALL OF ITS RIGHTS AND REMEDIES CONFERRED UPON A Lessee UNDER SECTIONS 10508 THROUGH 10522 OF THE CAL. COM. C. AND Lessee WARRANTS THAT THIS PROVISION HAS BEEN NEGOTIATED BY Lessor AND Lessee.

In pertinent part, the Equipment lease agreement the following with respect to failure to make timely monthly payments.

If Lessee fails to pay any rent or other sum to be paid by Lessor hereunder within ten (10) days after the due date hereof, Lessee shall pay Lessor (a) an amount calculated at the rate of ten cents (\$.10) per one dollar (\$1.00) of each such delayed payment, and shall pay within ten (10) days after the original due date, as compensation for Lessor's internal operating expenses arising as a result of such failure, (b) amounts paid by Lessor to others

relevant to the collection thereof, and (c) interest on such unpaid rent or other amount, at the rate of eighteen percent (18%) per annum based on a 360 year or at such lesser rate as may be permitted by law, computed from the date due to the date paid.

Equipment Lease Agreement ¶ 4.

An event of default(¶ 15) is described follows:

DEFAULT. Any of the following events or conditions shall constitute an "Event of Default" hereunder: (a) If Lessee shall default in the payment when due of any obligation or other indebtedness (i) under this lease or any other document, instrument or agreement executed and/or delivered in connection with this lease or (ii) under any other agreement for borrowed money between Lessee and Lessor arising independently of this lease; (b) if Lessee fails to pay any other monies or charges on the due date.

The Lessor's remedies in the event of the Lessee's default are set forth in paragraph "16" of the agreement, and may be exercised at the sole discretion of the Lessor. Among the remedies is the option to declare the entire balance of the rent for the remaining term to be immediately due and payable, and the right to "recover such rent and all other rent and sums due thereunder, such payments to be discontinued to present value as set forth (therein)" (¶ 16(a)). The remedies include, inter alia taxing possession fo the Equipment and selling a leasing it (¶ 16(d)), and proceeding by appropriate action either at law or in equity to enforce performance or recover damages (¶ 16(f)). The Lessor's remedies also include recovery of reasonable attorneys fees.

If any legal action or other proceeding is brought to enforce the terms of this lease, or to protect or enforce the ownership of the Equipment or the priority of the Lessor with respect to the Equipment or with respect to any collateral of Lessor, whether in state, federal or bankruptcy court (including, but not limited to, such actions as relief from the automatic stay, to obtain administrative expense claims, with respect to avoidance actions, and with respect to Lessor's treatment in a plan) or in any administrative or other proceeding of any kind, or with respect to any alleged dispute, breach, breach, default, misrepresentation, or otherwise in connection with any provisions of this lease, Lessor shall be entitled to recover its reasonable attorneys fees, including costs of in-house counsel, whether litigation has or has not been commenced, and all other reasonable costs incurred in that

action or proceeding, in addition to any other remedies, reasonable costs and reasonable expenses to which Lessor may be entitled. In addition, Lessor shall be entitled to all collections costs of any kind arising out of the enforcement or administration of this lease.

With respect to the issues of governing law as well as the venue of any action the agreement in paragraph 24 set forth the following:

GOVERNING LAW; VENUE; JURY TRIAL WAIVER. Lessee acknowledges that the last act necessary to the formation of this lease is the acceptance and execution of this lease by Lessor at Lessor's principal place of business, which is in Los Angeles, California. The exclusive jurisdiction and venue of any claim or controversy arising out of this lease shall be in federal or state court in Los Angeles, California, unless Lessor, at its sole option, chooses to commence litigation in another state because the Equipment or any item of Equipment is located in that state. However, under no circumstances will litigation filed against Lessor be filed by way of complaint, counterclaim, cross-complaint or cross-action in any court other than in Los Angeles County, California. The choice of law under which this lease shall be interpreted is California law. Lessee **HEREBY KNOWINGLY AND VOLUNTARILY WAIVES TRIAL BY JURY AND THE RIGHT TO INTERPOSE ANY NON-COMPULSORY COUNTERCLAIM OR OFFSET OF ANY NATURE OR DESCRIPTION IN ANY LITIGATION BETWEEN Lessee AND Lessor OR ITS ASSIGNEES, WITH RESPECT TO THIS LEASE, AND THE Equipment OR THE REPOSSESSION THEREOF.**

Affidavit of Michael Fernandez

Michael Fernandez attests that he has personal knowledge of the facts and circumstances of this action by virtue of his review of the books and records maintained in the ordinary course of the business by his employer.

He further attests that defendant is licensed to do business in New York State, and on or about June 30, 2008 executed a lease with defendant.

Fernandez attests that on April 22, 2009² was sent a letter advising that it was in

²The letter dated 04/23/09 is annexed to the Summons and Complaint.

default of the Lease agreement for failure to make the monthly payments due October 15, 2008 and thereafter. Defendant was advised that Dakota was electing to accelerate the Lease and demanded as immediately due and payable the entire balance of rent for the remainder of the term [\$162,313.75]. In addition, plaintiff demanded that the vehicle be made available to Dakota for immediate surrender and sale. Defendant was also advised that until the debt was paid in full, interest would continue to accrue at the default interest rate of 18% per annum.

Fernandez attests that defendant surrendered the truck to plaintiff on May 12, 2009 and states "in the event the vehicle is re-sold, plaintiff will issue a credit to defendant against the debt in the amount of the net proceeds realized."

Cross-Motion

Defendant cross-moves for an order dismissing plaintiff's motion for failure to give requisite notice of motion pursuant to CPLR § 2214.

Defendant also moves to dismiss the complaint on the grounds that plaintiff is a foreign corporation, not licensed to business in the state of New York.

Defendant contends that plaintiff's motion for summary judgment must be denied as the affidavit of Gibraltar's principal raises triable issues of fact including the ownership of the vehicle, and fraudulent inducement. It is also argued that plaintiff has failed to demonstrate that it has mitigated its damages.

Sanctions

Both parties move for the imposition of sanctions.

Plaintiff seeks sanctions against defendant and its counsel "for the attorneys' fees and costs incurred as a result of having to respond to Gibraltar's approximately fifty (5)

Affirmative Defenses as these claims are frivolous and without merit.” [Affirmation In Opposition to Cross-Motion ¶ 17].

Defendant seeks the imposition of sanctions against plaintiff and against both the law firm representing plaintiff and its named associate pursuant to NYCRR § 130-1.1 “for commencing and maintaining frivolous and harassing motion practice.”

Discovery

Defendant also moves pursuant to CPLR 3126 for penalties for plaintiff’s failure to respond to certain discovery demands.

Discussion and Conclusions

It is established that “[e]very contract requires the mutual assent or consent of the parties”, with “[t]he existence of mutual consent [to be] determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.” (Meyer v Banko, 55 Cal. App. 3d 937, 942-943 [1976], 127 Cal. Rptr. 846).

It is also settled that the “acceptance of the benefit of [a] transaction is [the] equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.” (CA Civil Code § 1589). In the context, as here, of a finance lease “the lessee’s provisions under the lease contract become irrevocable and independent upon the lessee’s acceptance of the goods.” (Cal. U Com. Code § 10407(a)).

By the terms of the applicable statute, CA U Com Code § 10103(7), the Finance Lease here is defined as a “lease with respect to which (a) the lessor does not select, (b) the lessor acquires the goods or the right to possession and use of the goods in connection

with the lease and (c) the following occurs:

The lessor, before the lessee signs the lease contract, informs the lessee in writing (aa) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use the goods from that person, (bb) that the lessee is entitled under this division to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (cc) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or the remedies.

Procedural Issues

The court first will address procedural issues raised in the cross-motion.

Plaintiff's motion for summary judgment by notice dated March 18, 2010 returnable April 30, 2010, served upon defendant's counsel by mail on April 6, 2010 was properly noticed.

Moreover, as issue was joined by service of defendant's answer in September 2009, the motion is timely made.

Defendant's second "procedural" issue requires a threshold determination of whether the plaintiff, foreign limited liability company, is authorized to maintain this action.

Limited Liability Company Law § 808(a) states "[a] foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state."

Plaintiff makes no showing that it applied to and received from the NYS Department

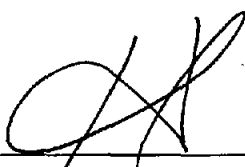
of State a Certificate of Authority to do business in this state (see, Limited Liability Company Law §§ 804, 805) but rather relies on the issuance to it of a NYS Department of Taxation and Finance Certificate of Authority which merely enabled Dakota to collect state sales taxes. Plaintiff refers to neither statutory nor case law authority to support its position that issuance of a certificate pursuant to New York State Tax Law Articles 28/29 is equivalent to foreign entity authorization by the Department of State. Nor does plaintiff offer authority for a finding that requirement of compliance with the Limited Liability Company Law is waived if the foreign entity has been authorized to collect sales tax.

The apparent current lack of authorization to do business in New York does not impair the validity of the underlying agreement executed by the foreign limited liability company. However, it does prevent this action from going forward.

The action is stayed sixty (60) days for plaintiff to present to this court the requisite Certificate of Authority issued by the Secretary of State. Failure to comply with the foregoing shall result in dismissal of the action without prejudice.

This constitutes the decision and order of this court.

Dated: July 26, 2011
Bronx, New York



Howard H. Sherman
J.S.C.