**State of New York** **Supreme Court**
**County of Steuben**

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**CORNING CREDIT UNION,**

**Plaintiff,**

**DECISION**

**vs.**

**Index No. 2015-0238CV**

**CASEY SPENCER and**
**BENJAMIN MOSKEL,**

**Defendants.**

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*Appearances:* *Davidson Fink LLP,* Rochester *(David L. Rasmussen* of counsel) for Plaintiff

*Benjamin D. Moskel,* Rochester for Defendants

This matter comes before the Court on plaintiff's motion for summary judgment seeking an award of $14,121.21, plus interest, costs, expenses, and attorney's fees, based on plaintiff's claim that defendants defaulted in making payments on a boat loan given to them by plaintiff. Plaintiff also seeks to dismiss the affirmative defenses presented in defendants' answer. Defendants oppose plaintiff's motion, contending that the loan was not in default on the date plaintiff claims it was, and ask the Court to grant them summary judgment. At oral argument, plaintiffs requested additional time to submit the documentary evidence which supported its claim. Defendants were given additional time to respond. The Court reserved decision on plaintiff's motion pending receipt of this additional evidence.

A party seeking summary judgment must set forth sufficient evidence to demonstrate the absence of any material issue of fact *(Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Paternostro v. Advance Sanitation, Inc.*, 126 AD3d 1376 [4th Dept. 2015]). If the proponent fails to make this showing, the motion for summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial *(Gonzalez v. 98 Mag Leasing Corporation,* 95 NY2d 124, 129 [2000]; *Alvarez v. Prospect Hospital*, Id.). In reviewing a motion for summary judgment, the evidence must be considered in the light most favorable to the opponent (*Pakenham v. Westmere Realty, LLC*, 58 AD3d 986, 987 [3rd Dept. 2009]; *Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]).

In support of its summary judgment motion, plaintiff presented affidavits from plaintiff's Coordinator of Asset Protection, Timothy Montayne (the Montayne affidavit), and plaintiff's Loss Mitigation Specialist, Mary Lucas (the Lucas affidavits), as well as copies of defendants' boat loan account records. This evidence establishes that defendants applied for a boat loan and on or about May 29, 2007, plaintiff approved the application and thereafter issued defendants a check for $39,545.60. Plaintiff claims that defendants pledged the boat as

security for the loan. Plaintiff submitted an unsigned copy of the Advance Request Voucher and Security Agreement (Agreement), which contains the security interest language. Plaintiff also presented copies of defendants' account statements which establish that the monthly loan payment was $426.00. These records establish that defendants made regular and timely payments through November, 2012, often paying far in excess of the payment due. This resulted in a loan payment surplus. When defendants stopped making boat loan payments after November, 2012, plaintiff used the loan payment surplus to make the monthly loan payment until the surplus was depleted.

Plaintiff's records also show that, at the time defendants were making boat loan payments, they were also making monthly payments to plaintiff of $220.00 on a student loan. When defendants paid off the student loan on June 8, 2012, plaintiff applied the monthly payments of $220.00 to the boat loan until September of 2013. Beginning in October, 2013, $110.00 was applied to the boat loan for three (3) months. Plaintiff's records show no further payments were made toward the boat loan except for a $23.00 payment in July of 2014. The bank records also reflect that in January of 2014, plaintiff returned to defendants all payments made by them during the year 2013. This amounted to $2310.00. This returned the loan to its status as of December 2012. Defendants do not dispute that they made no further payments from their Chase account after November 2012.

The Lucas affidavits also establish that plaintiff was contacted by the Federal Trade Commission (FTC) on August 22, 2014, and advised that the FTC would be taking possession of the boat. Faced with the loss of their security and the default in payment, plaintiff repossessed the boat on August 29, 2014, and sold it at auction a short time later for $17,500. Plaintiff sent defendants a letter dated November 12, 2014, advising them that, after the proceeds from the sale were applied to the debt owed, defendants owed plaintiff a deficiency balance of $14,121.12.

In opposition to plaintiff's motion, defendants submitted copies of their Chase bank account statements from April 13, 2010, through and including November 13, 2012. These show that defendants made electronic payments towards the boat loan including a $910.00 payment on July 9, 2012. Plaintiff's records do not show receipt of that July payment. All other payments from defendants' Chase account were applied to the boat loan.

Plaintiff acknowledged that, as of the date they repossessed the boat, defendants' loan was paid through July 21, 2014 (Lucas Affidavit dated April 11, 2016). However, if plaintiff received but failed to apply the $910.00 payment allegedly sent to the plaintiff on July 9, 2012, there would have been sufficient funds on hand to keep the loan current through September 21, 2014. The evidence submitted by defendant thus raises a question of fact as to whether the loan was in default at the time of repossession, as well as a question of fact as to the amount of the deficiency plaintiff is entitled to recover.

However, plaintiff proved that it had a separate basis for repossessing the boat based upon the communication from the FTC on August 22, 2014, that it was planning to take possession of the boat. In the Lucas affidavit dated April 11, 2016, plaintiff asserted that this effort by the FTC to take possession of the boat constituted a default under the security agreement which authorized the plaintiff to repossess the collateral. The security agreement upon which plaintiff relies clearly states that defendants would not allow anyone else to take an interest in the secured property, would not transfer it without the plaintiff's written consent and that plaintiff had the right to repossess the secured property based on defendants' default in any agreement or if any person legally tried to take property in the credit union's possession.

This evidence supports plaintiff's claim that it rightfully repossessed the boat. Although this basis for default was not pleaded in the complaint, defendants were placed on notice of this claim before they submitted their affirmations dated May 4, 2016, and July 7, 2016, and chose not to address it. "Summary judgment may be granted on an unpleaded cause of action if the proof supports such cause of action and if the opposing party has not been misled to its prejudice" (*Boyle v. Marsh & McLennan Cos. Inc.,* 50 AD3d 1587, 1588 [4th Dept. 2008]; *Syracuse Equip. Co. v. Lebis Contr.,* 255 AD2d 992 [4th Dept. 1998]; *Stiber v. Cotrone,* 153 AD2d 1006 [3rd Dept. 1989]). Therefore, even if the payments were current at the time of repossession, plaintiff has met its burden to prove that the repossession

was not a wrongful taking. This does not resolve the question of fact as to the amount of deficiency to which plaintiff is entitled.

Plaintiff also moved to dismiss defendants' eight (8) affirmative defenses, claiming the defenses are "bald, conclusory, and unsupported by any fact, evidence, or law; therefore, they are without merit." Plaintiff's motion is granted to the extent that the affirmative defenses of improper party, collateral estoppel, and res judicata are dismissed. These defenses do not raise issues as to the breach of contract between these two parties. There was no evidence presented that plaintiff was made a party to any federal lawsuit so as to be bound by any determination made in that action.

Defendants' affirmative defense of improper service based on the time of day the defendants were served does not affect the court's jurisdiction over the parties. Furthermore, defendants did not move to dismiss the complaint for lack of improper service within sixty (60) days after serving the answer. Therefore, this affirmative defense was waived and must be dismissed (CPLR 3211(e)).

Defendants' affirmative defense alleging a violation of UCC Section 9-504 must also be dismissed. Plaintiff's letter to defendants advising them of their right to redeem the boat after it was repossessed (Lucas affidavit Ex. "E"), refutes this affirmative defense. Defendants offered no evidence creating a question of fact on this issue.

Defendants' affirmative defense of breach of contract by the plaintiff based on its premature repossession of the boat is dismissed based on the Court's finding that plaintiff had the right under the Agreement to repossess the boat for reasons other than non-payment.

Defendants' affirmative defense alleging a violation of General Business Law §601 must also be dismissed. There is no private cause of action which can be maintained for violations of this statute (*Varela v. Investors Insurance Holding Corp.*, 81 NY2d 958 [1993]).

Defendants' affirmative defense that no valid security interest was created due to the lack of signatures on the contract and security interest cannot be dismissed at this time. Under UCC §9-203(b) an enforceable security interest is created when the debtor has authenticated a security agreement which provides a description of the collateral (UCC §9-203(b)(3)(A)). The term "authenticate" means to sign ( UCC §9-102(a)(7)(A)). A security agreement is any agreement that creates or provides for a security interest ( UCC §9-102(a)(74)). In this case, the copy of the Advanced Request Voucher and Security Agreement attached to the pleadings did not contain a signature by either defendant. However, the loan application is signed by the defendants and references that they had received and read the agreement for the Quick Loan plan and the Permanent Security Agreement and agreed to be bound by them. There was insufficient evidence presented by plaintiff in this motion to determine whether defendants did sign the

Advance Request Voucher and Security Agreement or whether the loan application satisfied the requirements of UCC §9-203(b)(3)(A), as the agreements referenced were not attached to the application and there was no affidavit from anyone with knowledge of the transaction which addressed this issue. As a result, plaintiff has failed to meet its burden of proof that this affirmative defense is without merit. Therefore, the motion to dismiss this affirmative defense is denied.

Based upon the above, plaintiff's motion for summary judgment is denied in so far a there exist questions of fact as to the amount of the deficiency judgment and whether or not there is a signed security agreement to support plaintiff's recovery of a deficiency judgment against defendants. Defendants' request for Summary Judgment is also denied.

Defendants' counsel to submit order.

Dated: January 6, 2017.

ENTER:

Hon. Marianne Furfure
Acting Supreme Court Justice