

Decided on May 19, 2008

Supreme Court, Queens County

Caterpillar Financial Services Corp., Plaintiff,
against
N.H.C. Group Inc., Michael F. Tyrell and Chung Chia,
Defendants.

15842/06

Joseph P. Dorsa, J.

By notice of motion, plaintiff seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment.

Defendant, Chung Chia, opposes and cross-moves for summary judgment and dismissal of the complaint as to him.

Plaintiff files an affirmation in opposition and a reply to defendant's opposition. Defendant files a reply to plaintiff's opposition.

The underlying action is a claim by plaintiff, Caterpillar Financial Services Corp., for non-payment on a commercial loan, installment contract. The original contract was executed between Giles & Ransome, Inc. and defendant, N.H.C. Group, Inc. on September 8, 2005. Defendant buyer purchased from Giles & Ransome, Inc., one number 330BL Caterpillar excavator. Thereafter, on September 9, 2005, Giles & Ransome, Inc., assigned all of their rights, title and interest under the installment contract to plaintiff. (See plaintiff's Exhibit D, attached to amended complaint as Exhibit B).

Prior to this specific purchase, specifically on April 27, 2005, defendants Chia and Tyrell executed a personal guaranty of payment to plaintiff, including a so called "dragnet clause" which guarantees payment for indebtedness owed now or hereafter. (See plaintiff's Exhibit D, the

complaint, attached as Exhibit "D" thereto).

On November 6, 2006, by Short Form Order, this Court denied defendant Chia's motion to dismiss the action as against him on the grounds that he did not execute a personal guaranty, and granted plaintiff's motion for an order allowing the Sheriff to seize the collateral, to wit: one Caterpillar 330BL excavator. (See plaintiff's Exhibit C). Since the issuance of this Court's Short Form Order of November 6, 2006, plaintiff has been unable to locate the subject collateral. Defendant Chia maintains that he has no knowledge of its location.

In response to plaintiff's motion and in support of the cross-motion, defendant Chia continues to maintain that he executed no personal guaranty of payment with respect to this subject installment contract. Defendant points out that the guarantee of payment upon which plaintiff relies (see plaintiff's Exhibit D, the complaint attached as Exhibit "D" thereto) is dated April 27, 2005 (emphasis added) some five months prior to the date of the subject installment contract. Defendant argues that the guaranty of payment signed April 27, 2005, referred only to two prior machinery purchases, both of which were paid in full by the defendants. Moreover, defendant argues that the original installment contract between Giles & Ransome, Inc. and defendants N.H.C., Tyrell and Chia did not include a personal guaranty of payment. Defendant maintains he signed that installment contract as an officer of the N.H.C. corporation only.

Therefore, defendant argues plaintiff, as assignee of Giles & Ransome, Inc., cannot assume a right, to wit, personal guaranty of payment, that was never held by Giles & Ransome, Inc., and therefore never conferred.

Plaintiff makes mention that neither Tyrell nor N.H.C. have served an answer in this action. The Court notes, however that plaintiff fails to affirmatively seek a default judgment against defendants, N.H.C. Group, Inc. or Michael F. Tyrell as part of its motion in chief. Accordingly, the parties' arguments with respect to the timeliness of such an application are of no moment, and will not be addressed by the Court. [*2]

As noted above the guaranty of payment signed by defendants Chia and Tyrell contained a "dragnet clause" which plaintiff maintains obligated defendant Chia to pay all future indebtedness between the parties. (See Section 1, Guaranty of Obligor's Indebtedness, plaintiff's Exhibit D, attached to complaint). Under Section Seven (7) of the same document, the guarantor (Chia) waives notice of the "existence, creation, or incurrence of new and/or additional debt..." (*Id.*), including rights the Seller (Caterpillar Financial Services Corporation) "...hereafter acquires." (*Id.*).

Within months of defendant's execution of said guaranty, and only one day following the execution of the installment agreement regarding the Caterpillar excavator which is the subject of this action, plaintiff acquired the rights to the installment payments or indebtedness involved.

Plaintiff cites two actions in support of the recognition of "dragnet clauses" by the Court, including *State Bank of Albany v. Fioravanti*, 51 NY2d 638, 435 NYS2d 947 (1980), and *Choi v. Korea First Bank of NY*, 244 AD2d 236, 664 NYS2d 437 (1st Dep't 1997). Although defendant

maintains that such clauses apply only to transactions involving mortgages, he provides no authority for this claim.

Accordingly, upon all of the foregoing, the motions are decided as follows:

Defendant's cross-motion for summary judgment and dismissal is denied; and, it is further

ORDERED, plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment to plaintiff against defendant, and the issue of the amount of the judgment to be entered shall be determined at an inquest herein; and, it is further

ORDERED, upon proof of filing a copy of this Order with a Note of Issue and Statement of Readiness with the Trial Term Clerk and compliance with all the rules of this Court, this action shall be placed on the I.A.S. Part 12 calendar, for the **2nd** day of **July, 2008** at **11:00 a.m.**, 88-11 Sutphin Boulevard, Jamaica, NY, Courtroom 45, for inquest/assessment of damages by the Court, provided that a copy of this order with notice of entry is served upon the defendant, Chung Chia, by regular mail and upon the Clerk of I.A.S. Part 12 of this Court at least twenty (20) days prior to the scheduled Inquest date. [*3]

Upon the rendering of said assessment, the plaintiff shall recover judgment against the defendant, Chung Chia, in the sum for which the damages are thus fixed, together with the costs of the action to be taxed by the Clerk of the Court, and said Clerk is hereby directed to enter judgment in favor of the plaintiff and against the defendant, Chung Chia, for said sum in which damages are thus fixed, together with the costs of the action as taxed, if authorized by statute.

Dated: Jamaica, New York

May 19, 2008

JOSEPH P. DORSA

J.S.C.

OCA e-submission: no Judge E-Mail