

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-17

Key Equipment Finance, Inc.,

Plaintiff

v.

Benjamin Hawkins and Timothy Morse,

Defendants

DECISION AND ORDER

This matter was heard on June 23, 2008, on Plaintiff's Complaint. Attorneys Eric Wycoff and Jacob Manheimer represented the Plaintiff. Attorney Ralph Dyer represented Defendant Hawkins.¹

Following completion of the hearing, the Court granted the parties leave to file written argument. The Court received the parties' written argument on July 22, 2008. Upon review of the filings, and consideration of the parties' arguments, the Court conducted a telephonic conference with the parties to entertain further argument. During the conference, the Court invited the parties to submit supplemental written argument on some of the issues that the Court believed had been generated by evidence. Plaintiff filed a written submission on August 29, 2008. On September 16, 2008, Defendant Hawkins filed a response to Plaintiff's submission.

Procedural Background

Plaintiff commenced this action with the filing of a Complaint dated September 28, 2006. As part of his response to Plaintiff's Complaint, Defendant Hawkins filed a third-party complaint against TD Banknorth, N.A.

In December 2006, Plaintiff filed a motion for summary judgment as to its claims against both defendants. Defendant Morse did not object to the motion and, therefore, the Court granted the

¹ The Court previously granted Plaintiff's Motion for Summary Judgment against Defendant Morse. Accordingly, Defendant Morse did not attend the hearing.

motion against Defendant Morse. At Defendant Hawkins' request, the Court deferred ruling on the motion as to Defendant Hawkins until after the completion of discovery. In August 2007, Plaintiff moved for the entry of final judgment against Defendant Morse. The Court deferred ruling on Plaintiff's request for final judgment until after the evidentiary hearing.²

In October 2007, Defendant Morse filed a motion seeking to vacate the entry of summary judgment against him. Soon thereafter, the matter was transferred to the Business and Consumer Docket. Upon review of Defendant Morse's motion, and Plaintiff's opposition thereto, the Court denied the motion. The Court subsequently denied Defendant Morse's Motion for Reconsideration of the Court's denial of Defendant Morse's motion to vacate.

Following the close of discovery, upon Defendant Hawkins' motion, the Court dismissed the claims asserted against third-party defendant TD Banknorth, N.A. In addition, the Court granted in part and denied in part Plaintiff's motion for summary judgment against Defendant Hawkins. In its decision on Plaintiff's motion for summary judgment, the Court concluded that an issue of fact remained for trial on the issue of whether Defendant Hawkins, as a guarantor of Morse Brothers' financial obligation to Plaintiff, received notice of the sale of the assets that secured the financial obligation.

Findings of Facts

Based on the evidence, the Court makes the following findings of fact:

1. Morse Brothers Inc. was in the business of buying, processing and distributing bark mulch.
2. Defendant Hawkins first became involved with Morse Brothers in 1990 or 1991. Morse Brothers employed him in 1991.
3. In 1995, Defendant Hawkins exercised an option to purchase 50% of the stock of Morse Brothers.

² The Court will, as part of this Decision and Order, enter final judgment in favor of Plaintiff and against Defendant Morse.

4. At all pertinent times, Defendant Hawkins served on Morse Brothers' board of directors and was the treasurer/chief financial officer of Morse Brothers.
5. Morse Brothers and Plaintiff are parties to a Master Lease and equipment schedules for certain tractors and trailers.
6. Defendant Hawkins personally guaranteed Morse Brothers' financial obligation to Plaintiff under the terms of the Master Lease and equipment schedules.
7. On September 28, 2005, because Morse Brothers was experiencing financial difficulties, Morse Brothers filed for bankruptcy protection.
8. Defendant Hawkins signed the bankruptcy petition on behalf of Morse Brothers.
9. At the time of the filing of the bankruptcy petition, Morse Brothers was in default of its loan obligations to Plaintiff.
10. Morse Brothers retained the law firm of Marcus, Clegg & Mistretta (the Marcus law firm) to represent Morse Brothers in the bankruptcy proceeding.
11. Throughout the bankruptcy proceeding, the Marcus law firm communicated regularly with Defendant Hawkins, and regularly apprised Defendant Hawkins of the status of the bankruptcy proceedings.
12. On occasion, Defendant Hawkins ignored and did not read some of the materials forwarded to him by the Marcus law firm. Defendant Hawkins also discarded some of the mail from the Marcus law firm without opening the mail.
13. During the course of the bankruptcy proceeding, Defendant Hawkins was involved in the negotiations to sell some of Morse Brothers' assets to JWA Holdings Corp. At the time, Defendant Hawkins' son was the general manager of JWA Holdings Corp.

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14. As the result of the negotiations, Morse Brothers entered into an asset purchase agreement with JWA Holdings Corp. by which Morse Brothers was to convey to JWA Holdings Corp. some of the assets of Morse Brothers.

15. Defendant Hawkins was aware of the terms of the asset purchase agreement.

16. On February 16, 2006, Defendant Hawkins authorized a name change for Morse Brothers, Inc., to MBI Liquidations.

17. Prior to the sale of the assets, Defendant Hawkins spoke with a representative of Plaintiff (Geoff Cuneo) to discuss with and identify for Plaintiff some potential purchasers of the assets.

18. By Order dated March 28, 2006, the bankruptcy approved the sale of the assets to JWA Holdings Corp. for \$500,000. Before the Order was filed with the Court, the Marcus law firm reviewed and approved the terms of the Order.

19. The Marcus law firm forwarded to Defendant Hawkins a copy of the order authorizing the sale of the assets.

20. Morse Brothers sold the assets in accordance with the bankruptcy court order on March 31, 2006.

21. The sale of the assets resulted in a deficiency in the amount of \$345,769.30 on Morse Brothers' loan obligations to Plaintiff.

Discussion

As mentioned above, in its Decision and Order on Plaintiff's Motion for Summary Judgment, the Court identified the issue for trial as whether under the applicable New York law, Defendant Hawkins had reasonable notice, actual or constructive, of the sale of the equipment prior to the sale. (*Decision and Order*, p. 12). At trial and in its post-trial memoranda, Plaintiff argued that the information provided to or available to Defendant Hawkins during Morse Brothers' bankruptcy was sufficient to satisfy the notice requirement. Defendant Hawkins maintains that not only did he not have notice of the sale, but also that Plaintiff cannot satisfy the notice requirement through

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constructive notice. Instead, Defendant Hawkins contends that the notice must be "authenticated," which, according to Defendant Hawkins, requires written notice.³

The parties and the Court agree that New York law applies to the resolution of the parties' dispute. New York Uniform Commercial Code § 9-611(c)(2) governs the notice that is to be provided to a guarantor before a secured creditor disposes of the collateral. In particular, the law provides in pertinent part:

- (b) Notification of disposition required. Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition.
- (c) Persons to be notified. To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:
 - (1) the debtor;
 - (2) any secondary obligor ...

N.Y. U.C.C. § 9-611(c)(2)(b)&(c). Because Defendant Hawkins is a "secondary obligor," he was entitled to "a reasonable authenticated notification of disposition" of the collateral.

If, as Plaintiff contends, constructive notice can satisfy the notice requirement under New York law, Plaintiff has demonstrated that Defendant Hawkins had notice of the sale. Indeed, the Court found no evidence to support Defendant Hawkins' contention that he was unaware of the sale. To the contrary, all of the credible evidence supports the conclusion that Defendant Hawkins was aware of the sale before consummation of the sale.

At all pertinent times, Defendant Hawkins was involved in or aware of the efforts to sell the assets during Morse Brothers' bankruptcy proceeding. At one point, Defendant Hawkins was involved in the negotiations to sell the assets to JWA Holdings Corp., which employed Defendant Hawkins' son as its general manager. In addition, well before the sale, Defendant Hawkins learned that JWA Holdings Corp. did not intend to assume responsibility for the written agreements between Plaintiff and Morse Brothers and, therefore, was aware that the assets would be sold. In

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³ Defendant Hawkins did not raise this issue directly in the summary judgment filings or at trial. Because Defendant Hawkins raised the issue in his post trial memorandum, the Court permitted Plaintiff an opportunity to address the issue in a supplemental written argument.

fact, Defendant contacted and discussed with one of Plaintiff's representatives potential purchasers of the assets.

Furthermore, the Marcus law firm regularly communicated with Defendant Hawkins as to the bankruptcy proceeding, including the status of the sale of the assets. Despite Defendant Hawkins' assertions to the contrary, the Court believes that it is inconceivable that Defendant Hawkins did not view a copy of the bankruptcy court's order, either in draft or in final form, approving the sale of the assets. Consistent with the Court's conclusion, at one point in the proceedings, Defendant Hawkins testified that he *did not recall* seeing the document. In other words, at least at one time during this litigation, Defendant Hawkins did not deny having seen the bankruptcy court's order.

Under New York law, "a person has notice of a fact when ... from all the facts and circumstances known to him at the time in question he has reason to know that it exists". *N.Y. U.C.C. § 1-201(25)*. As explained above, the overwhelming evidence establishes that Defendant Hawkins was aware of the sale of the assets before the sale. At a minimum, Defendant "had reason to know" of the sale based on the "circumstances known to him". *Id.*

Perhaps recognizing the strength of Plaintiff's argument that Defendant Hawkins had constructive notice of the sale, in his post-trial memorandum, Defendant Hawkins argues that whether Defendant knew of the sale or had reason to know of the sale is irrelevant because the notice must be "authenticated" pursuant N.Y. U.C.C. § 9-622(c)(2)(b) in order to be effective. To authenticate means "(A) to sign; or (B) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record." *N.Y. U.C.C. § 9-102*. Because an authenticated notice requires a writing, Defendant maintains that under the applicable New York law at the time of the sale, Plaintiff cannot rely upon constructive notice to satisfy the notice requirement.

While acknowledging that the court in *Chase Manhattan Bank, N.A.; v. Nataralli*, 93 Misc. 2d 78, 401 N.Y.S. 2d 404 (1977) concluded that constructive receipt of notice was sufficient, Defendant contends that the decision in *Chase* is inapplicable because the court in *Chase* interpreted and applied a predecessor statute to § 9-611, which is applicable to this case. The notice provision of § 9-611 was adopted in 2001. Previously, New York law required that "reasonable notification of

the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor ..." *N.Y. U.C.C. § 9-504(3) (law applicable prior to July 2001)*. Of significance, Defendant argues, is the absence in the pre-2001 law of the requirement that the secured party provide an authenticated notice.

In response to Defendant's argument, Plaintiff contends that "[t]here is no substantive difference between the statutory schemes [§ 9-504(3) and § 9-611] which would render caselaw interpreting former § 9-504 inapplicable to the notice requirements contained in revised Article 9". (*Plaintiff Key Equipment Finance, Inc.'s Additional Briefing, p. 2*). In essence, Plaintiff argues that there is no material difference between a "notice" under the former §9-504 and an "authenticated notice" under §9-611.

By definition, an "authenticated" notice must be in writing. *N.Y. U.C.C. § 9-102*. For Plaintiff to prevail, therefore, the Court would have to determine that the New York legislature, presumably aware of the *Chase* decision,⁴ did not intend to change the form of the required notice when it made a substantive change to the applicable statute. Particularly given that the revised statute also requires that any waiver of the notice must be "authenticated" (*N.Y. U.C.C. § 9-602 & § 9-624*), the Court concludes that the notice requirement, as viewed by the New York legislature, is a critical part of the process by which a party might secure a deficiency judgment. The Court specifically finds that the legislature intended to change (i.e., heighten) the notice requirement by requiring a written notice. Otherwise, there would have been no reason for the New York legislature to require an authenticated notice instead of the mere notice that was permissible under the predecessor statute. Because a written notice is required, Plaintiff cannot satisfy the requirement by establishing, as it has in this case, that Defendant Hawkins had constructive notice of the sale.

Insofar as the Court has determined that Defendant was aware of the sale, the Court recognizes that in this case the Court's conclusion in some ways promotes form over substance. However, the Court cannot ignore the plain language of the statute, which requires an "authenticated" (i.e., written) notice. Furthermore, when a party seeks a deficiency judgment,

⁴ Comment 5 to § 9-611 reveals that the drafters were aware of case law, and that the "authenticated" requirement was included to make clear that the notice must be in writing. The comment specifically provides: "Authentication Requirement. Subsections (b) and (c) explicitly provide that a notification of disposition must be 'authenticated.' Some cases read former Section 9-504(3) as validating oral notification."

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compliance with the statutory prerequisites to such a judgment is necessary. As the court in *In re Steven L. Downing*, 286 B.R. 900 (Bankr. W.D. Mo. 2002) observed, “[s]trict compliance is required because deficiency judgments after repossession of collateral are in derogation of common law ... in other words, since deficiency judgments were unheard of in common law, the right to a deficiency judgment accrues only after strict compliance with a relevant statute.”⁵

Plaintiff’s failure to satisfy the notice requirement of § 9-611 does not necessarily preclude Plaintiff from recovering a deficiency judgment against Defendant Hawkins. N.Y. U.C.C. § 9-626 provides:

(3) ... if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney’s fees exceeds the greater of:

(A) the proceeds of the collection, enforcement, disposition, or acceptance; or

(B) the amount of proceeds that would have been realized had the non-complying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

Id.

In *Coxall v. Clover Commer. Corp.*, 4 Misc. 3d 654, 781 N.Y.S. 2d 567 (N.Y. 2004), the court, citing § 9-626(3), observed that New York had adopted the “rebuttable presumption” rule. That is, rather than serving as an absolute bar to the recovery of a deficiency judgment, the failure to provide the requisite notice raises a rebuttable presumption that compliance would have generated an amount sufficient to satisfy the debt. *Id.* at 663-664. Here, Plaintiff can rebut the presumption if it can prove that the amount of the proceeds that would have been realized if the required notice had been given is less than the amount of the “secured obligation, expenses and attorney’s fees”. N.Y. U.C.C. § 9-626(3).

⁵ The Court also notes that one of the purposes of the notice requirement is to place a guarantor on notice as to the possibility of a deficiency judgment. In this case, Defendant Hawkins was aware of the sale in his capacity as a corporate representative of Morse Brothers. He did not receive a written notice of the sale as a guarantor, which would presumably have placed him on notice of Plaintiff’s intent to seek to recover the deficiency from him.

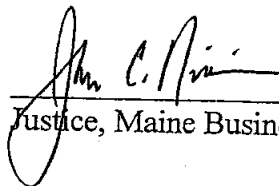
Conclusion

Based on the foregoing analysis, the Court orders as follows:

1. Because Plaintiff did not satisfy the notice requirement of N.Y. U.C.C. § 9-611, the Court cannot, at this point in the proceeding, enter judgment in favor of Plaintiff.⁶
2. Because Plaintiff's failure to satisfy the notice requirement of N.Y. U.C.C. §9-611 results in a rebuttable presumption that compliance would have generated an amount sufficient to satisfy the debt, and does not result in an absolute bar to Plaintiff's recovery, the Court cannot, at this stage of the proceeding, enter judgment in favor of Defendant Hawkins.
3. The Court will conduct further hearing in this matter to determine whether, in accordance with N.Y. U.C.C. § 9-626(3), Plaintiff is entitled to a deficiency judgment.
4. Because the Court granted Plaintiff's Motion for Summary Judgment against Defendant Timothy Morse, and because the Court subsequently denied Defendant Morse's Motion to Vacate and Motion for Reconsideration, the Court grants Plaintiff's request for the entry of final judgment, and enters final judgment against Defendant Morse and in favor of Plaintiff in the amount of \$345,769.30.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 9/22/08


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⁶ In its final written submission, Plaintiff also argued that by participation in the Morse Brothers' bankruptcy proceeding, Defendant Hawkins waived the statutory notice requirement. As mentioned above, for a waiver to be effective, it must be "authenticated" after default. N.Y. U.C.C. §§ 9-602 & 9-624. Although Defendant Hawkins signed certain documents in the bankruptcy proceeding, he did not sign a waiver of the notice requirement. Plaintiff's waiver argument must, therefore, fail.