

Key Equipment Finance, Inc.,

Plaintiff

v.

Benjamin Hawkins and Timothy Morse,

Defendants

## DECISION AND JUDGMENT

This matter is before the Court on Plaintiff's request for the entry of a deficiency judgment against Defendant Benjamin Hawkins.<sup>1</sup> The parties have filed written arguments, which the Court has considered.

### 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 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.

In October 2007, Defendant Morse filed a motion seeking to vacate the entry of judgment against him. Soon thereafter, the matter was transferred to the Business and Consumer Docket.

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<sup>1</sup> In its September 22, 2008, Decision and Order, the Court entered a deficiency judgment in the amount of \$345,769.30 in favor of Plaintiff and against Defendant Morse.

Upon review of Defendant Morse's motion, and Plaintiff's opposition thereto, the Court denied the motion. The Court subsequently denied Defendant Hawkins' Motion for Reconsideration.

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 as 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.

On June 23, 2008, the Court conducted a trial on the notice issue. After consideration of the parties' written final arguments, and the parties' supplemental briefs, the Court issued a Decision and Order in which the Court concluded that Plaintiff had failed to provide Defendant Hawkins with an "authenticated" written notice of the sale as required by New York law. The Court also concluded that it would "conduct further hearing ... to determine whether, in accordance with N.Y. U.C.C. § 9-626(3), Plaintiff is entitled to a deficiency judgment." (Decision and Order, p. 9).

The Court subsequently conducted a pretrial conference in anticipation of a trial on the issue of whether Plaintiff is entitled to a deficiency judgment despite the fact that Plaintiff did not provide Defendant with an "authenticated" written notice of the sale of the assets. At that conference, the parties agreed that in the summary judgment record and at trial, the parties had submitted all of the evidence relevant to that issue. Accordingly, the parties agreed that further hearing was not necessary, and that the Court could decide the issue based on the current record.<sup>2</sup>

### Discussion

Under New York law, a party can recover a deficiency judgment even if the party did not provide the requisite notice of the sale of the assets by which a debt is secured. In particular, N.Y. U.C.C. § 9-626 provides in pertinent part:

(3) ... if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this

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<sup>2</sup> The Court incorporates herein the Findings of Fact set forth in the September 22, 2008, Decision and Order.

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.

Citing this provision, the court in *Coxall v. Clover Commer. Corp.*, 4 Misc. 3d 654, 781 N.Y.S. 2d 567 (N.Y. 2004), determined that New York had adopted the "rebuttable presumption" rule. Under the rebuttable presumption rule, the failure to provide the requisite notice generates a rebuttable presumption that with proper notice, the sale would have realized an amount sufficient to satisfy the outstanding debt. *Id.* at 663-664. The secured party can rebut the presumption, and obtain a deficiency judgment, if it can establish that the amount that the sale would have realized with proper notice is less than the amount of the "secured obligation, expenses and attorney's fees." *N.Y. U.C.C. § 9-626(3)*.<sup>3</sup>

For Plaintiff to prevail in this case, therefore, Plaintiff must overcome the presumption that the sale of the assets would have generated at least \$845,769.30 (i.e., the amount of the secured obligation) if Plaintiff had provided Defendant Hawkins with the requisite notice. Based upon its review of the record, the Court concludes that Plaintiff has satisfied its burden.

First, the bankruptcy court approved the amount of the actual sale (i.e., \$500,000). As a matter of law, it was, as the Court previously ruled, a commercially reasonable sale. Given that the bankruptcy trustee and the bankruptcy court seek to maximize the value of the assets for the benefit of the creditors, it is reasonable to assume that the amount realized represents a fair value for the assets.

Perhaps more significantly, however, Defendant Hawkins had actual notice of the sale price before the sale of the assets, and did not seek to challenge the sale. As set forth in the Decision and

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<sup>3</sup> The comments to § 9-626 confirm that the rebuttable presumption rule applies in New York. In relevant part, the comment provides, "Unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, under paragraph (4) the amount that a complying collection, enforcement, or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees. Thus, the secured party may not recover any deficiency unless it meets this burden."

Order, Defendant Hawkins had a copy of a draft of the bankruptcy order approving the sale price before the order was signed. Defendant Hawkins took no steps to contest the sale amount thereby suggesting that at that time, Defendant Hawkins believed that the amount was reasonable.

Defendant's decision not to challenge the sale price might be based on his participation in the efforts to locate a buyer for the assets, and his involvement in the negotiations for the sale of the assets. When Defendant Hawkins realized that the assets would be sold, he attempted to assist in the solicitation of possible buyers, and was involved in some of the negotiations to sell the assets. Insofar as Defendant Hawkins was involved in efforts to sell the assets, which is one of the principal reasons for the notice requirement (i.e., to provide the debtor with an opportunity to participate in the sale to minimize the possibility of a deficiency), the Court is convinced that Defendant's receipt of an "authenticated" written notice would not have produced a different result.

Finally, as mentioned above, the sale price was not an arbitrary amount without regard for the market for the assets. Instead, the sale price was established after negotiations between Plaintiff and the buyer, J.W. Holdings Corp. In other words, Plaintiff did not unilaterally set the price. The record established that Plaintiff engaged in a series of good faith negotiations in an effort to generate a favorable price. The fact that a good faith, arms-length negotiation generated a sales price of \$500,000 further persuades the Court that an authenticated written notice to Defendant Hawkins would not have produced a higher sales price.

### Conclusion

Based on the foregoing analysis, the Court concludes that Plaintiff has rebutted the presumption that with an "authenticated" written notice to Defendant Hawkins, the sale of the assets would have generated an amount equal to the secured obligation, expenses and attorney's fees.<sup>4</sup>

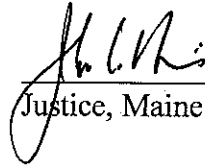
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<sup>4</sup> Although Defendant Hawkins contends that Plaintiff must rebut the presumption with "substantial evidence," New York state courts have expressly rejected that contention. According to relevant and applicable New York law, the drafters of the code did not intend to impose a "clear and convincing" or "substantial evidence" standard. See N.Y. U.C.C. § 1-201(31); and *Freeman Check Cashing, Inc. v. New York*, 412 NYS2d 963, 964 (N.Y. 1979). Instead, in order to overcome a rebuttable presumption under the UCC, the party bearing the burden must simply adduce "some evidence" supporting its claim – in this case, the claim that the secured party would have obtained less than the amount of the secured debt had it complied with the notice provisions of the statute. See *Freeman Check Cashing*, 412 NYS2d at 964. In this case, the Court concludes that Plaintiff not only satisfied the applicable standard, but has also produced "substantial evidence" to rebut the presumption. Thus, Plaintiff has satisfied its burden of proof even if the Court applies the standard urged by Defendant Hawkins.

Accordingly, the Court enters judgment in favor of Plaintiff and against Defendant Hawkins in the amount of \$345,769.30, together with interest and costs.

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

Date: 2/12/09

  
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