



# Summary Judgment: An Increasingly Effective Litigation Strategy For Lessors

By Howard M. Jaslow and Scott K. Levine

**O**ne of the most effective litigation tools available to expedite the receipt of a judicial determination and avoid the cost of protracted discovery and trial is the use of the motion for summary judgment — a procedural device intended to provide judgment on an accelerated basis where the controlling documentation is straightforward and unambiguous and there are no issues of fact requiring a trial.

Summary judgment provides a means to defeat and eliminate frivolous claims and unsubstantiated defenses where the defendant lacks a genuine justification for its default. It has been our experience that a motion for summary judgment is an invaluable tool in equipment leasing transactions, particularly in situations where the lessee and/or the guarantors are alleging defenses of forgery, fraud and misrepresentation, or lack of intent to guarantee.

Until recently, under New York law, a guarantor could successfully avoid his obligation to pay under a defaulted lease agreement and prevent the entry of summary judgment against him by simply asserting in his answer to a complaint or in his affidavit in opposition to a motion for summary judgment that his signature was not genuine or, alternatively, that he executed the guaranty in his capacity as a corporate officer and not personally. By making such allegations, the guarantor effectively raised triable issues of fact, rendering summary judgment in favor of the lessor almost impossible. Under such circumstances, the case would be forced to trial on the issue of authenticity or guarantor intent. The practical effect of this weighed heavily in favor of the lessee who had essentially forced the lessor to hire a handwriting expert, conduct discovery, and delay the entry of a potential judgment. In most cases, such tactics created an additional financial burden to the lessor and could ultimately render a valid judgment worthless if the lessee delayed long enough to liquidate, dissipate and/or secrete assets.

The playing fields were leveled in February 2004, when New York's highest court, the Court of Appeals, reversed existing law regarding the impact of raising forgery as a defense to a lessor's action against a personal guarantor. In *Banco Popular North America vs. Victory Taxi Management, Inc.*, 1 N.Y. 3d 381 (2004), the Court of Appeals held that: "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." This pronouncement obviated the need to spend thousands of dollars to retain a handwriting expert to examine a signature, issue a report and thereafter testify at trial. The facts of the Banco Popular North America (BPNA) case are common to many defaulted lease trans-

actions. BPNA provided financing to purchase taxicabs. Upon the defendant's default, BPNA commenced an action and thereafter filed a motion for summary judgment for breach of various vehicle installment contracts to recover monies due under the terms of said contracts. In its motion for summary judgment, BPNA asserted that one of the defendants' officers executed thirteen out of the fourteen contracts. In opposition to the BPNA motion, the defendants submitted an affidavit from the officer whose signature appeared on the contracts alleging that her signature was a forgery. The issue before the Court was whether the officer whose signature appeared on the contracts presented sufficient evidence pertaining to the authenticity of her signatures to establish the requisite triable issue of fact to defeat summary judgment.

The Court of Appeals held that the affidavit alone did not raise a triable issue of fact, stating that "[a]llegations merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment." The Court indicated that in order for the defendant to have raised a triable issue, it would have had to procure a handwriting expert and have that expert testify, in admissible form and with reasonable certainty, that the signature was not authentic. The practical effect of the ruling was that the burden of proof on the issue of forgery switched from the plaintiff to the defendant, as did the accompanying costs of acquiring expert testimony.

Recently, the Civil Court of The City of New York granted summary judgment in favor of one of our clients, an equipment lessor, despite the lessee's allegation that his signature was forged. The Court held that "a plaintiff in this type of action meets its initial burden of establishing its entitlement to judgment as a matter of law by submitting the equip-

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ment lease and proof of nonpayment. The defendant then bears the burden of raising a triable issue of fact." The Court held that the defendant's sworn statement that the signature was not his could not, alone, in the absence of more compelling evidentiary proof, defeat the lessor's motion for

any. Virtually all lessors require, as additional security, guarantees of the lessee's obligation to pay in accordance with the terms of the lease agreement. Commonly, this guarantor is an officer or principal of the corporate lessee. It is commonplace for the lessee to argue that the action

security agreement and personal guaranty, the trial court unexpectedly dismissed the action against the personal guarantor when, in his opposition to the summary judgment motion, he argued that although he executed the guaranty clause, he never intended to execute it in his individual capacity, as evidenced by adding the title "President" next to his signature.

The Appellate Division, First Department correctly reversed the trial court's order and held, as a matter of law, that the terms of the guaranty were unambiguous and "that the inclusion of 'president' after his signature is merely descriptive (and) did not evidence an intention to sign in a purely corporate capacity which would, in any event, be inconsistent with the nature of the guaranty." The Appellate Division reasoned that it would be illogical for the corporate defendant to guaranty its own default, consistent with the longstanding practice of the New York Courts to avoid construing a contract in a way that would render contractual clauses meaningless.

As illustrated by the above examples, the overall trend of the New York judiciary over the past few years has been to protect the integrity of equipment lease agreements and to promote the validity of leasing transactions upon default by a lessee, thereby maximizing the effect of the motion for summary judgment as an important litigation tool.

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summary judgment. "The defendant bears the burden to state his version of the facts in evidentiary form. The defendant's bald, conclusory assertions, even if believable, are not sufficient to defeat a motion for summary judgment."

Unlike a situation where forgery is alleged, the guarantor asserting that he signed only in corporate capacity as his defense does not contest the authenticity of his signature. Rather, the lessee argues that he did not intend to be bound as a personal guarantor, and that such lack of intention nullifies the personal liability aspect of the guar-

against him be dismissed on the grounds that he had no intention of being personally and individually liable to the lessor, despite signing a document entitled "Personal Guaranty." While it may seem self-evident that a Court would have no basis to entertain such a defense, in *PNC Capital Recovery vs. Mechanical Parking Systems, Inc.*, 283 A.D. 2d 268 (1st Dept., 2001), our client, a successor in interest to the original lessor, was faced with just such a situation. In an action on behalf of PNC against the lessee and its personal guarantor for the breach of a promissory note,

To date, this trend seems to be steadfast even in light of the recent events arising out of the bankruptcy of NorVergence Inc., a telecommunications company located within

have been affected by unsubstantiated allegations of cohes-  
sion between the leasing companies and NorVergence. However, to date these allegations have not affected the

Prior to the NorVergence fallout, the New York courts reviewed similar situations and found in favor of the lessors. For instance, in *Preferred Capital, Inc vs. PBK, Inc.*, 309 A.D. 2d 1168 (4th Dept. 2003), our client commenced an action to recover the remaining payments under a defaulted equipment lease agreement. The lessee argued that the leasing company had fraudulently induced it into executing the underlying lease agreement despite allegedly having prior knowledge that the supplier, the Credit Card Center, Inc., which had continuing maintenance and financial support obligations to the lessee, would file for bankruptcy protection shortly thereafter, thereby rendering the equipment virtually useless. Despite the lower court finding that a triable issue of fact existed sufficient to defeat the motion for summary judgment, the Appellate Division, Fourth Department reversed. The appellate court held that the leasing company had established its burden by submitting evidence of the lease agreement and nonpayment, and that the lessee's bald and unsubstantiated allegations of fraud and agency, raised in the lessee's opposition affidavit, could not defeat the lessor's motion for summary judgment.

The Fourth Department further found that the validity of the lessee's defense was belied by the express terms of the lease agreement. Courts have further asserted that when the terms of a lease agreement expressly provide that a supplier is not an agent of the lessor, the lessee is barred from raising an unsubstantiated defense. It has been our experience that courts will look to the unambiguous terms of the lease agreement to find that a lessee is put on notice that an agency defense is not available to it. In fact, courts will impose a duty on lessees to "exercise ordinary due diligence" in determining the terms of the executed documents.

As the expenses of litigation consistently trend upward, summary judgment stands as a plaintiff's most efficient means of controlling costs and expediting results. By eliminating the necessity to engage in the discovery process and conduct a trial, leasing company plaintiffs can avoid the "hard" costs for items such as legal fees, deposition transcripts and expert testimony, as well as the "hidden" costs of employee travel and lost in-office productivity arising from the need to participate in court proceedings. The continuing judicial support for summary judgment only serves to enhance its benefits. ■

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the State of New Jersey. The fallout from NorVergence and the allegations of fraud alleged by numerous lessees has been far-reaching. Numerous equipment leasing companies

trend of the New York Courts to properly enforce the validity of contractual terms over unsubstantiated and conclusory allegations.