

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN EQUIPMENT LEASING, a	:	CIVIL ACTION
division of EAB LEASING CORP.	:	
	:	
v.	:	
	:	
CAPITAL TRANSPORTATION, INC.,	:	
HAROLD E. WILFONG and	:	
BARBARA D. WILFONG	:	NO. 01-2650

MEMORANDUM ORDER

Plaintiff is suing to recover damages for defendants' default under a lease agreement. Plaintiff is a citizen of Pennsylvania. Defendants are citizens of Tennessee. Plaintiff seeks a judgment for \$145,995.68. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

Plaintiff filed its complaint on May 31, 2001. Defendants filed a pro se answer on July 12, 2001 admitting their identity and generally denying liability. The court entered an order striking the answer to the extent it was filed on behalf of defendant Capital Transportation, Inc. and ordered the corporation to appear through counsel and file an answer by November 26, 2001. No attorney has ever entered an appearance on behalf of the corporate defendant.

Plaintiff served defendants with interrogatories, requests for production of documents and requests for admissions. Defendants never responded to any of plaintiff's discovery requests. Plaintiff has moved for summary judgment against the answering defendants and, if granted, for a default judgment against the defaulting defendant.

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256. The movant has the burden of demonstrating the absence of genuine issues of material fact and the non-movant must establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990).

Each matter for which an admission is requested is deemed admitted in the absence of a timely response. See Fed. R. Civ. P. 36(a). The admitted matter is conclusively established for purposes of the pending action. See American Auto Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991) (conclusive effect of admission applies equally to matters affirmatively admitted and those established by default). Failure to respond to properly served admissions permits the entry of summary judgment when the facts deemed admitted are dispositive. See Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176 (3d Cir. 1990) (deemed admissions sufficient to support summary judgment); Freed v. Plastic Packaging Materials, Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975).

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to defendants, the pertinent facts are as follow.

Capital and AEL executed a lease agreement in February 2000 covering seven Volvo trucks. The agreement was signed for Capital by Harold Wilfong as chief executive officer and Barbara Wilfong as chief financial officer in Tennessee on February 1, 2000. The agreement was then sent to plaintiff in Reading, Pennsylvania where it was executed on February 7, 2000.

AEL purchased the trucks from Nacarto Volvo and GMC Trucks on January 27, 2000 for a total of \$576,303.00. The price of each vehicle was \$82,329.00. Under the terms of the lease, Capital was obligated to make forty-eight monthly payments of \$10,429.98 and a final payment of \$249,478.98. The Wilfongs executed a guarantee for the promised lease payments by which they agreed to be "directly and primarily liable, jointly and severally" with Capital. The lease and the guarantee contain Pennsylvania choice of law and forum selection clauses.

The lease agreement provides that in the event of default, AEL retains the right to repossess the trucks and re-lease or sell them "at a public or private sale on such terms and with or without notice, as [AEL] shall deem reasonable" and to recover damages calculated as the "Lease Default Balance" plus costs incurred in connection with disposition of the trucks less the amount received by any re-lease or sale of the trucks. The Lease Default Balance is defined as the sum of:

(a) any accrued and unpaid rent due under all Lease Documents as of the date of entry of judgment entered against you ... plus late charges and all other sums that may accrue under the Lease Documents;  
(ii) the present value of all unpaid future rentals remaining due under the Lease Documents discounted as of the date of entry of judgment at a rate of five per cent (5%);  
(iii) all Collection Expenses ... incurred by us in connection with the collection of your obligations;  
(iv) estimated fair market value of the Equipment as of the expiration of the Lease Term of the applicable Schedule, and  
(v) any indemnity due under any Lease Document, if then determinable.

Capital made the first seven payments under the lease on the fifth day of each month commencing in March, but then failed to make the payment due on October 5, 2000 and all payments due thereafter. The remaining unpaid balance due under the lease includes forty-one payments of \$10,429.98 and the final payment of \$249,479.98. On February 6, 2001, defendants voluntarily delivered the trucks to plaintiff. In preparation for re-sale, AEL incurred repair and refurbishing expenses of \$44,060.59. AEL disposed of the trucks on February 21, 2001 through a lease purchase agreement for net proceeds of \$483,483.25. The sale price and associated costs incurred were commercially reasonable.

As an "affirmative defense," the Wilfongs state in their answer that "Defendants signed the contract in Tennessee." They do not further elaborate on the significance of this fact or specify what particular defense it affords them.

If defendants meant to suggest that personal jurisdiction over them is lacking in this forum, it is not. They

entered into and guaranteed performance of a contract with a forum resident which it accepted and executed in this district. The agreements established an ongoing relationship and created continuing obligations between defendants and a forum resident, including an obligation of defendants to make or ensure routine payments to plaintiff in the forum. This is sufficient to sustain an exercise of personal jurisdiction in an action arising from or related to those obligations. See General Electric Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001); Mellon Bank (East) PSFS Nat'l Assoc. v. Farino, 960 F.2d 1217, 1225-26 (3d Cir. 1992). Moreover, defendants executed agreements with Pennsylvania forum selection provisions.

The effect to be given to a forum selection clause in federal court is determined by federal law. See Jumara v. State Farm Insurance Co., 55 F.3d 873, 877 (3d Cir. 1995). Forum selection clauses are prima facie valid and are enforced unless the defendant can make a strong showing that the forum selected is "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court," The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972), or that the clause was procured through "fraud or overreaching." Foster v. Chesapeake Insurance Co., Ltd., 933 F.2d 1207, 1219 (3d Cir. 1991) (quoting The Bremen, 407 U.S. at 15). The absence of actual negotiation of the clause does not affect its validity. See Foster, 933 F.2d at 1219.

Defendants have made no averment or showing that the forum selection clause was the product of fraud or overreaching

or that its application would deprive them of their day in court. Indeed, it appears that defendants, who never responded to the motion for summary judgment, have effectively conceded their liability and have no interest in undertaking the effort or expense of proceeding to trial in any forum.

Plaintiff seeks damages for the \$83,439.84 in accrued monthly payments outstanding when this action was initiated with \$6,258 in accrued late charges plus \$539,781.09 for the future payments due through the end of the lease period discounted to present value, less the net proceeds from the sale of the trucks of \$483,483.25. Plaintiff asks for judgment in the resulting amount of \$145,995.68. Plaintiff has clearly demonstrated its entitlement to the judgment it seeks on the record presented. As such, plaintiff is also entitled to judgment against defendant Capital pursuant to Fed. R. Civ. P. 55(b)(2).

**ACCORDINGLY**, this                      day of July, 2002, upon consideration of plaintiff's Motion for Summary Judgment (Doc. #11) and in the absence of any response thereto, consistent with the foregoing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and judgment will be entered in the above action for the plaintiff and against the defendants, jointly and severally, in the amount of \$145,995.68.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**