

**SUPREME COURT - STATE OF NEW YORK**  
**IAS TERM, PART 19 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**

Justice

**Motion R/D: 6-2-04**

**Submission Date: 6-2-04**

**Motion Sequence No.: 005/MOT D**

\_\_\_\_\_  
**FORD MOTOR CREDIT COMPANY,**  
Plaintiff, X

**COUNSEL FOR PLAINTIFF**  
Wilson, Elser, Moskowitz, Edelman &  
Dicker, LLP  
925 Westchester Avenue  
White Plains, New York 10604

- against -

**RIT AUTO LEASING GROUP, INC. and**  
**RICHARD TOPOREK,**  
Defendants.  
\_\_\_\_\_ X

**COUNSEL FOR DEFENDANTS**  
Richard A. Kraslow, P.C.  
425 Broad Hollow Road - Suite 206  
Melville, New York 11747

The following papers were read on Plaintiff's motion to reargue the Order of this Court dated April 22, 2004;

- Order to Show Cause dated May 12, 2004;
- Affirmation of Christine Reddy, Esq. dated May 7, 2004;
- Affirmation of Richard A. Kraslow, Esq. dated June 1, 2004.

Plaintiff Ford Motor Credit Company ("Ford") moves to reargue the Order of this Court granted on April 22, 2004. Upon reconsideration, Ford requests that the Court issue an order directing Defendants, RIT Auto Leasing Group, Inc. ("RIT") and Richard Toporek ("Toporek"), to account.

BACKGROUND

RIT was in the motor vehicle leasing business. Ford provided a line of credit to RIT which was used to finance the purchase of vehicles. RIT would then lease the vehicles it purchased to its customers.

To secure its obligations to Ford, RIT granted Ford a security interest in each motor vehicle it purchased from advances made from the line of credit. RIT also granted Ford a security interest in each underlying lease and in the proceeds received on the lease. Toporek personally guaranteed RIT's obligations to Ford.

RIT defaulted in its obligations to Ford when it failed to make the payment due on the line of credit in February, 2001. Under the terms of its agreements with Ford, RIT's right to received lease payments terminated upon its default in its obligations to Ford.

Upon RIT's default, Ford exercised its right to service RIT's portfolio. Ford notified all of RIT's known customers/lessees that all rental payments due after February 2001 should be sent directly to Ford Motor Credit.

RIT attempted to countermand Ford's letter by sending a subsequent letter to its customers advising them to disregard the letter they received from Ford and to send all future lease payments to RIT. Some of RIT's customers heeded Ford's request while others continued to make their lease payments to RIT. At some point, almost all of RIT's customers/lessees began to make their monthly lease payments to Ford.

When RIT defaulted in its obligations to Ford, approximately 286 vehicles were subject to the various security agreements between Ford and RIT.

When a lease expired, the vehicle came "off lease." When a vehicle came "off lease", the lessee had the option to purchase the vehicle for the amount stated in the lease or to return the vehicle to the lessor. Vehicles which were returned to the lessor are supposed to be sold in a commercially reasonable manner.

Once Ford began to administer the RIT portfolio, any lease payments received by Ford from RIT customers/lessees should have been applied to the outstanding balance due on the line of credit. Any amount received from an RIT customer/lessee to purchase the vehicle when it came "off lease" should have been applied to the outstanding balance on the line of credit. Finally, any amount received on the sale of a vehicle that has come "off lease" should have been applied to the amount due on the line of credit.

Ford commenced this action alleging four causes of action. The first cause of action seeks to recover the amount due to Ford from RIT on the line of credit and the security agreements. The second cause of action seeks to recover against Toporek on his guarantee of RIT's obligations to Ford. The third cause of action seeks to enjoin RIT and Toporek from receiving and collecting any rental payments. The fourth cause of action seeks an accounting from RIT and Toporek. Ford also seeks to recover legal fees incurred in connection with this action in accordance with the terms of the line of

credit, security agreements and guarantee. Ford's request for legal fees is not an issue on this motion.

RIT and Toporek answered and counterclaimed. Their counterclaim alleges that Ford did not service the portfolio in a commercially reasonable manner. Their allegations are essentially that Ford has failed to give RIT credit for all of the payments received from RIT's customers/lessees; that Ford has failed to take appropriate measures to obtain payment from RIT customers/lessees after it undertook to service RIT's portfolio; that Ford failed to take appropriate action to repossess vehicles from lessees who were in default; that Ford has failed to take appropriate action to recover vehicles as they came "off lease"; and, to the extent that Ford took possession of such vehicles, that the vehicles were not sold in a commercially reasonable manner. RIT asserts that, as a result of Ford's failure to service the portfolio in a commercially reasonable manner, RIT has not received a full credit for all payments made or full value for vehicles that were sold.

During this action, RIT and Toporek have sought through discovery to obtain Ford's records reflecting the lease payments received by Ford on account of the RIT portfolio and the amounts received by Ford for the sale of the vehicles as they have come "off lease." RIT and Toporek claim that Ford has not provided them with this information.

Ford has previously moved for summary judgment on its fourth cause of action that seeks an accounting. The Court granted that motion and directed that an order be settled on notice.

Ford settled an order directing RIT and Toporek to account for all payments made on account of the leases from the inception date of the lease through the date of the accounting, to account for any insurance proceeds received in regard to each vehicle and to account for all amounts received for the sale of vehicles that were either repossessed by RIT or as they came "off lease." RIT submitted a counter-order that required reciprocal accountings.

The Court granted RIT's proposed counter-order.

Ford now seeks reargument and, upon reconsideration, seeks to have the Court to direct only RIT and Toporek to account.

#### DISCUSSION

CPLR 2221(d) provides that a motion to reargue must address matters of fact alleged to have been misapprehended and/or the law misapplied by the Court in deciding the prior motion. CPLR 2221(d) requires that a motion to reargue be made within 30 days of service of a copy of the order with notice of entry from which reargument is sought.

A motion to reargue is addressed to the discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or

misapplied the applicable law or for some other reason resulting in error in the prior motion. Eveready Ins. Co. v. Farrell, 304 A.D.2d 830 (2<sup>nd</sup> Dept., 2003); Hoey-Kennedy v. Kennedy, 294 A.D.2d 573 (2<sup>nd</sup> Dept., 2002); and Foley v. Roche, 68 A.D.2d 558 (1<sup>st</sup> Dept., 1979).

A motion to reargue is not to be used by the unsuccessful party as a means to obtain a second opportunity to argue issues previously decided or to present new or different arguments relating to the issues previously decided. Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2<sup>nd</sup> Dept., 2004); McGill v. Goldman, 261 A.D.2d 593 (2<sup>nd</sup> Dept., 1999); and Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22 (1<sup>st</sup> Dept., 1992).

Ford asserts that the court misapprehended the law and the facts by compelling Ford to account since Defendants have never sought such relief and did not move or cross-move for such relief. Since the only relief requested in the motion which resulted in the Order from which reargument is sought was summary judgment on Ford's fourth cause of action which sought to compel the Defendants to account, the Court should have issued an order directing only the Defendants to account.

The Court neither misapprehended the facts or misapplied the law.

The issue which has to be decided in this action is the amount owed by RIT to Ford on the line of credit and security agreements. Determining RIT's obligation to Ford will also fix Toporek's obligation pursuant to the guarantee.

RIT concedes that it defaulted in payment on the line of credit and security agreements. The parties also agree that after RIT defaulted that Ford began to service RIT's portfolio.

In order to determine the amount RIT owes Ford and the amount due from Toporek on the guarantee, Ford must first establish the amount due on the line of credit and security agreements as of the date of RIT's default. This amount is then reduced by the any payments received by Ford as lease payments on the existing RIT leases. This amount is also reduced by any amounts received from any RIT customers/lessees who purchased the vehicles at the end of the lease any amounts received by RIT through the sale of vehicles as they came "off lease" as well as any other funds Ford received on account of the RIT leases.

Ford had an obligation to manage the portfolio in a commercially reasonable manner. This includes making certain that the monthly lease payments were received, that vehicles were repossessed from RIT customers/lessees who were in default on their leases, that the vehicles were retrieved or turned in when the lease expired and that the vehicles that came into Ford's possession were sold in a commercially reasonable manner. See generally, Bankers Trust Co. v. Dowler & Co., 47 N.Y.2d 128 (1979); and Associates Commercial Corp. v. Liberty Truck Sales & Leasing, Inc., 286 A.D.2d 311 (2<sup>nd</sup> Dept., 2001).

RIT and Toporek have been attempting to obtain information from Ford regarding the amounts Ford received as lease payments, the efforts Ford made to repossess and sell vehicles of defaulting lessees, the amounts received by Ford from the sale of vehicles at the end of the terms of the lease and the amounts received by Ford from the sale of vehicles which came into Ford's possession at the end of the lease. Ford has not provided this information to RIT or Toporek through normal discovery despite being directed to do so.

Directing Ford to account for the money it received on account of the RIT leases and sales of RIT vehicles requires Ford to provide the information that RIT and Toporek have demanded but have been unable to obtain through discovery. It also permits a full and complete accounting which underlies this matter. The handling of the RIT portfolio by RIT and Ford are inextricably intertwined. Requiring Ford to account will also permit the parties to focus on those specific leases and/or sales for which there are questions of commercial reasonableness.

At some point during this action, Ford must be compelled to disclose and account for the amounts it received once it began to administer the RIT portfolio. That time is now. Ford cannot reasonably be heard to suggest that accounting and disclosure is a one way street. The relief granted by the Court in the counter-order well falls within the ambit of "such other and further relief as to the Court sees just and proper" which Ford sought and RIT urged in the underlying motion.




Accordingly, it is,

**ORDERED**, that Ford's motion to reargue is **denied**; and it is further,

**ORDERED**, that the parties are directed to appear for a conference before Special Referee Thomas V. Dana on October 25, 2004 at 10:00 a.m. for the purposes of scheduling the filing of the accounting and to schedule discovery required in connection with the accounting.

This constitutes the decision and order of this Court.

Dated: Mineola, NY  
September 29, 2004

  
\_\_\_\_\_  
Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**

OCT 12 2004

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**