

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**MICHAEL S. WEISS and JONATHAN M.
WEISS,**

Plaintiffs,

-against-

**NORTH SHORE MOTOR GROUP, INC.,
R.A. COHEN a/k/a RICK COHEN,
BANK OF AMERICA,
DCFS USA LLC d/b/a
MERCEDES-BENZ FINANCIAL,
DAIMLER FINANCIAL SERVICES,
DAIMLER FINANCIAL and/or
DAIMLER TRUCK FINANCIAL,
GENERAL MOTORS ACCEPTANCE CORP. d/b/a
GMAC FINANCIAL SERVICES,
BMW FINANCIAL SERVICES NA, LLC d/b/a
BMW BANK OF NORTH AMERICA and
VW CREDIT, INC. d/b/a
VOLKSWAGEN CREDIT, INC.,
AUDI FINANCIAL SERVICES and/or
BENTLY FINANCIAL SERVICES,**

Defendants.,

**CLEAN CORP. (NY), NSMG LLC,
CDMS, INC., CORTNEY RHEN DUBIE,
and KATHLEEN GIBSON HAMBURGER,**

Cross-Claim Defendants.
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**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 12622-10
Motion Seq. No. 3
Submission Date: 8/5/11**

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Supplemental Affirmation in Support and Exhibit.....x

This matter is before the Court for decision on the motion filed by Defendant Bank of America, N.A. s/h/a Bank of America on (“BOA”) on July 8, 2011 and submitted on August 5, 2011. For the reasons set forth below, the Court grants the motion and refers the matter to an inquest on the issues of damages, interest, costs, expenses and attorney’s fees.

BACKGROUND

A. Relief Sought

BOA moves for an Order, pursuant to CPLR § 3215, awarding BOA judgment on its Amended Verified Answer with Counterclaim and Cross-Claims, against the Defendants North Shore Motor Group, Inc. (“North Shore”) and R.A. Cohen a/k/a Rick Cohen (“Cohen”), and against the Cross-Claim Defendants, Clean Corp. (NY) (“Clean Corp.”), NSMG LLC (“NSMG”), CDMS, Inc. (“CDMS”) and Cortney Rhen Dubie (“Dubie”), and setting this matter down for an inquest on the issue of damages.

B. The Parties’ History

The parties’ history is set forth in a prior decision of the Court dated September 13, 2010 (“2010 Decision”) in which the Court denied Plaintiffs’ application for injunctive relief, and the Court incorporates the 2010 Decision herein by reference. As noted in the 2010 Decision, in the Complaint, Plaintiffs allege certain improprieties by Defendants in connection with Plaintiffs’ leasing and purchase of certain vehicles including but not limited to 1) submitting forged documents; and 2) entering into agreements, purportedly on behalf of Plaintiffs, without Plaintiffs’ consent or authority. The first through tenth causes of action are asserted against Defendants Cohen and North Shore only. In the eleventh cause of action, Plaintiffs seek a declaratory judgment holding, *inter alia*, that there are no monies due and owing from Michael S. Weiss (“Michael”) on the 2005 Mercedes. In the twelfth cause of action, Plaintiffs seek a declaratory judgment holding, *inter alia*, that Jonathan M. Weiss (“Jonathan”) is the lawful owner of the 2010 Audi.

In support of the instant motion, counsel for BOA affirms that BOA filed its Cross-Claim

Summons and Amended Verified Answer with Counterclaim and Cross-Claims (“Answer”) (Ex. B to Warmuth Aff. in Supp.) on December 17, 2010. Counsel for BOA affirms further that BOA served its Answer on Defendants North Shore and Cohen, as well as Cross-Claim Defendants Clean Corp. (NY), NSMG, CDMS and Dubie, and provides documentation in support (*id.* at Exs. C, D, E, F, G and H).¹ BOA provided additional notice pursuant to CPLR § 3215(g) (*id.* at Ex. I). Defendants North Shore and Cohen, as well as the Cross-Claim Defendants, have not responded to BOA’s Answer, their time to answer or otherwise move with respect to the Answer has expired, and they are in default.

The Answer contains the following Cross Claims:

First Cross Claim against North Shore, Cohen, NSMG, Clean Corp. and Dubie (“James Contract)(Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract purportedly involving Alan James’ (“James”) purchase and finance of a new 2007 BMW X5.²

Second Cross Claim against North Shore, Cohen, CDMS, NSMG and Dubie (DiMaria Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract purportedly involving Rino DiMaria’s purchase and finance of a new 2009 Cadillac Escalade.³

Third Cross Claim against North Shore, Cohen and NSMG (Aryeh Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract involving

¹ In her Supplemental Affirmation in Support, counsel for BOA affirms that the affidavits of service inadvertently omitted the word “summons” from the description of documents served, and provides amended affidavits of service (Ex. J to Supp. Aff. in Supp.).

² James provided BOA with a sworn statement that he did not sign the loan documents or receive the proceeds of the loan, and was a victim of identity theft (Answer at ¶¶ 77-79).

³ DiMaria provided BOA with a sworn statement that he did not sign the loan documents or receive the proceeds of the loan (*id.* at ¶ 139).

Benhamin Aryeh's purchase and finance of a new 2008 Mercedes S550.⁴

Fourth Cross Claim against North Shore, Cohen and NSMG (Apa Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract purportedly involving Michael A. Apa's purchase and finance of a used 2007 Porsche 911.⁵

Fifth Cross Claim against North Shore, Cohen and NSMG (Warantz Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Scott M. And Kimberly A. Warantz's purchase and finance of a new 2008 Mercedes S550.

Sixth Cross Claim against North Shore, Cohen, NSMG, Clean Corp. and Dubie (Rosenthal Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Larry W. Rosenthal's purchase and finance of a new 2008 Mercedes S550.

Seventh Cross Claim against North Shore and Cohen (Dilluvio Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Salvatore A. Dilluvio's purchase and finance of a used 2006 Mercedes X5.

Eighth Cross Claim against North Shore, Cohen and NSMG (Shuman Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Loren B. Shuman's purchase and finance of a new 2008 Landrover Rangerover.

Ninth Cross Claim against North Shore, Cohen, NSMG, Clean Corp. and Dubie (Lifton Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Steven Lifton's purchase and finance of a used 2007 BMW.

⁴ Aryeh provided BOA with a sworn statement that he did not sign the loan documents or receive the loan proceeds, and was the victim of identity theft (*id.* at ¶¶ 191-192).

⁵ Apa provided BOA with a sworn statement that he did not sign the loan documents or receive the proceeds of the loan, and was a victim of identity theft (*id.* at ¶¶ 241-242).

Tenth Cross Claim against North Shore, Cohen, Clean Corp., CDMS and Dubie (Kandel Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Marcella L. Kandel's purchase and finance of a used 2004 Mercedes Benz.

Eleventh Cross Claim against North Shore, Cohen and NSMG (Schwartz Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Ronald J. Schwartz's purchase and finance of a new 2007 Mercedes S550.

Twelfth Cross Claim against North Shore, Cohen, NSMG, Clean Corp. and Dubie (Weiss Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for Plaintiff Michael S. Weiss' purchase and finance of a new 2008 Mercedes SL550.

Thirteenth Cross Claim against North Shore, Cohen and NSMG (AAC Consulting Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for AAC Consulting Inc. and Maria Anna Chierico's respect to the purchase and finance of a new 2008 Landrover Rangerover.

Fourteenth Cross Claim against North Shore, Cohen, NSMG, Clean Corp., Dubie and Hamburger (Hamburger Contract) (Fraud)⁶ - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for North Shore and Kathleen Gibson Hamburger's purchase and finance of a new 2008 Mercedes GL450.

Fifteenth Cross Claim against North Shore, Cohen, Clean Corp., CDMS and Dubie (Dubie 1 Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail installment contract for CDMS and Dubie's purchase and finance of a new 2009 Cadillac Escalade.

Sixteenth Cross Claim against North Shore, Cohen, CDMS, Clean Corp. and Dubie

⁶ BOA does not seek relief against Cross Claim Defendant Hamburger in its motion.

(Dubie 2 Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail contract for CDMS and Dubie's purchase and finance of a new 2009 Cadillac Escalade.

Seventeenth Cross Claim against Clean Corp., Cohen and Dubie (Spencer Contract) (Fraud) - contains allegations regarding the fraudulent scheme of Defendants and Cross Claim Defendants to deprive BOA of its collateral in connection with a retail contract for Clean Corp. and Randy A. Spencer's purchase and finance of a new 2010 Jaguar XKR.

Eighteenth Cross Claim against CDMS and Dubie (Dubie 1 Contract) (Breach of Contract) - contains allegations regarding CDMS and Dubie's failure to make required payments pursuant to the Dubie 1 retail installment contract, and the sums owed in principal, interest, late charges, fees and attorney's fees, pursuant to the applicable provisions of the retail installment contract.

Nineteenth Cross Claim against CDMS and Dubie (Dubie 2 Contract) (Breach of Contract) - contains allegations regarding CDMS and Dubie's failure to make required payments pursuant to the Dubie 2 retail installment contract, and the sums owed in principal, interest, late charges, fees and attorney's fees, pursuant to the applicable provisions of the retail installment contract.

Twentieth Cross Claim against North Shore and Hamburger (Hamburger Contract) (Breach of Contract) - contains allegations regarding North Shore and Hamburger's failure to make required payments pursuant to the Hamburger contract, and the sums owed in principal, interest, late charges, fees and attorney's fees, pursuant to the applicable provisions of the retail installment contract.

Twenty-First Cross Claim against CDMS (DiMaria Contract) (Breach of Contract) - contains allegations regarding CDMS and DiMaria's failure to make required payments pursuant to the DiMaria contract, and the sums owed in principal, late charges, fees and attorney's fees, pursuant to the applicable provisions of the retail installment contract.⁷

Twenty-Second Cross Claim against Clean Corp. (Spencer Contract) (Breach of Contract) - contains allegations regarding CDMS' failure to make required payments pursuant to

⁷ The Answer alleges that Mr. DiMaria has claimed that he did not execute the DiMaria contract (Answer at ¶ 973).

the Spencer contract, and the sums owed in principal, late charges, fees and attorney's fees, pursuant to the applicable provisions of the retail installment contract.⁸

BOA seeks damages consisting of principal, late fees, interest and other expenses, as well as attorney's fees pursuant to the terms of the contracts.

C. The Parties' Positions

BOA submits that it has demonstrated its right to the requested relief by presenting 1) proof of service of the Answer on the Defendants and Cross Claim Defendants against whom they seek relief, 2) the Answer, in which the Cross Claims allege in detail the conduct comprising the causes of action on which BOA seeks judgment, and 3) the default by the relevant Defendants and Cross Claim Defendants. BOA asks that the Court grant it judgment for the relief requested in its Answer against Defendants North Shore and Cohen, and Cross Claim Defendants Clean Corp., NSMG, CDMS and Dubie, and that the Court set this matter down for an inquest on the issue of damages.

None of the Defendants or Cross Claim Defendants against whom BOA seeks relief have answered or moved in this action with respect to the Answer, or submitted any response to BOA's motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Relevant Causes of Action

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to reply upon it, 3) justifiable reliance of the other party

⁸ The Answer alleges that Mr. Spencer is deceased, and his relative claims that Mr. Spencer did not execute the Spencer contract (Answer at ¶ 986).

on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007). CPLR § 3016(b) provides that an action for fraud must be pled with particularity.

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

C. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

D. Application of these Principles to the Instant Action

The Court grants BOA's motion, based on the Court's conclusion that 1) BOA has provided proof of service of the Answer on the Defendants and Cross Claim Defendants against

whom they seek relief; 2) the Cross Claims establish BOA's entitlement to judgment; and 3) the Defendants and Cross Claim Defendants have defaulted by failing to respond to the Answer.

The Cross Claims contain extensive factual detail regarding the alleged fraud, including but not limited to allegations regarding 1) the relationship among North Shore, Cohen and the Cross Claim Defendants, 2) claims by several of the purported purchasers that they did not execute the retail installment contract and related loan documents, 3) North Shore and Cohen's efforts to conceal from BOA that the subject vehicle was not in possession of the purported purchaser and that the retail installment contract may not be valid, including a) North Shore and Cohen's use of a duplicate certificate of title to fraudulently remove BOA's lien, b) the issuance of checks by NSMB, at the behest of North Shore and Cohen, to BOA in payment of the retail installment contracts, to create the misimpression that the vehicle was still in possession of the purported purchaser, c) North Shore and Cohen's changing the address and contact information of a purchaser with BOA to the address and contact information of North Shore, and d) North Shore and Cohen's false representations to BOA that they were a purported purchaser, and 4) BOA's reliance on the misrepresentations to its detriment in that BOA, in reliance on the checks provided by NSMB and the other fraudulent conduct, did not seek to recover its collateral or take other actions in mitigation of its damages. BOA has also established proof of the breaches of contract by providing detailed allegations regarding the existence of the enumerated contracts, the consideration for those contracts, performance by BOA, breach by the Defendants/Counterclaim Defendants, and damages resulting from the breach.

In light of the foregoing, it is hereby

ORDERED, that the motion of Defendant Bank of America for an Order, pursuant to CPLR § 3215, awarding Bank of America judgment on its Amended Verified Answer with Counterclaim and Cross-Claims, against the Defendants North Shore Motor Group, Inc. and R.A. Cohen a/k/a Rick Cohen, and against the Cross-Claim Defendants Clean Corp. (NY), NSMG LLC, CDMS, Inc. and Cortney Rhen Dubie is granted; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of damages, interest, costs, expenses and attorney's fees on October 20, 2011 at 9:30 a.m.; and it is further

ORDERED, that Bank of America shall serve upon North Shore Motor Group, Inc., R.A. Cohen a/k/a Rick Cohen, Clean Corp. (NY), NSMG LLC, CDMS, Inc. and Cortney Rhen

Dubie, by regular mail, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before October 6, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of Bank of America and against North Shore Motor Group, Inc., R.A. Cohen a/k/a Rick Cohen, Clean Corp. (NY), NSMG LLC, CDMS, Inc. and Cortney Rhen Dubie, in accordance with the decision of the Special Referee.

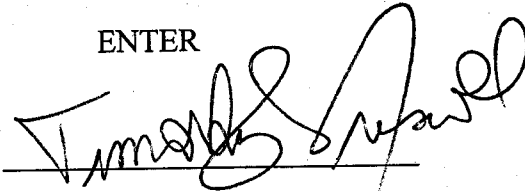
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

September 13, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
SEP 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE