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MEMORANDUM DECISION

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. VICTOR M. ORT

Justice

TRIAL/IAS PART 37

FIRST EMPIRE AUTO LEASE INC.
Plaintiffs

NASSAU COUNTY
INDEX NO. 016615/96

-against-

IMPRESSIVE FORMALWEAR LTD
MORTON LEVINE AND SAL MANNO
Defendants

This is an action for breach of an automobile lease and a contract of guaranty. It was tried by the court without a jury on July 30, 31, August 1, and October 10, 2001. The following constitutes the court's findings of fact and conclusions of law.

Plaintiff First Empire AutoLease, Inc. is a corporation located in Hicksville which is engaged in the business of leasing motor vehicles. Defendant Dr. Morton Levine is a physician who maintains an office for the practice of medicine at 1821 Schenectady Avenue in Brooklyn. Dr. Levine is the owner of various business enterprises, most notably the El Caribe, a catering hall, gym, and swimming club which is located on Strickland Avenue in Brooklyn. Dr. Levine delegated many of the managerial functions at El Caribe to Jack Schwartz, a man who had been his close friend for approximately thirty years. Schwartz was responsible for making bank deposits for El Caribe and was authorized to sign Dr. Levine's name on various documents in the course of El Caribe's business. It appears that Dr. Levine trusted Schwartz implicitly and considered him "like a brother." Over the years Schwartz had struggled financially. Dr. Levine advanced him money from time to time, and the doctor's purpose in employing Schwartz at El

Caribe was to help with his financial difficulties.

Sometime in 1994 Schwartz discussed with Dr. Levine his desire to acquire an interest in Impressive Limousines, a business run by defendant Sal Manno. Dr. Levine knew Manno as a patient and had treated him for an asthma condition. Impressive Limousines was located on Avenue N near Dr. Levine's office and provided limousine service for weddings which were held at the El Caribe. Manno was seeking additional financing for the business in order to turn it into a full service wedding center, providing photography, tuxedos, flowers, invitations, and limo service for weddings. Manno was willing to accept a partner into the business in order to get the funds necessary for the expansion. Dr. Levine discouraged his friend from getting involved with Manno, pointing out that Schwartz had no money to invest in the business. Nevertheless, Dr. Levine did advance Schwartz approximately $60,000 ostensibly to pay for Schwartz' daughters' weddings but with the implicit understanding that Schwartz intended to invest the money in the wedding center.

It is clear that Manno knew the source of the funds, but the court rejects his testimony that the money was paid in exchange for Dr. Levine's becoming a 50% partner in the business.[1] No documentation was introduced into evidence to establish a partnership agreement. Manno testified that Dr. Levine had insisted that the agreement remain oral because he did not want his name to appear on any of the records of the business. However, Manno's claim in this regard is contradicted by the fact that Dr. Levine held his interest in the El Caribe, and presumably his

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[1]Plaintiff discontinued the action against Mr. Manno at the conclusion of his testimony. While the court does not conclude that there was necessarily any collusion between Manno and the plaintiff, the friendly nature of his testimony toward plaintiff's case, considered in the light of the other evidence in the case, detracts significantly from Manno's credibility.

other business interests, openly.

In any event, the money was provided by Dr. Levine and was used by Manno to renovate Impressive Limousines' premises. After the renovations were performed, the business became known as Impressive Formalwear. In March 1994, Manno decided to acquire an additional limousine for the business, and Impressive Formalwear leased a repossessed silver Lincoln from plaintiff in April of that year. The transaction required Impressive Formalwear to assume an existing lease and to submit a lease credit application. The credit application purports to be signed by Morton Levine as an individual credit applicant and Sal Manno on behalf of the business applicant, Impressive Formalwear. (Lease credit application dated March 25, 1994, plaintiff's Ex.1). According to Manno, he brought the credit application to Dr. Levine's office, and Dr. Levine signed the credit application in his presence. Manno claims that he then faxed the completed credit application to First Empire. The court notes that the March credit application contains Dr. Levine's phone number, social security number, date of birth, bank, and bank account number. In April, after the credit application was approved, First Empire faxed Manno an assignment and assumption of lease, which Manno claims was also signed by Dr. Levine at his office. (Assignment and Assumption of Lease dated April 19, 1994, plaintiff's Ex. 2). The assignment and assumption of lease purports to be signed by "Mortin Levine" (sic) and Sal Manno as guarantors and is "acknowledged" by Joan Cangeleri, a notary public.

The assignment and assumption of lease purports to be witnessed by an individual by the name of Robert Landron. Manno described Robert Landron as his nephew and suggested in his testimony that Landron had in fact witnessed the signing of the document by both Manno and Dr. Levine. However, when Robert Landron was called as a witness for Dr. Levine, Landron

testified not that he was a relative of Manno but that he knew him only as the owner of a candy store in the neighborhood where he had lived as a child. Landron further testified that he had worked for Manno in the candy store as a teenager and that at sixteen he had left his own family and moved in with Manno. Landron lived with Manno for approximately four years and continued to work for him after he opened the limousine business. Landron worked as both a limo driver and a dispatcher for Manno and then managed the entire wedding operation after Manno started Impressive Formalwear. Landron recalled Manno and Jack Schwartz' discussing the leasing of a silver limousine in early 1994. Landron further testified that after the lease for the vehicle was received through the fax machine, Manno signed it and Jack Schwartz produced a piece of paper with a signature on it. Landron testified that he observed Manno and Schwartz photocopy the document with the signature and paste the copy of the signature onto the lease. Landron testified that he did in fact witness the signing of plaintiff's Ex. 2, the assignment and assumption of lease, by Manno, but that he did not observe the signing of the document by Dr. Levine.

As further documentation for the lease of the vehicle in April, two personal guaranties were issued, one by Sal Manno, (plaintiff's Ex. 3), and the other purportedly by Dr. Levine (plaintiff's Ex. 4.) Manno claimed that the guaranties were signed by Dr. Levine and Manno at the office of the notary public, Joan Cangeleri, which was across the street from Impressive Formalwear. Manno also claimed that Dr. Levine signed his name on Manno's personal guaranty immediately to the left of Manno's signature. The court notes that what purports to be Dr. Levine's signature on both guaranties is merely a scrawl rather than a legible signature. The court also notes that Dr. Levine's first name is spelled "Mortin" rather than "Morton" on the

purported guaranty, and the purported guaranty is "witnessed" by notary public Joan Cangeleri. The court also notes that "Schenectady" is misspelled on the address section of the guaranty.

Although the first vehicle lease was fully performed, in September ,1994 Impressive Formalwear entered into a lease for a second vehicle, a black Lincoln Town Car. It is Impressive Formalwear's default on the second lease which prompted the commencement of this action. In connection with the second lease transaction, an assignment and assumption of lease, (plaintiff's Ex. 5), and a guaranty (plaintiff's Ex. 6), were issued. The court notes that the assignment and assumption of lease dated September 29, 1994 is a photocopy as opposed to an original document. The document is signed by Sal Manno on behalf of Impressive Formalwear as assignee and purports to be signed by Morton Levine and Sal Manno as guarantors. Manno gave conflicting testimony as to how Dr. Levine purportedly came to execute this document. Manno claimed on his direct testimony that he gave the assignment and assumption of lease for the second vehicle to Jack Schwartz who then obtained Dr. Levine's signature. However, when Manno was confronted with the fact that this manner of execution would have required the notary to notarize a document which was not signed in her presence, he then claimed that Jack Schwartz merely took the assignment and assumption of lease to Dr. Levine and that the document was actually signed by Manno and Dr. Levine at the notary's office. The court notes that the photocopy of the assignment and assumption of lease is not clear enough to determine whether "Morton" is spelled properly. The document is "acknowledged" by the notary public, Joan Cangeleri.

With respect to the purported guaranty for the second vehicle, Manno did not claim that Dr. Levine signed it in his presence. Rather, Manno claimed that he gave the document to Jack

Schwartz who then returned it to him signed by Dr. Levine and fully notarized. Why the assignment/assumption of lease and the guaranty, which were both dated September 29, 1994, should have been executed in different manners was not explained. The only conclusion which the court can draw from this inconsistency in the evidence is that Mr. Manno, having chosen to explain the irregular notarizing of the assignment/assumption of lease in an implausible manner, decided not to make a similar claim with regard to the execution of the guaranty. The court notes that the guaranty purports to be signed by "Mortin Levine" (sic) and that "Schenectady" is similarly misspelled on that document.

In any event, the black Lincoln Town Car was in fact received by Impressive Formalwear and payments were made on the lease for a period of approximately eight months. However, in May of 1995 Manno returned from a vacation in Las Vegas and was confronted by certain individuals whom he recognized but refused to name in court "for other reasons." According to Manno, these men whom he refused to identify, other than to state that they were friends of Dr. Levine, told him that his services were no longer needed in the business and that he should "get lost." Bowing to their pressure, Manno then withdrew from the business, keeping only those limousines which were registered in his own name. The new owners of the wedding center failed to make the required payments on the black Lincoln and the lease became in default.

Plaintiff offers two theories in attempting to hold Dr. Levine liable on the second vehicle lease. First, plaintiff argues that Dr. Levine is personally liable on the assignment/assumption of lease and guaranty either because he signed the documents personally or through Jack Schwartz as his agent. Plaintiff also suggests that even if Dr. Levine did not validly execute the lease documents he is personally liable as a partner in Impressive Formalwear. The court concludes

that neither claim has merit.

As a threshold matter, the court holds that it is not required to apply a presumption of validity to the lease documents based on the fact that Dr. Levine's purported signature was notarized. A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption can be rebutted only by clear and convincing evidence. Republic Pension Services, Inc. v.Cononico, 278 A.D.2d 470 (2d Dep't 2000); Son Fung Lum v. Antonelli, 102 A.D.2d 258 (2d Dep't 1984); Albany County Savings Bank v. McCarty, 149 N.Y. 71, 80. A "certificate of acknowledgment" is a formal declaration before the notary by the person who executed the instrument that it is his free act and deed. Black's Law Dictionary, 6th Ed. While the first and second assignment/assumptions of lease purport to be "acknowledged" by Joan Cangeleri, neither document contains a declaration by Dr. Levine that he is the person who executed the instrument. Similarly, although the guaranties pertaining to both leases purport to be witnessed by Joan Cangeleri, neither document contains a declaration by Dr.Levine that he is the person who executed the guaranty. According to the notary's deposition, her custom and practice was to require the person who executed a document to appear before her. However, Ms. Cangeleri had no recollection of the execution of the specific documents which form the basis of plaintiff's claim. Thus, the court is not required to apply a presumption of due execution to any of the lease documents.

Based on all of the evidence in the case, the court rejects Manno's testimony that Dr. Levine signed the assignment/assumptions of lease and guaranties pertaining to the first and second vehicles. The misspellings of Dr. Levine's first name and street address constitute indicia of fraud with respect to both transactions. Although the credit application for the first lease

contained accurate information such as Dr. Levine's social security and bank account number, Jack Schwartz had access to this information through his work for the El Caribe and appears to have provided it to Manno.[2] Schwartz was accustomed to signing Dr. Levine's signature at the El Caribe and thus had the ability forge his signature on the lease documents. Robert Landron observed Manno and Schwartz photocopying Dr. Levine's signature at the time that the first lease was executed. The most likely conclusion from the evidence is that Schwartz forged Dr. Levine's signature himself, or plaintiff's Ex. 2 was simply a photocopy of a "cut and paste job." Thus, the court concludes that Dr. Levine did not sign the credit application or either the assignment/assumption of lease or guaranty in connection with the first lease transaction.

Manno gave conflicting testimony as to whether he was present when Dr. Levine signed the second assignment/assumption of lease or whether Jack Schwartz obtained defendant's signature. Moreover, the court concludes that evidence of irregularity concerning the first lease tends to belie the genuineness of the documents concerning the second lease transaction. The court notes that the handwriting expert concluded that what purported to be the signature of Dr. Levine was not his authentic signature on any of the disputed documents. Furthermore, only a photocopy of the second assignment and assumption of lease was ever found. Thus, the court credits the testimony of Dr. Levine that he did not sign the assignment/assumption of lease or the guaranty concerning the second lease transaction.

The court further concludes that if Jack Schwartz did sign the documents pertaining to the second lease transaction, he did not do so as either the actual or apparent agent of Dr. Levine. Despite the fact that Dr. Levine advanced Schwartz money to invest in Impressive Formalwear,

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[2]Jack Schwartz died in March, 1995 and so was not able to be called as a witness at trial.

there is no evidence that he granted Schwartz authority to sign his name to any vehicle lease document or that he engaged in any conduct suggesting that Schwartz was authorized to act for him in any such transaction.

As stated above, the court rejects plaintiff's theory that Dr. Levine is liable on the vehicle lease as a partner in Impressive Formalwear. The only evidence of such a partnership is the testimony of Sal Manno, which the court finds unworthy of belief for the reasons which have been discussed. However, since plaintiff claims to have relied on Dr. Levine's credit information supplied in connection with the first vehicle lease, the court must consider whether he was a partner by estoppel. Section 27 of the Partnership Law provides that when a person by words spoken or written or by conduct consents to another representing him to anyone as a partner in an existing partnership, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership. Thus, if Dr. Levine consented to Jack Schwartz using his name and credit information in connection with the original vehicle lease, he could be liable as a partner by estoppel. However, the court credits Dr. Levine's testimony that he did not know that his name had been used on the credit application. Since Dr. Levine did not even know of the fraudulent credit application, he cannot be held to have consented to it and, therefore, is not a partner by estoppel.

Accordingly, plaintiff's complaint is dismissed. Settle judgment on notice.

Dated: October 18, 2001

Victor M. Ort, JSC

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