SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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CAPITAL ONE EQUIPMENT FINANCE CORP.,

Plaintiff,

-against-

OFFER HARARI, AMALIA HARARI, LUKE EMERY, KAREENE HARARI, JOELLE HARARI, PAULA BOUZAGLOU, NOREEN HARARI, DANIEL BOUZAGLOU, ARIE H, LLC, ASTREP SERVICE CORP., BUNDI CAB CORP., CHELSEA CAB CORP., FELICHE', LLC, FIRST H & H, LLC, FIRST IGAL H, LLC, FIRST SAAD TAXI CORP., G & K TAXI, INC., GABBI CAP CORP., GENT SERVICE CO., INC. a/k/a GENT SERVICE CORP., H. ASHIRA K, LLC, KAREENE JOELLE HACKING CORP., MAGYAR CAB CORP., MIDGET SERVICE CORP., RYDER TAXI, INC., SONG CAB CORP., TAIRI HACKING CORP., TERM TAXI, INC., and TIMOT CAB CORP.,

Defendants.

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TRIAL/IAS PART: 11
NASSAU COUNTY

Index No: 602726-18
Motion Seq. No. 1
Submission Date: 7/20/18

(Formerly New York County Supreme Court Index Number 650803-17)

Papers Read on this Motion:

Notice of Motion.....x
Affidavit in Support and Exhibits.....x
Affirmation in Support and Exhibits.....x
Plaintiff's Statement of Undisputed Material Facts.....x
Affidavit in Opposition and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Response to Plaintiff's Statement of Material Facts.....x
Memorandum of Law in Opposition.....x
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Reply Memorandum of Law.....x

This matter is before the court on the motion filed by Plaintiff Capital One Equipment Finance Corp. ("CapOne" or "Plaintiff") on June 2, 2018 and submitted on July 20, 2018, following oral argument before the Court.[1] For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order granting summary judgment on damages against the defendant guarantors, who are the individual defendants in this action, and the defendant borrowers, who are the entity defendants in this action.

Defendants oppose the motion.

B. The Parties' History

In support of the motion, Michael P. Robinson ("Robinson"), a Special Assets Director of Plaintiff, affirms that the above-captioned action (the "Instant Action" or the "Harari Action"), as well as the Andras Action and Amalia-Molly Action (the "NY County Actions"), were transferred to this Court in accordance with the November 27, 2017 decision of the Honorable O. Peter Sherwood, New York County Supreme Court, for a determination on the issue of damages (decision at Ex. 23 to Robinson Aff. in Supp.). Robinson affirms that this is an action to recover payment on 22 loans in the aggregate principal amount of approximately $33,730,000.00 ("Loans"), plus interest, late fees, costs and expenses against the Borrowers and Guarantors based on 22 promissory notes ("Promissory Notes") executed by the Borrowers and

[1] Plaintiff's notice of motion contains the caption of three (3) separate cases: 1) the instant action, 2) *Capital One Equipment Finance Corp. v. Andras Cab Corp., and Kareene Harari*, Index Number 602727-18 (the "Andras Action"), and 3) *Capital One Equipment Finance Corp. v. Capital One Equipment Finance Corp. v. Amalia-Molly LLC, and Aleksandr Mosheyev*, Nassau County Index Number 602728-18 (the "Amalia-Molly Action"), all of which were initially filed in New York County Supreme Court. While the notice of motion correctly states that these three matters were transferred to this Court pursuant to Justice Sherwood's November 27, 2017 decision and order, the motion filed before this Court was filed under only one of the three Nassau County Index Numbers. Thus, this decision technically addresses only the motion filed under Index Number 602726-18, but the Court's reasoning would apply to the other two actions.

corresponding unconditional monetary guaranties ("Guaranties") executed by the Guarantors.

Robinson affirms that the Guarantors are the owners of the Borrowers, which are all taxicab companies. The Loans were originated by taxicab medallion lending company The OSG Corp. ("OSG") between November 2012 and May 2013. The Loans are evidenced and secured, *inter alia*, by the Promissory Notes and Guaranties which, along with all other documents and instruments executed in connection with those instruments, are referred to as the "Loan Documents." Robinson provides copies of the Promissory Notes and Guaranties for each of the Loans (Exs. 1-22 to Robinson Aff. in Supp.). Simultaneously with the closing of the Loans, OSG executed and delivered an Assignment and Transfer agreement for each of the Loans, transferring and assigning all of its interests and rights in the Loans to Plaintiff. Robinson provides a chart outlining the original principal loan amounts to each Borrower and the respective Guarantor, Note Rate and maturity date for each Loan (Robinson Aff. in Supp. at ¶ 9).

Robinson affirms that each of the Loans matured by their terms in 2015 and 2016, and each of the Borrowers and Guarantors defaulted under the Loan Documents by, *inter alia*, failing to repay the outstanding balances due and owing upon the maturity dates when the unpaid balance and accrued interest became due and payable. Between February and March 2017, Plaintiff commenced the NY County Actions by filing motions for summary judgment in lieu of complaint, pursuant to CPLR § 3213. In Justice Sherwood's decision ("NY County Decision"), Justice Sherwood granted Plaintiff's motion for summary judgment as to liability in each of the NY County Actions and transferred the NY County Actions to the Supreme Court of Nassau County for a determination on the issue of damages. [2]

Robinson provides a computation of the sums owed to Plaintiff by the Borrowers and Guarantors. He affirms that, to calculate the outstanding amounts due to Plaintiff for these Loans, Plaintiff relied on loan summaries for each of the Loans (the "Loan Summaries"). The Loan Summaries reflect data compiled from Plaintiff's internal business records created by Plaintiff at or near the time that the loan payments were made, as well as payment histories and

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[2] The NY County Actions were transferred to Nassau County in consideration of the fact that the Court is presiding over the related matter titled *Capital One Equipment Finance Corp. v. The OSG Corp. et al.*, Nassau County Supreme Court Index Number 600749-17 (the "OSG Action").

schedules provided by OSG to Plaintiff (the "OSG Payment Histories"). Robinson affirms that the total amount due on all of the Loans, inclusive of outstanding principal, interest, late charges, as of March 1, 2018, is $37,908,557.43. In addition, Plaintiff is entitled to attorney's fees and costs under the Loan Documents, in an amount to be determined by the Court. Robinson provides a breakdown of the computation of the amounts due for each of the 22 Loans, consisting of the amounts due from each Borrower (Robinson Aff. in Supp. at ¶¶ 29-51) and the amounts due from each guarantor (Robinson Aff. in Supp. at ¶¶ 52-64).

In further support of the motion, counsel for Plaintiff ("Plaintiff's Counsel") affirms that, in accordance with the Court's directive at the January 23, 2018 conference, on February 12, 2018, he provided counsel for Defendants ("Defendants' Counsel") with copies of the payment records and loan summaries for the 22 Loans at issue (the "Harari Loans"). Those records reflect the outstanding amounts owed on each Loan as well as the amount of any payments made by the respective borrowers to either OSG or Plaintiff. Plaintiff's Counsel asked Defendants' Counsel to notify him promptly if Defendants believed that they had made any payments that were not reflected in the enclosed payment histories and summaries, and to provide Plaintiff's Counsel with any related documentation so that Plaintiff could address any discrepancies. Plaintiff's Counsel provides a copy of his February 12, 2018 correspondence to Defendants' Counsel (Ex. A to Adler Aff. in Supp.). Plaintiff's Counsel did not receive a response from Defendants' Counsel with inquiries directed to the amounts on the payment histories and loan summaries.

Plaintiff's Counsel affirms that, in a further effort to minimize or eliminate any potential disputes regarding the damages being claimed, on March 20, 2018, Plaintiff provided OSG with detailed loan summaries for the OSG loans, including the Harari Loans, for the purposes of further verifying the outstanding amounts owed, as well as the amount of any payments made by the underlying borrowers and/or OSG with respect to each of the Loans. Defendants' Counsel was provided with a copy of all of the information provided to OSG regarding the Harari Loans, and was invited to provide any input regarding the accuracy of the information provided. Plaintiff's Counsel provides a copy of his March 20, 2018 correspondence (Ex. B to Adler Aff. in Supp.).

Defendants' Counsel, rather than inquiring as to the accuracy of the loan information provided, served a First Request for Production of Documents ("Document Requests") (Ex. C to Adler Aff. in Supp.). By letter dated April 5, 2018 (Ex. D to Adler Aff. in Supp.), Plaintiff objected to the Document Requests as improper to the extent that they sought discovery directed at issues of liability on the underlying Notes and Guaranties, which had already been adjudicated by Justice Sherwood. Plaintiff directed Defendants to the payment records and loan information previously provided by Plaintiff, pursuant to the Court's directive.

In opposition to the motion, Defendant Offer Harari ("Offer") provides background regarding the Loans at issue in the Instant Action. He affirms that taxi medallions are issued by the New York City Taxi and Limousine Commission (the "TLC"). Medallions are licenses that permit, through TLC regulations, a taxi to operate in the City of New York. Taxis are often managed and operated as part of a taxi cab fleet business, in which medallions are leased by the medallion owners to management companies that run the taxi operations, often involving hundreds or thousands of vehicles. The corporate defendants in the Instant Action represent 22 such medallion owners, owned directly or indirectly by Offer (the "Harari Medallion Owners"). The Harari Medallion Owners leased 25 of their medallions to Taxi Club Management LLC ("TCM") and 6 medallions to Queens Medallion Leasing LLC ("QML"), both of which are taxi management and leasing companies that oversee taxi operations. In addition, Napasei Management Co. has leased the medallions owned by Defendant H. Ashira K, LLC.

Offer affirms that during the last 3 years, the taxi cab business experienced a sharp downturn due to the emergence of ride sharing competitors and technologies, such as Uber. As a result, the revenue earned from New York City taxi cab medallions, and the value of New York City taxi cab medallions, has plummeted. Before this downturn, lenders were eager to lend money to taxi medallion owners because the values of the medallions constantly rose and provided the collateral needed to secure the debt. There was never any examination by the lender, including OSG, of the financial condition of a borrower or guarantor.

Pursuant to the historical agreements and longstanding practices in the industry, medallion owning entities, like the Harari Medallion Owners, have had little or no involvement in the taxi business. The management companies that lease the medallions from the owners

conduct the operations, which includes collecting revenues, "hacking" up the vehicles (Offer Aff. in Opp. at ¶ 4) and paying all operating costs and expenses. This includes paying all loans owed to the lenders that provide financing to the medallion owners. Thus the management companies, not the medallion owners, made all payments to OSG paid on the Harari Medallion Owners' behalf. The Harari Medallion Owners held no bank accounts and had no employees. Their business was limited to holding, financing and leasing the medallions to the management entities. The Harari Medallion Owners financed the purchase of the medallions in 2012 from OSG. All loan documents were between OSG and the Harari Medallion Owners, and Plaintiff never had any contract with any of the Defendants.

Offer affirms that, with the exception of one meeting in June 2016 with OSG, CapOne and Offer, Defendants never dealt with CapOne. At that meeting, Salvatore Chierico ("Chierico") of CapOne and Roman Sapino ("Sapino") of OSG stated that medallions were worth approximately $800,000 to $850,000 each, and that they would mutually pursue a sale of the loan portfolio to a buyer. It was not until OSG filed lawsuits in 2017 that Offer learned that such a sale was no longer being pursued. With the exception of the June 2016 meeting, Offer always dealt with OSG's owners and employees, and the management companies, regarding the loans and repayment. He was unaware that CapOne had placed the Loans in default, and never received a notice of default.

Offer affirms that OSG collected all funds paid under the 22 Loans on behalf of the Harari Medallion Owners from 2012 through at least 2016. Offer submits, however, that CapOne has not accounted for the later payments. By way of example, Offer provides a copy of a Transaction by Account report that OSG provided to him (Ex. A to Offer Aff. in Opp.). This document reflects that payments were made on behalf of Defendant H. Ashira K LLC through at least April 2016. The records provided by Plaintiff in this litigation, however, reflect that payments were made on behalf of H. Ashira K LLC only through October 2015, and then stopped. This is similarly true for several other Defendants, including Feliche LLC and Amalia-Molly LLC. Offer submits that these discrepancies and errors are not accounted for in Plaintiff's instant motion.

Offer affirms that although there were purported assignments by OSG to CapOne in 2012 regarding some of all of the Loan Documents at issue, it is undisputed that CapOne never acted on any assignment until late 2016, after it had demanded payment from OSG under its 2010 master joint participation agreement ("MJPA"). Thus, Offer submits, CapOne has no direct knowledge of the payments made to OSG. The 2010 MJPA allowed OSG and CapOne to share in the monetary benefits of all loans. Offer submits that it is undisputed that no loan payments were ever made on Defendants' behalf to CapOne directly.

Offer affirms that the Harari Medallion Owners received certain information from OSG, at various times, regarding the status of their loans. The OSG records that Defendants have located in their files reflect that payments were consistently made each month to OSG, and that each monthly payment was significantly more than what OSG recorded as a "payment amount" for each loan (Offer Aff. in Opp. at ¶ 10). Defendants do not know why the records that OSG provided to the Harari Medallion Owners and the summaries that OSG apparently provided to CapOne reflect different amounts paid and owed. Offer affirms that a principal payment of $420,000 was credited by OSG on December 31, 2015, none of which is credited by CapOne in its Loan Summaries. Similarly, as of March 29, 2016, OSG stated that the total net amount owed to OSG for the Harari Loans was $15,272.75 (*see* March 29, 2016 email, Ex. B to Offer Aff. in Opp.), but that sum is not reflected in the records submitted by Plaintiff in support of its motion. Offer also does not know when the defaults occurred, as he never received notice of a default.

In further opposition to the motion, Defendants' Counsel affirms that Justice Sherwood, in the NY County Decision (Ex. A to Fellner Aff. in Opp.), denied summary judgment to Plaintiff on damages, and granted Defendants' motion to transfer the NY County Actions to Nassau County, to be heard in conjunction with the OSG Action. The NY County Decision includes the following (Ex. A to Fellner Aff. in Opp. at p. 13):

> For the reasons discussed above, there are no common questions of law and fact with respect to defendants' liability. However, consolidation is warranted with respect to the issue of damages, and neither party disputes that discovery in the NY County Actions and the Nassau County Action is required with respect to the amounts paid to OSG...

Defendants' Counsel affirms that in addition to the three NY County Actions, which were commenced by motions for summary judgment in lieu of complaint pursuant to CPLR § 3213, Plaintiff also filed a separate action in April 2017 against Defendants, seeking the remedy of replevin to seize 36 medallions based on security agreements with the Harari Medallion Owners (the "Replevin Action"). Defendants' Counsel provides a copy of the complaint in the Replevin Action ("Replevin Complaint") (Ex. B to Fellner Aff. in Opp.). In the Replevin Complaint, CapOne listed 11 medallions that were taken by CapOne by "repo" (*see* Replevin Comp. at pp. 4-5), but Defendants do not know when these repossessions occurred. CapOne does not seek replevin as to those 11 medallions, however, because they were placed in storage with the TLC.

In their answer in the Replevin Action (Ex. C to Fellner Aff. in Opp.), seven defendants asserted a counterclaim against CapOne based on defendants' contention that CapOne delayed or forewent selling the medallions at issue in violation of obligations of secured creditors under Article 9 of the Uniform Commercial Code ("UCC"), and delayed selling the medallions at issue in violation of its obligation to mitigate damages (*see, e.g.*, Ex. C to Fellner Aff. in Opp. at ¶¶ 48-49). Defendants' Counsel affirms that it is undisputed that post-default, neither OSG nor CapOne took any steps to sell or auction any medallion for one to two years after the purported defaults.

Defendants' Counsel affirms that although CapOne asserts that 7 loans went into default in late 2015 and early 2016 that were secured by 11 medallions, which were repossessed on an unknown date, it was not until the defendants in the Replevin Action filed a counterclaim against CapOne that CapOne scheduled an auction of the repossessed medallions. CapOne "finally awoke" (Fellner Aff. in Opp. at ¶ 7) and scheduled an auction in September 2017, pursuant to UCC Article 9, to sell the 11 repossessed medallions. A sale was held on September 7, 2017 when CapOne "credit bid" (*id.* at ¶ 8) for the 11 medallions in the amount of $335,000 each. Defendants do not know how that amount was determined, or what steps were taken to provide notice of the auction. In their Document Requests in the Instant Action (Ex. D to Fellner Aff. in Opp.), Defendants sought discovery from Plaintiff regarding the auction, but Plaintiff refused to provide any records. Defendants' Counsel affirms that records retrieved from the TLC website (Ex. E to Fellner Aff. in Opp.) reflect that New York City tax medallions were going at auction

in early 2016 for $580,000. These records also reflect that, on average, the medallions were selling for $630,000 during the period December 2015 through April 2016.

Defendants' Counsel affirms that at a January 23, 2018 conference in the Instant Action, Plaintiff's Counsel stated his intent to move for summary judgment on damages against the Harari Defendants. Defendants' Counsel objected, contending that the damages were unclear, and that no discovery had been exchanged, making summary judgment inappropriate. During a conference in chambers, the Court directed Plaintiff's Counsel to produce all payment records to Defendants by February 12, 2018. Plaintiff's Counsel produced records (Ex. F to Fellner Aff. in Opp.), consisting of summaries, but no actual payment records. Nothing was provided to demonstrate how the summaries were prepared, and Plaintiff did not provide back-up support, or other documentation, that demonstrated what OSG actually received on Defendants' behalf. Defendants' Counsel thereafter received another set of summary records on March 20, 2018 (Ex. G to Fellner Aff. in Opp.) but, again, no back-up was provided to demonstrate what was paid to, or by, OSG. Plaintiff thereafter served a third set of documents on April 16, 2018. Defendants' Counsel contends that these records are not even consistent with each other.

In addition, Defendants issued a subpoena ("Subpoena") to OSG on February 22, 2018 (Ex. I to Fellner Aff. in Opp.). Defendants have requested from OSG, *inter alia*, checks, wire transfers and deposit records supporting payments reflected in the loan summaries previously provided by Plaintiff, as well as back-up documents reflecting actual payments that OSG received from management companies for each loan. Defendants also requested from Plaintiff documents concerning the medallions that were purchased by "credit bid" in September 2017. By letter dated April 5, 2018 (Ex. J to Fellner Aff. in Opp.), Plaintiff objected to the Document Requests. On March 29, 2018, OSG, through its counsel, responded to the Subpoena by producing 20 pages of summaries plus numerous objections (Ex. K to Fellner Aff. in Opp.). OSG produced no underlying payment records reflecting what OSG received on Defendants' behalf. By letter to Plaintiff's Counsel dated April 9, 2018 (Ex. L to Fellner Aff. in Opp.), Defendants' Counsel asked that Plaintiff's Counsel reconsider his position. Plaintiff's Counsel did not respond. By letter to OSG Counsel dated April 10, 2018 (Ex. M to Fellner Aff. in Opp.), Defendants' Counsel asked OSG Counsel to reconsider his objections and failure to provide

backup payment records, but OSG Counsel did not respond.

Defendants then issued three additional subpoenas in April 2018 to non-parties TCM, QML and First Central Savings Bank ("First Central"), QML's bank (*see* Exs. N, O and P to Fellner Aff. in Opp.). These subpoenas seek ledgers, checks, wire transfers, and money orders reflecting all payments made on each loan on behalf of the Harari medallion owners. Defendants' Counsel received business records from QML (Ex. Q to Fellner Aff. in Opp.) which reflect its loan payments made directly to OSG on behalf of five of the Harari medallion owners. Defendants' Counsel has not yet received records from TCM which advised Defendants' Counsel that it is working on his request. First Central recently provided copies of checks in response to the subpoena (Ex. S to Fellner Aff. in Opp.). These records reflect several payments made to OSG. Defendants' Counsel affirms that these records are consistent with QML's records with respect to payments made to OSG, but do not match the understated credits that Plaintiff gave to Defendants for monies paid on their behalf. No depositions have yet been taken of any party.

In reply, Plaintiff's Counsel provides copies of the following (Exs. A-C to Adler Reply Aff.): a copy of an Order to Show Cause filed by defendants in the Replevin Action to stay the auction scheduled for September 12, 2017 (Ex. A); Justice Sherwood's Decision and Order in the Replevin Action, dated September 11, 2017, denying defendants' Order to Show Cause (Ex. B); and an April 16, 2018 letter from Plaintiff's Counsel to Defendants' Counsel (Ex. C) in which Plaintiff's Counsel enclosed schedules from OSG corresponding to each of the Harari Loans.

C. The Parties' Positions

Plaintiff advises the Court that Justice Sherwood, in the NY County Decision, granted Plaintiff's motion for summary judgment as to all of the NY County Actions and transferred the NY County Actions to this Court for a determination on the issue of damages. Plaintiff seeks an Order granting Plaintiff summary judgment as to damages in the sums set forth in the Robinson Affidavit in Support.

Defendants oppose the motion submitting that Justice Sherwood's assertion in the NY County Decision that discovery on damages should proceed constitutes the law of the case on this issue. In addition, discovery on damages is warranted because Plaintiff has no personal knowledge of the payment history reflecting payments to OSG. No one from CapOne has filed

an affidavit asserting, or can properly testify that, the loan documents that CapOne relies on were entered contemporaneously with the time when payments were made by the management company to OSG on Defendants' behalf. Thus, Defendants submit, the records on which Plaintiff relies do not qualify as business records. Defendants contend that the summaries offered by Plaintiff are inadmissible because Robinson does not identify how he obtained or complied the information contained in the summaries. Moreover, even assuming that CapOne had supplied proof to overcome the lack of personal knowledge issue as it relates to the business records exception, Defendants would still be entitled to discovery of the underlying data to verify the accuracy of the summaries before they are used as evidence against Defendants. Defendants contend, further, that they have adduced proof demonstrating 1) inconsistencies in the documents on which Plaintiff relies, and 2) Plaintiff's failure to properly credit Defendants with payments actually made on their behalf.

Defendants also argue that summary judgment is improper as to the 7 defendants whose 11 medallions were repossessed and sold, for which CapOne "arbitrarily" issued a credit of $335,000 (Ds' Memo. of Law in Opp. at p. 25). Defendants contend that material questions of fact exist as to the reasonableness of the notices, sale process and amounts that Plaintiff credited after its credit bids were offered in September 2017.

In reply, Plaintiff submits *inter alia* that 1) Defendants' reliance on the law of the case doctrine is misplaced because Justice Sherwood did not make any determination as to whether the loan summaries and payment histories on which Plaintiff relies are sufficient to entitle Plaintiff to summary judgment on damages; 2) Defendants' opposition "conveniently ignores" (P's Reply Memo. of Law at p. 5) that the parties have already engaged in extensive informal, formal and third-party discovery directed at determining the outstanding amount owed with respect to each loan, as well as the amount of any payments made by the respective Borrowers to either OSG or Plaintiff; 3) Defendants have failed to even attempt to raise any issues of material fact as to Plaintiff's calculations for 15 of the 22 loans at issue and, therefore, summary judgment should be granted on damages as to these loans in the amounts set forth in the Robinson affidavit; and 4) the counterclaims in the Replevin Action are frivolous in light of a) CapOne was only forced to bring the Replevin Action as a result of Defendants' deliberate refusal to turn over

the collateral, consisting of New York City taxicab medallions and vehicles, which Defendants pledged to CapOne as security for the Harari Loans; b) Defendants engaged in bad faith by attempting to delay the prior public sale on September 12, 2017 of the 11 medallions which were surrendered and placed into storage with the TLC; and c) the counterclaims are barred by the express provisions of the Security Agreements.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a prima facie showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Pursuant to CPLR §3212(f), should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. *Staskiv v. Shlayan*, 132 A.D.3d 971, 973 (2d Dept. 2015), quoting *Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 760 (2d Dept. 2006).

B. Application of these Principles to the Instant Action

The Court denies the motion. Defendants should be permitted to obtain from Plaintiff discovery, which at the very least should include (a) the underlying documents that form the

basis of the loan summaries and payment histories on which Plaintiff relies in support of its motion, and (b) depositions of individual(s) with knowledge regarding the determination of damages. Defendants are entitled to this discovery in consideration of the issues that they have raised regarding the accuracy and reliability of the loan summaries and payment histories on which Plaintiff relies in support of its motion. Discovery will aid Defendants in determining the accuracy of the damage figures cited by Plaintiff in its motion. This determination is consistent with the NY County Decision, which reflects that Justice Sherwood contemplated that discovery on the issue of damages would proceed following the transfer of the NY County Actions to Nassau County.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on October 5, 2018 at 11:00 a.m.

ENTER

DATED: Mineola, NY
August 20, 2018

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 21 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE