Slip Copy, 2011 WL 5041795 (N.Y.Sup.), 2011 N.Y. Slip Op. 51917(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2011 WL 5041795 (N.Y.Sup.))

Supreme Court, Kings County, New York.
TCF EQUIPMENT FINANCE, INC., Plaintiff,
v.
NEW DOOR OF NEW YORK CORPORATION, and Shulem Gombo a/k/a Sol Gombo a/k/a Sulem Gombo, Defendants.

No. 9024/11.
Oct. 24, 2011.

Andrew Helfand, Esq., Helfand & Helfand, New York, for Plaintiff.

Irina Kushel, Esq., New York, for Defendants.

CAROLYN E. DEMAREST, J.

***1** In this action by plaintiff TCF Equipment Finance, Inc. (TCF) against defendants New Door of New York Corporation (New Door) and Shulem Gombo a/k/a Sol Gombo a/k/a Sulem Gombo (Shulem) for breach of a lease agreement and repossession of certain equipment, TCF moves, by order to show cause, for an order directing the Sheriff of any county of the State of New York to seize equipment described as "One (1) Buffering Wide Belt Sander, Model SBR TBB s/n 0–412–20–0041 and One (1) Used 2007 Dantherm Dust Collection with Piping, Model S750 s/n 323808, together with attachments and accessions" (the equipment).

TCF is a foreign corporation organized under the laws of the State of Minnesota, which is authorized to do business in New York. New Door is a New York corporation in the business of manufacturing doors, and Shulem is its president. On May 8, 2009, TCF and New Door entered into an Equipment Lease Agreement (the lease), whereby TCF, as the lessor, leased the equipment to New Door, as the lessee, for a term of 24 months, commencing on October 12, 2009, at a monthly rate of $4,706.23, plus taxes, with a mandatory purchase of the equipment at the end of the lease. Under the terms of the lease, New Door was to make one advance rental payment in the amount of $9,412.46, consisting of the first and last payments. The lease was executed on behalf of New Door by Shulem.On May 8, 2009, Shulem executed a personal Continuing Guaranty (the Guaranty), whereby he unconditionally and absolutely guaranteed the full and prompt payment by New Door, when due, of all rents. The Guaranty provided that in the event of a default by New Door, or its failure to perform any of the terms and conditions required under the lease, or in the event of the failure of New Door to make any or all payments, Shulem promised to pay TCF all sums at any time due and unpaid under the lease, including its reasonable attorneys' fees.

The equipment was to be located at One 43rd Street, in Brooklyn, New York. TCF perfected its security interest in the equipment by duly filing a UCC–1 Financing Statement on May 14, 2009. As reflected by a Delivery and Acceptance Certificate, the equipment was delivered and received by New Door on October 12, 2009.

Paragraph 11 (a) of the lease defined an "Event of Default" as including when the "Lessor fails to pay any rent or other payment required hereunder when due." Paragraph 12 of the lease, entitled "Remedies," provided as follows:

"At any time on or after an Event of Default, Lessor may in its sole discretion, with or without terminating this Lease, exercise one or more of the following remedies: (a) on written notice to Lessee, terminate this Lease; (b) declare immediately due and payable and recover from Lessee, as liquidated damages and not as a penalty, the sum of all rent and other amounts then due, plus all rent and other payments for the remaining term of this Lease, discounted from their respective due dates at the rate of 3% per annum plus the greater of (i) the Mandatory Purchase Price; (ii) the Equipment's Anticipated Residual Value', as determined by Lessor's books at the Commencement Date; or (iii) 10% of the original Total Cost; (c) enforce performance of, and/or recover damages for the breach of, Lessee's covenants; (d) repossess the Equipment wherever located, without notice or legal process; (e) exercise any other right or remedy available by law or agreement. Upon repossession, Lessor may retain the Equipment in full satisfaction of Lessee's obligation or may use reasonable efforts to sell or lease the Equipment in a manner and on terms as deemed appropriate by Lessor. Lessor will be entitled to any surplus and Lessee will be liable for any deficiency. Lessor may recover legal

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fees and other expenses incurred due to an Event of Default or the exercise or any remedy hereunder, including costs or repossession, repair, storage, transportation and disposition of the Equipment. No remedy shall be exclusive, and each shall be cumulative to the extent necessary for Lessor to recover amounts for which Lessee is liable hereunder."

***2** Paragraph 15 of the lease, entitled "Governing Law; Jury Trial Waiver," provided that "[t]his Lease shall be governed by, and construed in accordance with, the laws of the State of Minnesota." It further provided that Lessee consented to the jurisdiction and venue of the State of Minnesota, but agreed that, at Lessor's sole determination, it could select an alternative forum, including arbitration or mediation, to adjudicate any dispute arising out of the lease.

According to Shulem, when the first payment became due, he realized that TCF had issued the lease for 24 months, rather than for 48 months as he had initially requested, and that this resulted in doubling the monthly payment, which New Door could not afford. After negotiations regarding this mistake, the payment terms were amended, according to both parties, on May 23, 2010, by an Amendment to Lease (which is actually dated March 23, 2010). The terms of the Amendment to Lease provided that the lease was thereby amended so that the initial term stated in the lease was amended and restated to be 48 months, that the amount of each rent payment set forth in the lease was amended and restated to be one at $9,412.46, followed by one at $4,706.23, followed by one at $0.00, followed by two at $4,706.23, followed by 43 at $2,246.56, and that all of the other terms of the lease remained in full force and effect.

After accepting delivery of the equipment, New Door proceeded to make the required payments due to TCF pursuant to the lease. According to Shulem, the payments were automatically directly deducted from New Door's bank account until May 2010, when New Door closed that account. New Door defaulted under the lease by failing to make payment of the rental installment due on May 12, 2010.

On April 20, 2011, TCF filed the order to show cause, seeking seizure of the equipment, and also filed its summons and complaint. TCF's complaint alleges that New Door committed an act of default pursuant to the lease by failing to make payment of the rental installment due on May 12, 2010, and of all required monthly payments due thereafter, and that it terminated the lease and accelerated the balance in accordance with its remedies as provided for in the lease. TCF's complaint further alleges that there is now due and owing to it from New Door the sum of $93,196.48, representing: (1) the past due rental payments of $15,725.92, (2) the present value of the remaining lease payments of $75,198.74, and (3) late charges of $2,211.82, and misc. $60.00, plus interest, and that no part of this sum has been paid although due demand has been made by it. TCF's complaint asserts a first cause of action for breach of the lease, a second cause of action seeking possession of the equipment, a third cause of action for attorneys' fees from New Door pursuant to the terms of the lease, and a fourth cause of action against Shulem based upon the Guaranty. TCF's complaint seeks a judgment against New Door and Shulem, awarding it monetary damages of $93,196.48, plus interest due thereon from November 18, 2010, possession of the equipment, and attorneys' fees.

***3** In support of its motion, TCF has submitted the affidavit of its assistant vice-president, Douglas J. Fuchs (Fuchs). Fuchs asserts that he has reviewed the financial books and records maintained by TCF with respect to the underlying transaction, and that New Door has defaulted under the lease and remains indebted to TCF for the sum of $93,196.48, plus interest due thereon from November 18, 2010. Fuchs states that following termination of the lease, TCF demanded that New Door return the equipment to it, and that, in response, New Door refused to turn over possession of the equipment to TCF. Fuchs further states that the present fair market value of the equipment is approximately $35,000, and that there is no defense to TCF's claims known by it.

In opposition to TCF's motion, Shulem has submitted his affirmation, in which he states that after the alleged default by New Door in May 2010, New Door made a large payment of $15,725.92 on or about December 8, 2010 (which was owed as of November 2010) and $2,246.56 on or about February 4, 2011 (which was the December 2010 rent payment).[FN1] Shulem claims that TCF accepted and cashed both payments, which covered the full eight months of arrears (from May 2010 to December 2010), and did not object to the payments or notify him or New Door that the default or that any future

lateness would result in repossession. Shulem states that he was in contact with TCF's representative, explaining that New Door had financial difficulties, and that he had brought the arrears up to date as soon as possible. Shulem explains that he was under the impression that TCF understood New Door's financial hardship and would accept his good faith efforts to satisfy New Door's financial obligations to it.

> FN1. New Door and Shulem have not actually attached any proof of these payments. While TCF's attorney asserts that New Door and Shulem have failed to prove that they made these payments, TCF does not deny that such payments were, in fact, made and accepted by it.

Shulem claims that in or about the beginning of April 2011, just before the Jewish holidays of Passover (and following New Door's failure to make the rent payments due for January, February, and March 2011), someone from New Door called TCF to make another payment for two months of rent. Shulem states that the officer at TCF refused to speak to New Door, and that he then put off dealing with the issue until after the Passover holidays and took the week off, as is customary in his religious community. Shulem asserts that during the holidays, he received the papers in this action, which he did not anticipate, and that TCF never notified him or let him know that if any of his future payments were late, it would repossess the equipment. Shulem also asserts that TCF did not credit New Door with all of the payments which were actually made after May 12, 2010, the alleged date of default, and that it is claiming that New Door owes a much higher amount than is actually due. Shulem claims that New Door would have been up to date on the payments if TCF had accepted the payment in April 2011 (since he was four payments behind at that time, and intended to make another two months worth of payments after the Passover holidays) and that removing the equipment would cause a disruption to his business, causing it further financial hardship.

***4** On May 24, 2011, New Door and Shulem filed an answer to TCF's complaint, which asserts affirmative defenses. Their sixth affirmative defense alleges that TCF overstated the full amount owed and failed to credit New Door for payments made after May 2010. Their seventh affirmative defense asserts that any amount owed by New Door to TCF must be offset by the payments made by it after May 2010. Their eighth affirmative defense alleges that TCF's claims are barred in whole or in part because TCF effectively instituted a new course of dealing between them and reinstated the loan on different payment terms by accepting the large payments from it subsequent to the event of default and/or acceleration of the loan. With respect to this eighth affirmative defense, New Door argues that by accepting its payments without objection and thereby creating a new course of dealings between them, TCF was required to provide it with conspicuous notice that any other late payments would be refused and would result in repossession. New Door asserts that no such notice was given.

In support of this argument (and in opposition to TCF's instant motion), New Door points to the fact that (as set forth above) paragraph 15 of the lease provided that the lease would "be governed by, and construed in accordance with, the laws of the State of Minnesota." New Door, relying upon the case of *Cobb v. Midwest Recovery Bureau Co.* (295 NW2d 232 [Minn Sup Ct 1980]), contends that Minnesota law requires that notice to the debtor be given that future late payments will be treated as a default and will result in repossession where, as here, the creditor has previously accepted late payments.

In reply, TCF asserts that as provided in paragraph 11 of the lease, an event of default occurs when the lessee failed to pay rent "when due," and that it is undisputed that New Door and Shulem were in default due to the fact that they were not making payments "when due." TCF claims that New Door and Shulem were only prepared to make two more payments in April 2011, and were not prepared to catch up and bring New Door's account current. TCF argues that its mere acceptance of the payment does not change the fact that New Door and Shulem were in default by failing to make payments when due, and that their sporadic payments whenever they had funds available does not constitute making payments when due. TCF contends that paragraph 12 of the lease gives it the right to repossess the equipment, without notice, upon a default in payment.

TCF, while stating that paragraph 15 of the lease permitted it to select this court to adjudicate this matter, does not dispute that the laws of Minnesota apply

herein. TCF asserts, however, that it did send notices to New Door and Shulem that it would enforce its right to repossession. TCF points to the fact that it sent a Lease Default Notice dated December 22, 2009 (prior to the May 12, 2010 default and the March (or May) 23, 2010 Amendment to the Lease) to New Door and Shulem. That Lease Default Notice stated that New Door was in default of the lease, that it and Shulem were jointly and severally liable for all of New Door's obligations under the lease, and that formal demand was made upon New Door to immediately remit the past due sum of $9,677.77, inclusive of late charges. That Lease Default Notice advised New Door and Shulem that if they failed to cure all existing defaults by January 1, 2010, TCF intended to exercise its rights and remedies under the lease, including taking possession of the equipment. TCF has annexed proof of its sending of this notice by FedEx.

***5** TCF also points to a notice dated November 18, 2010 (after the May 12, 2010 default) sent to New Door and TCF, which stated that their lease payments under the lease were seriously in arrears and demanded immediate payment of $93,196.48, which was the amount then due and owing under the lease, and return of the equipment in accordance with the lease. TCF has annexed proof of its sending of this notice by FedEx.

The case of *Cobb* (295 NW2d at 235–236), relied upon by New Door and Shulem, involved the interpretation of UCC 9–609 (formerly UCC 9–503) (then Minn.Stat. § 336.9–503 and now Minn.Stat. § 336.9—609) by the Supreme Court of Minnesota. That section, entitled "Secured party's right to take possession after default," provides that after default, a secured party may take possession of the collateral and may proceed pursuant to judicial process or without judicial process, if it proceeds without breach of the peace.

In *Cobb*, the debtor, William E. Cobb (Cobb), a truck driver, sued for wrongful repossession of his truck when it was repossessed without notice by self-help repossession because of his failure to make timely payments under a retail installment purchase contract with Mack Financial Corporation (Mack). The Supreme Court of Minnesota held that where past due payments have been repeatedly accepted by a creditor who has the contractual or statutory right to repossess the collateral without notice, and the debtor is in default in payment under a security agreement, the secured party is required to give notice to the debtor prior to repossession, notifying the debtor that strict compliance with the time for payment will be required in the future or its contractual remedies may be invoked. The Court expressly stated: "if the creditor sends a letter to preserve its rights and then once again accepts late payments, another notice would be required. The second notice would be required because the acceptance of the late payment after the initial letter could again act as a waiver of the rights asserted in the letter." (295 NW2d at 237). The court reasoned that "[t]he basis for imposing this duty on the secured party is that the secured party is estopped from asserting [its] contract rights because [its] conduct had induced the justified reliance of the debtor in believing that late payments were acceptable" (295 NW2d at 236). It noted that "[t]he acts which induced reliance [in that case we]re the repeated acceptances of late payments and the occasional late charges assessed," and that such "reliance [wa]s evidenced by the continued pattern of irregular and late payments" (*id.*), as in the case at bar.

In ruling that "the repeated acceptance of late payments by a creditor who has the contractual right to repossess the property imposes a duty on the creditor to notify the debtor that strict compliance with the contract terms will be required before the creditor can lawfully repossess the collateral," the Supreme Court of Minnesota, in *Cobbs* (295 NW2d at 237), noted that the essential features of the conduct of Cobb and Mack, after a second extension agreement was signed, were that Cobb never made a payment on time; Cobb was generally two or more months behind on payments; Mack accepted every late payment and assessed late charges on some of them; Mack sent several letters to Cobb threatening to terminate the contract or to pursue the contract remedies unless payment was received by certain deadlines, but failed to carry out its threats and accepted payments tendered up to five weeks after the deadlines; Mack did not notify Cobb that the contract was terminated; and Mack did not notify Cobb that it was going to repossess the truck. The court found that these facts established that the repossession by Mack was wrongful as a matter of law.

***6** Thus, under Minnesota law, "a secured party who has not insisted upon strict compliance in the past, who has accepted late payments as a matter of

course, must, before it may validly rely upon such a clause to declare a default and effect repossession, give notice to the debtor (lessee) that strict compliance with the terms of the contract will be demanded henceforth if repossession is to be avoided' " (*Cobb*, 295 NW2d at 236, quoting *Nevada Natl. Bank v. Huff*, 582 P.2d 364, 369 [Nev 1978]). The Minnesota Supreme Court found that by requiring such notice, "[t]he debtor would be protected from surprise and from a damaging repossession by fore-warning that late payments would no longer be acceptable," and "[t]he creditor [would be] protected because, by the device of one letter, the creditor can totally preserve its remedies so that if the account continues in default, repossession could be pursued as provided in the contract without further demand or notice" (295 NW2d at 237).

Relying on the rationale of *Cobb* (295 NW2d at 237), New Door and Shulem argue that TCF should be estopped from claiming a default on the ground that TCF repeatedly accepted late payments. Specifically, New Door and Shulem rely upon the fact that subsequent to the November 18, 2010 letter, TCF, on December 8, 2010, accepted a late payment of $15,725.92, which is the very sum that TCF alleges in its complaint to be past due. Indeed, paragraph 9 of TCF's complaint is based on the default of the rental installment due on May 12, 2010 and thereafter, and paragraph 10 of TCF's complaint asserts that the sum of $93,196.48, which it seeks to recover in this action, consists of the past due rental payments of $15,725.92 plus the remaining accelerated lease payments and late charges, no part of which has been paid. As noted, this sum was accepted by TCF for eight months of rental arrears. In addition, New Door and Shulem rely upon the fact that TCF also accepted a rental payment of $2,246.56 on February 4, 2011.

In response, TCF, citing *Winthrop Resources Corp. v. Cambridge Research Associates, Inc.* (2003 WL 22846113 [Minn App Dec. 2, 2003]), an unpublished decision, argues that the holding in *Cobb* only can be applied to a consumer transaction, rather than a commercial transaction as in the case at bar. While the Court of Appeals of Minnesota, in *Winthrop Resources Corp.* (2003 WL 22846113,*4, citing *Swift County Bank v. United Farmers Elevators*, 366 NW2d 606, 609 [Minn App 1985]), found that *Cobb* was determined on a theory of a consumer's detrimental reliance and that the analysis in *Cobb* was inapposite to the facts presented in that case because the debtor and creditor therein were "corporate entities that may be assumed to have equal bargaining power," it also based the inapplicability of *Cobb* on the fact that "the lease contained no Article 9 security interest under which [the creditor] could engage in self-help repossession," and did not specifically hold that the reasoning of *Cobb* could not be applied to commercial cases. Rather, the *Winthrop* court ruled that a May 2002 letter operated as a legally sufficient notification of default under the lease, that the creditor, Winthrop, did not cash the full payment for invoices made by the debtor, Cambridge, on July 31, 2002, and that Cambridge could not credibly argue that it detrimentally relied on Winthrop's past practice of accepting late payments when Winthrop expressly notified Cambridge in the May 2002 letter that legal action would be forthcoming to collect delinquent payments. Significantly, the case of *Swift County Bank* (366 NW2d at 609), cited by the Minnesota Court of Appeals in *Winthrop Resources Corp.* (2003 WL 22846113, *4), a case involving express terms of an agricultural loan contract to which defendant United, recipient of the collateral, was not party, does not mention consumers or limit the *Cobb* rule to cases involving consumers, but confirms that "*Cobb* generally supports the proposition that a secured party's past course of dealing with a debtor may affect its right to insist on strict compliance with contract terms." It is noted that *Cobb* involved a lease for a truck which was used in defendant's business.

***7** Moreover, in the more recent decision by the Court of Appeals of Minnesota, *Hinden v. American Bank of North* (2009 WL 4573909, *1 [Minn App Dec. 8, 2009]), involving a loan by a bank to Marshall Hinden pursuant to a written loan agreement in which Hinden gave the bank a security interest in all inventory, equipment, accounts receivable, contract rights and general intangibles owned or thereafter acquired by his company, Marshall Hinden Contracting, Inc ., as well as a mortgage on real property owned by Hinden and his wife, reiterating the viability of the *Cobb* rule without making distinction between commercial and consumer cases, the court stated that "[i]f a creditor repeatedly accepts late payments and then fails to give proper notice to a debtor before repossessing the property, the repossession may be found to be wrongful" (*id.* at *3). The *Hinden* court found that the bank was entitled to summary judgment on Hinden's wrongful repossession claim because the bank did not have a duty to

provide additional notice to Hinden before repossessing the pledged collateral where the bank did not accept a late payment after a specified deadline set forth in a notice sent by the bank to Hinden of its intention to repossess the collateral if Hinden did not pay the outstanding balance on the loans by such deadline (*id.* at *3–4; *see also* *McNeill v. Dakota County State Bank*, 522 NW2d 381, 384 [Minn App 1994]).

In *Vacinek v. Gross* (1988 WL 128099, *1 [Minn App Dec. 6, 1988]), however, the Court of Appeals of Minnesota ruled that the *Cobb* rule was applicable in a case involving the wrongful repossession of cattle for the alleged failure to comply with the terms of a promissory note and security agreement where the creditor had repeatedly accepted late payments, thereby inducing reliance by the debtor. In the most recent case to discuss the *Cobb* rule, *Buzzell v. Citizens Auto. Finance, Inc.* (—— F Supp 2d ——, 2011 WL 2728299, *5–6 [D Minn Jul. 13, 2011]), the United States District Court for the District of Minnesota, applying the *Cobb* rule in a consumer vehicle repossession case, did not indicate that the holding of *Cobb* is limited to consumer transactions, as TCF now contends, but recited the duty of a "creditor" generally to give "*Cobb* " notice following acceptance of late payment prior to repossessing the collateral.

TCF's November 18, 2010 letter did not unequivocally state that it would seek repossession of the equipment. Rather, this letter stated that payment of $93,196.48 was then due under the lease, that New Door may be liable for other amounts payable under the lease, including costs and attorney's fees, and that "[f]ailure to pay the specified amount immediately may also result in additional late, finance or other charges as provided in the [l]ease or otherwise in accordance with applicable law." While this letter further stated New Door should prepare the equipment for pickup in accordance with the terms of the lease, it did not specify any deadline date on which it would seek repossession if the amount due under the lease was not paid.

***8** TCF does not deny that it accepted late payments after this November 18, 2010 letter. TCF's acceptance of these late payments after November 18, 2010, and its continued failure to insist on strict compliance with the loan terms required it to serve an additional notice prior to seeking repossession (*see* *Buzzell*, 2011 WL 2728299, *6–7; *Cobb*, 295 NW2d at 237; *Hinden*, 2009 WL 4573909, *1; *McNeill*, 522 NW2d at 384; *McCloud v. Norwest Bank Minnesota, N.A.*, 1996 WL 509846,* [Minn App Sept. 10, 1996]; *Steichen v. First Bank Grand*, 372 NW2d 768, 771–772 [Minn App 1985]).

TCF's reliance upon the notice dated December 22, 2009 is also misplaced. This letter was dated well prior to the May 12, 2010 default at issue and, in fact, evidences that there were prior late payments accepted by TCF. As discussed above, such a history of the acceptance of late payments by TCF further supports New Door and Shulem's argument that New Door was entitled to an additional notice before TCF could seek repossession (*see* *Cobb*, 295 NW2d at 237).

Furthermore, the case at bar, unlike the case of *Winthrop Resources Corp.* (2003 WL 22846113, *5), involves a security interest via a UCC–1 financing statement and TCF seeks the provisional remedy of seizure prior to trial. Notably, while TCF asserts that the present value of the equipment is approximately $35,000 (although seeking to recover $93,196.48), TCF has not filed an undertaking in accordance with Minn.Stat. § 565.25 or CPLR 7102, nor has it complied with Minn.Stat. § 565.23, which sets forth the notice, hearing, and undertaking requirements under Minnesota law.

Thus, in view of the acceptance of substantial payments after the November 18, 2010 notice, and given New Door and Shulem's representation that they desired to make a further payment in April 2011 and to cure New Door's default, they must be afforded a further notice and an opportunity to cure before the drastic remedy of seizure is granted. Consequently, TCF's motion must be denied.

Accordingly, TCF's motion for an order directing the Sheriff to seize the equipment is denied.

This constitutes the decision and order of the court.

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