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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

SUPERIOR COURT
CIVIL ACTION NO:
MICV2007-01558-H

TBF FINANCIAL, LLC, assignee of General Electric
Capital Corp.

vs.

EDUARDO ANGELL, d/b/a ANGEL ADVERTISING

**MEMORANDUM OF DECISION AND ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

This matter is a contract case involving a suit to collect unpaid lease payments, pursuant to two Equipment Lease Agreements ("Leases") entered into between Toshiba Business Solutions and defendant, Eduardo Angell, d/b/a Angel Advertising ("Angell"). The plaintiff, TBF Financial, LLC, assignee of General Electric Capital Corp. ("TBF") became assignee of the lease on June 7, 2005. By the terms of both Leases, such assignments assigned all rights, title and interest but not obligations in and to the Leases. Further, by its terms, Angell agreed "not to asset against out assignee claims, offsets or defenses you may have against [Toshiba Financial Services]." Toshiba Financial Services was the original lessor of the equipment that was leased to Angell on or about November 11, 2003. At the same time Angell executed a separate maintenance service contract with Toshiba Business Solutions, a different and separate corporation from Toshiba Financial Services, for the purpose of maintaining the leased equipment. Angell defaulted on his Lease payments as of September 8, 2005 with an unpaid balance of \$28,491.80. Angell also defaulted in the maintenance service contract payments. All the equipment subject to the lease has since been repossessed.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. *Cassesso v. Comm'r. of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. R. 56(c). The moving party bears the burden of

affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). Where the party moving for summary judgment does not bear the burden of proof at trial, the movant must submit affirmative evidence negating an essential element of the non-moving party's case or show that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact. *Pederson*, 404 Mass. at 17. The nonmoving party cannot defeat a motion for summary judgment by resting on his pleadings and mere assertions of disputed facts. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). In deciding a motion for summary judgment, the court may consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Cnty. Nat'l Bank*, 369 Mass. at 553.

The material facts are not disputed by the defendant. The plaintiff supported its motion by affidavit with relevant attachments. On the other hand, the defendant filed no affidavits in support of his opposition. Rather the defendant argues that there is a question of material fact concerning whether and by how much the plaintiff must mitigate its damages and that the judgment in a separate law suit bars this action under the principles of *res judicata*.

Res Judicata

Angell argues that this collection action is barred because of a collection judgment rendered against it by the Middlesex District Court Department, Malden Division (variously "Malden District Court" or "District Court"), in docket number Civil Action Number 0550cv1671, dated February 26, 2006.¹ The District Court case was filed on December 23, 2005. The plaintiff was Toshiba Business Solutions² which commenced the action to collect payments owed by the defendant under the maintenance service contract.

¹ Neither party provided the Court with the caption of this case.

² Although neither party provided a caption of the District Court case nor any information in an affidavit about who the parties were, both counsel stated in open court that the plaintiff in the District Court case was Toshiba Business Solutions and that the defendant was Eduardo Angell, d/b/a Angel Advertising. Although sloppy on the part of both counsel, especially counsel for the

Toshiba Business Solutions, not being a party to the Leases, did not assert any claims against the defendant under the Leases.

Res judicata describes legal doctrines by which one judgment has a binding effect on another judgment. *Bagley v. Moxley*, 407 Mass. 633, 636 (1990). Res judicata comprises the doctrines of claim and issue preclusion. *Id.* Claim preclusion “makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action” to spare the courts the burden of piecemeal litigation. *Heacock v. Heacock*, 402 Mass. 21, 23 (1988). The invocation of claim preclusion requires three elements: (1) identity or privity of the parties to the present and prior actions; (2) identity of the causes of action; and (3) prior final judgment on the merits. The burden rests with the party claiming preclusion by reason of a prior adjudication to allege enough facts to establish the requisite factors. *Fabrizio v. U.S. Suzuki Motor Corp.*, 362 Mass. 873, 874 (1972). In this case, the doctrine of claim preclusion does not bar the claims brought by the plaintiff for the following reasons.

First, the plaintiff in the District Court case is not the same as or in privity with the plaintiff in this case. The plaintiff in this action is not the same corporate entity as the plaintiff in the District Court action. The defendant has offered no evidence that the plaintiffs in both cases are the same entity. Further, the defendant has offered no evidence by way of affidavits or exhibits that there is privity between the two plaintiffs. The burden rests with the party claiming preclusion by reason of a prior adjudication to allege enough facts to establish the requisite factors. *Fabrizio v. U.S. Suzuki Motor Corp.*, 362 Mass. 873, 874 (1972). The defendant has failed to meet this burden.

Second, the District Court action sought to enforce payment under a different contract than the Leases at issue in this case. Again, the defendant has not come forward with evidence by way of affidavits or exhibits that there is identity of the causes of action.

Mitigation of Damages

This claim fails for two reasons. First, the defendant has provided no evidence by way of affidavits or exhibits that the plaintiff has failed in its duty to mitigate damages.

defendant, who is relying on principles of *res judicata*, the Court, for purposes of this motion, will view counsels’ tacit agreement as to the District Court case parties as a stipulation of fact.

Rather the defendant has rested on his pleadings and mere assertions of fact. Thus the defendant has failed to respond and allege specific facts establishing the existence of a genuine issue of material fact.

The second reason is that the terms of the Leases with respect to assignments is explicit in stating that the defendant agrees "not to assert against out assignee claims, offsets or defenses you may have against [Toshiba Financial Services]" such as mitigation of damages.

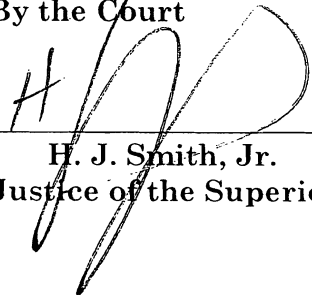
Accordingly the plaintiff's Motion for Summary Judgment is ALLOWED.

ORDER

For the reasons set forth above, it is hereby ORDERED that plaintiff TBF Financial, LLC, assignee of General Electric Capital Corp.'s Motion For Summary Judgment be and is ALLOWED as to all counts. Judgment shall enter in the favor of the plaintiff in the amount of \$28,491.80 plus interest and costs

DATED: May 16, 2008

By the Court



**H. J. Smith, Jr.
Justice of the Superior Court**