

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

AMERICREDIT FINANCIAL SERVICES, INC.,

Plaintiff,

-against-

BIENER NISSAN AUDI, INC.,

Defendant.

TRIAL/IAS, PART 48
NASSAU COUNTY

INDEX NO.: 012071-04

MOTION SUBMISSION
DATE: 5/9/06

MOTION SEQUENCE
NO. 001

The following papers read on this motion:

Notice of Motion, Exhibits & Affirmation	X
Affidavit in Opposition	X
Affidavit in Support	X
Affidavit in Reply on Defendant's Motion & in Opposition to Plaintiff's Summary Judgment	X

Motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

In July 20, 2002, Geraldine Stephens, a resident of Newark, N.J. applied on line to and received from plaintiff AmeriCredit Financial Services, Inc. pre-approval for an automobile loan in the maximum sum of \$30,500. She received a Voucher/Dealer Funding Package from plaintiff with the option to go to a dealer of her choice. Ms. Stephens was not restricted to going to a dealer in the state in which she lived, or in which she was to register the vehicle. On or about July 23, 2002, in order to purchase a used Audi vehicle from defendant Biener Nissan Audi, Inc. Ms. Stephens presented the

Dealer Funding Agreement and Dealer Funding Checklist to defendant Biener Nissan Audi, Inc. In connection with the sale of the Audi to Ms. Stephens, defendant submitted to plaintiff a Dealer Funding Agreement indicating that it had complied with all funding requirements and requesting that AmeriCredit pay \$30,500.00 to defendant in order to complete the sale of the vehicle to Ms. Stephens. The Dealer Funding Agreement, which is the basis of plaintiff's complaint in this action, provides, in part, as follows:

By signing below, Dealer:

Hereby agrees to abide by the terms of this Dealer Funding Agreement, the ACH Agreement, and the Dealer Funding Checklist ("Checklist"), the terms of which are incorporated herein by reference. Dealer agrees, acknowledges and guarantees that Dealer shall cause AmeriCredit Financial Services, Inc.; P.O. Box 182673; Arlington, TX; 76096-2679 to be listed as the first and only lienholder on the certificate of title to the vehicle within twenty (20) days from the date of purchase. Dealer understands that AmeriCredit has no obligation to fund the loan if the loan and/or vehicle are not within the parameters as outlined in this document and the Checklist. The individual signing below on behalf of the Dealer is an authorized signer for the checking account listed on the ACH agreement and is duly authorized to execute this document and deliver it to AmeriCredit, and no further consents or approvals are required in connection therewith.

Biener caused a New York State In-Transit permit ZAE9340 (a copy of which is annexed to the moving papers as Exhibit G), for the subject vehicle to be issued by the New York State Department of Motor Vehicles. "This permit is not acceptable as proof of ownership of the vehicle, and is not renewable or transferable" appears on the face of the permit. Apparently, AmeriCredit funded the loan based upon its belief that the "in-transit permit" was "Proof of Lien Perfection showing lienholder as AmeriCredit Financial Services, Inc." The "in-transit permit" was valid for 30 days and allowed Ms.

Stephens to register the vehicle in New Jersey.

In response to the demand in Biener's request for a bill of particulars that AmeriCredit specify when it first learned that its lien on the subject vehicle was not recorded and perfected as it alleged in its complaint, AmeriCredit responded, in ¶ 1 of its bill of particulars, that "On November 11, 2002, plaintiff checked the New York State Department of Motor Vehicles ("DMV") on line web site which, at that time, showed that the title to the subject vehicle remained in the previous owner's name." Ultimately, as AmeriCredit specifies in its bill of particulars, the subject automobile was sold to a third party on or about December 12, 2002, and then resold in July 2003. Ms. Stephens defaulted in making payments. She subsequently filed for bankruptcy and received a discharge. Being unable to take possession of the subject vehicle, the lender seeks to be made whole from the dealer on the ground that defendant never caused a valid lien to be perfected.

A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. See *Alvarez v Prospect Hospital*, 66 NY2d 320. Defendant Biener Nissan Audi, Inc. has failed to make an adequate *prima facie* showing of entitlement to summary judgment. *Zuckerman v City of New York*, 49 NY2d 557. Despite the contention of the defendant, there is no evidence before this Court that Biener caused AmeriCredit to be listed as the first lienholder on the Certificate of Title with respect to the used Audi sold to Ms. Stephens.

For the following reasons, the Court rejects AmeriCredit's putative "Cross-Motion." First, AmeriCredit has failed to serve a Notice or Cross Notice of Motion as

required by CPLR 2215. While CPLR 3212(b) permits the Court to grant summary judgment to a non-moving party, without a cross-motion, it is not mandatory and the better practice is to move by appropriate notice. Second, AmeriCredit submitted in opposition to Biener's motion for summary judgment, the affidavit of Jeffrey C. Heck, sworn to May 2, 2006. The attorney for the defendant has submitted a letter dated November 16, 2005 from plaintiff's counsel and the affidavit of Natalie Calvert of AmeriCredit, sworn to November 7, 2005 (Exhibit F to Biener motion), both to the effect that no one currently employed by AmeriCredit was involved in the processing of the loan involving Geraldine Stephens. Because of that, AmeriCredit produced no knowledgeable witness for deposition in this action, and Biener had to forego its right to depose AmeriCredit on the underlying facts. Despite those representations to the contrary, Mr. Heck now alleges he is "fully familiar with the facts that are material to this matter."

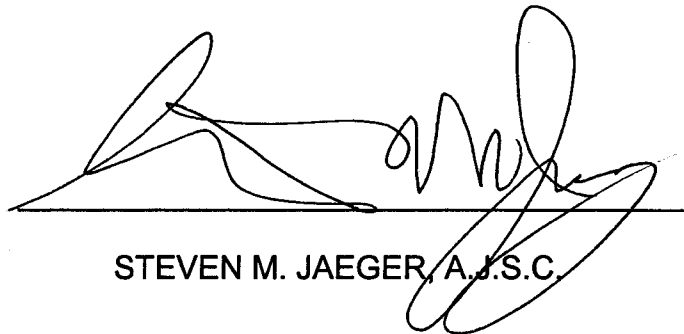
Third, and of most significance to the Court, the defendant has raised the following viable Fifth Affirmative Defense: "Any loss sustained by plaintiff was caused or substantially contributed to by plaintiff's own negligence, culpable conduct and failure to act in a commercially reasonable manner to protect its interest and plaintiff is, thus, precluded, in whole or in part, from recovery herein." Biener's defense is predicated on the theory that because AmeriCredit paid Biener the sum of \$30,500.00, AmeriCredit was satisfied that Biener had complied with the requirements for funding the loan. The attorney for the plaintiff contends that the factual basis which Biener utilizes to support its affirmative defense suggests that Biener misled AmeriCredit into believing Biener had complied with the terms of the Agreement. Thus, there are issues of material fact

to be resolved at a trial.

Defendant's motion for summary judgment for an order dismissing the complaint is denied.

This shall constitute the Decision and Order of the Court.

Dated: June 29, 2006



STEVEN M. JAEGER, A.J.S.C.

ENTERED
JUL 05 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE