

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TEXAS 1845, LLC,

Plaintiff,

- against -

MYINT J. KYAW,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 8397/12
Motion Seq. No.: 01
Motion Date: 07/16/12

XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Order to Show Cause, Affidavit, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Affidavit in Opposition and Exhibits</u>	<u>3</u>
<u>Affirmation in Reply and Exhibits</u>	<u>4</u>
<u>Sur-Reply Affirmation in Further Opposition and Exhibits</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves for an order vacating the filing and entry of the July 3, 2012 Judgment by Confession filed by plaintiff against him on the grounds that said filing is unauthorized and in violation of the Second Amendment to the parties' Settlement Agreement and Release dated March 1, 2012, amended March 12, 2012 and further amended on April 11, 2012; and moves, for an order staying any further enforcement of the aforementioned Judgment by Confession and attendant Subpoena Duces Tecum with Restraining Notices served upon defendant. Plaintiff opposes the motion.

By way of background, between December 2006 and October 2008, defendant signed and executed three personal guarantees to plaintiff totaling approximately \$20 million. *See* Defendant's Affidavit in Support Exhibits A, B and C. Said guarantees were executed in connection with the purchase of two aircraft, a Bombardier Inc., Model CL-600-2B19, serial number 7481, United States Registration Number N888WU (the "CRJ") and a British Aerospace, Model BAE 125-1000A, serial number NA 1002 (259009), United States Registration Number N229U (the "Hawker"). On October 14, 2010, defendant was notified that he was in default of his obligations under said guarantees. *See* Defendant's Affidavit in Support Exhibits D and E. A lawsuit entitled *Texas 1845, LLC v. Myint J. Kyaw*, under Index Number 3202/2011, was commenced on March 1, 2011, in Nassau County Supreme Court. With respect to said lawsuit, the parties ultimately entered into settlement negotiations and executed a Settlement Agreement on March 1, 2012. *See* Defendant's Affidavit in Support Exhibit I. As part of the Settlement Agreement, defendant signed a Confession of Judgment in the amount of \$24,744,833.56 that was to be entered with the County Clerk in the event that defendant failed to comply with any of the terms of the Settlement Agreement. *See id.* As part of the Settlement Agreement, defendant was required to make certain payments to plaintiff and to deliver the Hawker to plaintiff on or before March 28, 2012, in an airworthy condition in accordance with the standards set forth by the Federal Aviation Administration. *See id.* The Hawker was being held in a hangar in Portland, Maine by Maine Aviation Aircraft Maintenance, LLC, ("Maine Aviation") a company affiliated with the charter company used by defendant.

Shortly after the execution of the Settlement Agreement, on or about March 12, 2012, the parties entered into a First Amendment to the Settlement Agreement and Release. Defendant

submits that the First Amendment was executed due to the formality of documents which were necessary to discontinue a pending litigation between the parties in Maine and that said First Amendment did not materially alter the terms of the Settlement Agreement. *See* Defendant's Affidavit in Support Exhibit J.

Plaintiff submits that the March 28, 2012 deadline to deliver the Hawker to plaintiff came and went with no delivery by defendant. Plaintiff asserts that "[a]lthough Kyaw advised at the time that Maine Aviation needed more time to perform maintenance on the Hawker to make it airworthy, he had not even instructed Maine Aviation to begin work on the Hawker so it could be delivered to Texas 1845 in airworthy condition. Contrary to the terms of the parties' agreement, Kyaw did not advise Maine Aviation to begin repair on the Hawker until April 10, 2012, approximately two weeks after the plane was to be delivered to Texas 1845." *See* Defendant's Affidavit in Support Exhibit N.

Plaintiff adds that, "[n]ot knowing that Kyaw had breached his obligation to authorize repairs to the Hawker, Texas 1845 engaged in good faith discussions to amicably resolve Kyaw's breach of the Settlement Agreement by failing to deliver the Hawker. As a result of these discussions, Texas 1845 and Kyaw entered into a Second Amendment of the Settlement Agreement and Release, dated April 11, 2012." *See* Defendant's Affidavit in Support Exhibit K.

Plaintiff's counsel further contends that, "[o]n April 10, 2012, during negotiations of the terms of the Second Amendment, my office wrote an email to Kyaw's counsel stating as follows:

Joey,

As discussed, attached is a further revised Second Amendment to the Settlement Agreement and Release. The latest version extends the time of the \$4 million payment to June 1, 2012. Further, it requires Wu

to immediately execute all documents necessary to transfer title of the Hawker Collateral to Texas 1845 and immediately transfer possession of the Hawker Collateral (emphasis added).

Kyaw's counsel consented to this revision. Thus, pursuant to the Second Amendment, Kyaw was required to deliver the Hawker to Texas 1845 immediately in an airworthy condition and to transfer title of the plane to Texas 1845." See Plaintiff's Affirmation in Opposition Exhibit 3.

With respect to the Second Amendment to the Settlement Agreement, defendant submits that "[t]he Second Amendment altered paragraph's (*sic*) 3, 4 and 6 of the Settlement. The reason for the Second Amendment's execution was due to the fact that I was unable to deliver the Hawker by March 28, 2012, as the maintenance shop, Maine Aviation Aircraft Maintenance, LLC (hereinafter 'Maine Aviation'), was unable to commence the repair of the Hawker until the beginning of April. When I learned in March that Maine Aviation would be unable to commence maintenance on the Hawker until April, I offered to take the aircraft to a different location that could perform the maintenance immediately. I was advised by Plaintiff that it preferred to leave the aircraft with Maine Aviation. However, I knew that I would be in default of the Settlement if I did not deliver the Hawker....After days of negotiations, Texas 1845 agreed to execute a new agreement giving me additional time to deliver the Hawker to it, however, I was now liable for an additional One Million Dollars (\$1,000,000) in order to receive the additional time....As for the terms pertaining to the Hawker, subparagraph 'b' of paragraph 4 of the Settlement was deleted and replaced by the following:

b. The Wu Defendants shall immediately prepare and execute all necessary documents to transfer title to the Hawker Collateral to Texas 1845, and shall transfer, transport or otherwise deliver the Hawker Collateral to:

c/o Billy Meyer at Texas Aero
7815 Karl May Drive
Waco, Texas 76708

Texas 1845 has the right to immediately file all necessary documents

to register the Hawker collateral with the Federal Aviation Administration and/or any other administrative body, governmental agency or for public filing....

Notably, while the terms of the Settlement provided a date certain for the delivery of the Hawker, the Second Amendment does not. The only specified time parameters were for the payment of money - not for the delivery of the Hawker. A point which is critical to my position (emphasis added).” *See* Defendant’s Affidavit in Support Exhibit K.

Plaintiff contends that defendant breached the Second Amendment to the Settlement Agreement by continuing to fail to deliver the Hawker. Plaintiff claims that it made numerous good faith efforts to resolve defendant’s breach and communicated with defendant’s counsel at regular intervals to learn when the Hawker would be delivered. *See* Plaintiff’s Affirmation in Opposition Exhibit 5. Plaintiff submits that, “[o]n June 22, 2012, despite having no obligation to do so, Texas 1845 formally notified Kyaw of his default....Also having no obligation to do so, Texas 1845 gave Kyaw yet another 10 days and advised that if he did not cure his breach by delivering the Hawker by July 2, 2012 - more than three months after the initial agreed upon delivery date - Texas 1845 would take action to enforce its rights under the Settlement Agreement.” *See* Defendant’s Affidavit in Support Exhibits I, J and M.

Defendant failed to deliver the Hawker by July 2, 2012, and therefore, plaintiff filed the Confession of Judgment in the amount of \$12,326,530.82 on July 3, 2012. Said sum reflects the sum set forth in defendant’s Affidavit of Confession of Judgment, less the sums paid by defendant. *See* Plaintiff’s Affirmation in Opposition Exhibit 1. Upon the filing of the Confession of Judgment, plaintiff exercised its rights pursuant to the Settlement Agreement and sold both the CRJ and the Hawker, with the proceeds of such sales used to reduce the amount owed under the Judgment.

Defendant now argues that plaintiff's filing of the Judgment of Confession is in violation of the spirit and terms of the parties' Settlement Agreement and the Second Amendment to said Settlement Agreement. Defendant submits that he has complied with each and every payment term specified in the Settlement Agreements and subsequent Amendments, as well as transferred title to the Hawker to plaintiff. *See* Defendant's Affidavit in Support Exhibit L. Defendant states that the only outstanding provision of the Second Amendment to the Settlement Agreement pertains to delivery of the Hawker. Defendant contends that, after the initial inspection of the Hawker was done, it was deemed that approximately three hundred thirty three (333) items needed to be addressed before the Hawker could be deemed airworthy and that he has done everything imaginable to prepare the Hawker for deliver to plaintiff, but there are things that are out of his control. Defendant claims that plaintiff has been fully informed and provided full consent for the work required on the Hawker and knew that it would take months to complete. Defendant states that "[f]or numerous weeks, I tried to keep Plaintiff abreast of the situation up in Maine. The plane belongs to Plaintiff and has belonged to Plaintiff since early April. I spent hundreds of thousands of additional money to make the plane airworthy as to not deliver the plane in a compromised condition. I understand that Plaintiff wants the plane delivered, but the delivery of the Hawker is not a time sensitive issue, and also does not have a date certain in our Second Amendment for delivery. The delay in the delivery of the Hawker is not of my own volition. I had nothing to gain, but everything to lose, by not delivering the Hawker to Plaintiff. I have done everything in my power to complete the Hawker maintenance and deliver the plane to Plaintiff. Plaintiff's filing of the Confession of Judgment against me, with full knowledge that the plane could not be delivered withing the terms of the default, was done so in bad faith. I have complied with each and every term of the Settlement and Amendments, aside for this one

provision....I should not be penalized and forced to expend over Twelve Million Dollars (\$12,000,000) where I have done everything possible to ensure the plane's airworthiness prior to delivery - especially in light of the fact that the Hawker will likely be ready for delivery in two (2) weeks time....At bottom, the Second Amendment is binding and does not include a time is of the essence clause, nor does it obligate me to provide the Hawker by specific date. Plaintiff cannot choose to unilaterally thrust a default deadline upon me, one that is not provided for in our Settlement or one in which Plaintiff is fully aware of my inability to comply.”

In opposition to defendant's arguments, plaintiff contends that the Settlement Agreement unambiguously allows plaintiff to file the Confession of Judgment. Plaintiff submits that the language used in paragraph 4(b) of the Settlement Agreement, as amended by the Second Amendment, unambiguously directs plaintiff to immediately transfer the Hawker to plaintiff. Additionally, paragraph 10 of the Settlement Agreement, as amended by the First Amendment states that “[i]n the event the Wu Defendants fail to comply with *any terms* set forth herein, Texas 1845 shall immediately file the Affidavits of Confession of Judgment (emphasis added).” See Defendant's Affidavit in Support Exhibit J. Plaintiff argues that this provision specifically granted it the right to file the Confession of Judgment upon defendant's failure to comply with *any term* and this, of course, included the delivery of the Hawker, an essential and material term of the Settlement Agreement (emphasis added). Plaintiff adds that, “[b]y his own admission, Kyaw has yet to deliver the Hawker: ‘the only term of the contract I have failed to comply with is the delivery of the Hawker.’...This conspicuous admission is irrefutable evidence that Kyaw breached the Settlement Agreement, thereby allowing Texas 1845 the right to file the Judgment. Not only is Kyaw admittedly in default, but he is in default of his own volition. He waited more than two weeks beyond the March 28, 2012 delivery date to authorize Maine Aviation to begin

maintenance on the Hawker....Thus, he has not done ‘everything imaginable to prepare the Hawker for delivery,’ but rather stalled delivery to the detriment of Texas 1845.” See Defendant’s Affidavit in Support ¶ 51, Exhibit N and ¶ 26. Plaintiff further argues, “[d]espite being in default, Kyaw argues that the language of the Second Amendment did not require him to immediately deliver the Hawker. Instead, he argues that the parties intended to simply agree that the Hawker would be transferred to plaintiff at some undisclosed time in the future. **Kyaw’s reading of the Second Amendment would insert an unrealistic provision allowing him to take however long he wanted to complete the repairs to the Hawker, and then take whatever time he wanted to deliver the Hawker to Texas 1845. Such a provision simply does not exist and is plainly contrary to the parties’ intention....**It is illogical to argue that the Hawker could be held for an indeterminate amount of time with no repercussions to Kyaw. Texas 1845’s patience in waiting until July 2012 evidences its good faith efforts to amicably resolve the matter without the court’s intervention.”

“A stipulation of settlement is a contract, enforceable according to its terms.” *Alshawhati v. Zandani*, 82 A.D.3d 805, 918 N.Y.S.2d 173 (2d Dept. 2011) quoting *McKenzie v. Vintage Hallmark*, 302 A.D.2d 503, 755 N.Y.S.2d 288 (2d Dept. 2003). See also *Vider v. Vider*, 46 A.D.3d 673, 846 N.Y.S.2d 666 (2d Dept. 2007); *Fukilman v. 31st Ave. Realty Corp.*, 39 A.D.3d 812, 835 N.Y.S.2d 343 (2d Dept. 2007). Stipulations of settlement are to be enforced with rigor and without a searching examination into their substance, as long as they are clear, final and the product of mutual accord. See *Peralta v. All Weather Tire Sales & Service, Inc.*, 58 A.D.3d 822, 873 N.Y.S.2d 111 (2d Dept. 2009).

Paragraph 4(b) of the subject Settlement Agreement entered into on March 6, 2012 reads,

“4. Transfer of the Hawker Collateral. The Wu Defendants agree to transfer title and possession of the Hawker, its engines and

accessories including the Hawker Logbooks, as more fully described in the Aviation Security Agreement (collectively the 'Hawker Collateral') to Texas 1845, in accordance with the terms set forth below:...

- b. No later than March 28, 2012, the Wu Defendants shall prepare and execute all necessary documents to transfer title to the Hawker Collateral to Texas 1845, and shall transfer, transport or otherwise deliver the Hawker Collateral to:

c/o Billy Meyer at Texas Aero
7815 Karl May Drive
Waco, Texas 76708."

See Defendant's Affidavit in Support Exhibit I.

In the Second Paragraph of the Second Amendment to Settlement Agreement and Release, the parties agreed that the Settlement Agreement was amended in that "[s]ubparagraph 'b' of Paragraph 4 of the Agreement is deleted, and in its place the following is substituted:

- b. The Wu Defendants shall immediately prepare and execute all necessary documents to transfer title to the Hawker Collateral to Texas 1845, and shall transfer, transport or otherwise deliver the Hawker Collateral to:

c/o Billy Meyer at Texas Aero
7815 Karl May Drive
Waco, Texas 76708.

Texas 1845 has the right to immediately file all necessary documents to register the Hawker Collateral with the Federal Aviation Administration and/or other administrative body, governmental agency or for public filing."

See Defendant's Affidavit in Support Exhibit K.

The issue before the Court is the interpretation of the language used in the above listed Second Paragraph of the Second Amendment to Settlement Agreement and Release - specifically the use of the word "immediately." As previously mentioned, defendant claims that "the Second Amendment is binding and does not include a time is of the essence clause, nor does it obligate me to provide the Hawker by specific date." However, in making such an argument, defendant is clearly overlooking the use of the word "immediately" in the subject paragraph of the Second

Amendment.

According to BLACK'S LAW DICTIONARY, the definition of "immediately" is "[w]ithout interval of time, without delay, straightway, or without any delay or lapse of time." Defendant is correct in that a date certain for it to prepare and execute all necessary documents to transfer title to the Hawker Collateral to plaintiff, as well as a date certain to transfer, transport or otherwise deliver the Hawker Collateral was not contained in the Second Paragraph of the Second Amendment to the Settlement Agreement like it was in the original Settlement Agreement. However, it is evident to this Court, through a reading of the subject document, that the date certain contained in the original Settlement Agreement was substituted with use of the word "immediately" in the Second Amendment to the Settlement Agreement. Not providing a date certain in the Second Amendment to the Settlement Agreement did not give defendant an unlimited amount of time to deliver the Hawker. Instead, by entering into the Second Amendment of the Settlement Agreement, defendant was agreeing to deliver the Hawker "without interval of time, without delay, straightway, or without any delay or lapse of time." Plaintiff has provided, as evidence, a copy of an e-mail sent to defendant's counsel, immediately prior to the execution of the Second Amendment to the Settlement Agreement, where it was specifically stated that "[t]he latest version extends the time of the \$4 million payment to June 1, 2012. Further, it requires Wu to *immediately execute all documents necessary to transfer title of the Hawker Collateral to Texas 1845 and immediately transfer possession of the Hawker Collateral* (emphasis added)." See Plaintiff's Affirmation in Opposition Exhibit 3. Additional e-mails from plaintiff's counsel to defendant's counsel further support this argument. See Plaintiff's Affirmation in Opposition Exhibit 5.

Plaintiff did, however, afford defendant over three months from the date of the Second

Amendment to the Settlement Agreement in which to deliver the Hawker. Plaintiff did not make the demand upon defendant to deliver the Hawker the day after executing the Second Amendment to the Settlement Agreement, although the use of the word “immediately” in said document provided plaintiff with that right. Additionally, although having no obligation to do so, plaintiff provided defendant an additional ten (10) days after notifying it of its default to cure the breach. Defendant, admittedly, did not cure said breach, and, as of the filing of the instant motion, still had not delivered the Hawker to plaintiff.

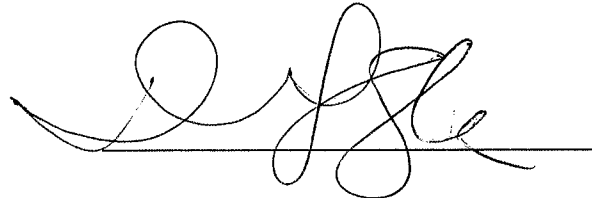
The Court finds that defendant has not complied with all of the terms of the Settlement Agreement and Second Amendment to same. Plaintiff’s filing of the Judgment of Confession was not in violation of the spirit and terms of the parties’ Settlement Agreement and Second Amendment to same. Pursuant to paragraph 10 of the Settlement Agreement as amended by the First Amendment, plaintiff had the right to immediately file the Affidavits of Confession of Judgment in the event defendant failed to comply with *any term* set forth herein. *See* Defendant’s Affidavit in Support Exhibit J. Defendant failed to comply with the term of the Second Amendment to the Settlement Agreement which required immediate delivery of the Hawker.

Accordingly, defendant’s motion for an order vacating the filing and entry of the July 3, 2012 Judgment by Confession filed by plaintiff against him on the grounds that said filing is unauthorized and in violation of the Second Amendment to the parties’ Settlement Agreement and Release dated March 1, 2012, amended March 12, 2012 and further amended on April 11, 2012, and for an order staying any further enforcement of the aforementioned Judgment by Confession and attendant Subpoena Duces Tecum with Restraining Notices served upon defendant is hereby **DENIED**. And it is further

ORDERED that the stay of enforcement of the Judgment by Confession and attendant Restraining Notices against defendant, his assets, accounts, properties, etc. is hereby lifted.

This constitutes the Decision and Order of this Court.

ENTER:

A handwritten signature in black ink, appearing to read 'D. Sher', written over a horizontal line.

DENISE L. SHER, A.J.S.C.

XXX

Dated: Mineola, New York
September 12, 2012