SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

NICHOLAS DOYLE
SPECIAL REFEREE

PRESENT: _____ PART 87R

Index Number : 600013/2004

GENERAL ELECTRIC CAPITAL CORP.

vs

HILLIARD, JAMES C.

Sequence Number : 005

HEAR AND DETERMINE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MATTER IS RESOLVED IN ACCORDANCE WITH THE ANNEXED ~~DECISION/REPORT~~.

NICHOLAS DOYLE
SPECIAL REFEREE

Nicholas Doyle
J.S.C.

Dated: NOV 13 2009

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

GENERAL ELECTRIC CAPITAL CORPORATION,

Plaintiff,

-against-

JAMES C. HILIARD and JAMES CRYSTAL AVIATION,

Defendants.

----------X

Index No. 600253/04

REPORT, DECISION, ORDER & JUDGMENT

NICHOLAS DOYLE, SPECIAL REFEREE:

By orders of the Honorable Richard Lowe, dated January 7, 2009 and March 24, 2009, the issue of the amount of surplus from the foreclosure sale of aircraft, including whether the sale and preparation expenses were commercially reasonable, and the reasonable attorneys' fees incurred by plaintiff, was referred to IA Part 50 R for assignment to a Special Referee to hear and determine. Additionally, the orders further provided for the Special Referee to supervise discovery, prior to the hearing.

This matter was assigned to me on March 24, 2009. On that date, appearing on behalf of the plaintiff, General Electric Capital Corporation ("General Electric"), was the law firm of Reed Smith LLP, by Debra S. Turetsky, Esq., and on behalf of the defendants, James C. Hilliard and James Crystal Aviation (hereinafter "Hilliard"), was the law firm of Traiger & Hinckley, LLP, by Christoph Heisenberg, Esq. I executed an order, on this date, providing for certain discovery. All discovery was completed prior to the hearing.

The hearing was held on September 15, 16 and 17, 2009. Counsel appearing at the hearing for General Electric, in addition to Ms. Turetsky, was Timothy S. Harris, a partner at Reed Smith LLP. Being filed with my report, decision, order and judgment is the transcript of this hearing, along with all exhibits in evidence, as well as the post-hearing memorandum of law, each side was permitted to submit by October 29, 2009. It is noted that each side submitted a binder containing pre-marked exhibits and that those exhibits, which included numerical markings for both sides, rather than alphabetical markings for defendants' exhibits, were received in evidence.

Testifying at this hearing on behalf of General Electric were Constantine Karides, the partner at Reed Smith, responsible for oversight in all General Electric matters handled by the law firm; Aferdita Mustafa, a litigation specialist at General Electric; Scott Forsberg, a remarketing manager with General Electric, for approximately 19-years, responsible for recovery and remarketing of the subject aircraft; and Dennis Blackburn, president of Corporate Concepts, an aviation service company, who was retained as an expert on the valuation of the subject aircraft.

Testifying on behalf of Hilliard was Donald Richards, president of Jet Quest, Inc., a company involved in the purchase and sale of aircraft on behalf of its customers, who was retained

as an expert on the valuation of the subject aircraft, and Hilliard, himself.

There are a number of facts that are not in dispute. Hilliard purchased a 1978 Hawker 700A aircraft, on December 31, 1998, for $4.1 million, obtaining financing from Bombardier Capital, Inc. ("Bombardier"), which obtained a security interest in the aircraft. Thereafter General Electric obtained all of Bombardier's right, title and interest in and to the loan documents through an assignment.

Hilliard was able to make the loan payments, from monies he earned, by leasing the aircraft to third parties. In March 2002, he brought the aircraft to AOG, an aircraft maintenance facility, located in Fort Lauderdale, Florida, for a 48-month inspection, required by the Federal Aviation Administration ("FAA"). AOG conducted the inspection and corrected 272 deficiencies, however, because of a billing dispute with Hilliard, AOG refused to provide the necessary logbook entries, resulting in the grounding of the aircraft, as Federal Air Regulations require proper logbook entries and without such, the aircraft is not airworthy. Hilliard, therefore, was unable to lease the aircraft and as a consequence, he defaulted under the loan agreement.

The aircraft remained with AOG until September 2004, when Hilliard obtained a ferry permit, which allowed the aircraft to be flown to Imaginaire, another maintenance facility, located in

Addison, Texas.

On December 29, 2004, General Electric and Hilliard entered into a settlement agreement restructuring the loan agreement. The agreement provided that Hilliard would be credited with the floor price of $1.85 million, if the aircraft was returned to General Electric in certified and airworthy condition and gave General Electric a lien on real property, owned by Hilliard, located in Florida. In the event of a default, General Electric could enter a judgment of confession in the sum of $3,190,082.81.

There is no dispute that Hilliard defaulted under the terms of the settlement agreement, sometime in September 2005, and that General Electric entered the confessed judgment on June 14, 2006. The proceeds of $1,534,048.29, from the sale of Hilliard's Florida property, were paid to General Electric on July 10, 2006 and on August 11, 2006, the aircraft was turnover to General Electric, pursuant to a voluntary surrender agreement.

General Electric retained Imaginaire and authorized it to perform the necessary inspections and repairs, to make the aircraft airworthy, and prepare the aircraft for sale. General Electric made payments to Imaginaire, during the period from September 2006 through February 2007, in the aggregate amount of $911,595.29. General Electric also retained Imaginaire to act as the broker for the sale of the aircraft.

On September 5, 2007, General Electric received

$1,878,686.91, from the sale of Hilliard's property, located in Colorado.

Imaginaire received only two written offers for the aircraft, the first offer was for $1.55 million, and a second offer for $1.6 million, from Andy Thomas, that was conveyed to General Electric, on June 27, 2008. The $1.6 million offer was accepted by General Electric and the sale was closed on October 26, 2007. Imaginaire was paid a commission of $32,000, 2% of the sale price.

In August 2008, General Electric acknowledged that there was a surplus, from the sale, and that it would remit the surplus to Hilliard on condition he executed a full release. Hilliard did not execute a release, which resulted in this subject reference.

REFERENCE ISSUES

The three main issues before me concern (1) whether the disposition of the subject aircraft was made in a commercial reasonable manner; (2) whether the expenses incurred in preparing for the sale were reasonable and (3) whether the attorney's fees and legal expenses incurred by General Electric were reasonable.

Disposition of the subject aircraft

The law is well settled that the secured creditor has the burden of proof of establishing the reasonableness of the sale at issue and that every aspect of the disposition of collateral, including the method, manner, time, place and other terms, was

commercially reasonable.

Scott Forsberg, a manager at General Electric, testified that he has been involved in the recovery and remarketing of between 50-100 aircraft, for General Electric, for the last 19-years, and that while General Electric had acted, on occasions, as its own broker, it has generally retained a third-party broker, since 2007.

Forsberg's retention of Imaginaire, to act as broker, was based upon the fact that the aircraft was already at Imaginaire's facility, located in Addison, Texas; that Imaginaire was able to do inspections and maintenance work necessary to certified the aircraft as airworthy; and that no objection was raised by Hilliard. Forsberg testified another reason for the selection was his belief that Hilliard had, in fact, also retained Imaginaire as his broker, prior to his voluntary surrender of the aircraft. Hilliard denied Imaginaire ever acted as his broker.

There is no dispute that retention of a broker is a recognized method utilized in the sale of aircraft. However, merely selecting a broker does not relieve the secured creditor from its burden of demonstrating that the broker acted in a commercially reasonable manner in disposing of the aircraft (*Heller Financial Leasing, Inc. v Gordon*, 2006 WL 1787745 [N.D. Ill. 2006]).

The parties' experts, as well as Forsberg, were in agreement

that the customary and traditional ways to market an aircraft is a three-method approach (1) paper based in which the aircraft is advertised in trade publications, (2) web based, where the aircraft is listed on Amstat and JetNet, a dealer network, and (3) customer base, wherein brokers send out an e-mail to its list of contacts.

When the written offer of $1.55 million and the subsequent $1.6 million offer was conveyed by Imaginaire's president Steve Wilson, to General Electric, Forsberg responded, by e-mail, that the $1.6 million offer was $300,000 low and requested marketing efforts to support the price. Although, he never received it prior to the sale, General Electric, nevertheless, accepted the offer. In fact, General Electric never received Imaginaire's marketing file, even after the sale.

While there was evidence that the subject aircraft was listed with Amstat and JetNet, Imaginaire was allegedly unable to supply General Electric with its marketing file, due to a crash of its computer system. Forsberg conceded that he was not aware as to whether the aircraft was ever listed in any of the trade publications. There was no evidence as to Imaginaire's customer base and whether e-mails were sent notifying them of the listing of this aircraft. Further, General Electric's expert Dennis Blackburn testified that he was not offering an opinion as to whether the aircraft was marketed in a commercial reasonable

manner.

Additionally, Hilliard's expert Donald Richards, testified that he saw the subject aircraft's listing in JetNet and that he was actively seeking to purchase a Hawker 700A for a client, during this time period. In fact, his company on three occasions, July 30 and 31, 2007 and August 9, 2007, e-mailed Imaginaire concerning the subject aircraft and never received any response.

More importantly is the relationship between the purchaser of the subject aircraft, Andy Thomas, and Imaginaire. Hilliard testified that in the same month of the sale, Andy Thomas purchased Imaginaire and Forsberg conceded that General Electric did learn of a relationship between the buyer and broker, but long after the sale. In fact, the evidence shows that Imaginaire attempted to hide the identity of the purchaser, by requesting a blank sales contract. There was also documentary evidence that Andy Thomas is the owner and president of Imaginaire. While General Electric's counsel argued that this document was hearsay, it waived that object, during the hearing, when the subject document, along with defendant's exhibit binder, was introduced into evidence without objection.

The parties dispute whether this sale constituted a disposition to a related party, which would make UCC §9-615(f) applicable. In the event that the disposition is to a person

related to the secured party, the surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than a person related to a secured party.

There is some support in the law that employees of secured creditors are related parties (4 White and Summers, Uniform Commercial Code §34-11, at 6 [Practitioner's 5th ed]). The relationship between Thomas and Imaginiare is not marginal as he appears to have purchased the company from Wilson, close to the time of the sale. Therefore, the broker chosen by General Electric for disposition of the aircraft, for all practical purposes, was the purchaser.

Even if UCC §9-615(f) was not applicable, General Electric has failed to demonstrate that the sale of the subject aircraft was commercially reasonable. The sales price of the aircraft, although not so inadequate as to shock the court's conscience, was significantly low (the value of the aircraft shall be addressed below), and it is noted that Hilliard, through his former attorneys, immediately raised the issue of price indicating that the $1.6 million was not even close to commercially reasonable, after receiving the notice of sale. General Electric did not respond and proceeded with sale.

In fact, instead of demonstrating a commercially reasonable

sale, the evidence shows the likelihood of self-dealing by Imaginaire, as demonstrated by its failure to follow up on inquires concerning the aircraft, its attempt to hide the true identity of the aircraft purchaser, who was, in fact, acquiring an interest in Imaginaire, during this same time period and the mysterious crash of its computer resulting in the lost of its marketing file.

Additionally, this same aircraft was listed for sale with JetNet, by Thomas, for $2.5 million, approximately a year later, in August 2008, providing further evidence of a sweet heart deal rather than a commercially reasonable disposition of the collateral.

Any argument by General Electric that it relied upon its broker and that it was under no obligation for the actions of its broker rings hollow, especially since it was not a novice in the in the recovery and remarketing of aircraft and, in fact, on occasion acted as its own broker (*Connex Press, Inc. v International Airmotive, Inc.*, 436 F.Supp. 51 [D.C. 1997], *aff'd without opinion*, 574 F.2d 636 [D.C. Cir. 1978]). In fact, Forsberg e-mailed that the offer of $1.6 was low and needed to be support by marketing, clearly reflected concerns about the commercial reasonableness of said sale.

As to the price of the subject aircraft, there were three appraisals prior to the sale closing, which must be adjusted for

a variety of reasons, as well as an appraisal by each of the parties' experts. All of the appraisals were higher than the purchase price. It is noted that each of the appraisers was aware of the fact, that this aircraft sat and had not flown from March 2002 until its resale.

Forsberg did what he described as a desktop appraisal, which was dated August 23, 2006 and good through October 15, 2006, valuing the aircraft at $1.945 million. He stated the sole purchase of his appraisal was General Electric's accounting department's need to value its inventory. I will discuss later why this valuation must be adjusted.

Robert Read, a certified aircraft appraiser, performed an appraisal of the subject aircraft for Imaginaire, dated December 19, 2006, and opined that the fair market value was $1.9 million, if the aircraft included revised vertical separation minimums ("RVSM"). RVSM allows an aircraft to fly above 29,000 and there was general agreement that it would cost $150,000 to purchase and install. Since the subject aircraft did not include RVSM, the above appraisal should be adjusted to $1.75 million.

It is unclear of the relationship between Reed and Imaginaire, but in any event, I find this valuation was low.

Tracy Lignon was retained by the bank, which was providing cash to Andy Thomas, the purchaser, to do an appraisal. Lignon, the only appraiser who physically inspected the aircraft, found

the fair market value as of August 22, 2007, was $1,928,670. This evaluation considered RVSM as installed. This appraisal also subtracted for lack of TCAS (traffic avoidance system). TCAS is not considered part of Bluebook's standard avionics and should not result in a deduction. The evidence is that TCASII, the more sophisticated system cost approximately $100,000.

It is noted that Hilliard assumed that this appraiser deducted $250,000 for lack of TCAS, however, this deduction also included the lack of RSVM.

Therefore, after the above adjustments, this valuation would actually be $1,878,700. I find this appraisal somewhat low and there was testimony by Hilliard's expert that appraisals done for banks are generally conservative.

General Electric's expert Dennis Blackburn admitted to a present business relationship with General Electric and that such constitutes approximately 10-12% of his total business.

He testified that he has done appraisals of Hawker 700A approximately 50 times. Attached to his reports are entries from Bluebook and Vref Price Digest ("Vref"), reflecting values in early 2007 of $2.15 million and $1.95 million, respectively, however, he stated that he does not rely on either Bluebook or Vref, as the information listed therein contains asking price and not actual contract price and, therefore, is often inflated. Instead he relies upon his own data system and first hand

knowledge. He did not include any of his own data, as he keeps such data for approximately only six months and then destroys it to avoid a conflict of interest, and relied upon his memory of approximately two years ago, to estimate the fair market value Hawker 700A, at the time of the subject sale, to be between $1.63 million and $1.675 million.

His low valuation of the subject aircraft relied heavily upon the fact that it had remained idle for an extended period of time, in a salt air environment.

There was no evidence that the subject aircraft actually sat in a salt air environment. Addison, Texas is near Dallas and while the aircraft was in Fort Lauderdale, Florida, for approximately two years, the evidence suggests it was stored in a hanger.

In any event, while I found Blackburn to be extremely knowledgeable in aviation, being rated to fly Hawker aircraft, he was unable to support his valuation, which was the lowest of any of the valuations.

Hilliard's expert, Donald Richards, has been involved in the industry for approximately 38-years, purchasing and selling approximately 1,500-2,000 aircrafts for clients, including 15 aircraft in the Hawker family. Richards' company made inquires to Imaginaire concerning the subject aircraft and, in fact, purchased a Hawker 700A, for a client, during that time period

for $2.5 million. The aircraft purchased by Richards was a 1980 model and included RVSM, although it had slightly more flight hours, then the subject aircraft.

Richards' appraisal, for the subject aircraft, was $2.2 million. He arrived at this figure by starting with a Bluebook value of $2.15 (there is no explanation as to why this differs from Lignon's appraisal indicating Bluebook value of $2.1) added the costs of the 48-month inspection ($100,000) and the new landing gear ($122,000) and subtracted for the lack of RVSM ($150,000). While he admitted the aircraft's idleness did have an effect on value, it was offset by the fact the aircraft had flown less than 10,000 hours. Both trial experts agreed that there was a 10,000 hour ceiling and that purchasers, often incorrectly, avoid aircraft with more than 10,000 hours.

Richards was very active in the Hawker 700A market, during this time period, and his testimony reflected knowledge of pricing and availability of this type aircraft.

I find as a matter of law and fact that the fair market value of the subject aircraft was $2.165 million. I arrived at this figure based upon the testimony of both Richards and Forsberg.

Forsberg testified that he had been certified, at a trial, as an expert on aircraft valuation and that he has been involved in recovery and remarketing of between 50-100 aircraft, for

General Electric, for approximately 19-years, and even on occasions, where General Electric acted as its own broker. Forsberg's valuation of $1.945 million was made less than two weeks after the aircraft was surrendered to General Electric, when there was no motive to overstate or understate the value of the aircraft. This valuation, however, must be adjusted for the subsequent purchase of new engines. When it was learned, the subject aircraft's engines had been placed on the manufacturer's damage list, General Electric decided to purchase new engines to insure the marketability of the aircraft. The net cost of the engines, after trade-in of the old engines, was $420,000. This further enabled the aircraft's engines to be re-enrolled in MSP, maintenance and service program, which provides for an extended warranty on the engines.

Forseberg testified that the new engines and re-enrollment in MSP increased the value of the subject aircraft by $220,000. Adding this sum to his original valuation, results in a fair market value of $2.165, which, for all practical purposes is identical to Richards' valuation.

Hilliard's argues he is entitled to the $3.4 million, the amount General Electric collected from the sale of his real properties in Florida and Colorado, however, I find as a matter of fact and law that Hilliard's liability is reduced only by the amount of the loss directly attributable to General Electric's

commercially unreasonable actions, pursuant to the "rebuttable presumption" rule, which is the difference between the fair market value of the aircraft, $2.165 million and the price, the subject aircraft was sold for, $1.6 million.

Expenses incurred in preparing the aircraft for sale

UCC §9-610 authorizes commercially reasonable preparation or processing prior to sale.

As previously stated General Electric retained Imaginaire and authorized it to perform the necessary inspections and repairs, to make the aircraft airworthy and to prepare the aircraft for sale.

General Electric made various payments, after the surrender of the aircraft, which were subtracted from the sale price in determining the amount of surplus. These payments are as follows: (1) landing gear overhaul, in the sum of $122,000; (2) Imaginaire's initial inspection, reflected in an invoice, dated September 2006, in the sum of $70,247.90; (3) Imaginaire's subsequent inspections, reflected in an invoice, dated February 2007, in the sum of $274,347.39; (4) replacement of the aircraft engines, in the sum of $420,000; (5) maintenance service plan ("MSP") for the engines, in the sum of $25,000 and (6) payment of Imaginaire's lien, for work performed on the subject aircraft, prior to the surrender, in the sum of $67,000.

Hilliard conceded that the new landing gear, was a necessary

and commercially reasonable expenses, as such was required pursuant to a FAA directive.

Hilliard also conceded that completion of the 48-month inspection was commercially reasonable as without said inspection, the aircraft would not have been airworthy and likely could only be sold as salvage. However, he maintained that the reasonable cost for said inspection was $100,000, rather than the $344,595.29 that General Electric, in fact, paid to Imaginaire.

The Imaginaire's invoice, dated February 21, 2007, reflected a total of $274,347.39, after providing General Electric, with credits for payments of invoice 4388, in the sum of $70,247.90, and of invoice 4821, in the sum of $55,684.75. While General Electric seeks recovery for payment of invoice 4388, it apparently does not seek recovery for payment of invoice 4821, which was not in evidence.

The portion of the February 21, 2007-invoice indicated 720 hours at $75 per hour for inspection discrepancies labor, for a total of $46,800 and costs for discrepancies parts (list to follow) in the sum of $177,420.04.

While Forsberg, at the time of the hearing, could not recall what work was actually performed and whether he ever received a discrepancy list from Imaginaire, he maintained a discrepancy list was not necessary as he was receiving services order, detailing the work, and he was often in contact with Wilson as to

the repairs being made. He further testified that he was not surprised by the costs and as a rule to thumb, the actual charges for inspection and repair are 2.5 times, the initial estimate, especially where it is an older aircraft that has sat for an extended period of time. Experts for each side agreed that inspection charges generally are 2.5 times higher than initial estimates.

It is noted that aircraft maintenance facilities have extreme latitude in their billing and that whatever it costs it has to be fixed, otherwise, as Hilliard, himself, knows, the aircraft will not be airworthy, since they can refuse to sign off on the logbooks.

Accordingly, I find as a matter of fact and law that the payment of $344,595.29 by General Electric to Imaginaire was a commercial reasonable expenses in preparing the aircraft for sale.

As to the replacement of the aircraft's engines and re-enrollment in MSP, Hilliard argued that the total cost of $445,000 was not commercially reasonable since it added only approximately $200,000 to the value of the aircraft.

This argument fails to consider the fact that the old engines were on the manufacturer's damage list and that the aircraft would not be airworthy, without either an overhaul of the old engines or the purchase of new engines. The engine

manufacturer estimated the overhaul and repair of the engines at a cost of $156,000 per engine, but the actual costs could have been much higher.

While Hilliard's expert indicated a cheaper method of inspecting the engines, there was no evidence that the manufacturer would have agreed to anything but the complete overhaul of the engines.

Accordingly, I find as a matter of fact and law that the net cost of the new engines and re-enrollment in MSP, totaling $445,000 was a commercially reasonable expense for preparing this aircraft for sale.

While there was lengthy testimony, in the hearing, concerning the party responsible for the engines being placed on the manufacturer's damage list, it is clear that this occurred prior to the surrender of the aircraft to General Electric. Therefore, there is no showing that General Electric was, in any way, responsible for failure to preserve the aircraft.

General Electric also seeks to deduct from the surplus, its payment of Imaginiare's lien in the sum of $67,000, for work it performed on the aircraft, prior to the surrender, and billed to Hilliard. Part of this lien included Imaginaire's installation of ELT (emergency location trasmitters) on the aircraft, which was also subsequently charged to General Electric as reflected in the February 2007 invoice in the sum of $10,000.

Accordingly, I find as a matter of fact and law that $10,000 of the lien should have not been paid by General Electric and that deduction of this amount from Hilliard's surplus would not be commercially reasonable as a secured creditor should be responsible for the acts of its agent, who double billed.

Reasonable attorneys' fees and expenses

General Electric is seeking attorneys' fees through August 31, 2009, in the sum of $290,130.10.

Hilliard argues that legal fees incurred prior to the default were incurred in drafting the settlement agreement and, therefore, would not be recoverable under the terms of the settlement agreement; that the legal fees incurred after the sale of the aircraft was not recoverable as General Electric's judgment was already satisfied; and that in general the attorneys' fees were unreasonable as he voluntarily surrendered the aircraft and voluntarily paid the proceeds from the sale of his Florida property.

I find as a matter of fact and law that legal fees incurred by General Electric, prior to the parties entering into the settlement agreement is recoverable, if not under the terms of the settlement agreement, under the terms of the loan documents.

I find as a matter of fact and law that legal fees incurred by General Electric, after satisfaction of judgment is not recoverable. None of the parties' agreement provides for the

recovery of said legal fees.

Additionally, providing for the payment of attorneys' fees after satisfaction of judgment would encourage the continuation of litigation by secured creditor, who could hold the surplus hostage knowing no matter what the outcome of the litigation, the surplus would be used to pay their counsel fees.

This would be outrageous, considering the facts, as in this particular case, where the collateral was not sold in a commercially reasonable manner and significantly below market value, the debtor, nevertheless, would be obligated not only to pay his attorneys' fees but the attorneys' fees of the secured creditor, when litigating the amount of the surplus.

As to the reasonableness of the fees, I find both the time spent and the rate charge, which was discounted by 20% of Reed Smith's normal 2007 billing rates, were reasonable.

Accordingly, I find as a matter of fact and law that General Electric is entitled to reasonable attorneys' fees and expenses in the sum of $170,627.77.

Amount of the surplus

I have adopted the figures in General Electric's pre-hearing brief (Court Exhibit II) as of October 26, 2007, which showed a balance due and owing by Hilliard in the sum of $896,883.60. This included all of the expenses incurred in preparing the aircraft for sale that I have already found to be commercially

reasonable, along with statutory interest from the date each expense was incurred by General Electric.

From this amount the fair market value of the aircraft $2.165 million should be deducted resulting in a surplus of $1,268,116.40. From this amount I am allowing a deduction of the commission General Electric paid to the broker in the sum of $32,000. While Hilliard argued that there should be no commission, the evidence shows that a 2% commission is standard. While the amount of commission would have been higher, if the aircraft was sold in a commercially reasonable manner, it should be limited to what was actually paid. I am also deducting the reasonable attorneys' fees, which were all incurred before the satisfaction of the judgement, in the sum of $170,627.77, and the lien in the sum of $57,000.

Accordingly, I find that Hilliard is entitled to a judgment for the amount of the surplus, which is the sum of $1,008,488.70, with statutory interest from October 26, 2007.

As to the issue of interest on the surplus, General Electric argues that the UCC §9-615(d) does not provide for such, however, this section actually provides that the secured creditor pay the surplus to the debtor, which was not done in this case. General Electric, in fact, waited almost a full year prior to acknowledging a surplus to Hilliard and thereafter refused to release said surplus without a full waiver from Hilliard.

CPLR §5001(a) provides for the recovery of interest because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property.

Furthermore, there is ample case law providing the debtor is entitled to interest on the surplus (*Connex Press, Inc. v International Airmotive, Inc.*, 436 F.Supp. at 58; *Cantrade Private Bank Lausanne Ltd. v Torresy*, 876 F. Supp. 564, 571 n.3 [S.D.N.Y. 1995]).

ORDERED and ADJUDGED that defendants James C. Hilliard and James Crystal Aviation shall have judgment as against the plaintiff General Electric, in the sum of $1,008,488.70, with statutory interest from October 26, 2007.

Dated: November 13, 2009

ENTER:

Nicholas Doyle

SPECIAL REFEREE

NICHOLAS DOYLE
SPECIAL REFEREE