

**CIT Communications Fin. Corp. v Lipper & Co., LP**

2005 NY Slip Op 30485(U)

March 30, 2005

Sup Ct, NY County

Docket Number: 0600739/2004

Judge: Diane A. Lebedeff

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

PRESENT: Hon. DIANE A. LEBEDEFF

*Justice*

PART 8

CIT Communications Finance Corporation,

- v -

Lipper & Company, LP

INDEX NO. 600739/04  
MOTION DATE 12/16/04  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 26

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } 1-8

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with the accompanying memorandum decision.

**FILED**  
APR 04 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

MAR 30 2005

Dated: \_\_\_\_\_

*DR*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Do Not Post  Reference

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: I.A.S. PART 8

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CIT COMMUNICATIONS FINANCE CORPORATION,  
f/k/a AT&T d/b/a CAPITAL CORPORATION a/k/a  
AVAYA FINANCIAL SERVICES,

Plaintiff,

-against-

Index No. 600739/04  
Mot. Seq. No. 001

LIPPER & COMPANY, LP and LIPPER & COMPANY,  
INC.,

Defendants.

-----X

DIANE A. LEBEDEFF, J.:

**FILED**  
APR 04 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiff CIT Communications Finance Corporation ("CIT") seeks to recover amounts claimed to be due under a computer equipment lease entered into by defendants Lipper & Company, LP and Lipper & Company, Inc. (referred to collectively as "Lipper"). CIT moves for an order granting summary judgment on its first and second causes of action against Lipper, and dismissing the affirmative defenses (CPLR 3211, 3212), and Lipper cross-moves for partial summary judgment on its affirmative defense that one provision of the Lease imposes an unenforceable penalty (twelfth affirmative defense).

*Factual Background*

Lipper entered into a Master Equipment Lease and lease schedule with CIT, then known as Avaya, on or about April 25, 2001, for a three-year period; a second lease

schedule was entered into on or about December 21, 2001, also for a period ending April 25, 2004 (the "Lease"). After making payments of about \$184,000 under the Lease with CIT through December of 2003, Lipper began liquidating and winding down its business in late 2003 and early January of 2004. Plaintiff CIT offered to terminate two computer equipment leases, referred to as Lease #00190 and Lease #00210, in exchange for return of all equipment and payment of a termination fee of \$32,821. Lipper returned all the equipment as of January 28, 2004, without reaching agreement as to the remaining payment due, and plaintiff now seeks to recover a total of \$116,255.64, including \$90,351 designated as the "present value of equipment casualty value" and \$3,502 as attorneys' fees.<sup>1</sup>

The Lease provides that it is "non-cancellable," and that the lessee undertakes an "unconditional obligation" to pay all amounts when due, unless its obligations are terminated pursuant to the terms of the lease (motion, exhibit A, Lease, para. 14). The Lease further provides that, in the event of default, the lessor's remedies include a right to terminate the lease, take possession of any equipment, bring suit, and to "declare the Lessor's Return (as defined in Section 13 hereof and calculated by Lessor as of the Event

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Under Lease #00190, plaintiff claims \$97,734.48 is due, including \$81,377.18 related to "casualty value", overdue payments of \$12,393, the present value of accelerated remaining lease payments of \$11,346, and late charges of \$285.42, with an offset of \$7,667.68, allowed for the net recoveries from sale of the repossessed equipment.

Under Lease #00210, plaintiff seeks to recover \$9,838.48, including \$8,974.46 for the "present value of the equipment casualty value," and with an offset of \$1,015.00 allowed for the net recovery from sale of repossessed equipment.

of Default) for each applicable schedule due and payable as liquidated damages for loss of a bargain and not as a penalty and in lieu of any further Rental Payments under the applicable Schedule” (*id.*, para. 20). The Lease provides that “Lessor’s Return” consists of “(i) the Rental Payments (and other amounts) then due and owing under the applicable schedule; plus (ii) the Stipulated Loss Value (computed as described in the applicable schedule); plus (iii) all other amounts that become due and owing under the applicable Schedule ....”

Plaintiff claims it is entitled to liquidated damages of \$90,000 under this provision, but submitted no evidence in its moving papers to demonstrate how that amount was calculated. In reply, plaintiff submits the affidavit of an in-house “litigation specialist” who asserts the amount is calculated as the “casualty percentage,” or 50% in the case of leases for 36 months or less, multiplied by the “Total Purchase Price” set forth on the lease schedules, and is intended to compensate CIT for damage to its “anticipated residual interest in the equipment” and allow it to recover “its net investment plus profit” (Bernido reply affidavit, paras. 6, 11, 14). In its reply, Lipper points out that the “formula” described in CIT’s reply is not found in the Lease annexed to the moving papers, and that it appears to have been drawn from an unsigned form which does not appear to have been part of the original Lease.

#### *Legal Discussion*

The general rule concerning liquidated damages provisions is that “when the damages flowing from the breach of a contract are easily ascertainable, or the damages

fixed are plainly disproportionate to the injury, the stipulated sum will be treated as a penalty" (*X.L.O. Concrete Corp. v. John T. Brady and Company*, 104 A.D.2d 181, 183 [1st Dept. 1984]; see also Restatement [Second] of Contracts § 356 [1], "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty"). The leases in issue provide for application of New Jersey law, which has adopted the provision of the Uniform Commercial Code which similarly provides, "[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy" (N.J.S.A. 12A:2-718; see *Wasserman's Inc. v. Township of Middletown*, 137 N.J. 238, 252 [1994], 645 A.2d 100, 107 [1994], clause in lease providing for damages based on lessee's gross receipts was unenforceable "penalty provision," rather than enforceable "liquidated damages" provision, unless stipulated amount was based on damages which likely would flow from breach of the lease).

Plaintiff shows that the \$32,821 initially demanded as a termination fee represented the remaining payments that were to be made under the remaining three months of the breached leases, and certain other items, without accounting for offsets subsequently allowed. However, plaintiff's motion papers do not contain any explanation as to how the liquidated damages demand of \$90,351, was calculated, or even refer to any provision of

the Lease using the phrase "equipment casualty value." Nor does plaintiff's reply explain, with reference to basic concepts of contract damages, how the demand for an additional \$90,000 bears any relationship to any anticipated or actual harm caused by breach of the Lease, and the amount demanded is grossly disproportionate to the actual injury caused by Lipper's breach, just months prior to its end date (*see In re Montgomery Ward Holding Corp.*, 326 F.3d 383, 388 [3d Cir. 2003], holding on application of Illinois law, that equipment lease provision providing for recovery of the present value of the "Casualty Value of the Equipment" did not "represent real damages, but rather an unrecoverable penalty"). Accordingly, the cross-motion for partial summary judgment on the twelfth affirmative defense is granted, and the lease provision, as applied by plaintiff to support a demand for about \$90,000 in damages, is declared to be an unenforceable penalty provision.

Defendant Lipper does not oppose the motion to strike the affirmative defenses, except the twelfth defense discussed above and the defense that plaintiff failed to dispose of the returned equipment in a commercially reasonable manner (fifteenth affirmative defense). That defense, based on the Lease itself, presents issues of fact precluding summary judgment as to the remainder of plaintiff's first cause of action. The motion to dismiss affirmative defenses is granted as to all other defenses. Finally, the branch of the motion seeking summary judgment as to the second claim for attorneys' fees is denied as the determination of the amount and reasonableness of the fees demanded should abide determination of the remaining claims.

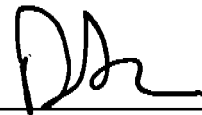
*Conclusion*

Plaintiff's motion for summary judgment is denied, and its motion to dismiss affirmative defenses is granted as to all affirmative defenses, except the twelfth and fifteenth affirmative defense. Defendants' cross-motion for partial summary judgment dismissing the complaint to the extent it seeks recovery of the "present value of equipment casualty value" is granted, and the demand for \$90,351 is stricken.

It appearing that the remainder of plaintiff's damages claim is for less than \$25,000 (see Papp affidavit, para. 14; Block affidavit, paras. 5 and 12), the matter is transferred to the Civil Court of the City of New York subject to the provisions of CPLR 325 (d). Plaintiff's counsel is reminded to contact the transfer clerk in the County Clerk's Office and to pay any necessary fee.

This decision constitutes the order of the court.

Dated: March 30, 2005



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J.S.C.



At an Individual Assignment Part 8 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 30<sup>th</sup> of March, 2005

PRESENT:

HON: DIANE A. LEBEDEFF  
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

CIT Communications  
Finance Corporation,  
vs.

County Clerk's

Lipper & Company, LP,

Index No. 600739 / 10 / 20 04

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 600739/04 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,

*[Handwritten Signature]*

J.S.C.

**FILED**

APR 04 2005

NEW YORK  
COUNTY CLERK'S OFFICE