IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CIT TECHNOLOGY FINANCING SERVICES,	:	C.A. No. 06C-08-047 WLW
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
OWEN PRINTING DOVER, INC., d/b/a SIR SPEEDY, aka SIR SPEEDY PRINTING CENTER and DAVID OWEN,	:	
	:	
Defendants.	:	

Submitted: January 16, 2008
Decided: April 30, 2008

ORDER

Court's Decision Upon Bench Trial.

John R. Weaver, Jr., Esquire of Farr Burke Gambacorta & Wright, P.C., Wilmington, Delaware; attorneys for the Plaintiff.

Thomas I. Barrows, Esquire of Hudson Jones Jaywork 7 Fisher, LLC, Dover, Delaware; attorneys for the Defendants.

WITHAM, R.J.

This Court held a bench trial on November 15, 2007 to determine the liability of Defendant Owen Printing, Dover, Inc. d/b/a/ Sir Speedy, also known as Sir Speedy Printing Center ("Owen Printing") and David Owen (collectively, "Defendants" or "Owen") to CIT Technologies Financing[1] ("CIT" or "Plaintiff") for Defendants' default on the lease of two Canon printers. I find that judgment should be entered in favor of the Plaintiff in part and in favor of the Defendants in part.

Questions Presented

The issues remaining in this litigation are essentially legal, however one issue of fact remains: how Plaintiff's damages should be measured, including costs and attorneys fees. Plaintiff requests the Court to determine (1) whether, under paragraph 16 of the lease, Plaintiff is entitled to a judgment for possession of the equipment by virtue of the default of Defendant, Owen Printing, in making lease payments starting with the rental payment due on February 15, 2006; (2) whether under the same provision Plaintiff is entitled to a judgment for all unpaid payments due under the lease as a result of the default; and (3) whether these remedies are cumulative and can be exercised by Plaintiff either serially or simultaneously.

Defendants ask the Court to determine (1) whether the "Acceleration Clause" that Plaintiff seeks to enforce is penal in nature and constitutes an unenforceable liquidated damages clause; (2) whether Plaintiff failed to mitigate damages and is thus barred from claiming damages beyond the date of judgment; and (3) whether Plaintiff is entitled to an award of costs and attorneys' fees incurred subsequent to the

---

[1]Successor-in-Interest to Citicorp Vendor Finance, Inc.

issuance of the Writ of Replevin.

Additionally, Plaintiff's closing argument brought up for the first time in his closing brief the argument that New Jersey law is the applicable law to decide the issues.

Procedural Background

Plaintiff filed this action on August 30, 2006 alleging that Defendants defaulted under a Lease Agreement signed by Defendants and Canon Financial Services, Inc. ("Canon"), on September 3, 2004 for the lease ("Lease") of two Canon RE 105 model printers ("equipment").[2] In the Complaint, Plaintiff demanded a judgment for all accrued rent and accelerated rent on the equipment totaling $188,324.00 plus costs and attorneys' fees, and requested a Writ of Replevin to be issued so that Plaintiff could repossess the equipment.

The Court granted the Writ of Replevin on January 19, 2007 and allowed Defendants two weeks to respond to the remainder of the Complaint. Defendants filed an Answer and Counterclaim for Declaratory Judgment on February 2. The Court entered an Order granting a Writ of Replevin on February 8. Plaintiff filed its Answer to the Defendants' Counterclaim on February 22.

Stipulated Facts

The parties stipulated to most of the facts to this case. The Lease provided that Owen Printing was to pay sixty monthly rental payments beginning on September 15, 2004, in the amount of $3,690.00 per month, payable on the 15th of each month, until

[2]Model Numbers MND06481 and MND06489.

the expiration of the sixty-month period. The Lease was personally guaranteed by David Owen, individually. Subsequently, Canon assigned all of its rights, title and interest in and to the Lease, the equipment and the guarantee to the Plaintiff.

Owen Printing defaulted by failing to make payments when due starting on February 15, 2006. Subsequent to this date, Owen Printing made two confirmed payments, the first on November 16, 2006 and the second on November 28, 2006, each in the amount of $3,690.00. Defendants admitted in their Answer to Plaintiff's Complaint that Plaintiff is due a judgment for rent due and accrued for as long as the equipment remains in Defendants' possession, and to an award of reasonable attorneys' fees and costs associated with Plaintiff pursuit of its Writ of Replevin.[3]

No attempt was made by Plaintiff to replevy or repossess the equipment, which remains in Owen Printing's possession, and Defendants have not returned the equipment. Owen testified that Owen Printing still used these machines. Settlement discussions involved the possibility of Owen Printing retaining the equipment.

Evidence Presented at Trial

The Court held a bench trial on November 15, 2007 and asked the parties to submit written closing arguments. Two witnesses were called in total: Michael Haines and David Owen. The Court ruled that Mr. Haines was not an expert in the valuation of equipment field or any other area, for trial purposes, noting that Plaintiff had not indicated that it would be calling an expert witness. As Defendants' witness, David Owen, was designated as a witness in the field of commercial photocopying

[3]These costs and fees are believed to be $1,275.00.

and printing and regarding commercial photocopying and printing equipment, in accordance with the pretrial stipulation.

Michael Haines, a representative from CIT, testified that he is a litigation manager who manages a network of attorneys representing CIT. CIT had recently purchased the file at issue in mid-September 2007, along with about $2.1 billion in files, comprising of about 144,000 loans. He had worked for CIT for about three and one-half months, and prior to this his position was of a similar nature with Daimler Chrysler Financial.

Mr. Haines testified that to value this equipment, he used one of the numerous options available for valuation. Using an internet service, the value of the equipment at the time of the Writ of Replevin was in the realm of $2,800 to $3,400.

On cross, Mr. Haines could not define a "click" (one photocopy on a piece of photocopy equipment) and the relationship between the number of clicks and the value of the equipment. Mr. Haines did not know of the Court's Order of Replevin. To Mr. Haines' knowledge, there was nothing in his file that indicated that the equipment should not be picked up. Further, nothing indicated that Defendants had prevented CIT from picking up the equipment.

On direct, Mr. Haines testified that there were 11 payments made of the 60 due. But on cross, he acknowledged that there were 17 payments due at the time of default, that there were two additional payments made subsequent to default, and could not explain the discrepancy.

Mr. Owen testified that he has been in the professional offset printing and

photocopy industry since 1992, that he is the president and owner of Owen Printing and that his duties include running a staff, ordering supplies and implementing and maintaining the technology-based equipment. Though he attended Sir Speedy University, most of his knowledge and experience are from being on the job, going to trade shows, learning from competitors and other Sir Speedy owners, and the "flood of information" from the vendors he uses as well as telemarketers and mailings. He purchases only new equipment but recognizes the depreciation in value of used equipment.

After the Replevin Order, Mr. Owen attempted to have the equipment refinanced. He was told that he might have better luck if he waited for CIT to purchase Citicorp Vendor Finance, which he did. His full efforts to refinance the equipment therefore had been brief. At no time did he request Citicorp Vendor Finance or CIT to hold off on repossessing the equipment.

Mr. Owen testified that he understood the Order for Writ of Replevin required of him of no duty except to cooperate with the sheriff. Every morning he expected the sheriff to show up. He admitted to continued use of the equipment after the date of the entry of Replevin but agreed not to use it from the trial date on.

Mr. Owen was unable to testify as to the number of payments made as he had not brought his file, but identified the two checks written subsequent to the default. Mr. Owen testified that he had tendered money to Plaintiff prior to the Replevin action and that it had been returned. An amount was not indicated. An email from Mr. Wright dated August 14, 2007 was admitted into evidence stating that Mr. Owen

could remove the machines at his expense or abandon them to Plaintiff, together with attorneys' fees and costs through the date of the Replevin hearing.

Mr. Owen also testified about valuating equipment. To determine the price of used photocopy equipment, the starting point is the type of equipment and its model, the age of the machine, the number of clicks on the machine, and whether it is possible to acquire a maintenance contract for the machine (once a machine has achieved a certain number of clicks, a maintenance agreement is unobtainable). He testified that without all of this information, there is no way to determine an equipment's fair market value. Finally, the current demand by the used printer market is a critical factor.

Another option for used equipment that Mr. Owen explained is re-leasing it after refurbishing it. This approach typically makes more money than just selling it.

Mr. Owen testified that the equipment in his possession are not worth as much now as they were in February or March because they have more clicks on them and are older.

In closing, Plaintiff argued that Defendants are liable for all unpaid payments due under the lease, not just those accruing prior to trial, and that Plaintiff is entitled to a judgment of possession.[4] The Lease Agreement provision on which his argument is based is Paragraph 16. The provision states, in *very* tiny print on the second page

---

[4]The total now being $173,430.00, plus costs and attorneys fees and possession of the equipment.

of the three-page lease agreement,[5] that

> Upon the happening of any one or more Events of Default, CFS [Canon Financial Services] shall have the right to exercise any one or all of the following remedies (which shall be cumulative) simultaneously or serially and in any order:
> (a) to declare all unpaid Payments and other amounts due and payable under this Agreement with CFS retaining title to the Equipment
> (b) to terminate any and all agreements with Customer
> (c) with or without notice demand or legal process to retake possession of any or all of the Equipment (and Customer authorizes and empowers CFS to enter upon the premises wherever the Equipment may be found) and
>> (I) retain such Equipment and all Payments and other sums paid under this Agreement or
>> (ii) re-lease the Equipment and recover from Customer the amount by which the Remaining Lease Balance exceeds the value attributed to the Equipment by CFS for purposes of calculating the payment under the new Agreement or
>> (iii) sell the Equipment and recover from Customer the amount by which the Remaining Lease Balance exceeds the net amount received by CFS from such sale or
>
> (d) to pursue any other remedy permitted at law or in equity. CFS
>> (I) may dispose of the Equipment in its then present condition or following such preparation and processing as CFS deems commercially reasonable
>> (ii) shall have no duty to prepare the Equipment prior to sale
>> (iii) may disclaim warranties of title, possession, quiet enjoyment and the like and
>> (iv) may comply with any applicable state or federal law

---

[5] The initial line on the bottom of that page, the Court observes, is unsigned. The Parties did not raise this as an issue.

> requirements in connection with a disposition of the Equipment and none of the foregoing actions shall be deemed to adversely affect the commercial reasonableness of the disposition of the Equipment.
>
> In the event the Equipment is not available for sale the Customer shall be liable for the remaining Lease Balance and any other amounts due under this Agreement.

Defendant argued that since Plaintiff made no attempt to execute upon the Writ of Replevin and made no attempt to repossess its equipment, and accordingly made no attempt to re-lease, sell or otherwise dispose of the equipment for the purpose of mitigating damages, Plaintiff is not entitled to monetary relief beyond the date of judgment in this action. Further, Defendants argue that the acceleration clause as applied here is penal in nature and therefore is unenforceable as a liquidated damages clause. Finally, because Plaintiff failed to attempt to mitigate damages, they cannot meet its burden of demonstrating entitlement to damages beyond November 15, 2007.

Defendants request damages from judgment per the pre-trial stipulation.[6] Defendants's counterclaim is that Plaintiff cannot accelerate damages *and* repossess

---

[6]Per 7.(a) of the Pre-trial Stipulation, Defendants calculate damages as follows:

(a) That between the initial default on February 15, 2006 and the date of judgment, calculated to be the day of trial (November 15, 2007), 22 months elapsed. 22 months x $3,690.00 = $81,180.00.

(b) That Defendants should be credited the two additional payments for a total of $7,380.00.

(c) That Plaintiff is entitled to a judgment in the amount of $73,800.00 as of November 15, 2006 at the rate of 10.5% as per 6 *Del.C.* §2301(a) (Federal Discount Rate as of February 13, 2006 was 5.5%).

(d) That Plaintiff is entitled to the recovery of its reasonable attorneys' fees and costs through the date of the issuance of the Writ of Replevin, in the amount of $1,275.00.

the equipment as that would constitute unenforceable punitive damages.

Findings of Fact and Conclusions of Law

First, given that Plaintiff did not raise the choice of law issue prior to closing argument,[7] the Court deems the Plaintiff to have waived this right and declares Delaware law the governing law.

Second, the Court finds that Defendant entered into a lease agreement for two Canon photocopy machines with Canon Financial Services on September 3, 2004 and that David Owen personally guaranteed the lease; that the lease was for 60 consecutive months of payments of $3,690 due on the 15th of each month; that Owen Printing defaulted on rental payments on February 15, 2006; and that Owen Printing provided two additional payments to Plaintiff in the amounts of $3,690 each. Defendants therefore breached the Lease Agreement. The equipment remains in Owen Printing's possession and Defendants have been using it up until the day of trial. Plaintiff made no effort to repossess the equipment, and made no attempt to re-lease, sell or otherwise dispose of the equipment to mitigate damages. Defendants did nothing to bar or complicate repossession by Plaintiff.

The Court also notes that during the course of this action, CIT Technologies Financing succeeded Citicorp Vendor Finance, Inc.'s interest in this action, along with a large number of similar cases, thus unintentionally prolonging this action at no fault of the Defendants.

Third, the Court finds that Plaintiff's exercise of the Remedies Clause at

[7]Plaintiff did in fact, as Defendants argue, use Delaware law in its pre-trial motions.

Paragraph 16 of the Lease Agreement renders it unenforceable as exemplary damages. Compensation for breach of contract is usually limited to that amount that "will place him in the same position that he would have been in if the contract had been performed. The measure of damages is the loss actually sustained as a result of the breach of the contract."[8] Generally, exemplary damages are not recoverable in an action for breach of contract.[9] Hence, Plaintiff's compensation can be an election of the stated remedies and may choose any or all so long as the end result is a sum of the total value of the Lease Agreement.

The total value of the Lease Agreement is $200,000, and that amount (minus the payments already made) would place Plaintiff in the same position as it expected to be in had the Lease Agreement not been breached.[10] Plaintiff asserts that they are entitled to any and all of the remedies listed in Paragraph 16 of the Lease Agreement. However, Plaintiffs are placed in a better position than expected if Defendants compensate Plaintiff for that amount plus repossession of the equipment.

The alternative would be to demand all payments due minus the value of the equipment. However, damages cannot be speculative. The Plaintiff "must prove his

---

[8]*J.J. White, Inc. v. Metropolitan Merchandise Mart*, 107 A.2d 892, 894 (Del.Super. 1954).

[9]*Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del.Super. 1982) (citing *J.J. White, Inc. v. Metropolitan Merchandise Mart*, 48 Del. 526, 107 A.2d 892 (1954)); *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

[10]Acceleration clauses and liquidated damage clauses are not the same thing, as Defendants contend.

damages with a reasonable degree of precision."[11] Reasonable estimates are permissible even if they lack mathematical certainty if the Court is given a reasonable basis to make a responsible estimate of damages."[12] Mr. Haines estimated the current value of the equipment to be in the range of $2,800 to $3,400. However, the Court does not find this evidence credible. Mr. Haines had little experience in this area and used only one of a number of techniques to estimate the equipments' value, and did not weigh all of the necessary criteria for valuation. The Court does find credible Mr. Owen's testimony as to the complexity of valuing copy and printer equipment.

Plaintiff asserts, and Defendants agree, that the equipment's value has depreciated significantly in value since the start of the Lease Agreement. Mr. Haines in fact testified on the stand that his company may or may not be interested in repossessing the equipment. The inference is that the equipment may be of little value to the company. However, the equipment still has value. The used-equipment industry, according to Mr. Owen, will sell, refurbish and sell, or refurbish and re-lease used equipment, the last being the most lucrative of options. Since neither party submitted evidence that provides the Court a means of reasonably determining the value of the equipment, the Court will not assign a value to the equipment. Hence, Plaintiff cannot both declare all unpaid Payments due under the Lease Agreement (Paragraph 16(a)) *and* retake possession of the equipment (Paragraph 16(c)) as the

---

[11] *Kronenberg v. Katz*, 872 A.2d 568, 609 (Del.Ch. 2004) (internal citations omitted).

[12] *In re Fuqua Indus., Inc.*, 2005 WL 1138744, at *8 (Del.Ch., May 6, 2005) (internal citations omitted).

sum total would exceed $200,000, allowing for exemplary damages.

Fourth, the Court finds that Plaintiff failed to mitigate damages[13] but that Defendants' use of the equipment negates some of the effect of this deficiency.

Fifth, the Court will grant Plaintiff costs and attorneys fees only for the Writ of Replevin. The Court generally will not award attorneys' fees and expenses incurred by the plaintiff in the prosecution of his claim, in the absence of fraud or the like, unless there is a statutory provision providing an exception.[14] Title 10 *Del.C.* § 3912 provides such an exception at the discretion of the Court, not to exceed twenty percent of the amount adjudged. Since Plaintiff failed to mitigate and to take prompt action after the Writ of Replevin Order, the Court will not award attorneys fees and costs beyond that which had already been determined for the replevin action.

Conclusion

Plaintiff is due the sum of $154,004 representing (a) $25,830 in rents that accrued prior to the filing of the Complaint (7 months), (b) $126,899 in the discounted value of the rents that accrued after the filing of the Complaint (38 months),[15] and (c) attorneys' fees in the amount of $1,275 per prior agreement at the

---

[13]The non-defaulting party is required to minimize damages. *Katz v. Exclusive Auto Leasing, Inc.*, 282 A.2d 866, 868 (Del.Super. 1971) (citing *Wise v. Western Union Telegraph Co.*, 181 A. 302 (1935)).

[14]*J.J. White, Inc. v. Metropolitan Merchandise Mart*, 107 A.2d 892, 894 (Del.Super. 1954).

[15]These values are based on Plaintiff's calculations presented in Post-Trial Brief on Behalf of Plaintiff CIT Technology Financing Services (Plaintiff's closing argument brief).

time of the Replevin Order.[16] Attorneys fees accrued after the Replevin Order are awarded at the rate of 5%.[17] Defendants are awarded ownership of the equipment. Plaintiff may submit an order incorporating the above within 15 days, with interest at the legal rate.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

---

[16] *See* Defendants' Revised Amended Rule 16 Pre-trial Stipulation and Order ¶ 7(VI) (agreed to by both parties at the pre-trial conference).

[17] *See* 10 *Del.C.* § 3912; *Rock v. Short*, 336 A.2d 219 (Del. 1975).