IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LEAF FINANCIAL CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ACS SERVICES, INC.,	)	**C.A. No. 07C-02-003 MJB**
	)	
and	)	
	)	
WILLIAM J. ADAMS, JR.,	)	
	)	
Defendants.	)	

Submitted: May 12, 2009
Decided: April 30, 2010

Upon Plaintiff's Motion for Summary Judgment.
GRANTED.

OPINION AND ORDER

Ronald J. Drescher, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Douglas A. Shachtman, Esquire, Douglas A. Shachtman & Associates, Wilmington, Delaware, Attorney for Defendants.

BRADY, J.

INTRODUCTION

Leaf Financial Corporation ("Leaf") moves for summary judgment in a claim of breach of a finance lease contract against ACS Services, Inc. ("ACS") and William Adams, Jr. ("Adams") (Adams and ACS collectively, "Defendants").

Upon reviewing the Motion, responses thereto, and additional submissions filed subsequent to oral arguments, this Court is fully advised on the matter and is prepared to issue its decision.

FACTS

On January 11, 2006, Leaf and ACS contracted for Leaf to purchase a "managed service program" system (the "System") from N-Able. Leaf leased the System to ACS in exchange for a monthly lease payment. Adams executed the Lease as Personal Guarantor, and therefore, guaranteed to remit all payments pursuant to the payment schedule. In accordance with the Lease, Leaf purchased the system, and it was delivered to ACS. Defendants maintain that the System did not function properly. ACS expended over one hundred hours trouble-shooting and working with N-Able to fix the issues

before "scrap[ping] the failed relationship"[1] in July 2006. ACS did not make any payments under the Lease.

Leaf is a finance and asset management company which lends money to businesses to purchase commercial equipment. Leaf does not manufacture, distribute, or supply the equipment it finances. Leaf also expressly disclaims any warranty, express or implied, in the merchantability or fitness of the equipment it finances. The first page of the Lease contains an explicit waiver of all warranties:

> The Equipment is being leased to you "as is." You acknowledge that we do not manufacture the Equipment and that you have selected the Equipment and the supplier based on your own judgment. **WE MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THE EQUIPMENT THAT IS THE SUBJECT OF THIS AGREEMENT. WE SHALL NOT BE RESPONSIBLE FOR ANY CONSEQUENTIAL OR INCIDENTAL DAMAGES. WE SHALL NOT BE LIABLE FOR ANY LOSS OF INJURY TO YOU OR TO ANY THIRD PERSON FOR PROPERTY, INCLUDING DIRECT, INDIRECT, CONSEQUENTIAL, INCIDENTAL AND SPECIAL DAMAGES CAUSED BY THE USE, OWNERSHIP, LEASE OR POSSESSION OF THE EQUIPMENT.** You agree to continue making Lease payments to us under this Lease, regardless of any claims you may have against the manufacturer or the supplier. We transfer to you for the term of this Lease any warranties made by the manufacturer or the supplier. No representation or warranty by the

[1] Defendants' Supplemental Response to Plaintiff's Motion for Summary Judgment, Ex. I.

> manufacturer or supplier is binding on us nor shall breach of any warranty relieve you of your obligation to us as provided herein.

There is another Lease Provision which is prominently titled "ARTICLE 2A RIGHTS AND REMEDIES" which states: "You agree that this Lease is a finance lease as that term is defined in Article 2A of the Uniform Commercial Code ("UCC"). You hereby agree to waive any and all rights and remedies granted to you by sections 2A-508 through 2A-522 of the UCC." UCC Sections 2A-508 through 2A-522 specify lessee defenses in light of a default by a lessor and are the precise sections that the Defendants rely upon in attempting to evade liability under the Lease.

According to the Lease, ACS's payment obligations were absolute and unconditional regardless of any problems with the quality of the leased goods. The Lease provides that if ACS defaulted on their payment obligations, the full balance could be immediately demanded.[2] In addition, the parties separately executed an Addendum to the Equipment Lease Agreement which specified that the Defendants have no right to assert failure of the underlying software in any action by Leaf to enforce the Lease:

> (a) This is an irrevocable Lease for the full term and cannot be cancelled for any reason. (b*) Lessee's obligation to make the*

[2] The Lease states in pertinent part: "If you default, we may require you to do any combination of the following: (1) immediately pay the present value of the remaining unpaid balance of the Lease…"

> *Lease payments is absolute, unconditional and independent and is not subject to any abatement, set-off, defense or counterclaim for any reason whatsoever, including equipment or systems failure, damage, loss or any other cause or problem*. (c) the Equipment is leased "as is"; Lessor makes no representation, guarantee, express warranty or implied warranty, including without limitation an implied warranty of merchantability or fitness for a particular purpose; if the equipment does not operate as represented by the Vendor or is unsatisfactory for any other reason, Lessee shall make any such claims solely against the Vendor and not Lessor; and no representation, guarantee or warranty by the Vendor is binding on Lessor nor shall any breach thereof relieve Lessee of its obligations to Lessor hereunder or under the Lease. (emphasis added).

THE PARTIES' CONTENTIONS

Defendants oppose Leaf's Motion for Summary Judgment. Specifically, Defendants argue the following: (1) under the Uniform Commercial Code, Article 2A, Defendants are relieved from all obligations under the transaction because the merchandise was defective; (2) Leaf is not entitled to assert a finance lease under Article 2A because the parties formed a partnership relationship[3] and/or ACS did not accept the goods; (3) alternatively, Defendants revoked acceptance of the computer system; (4) further discovery is needed; and (5) Plaintiff has requested an excessive amount of attorney's fees.

[3] In support of this argument, Defendants state that N-Able's promotional letter presented the MSP N-abler partnership proposal and that N-Able's Licensing Agreement, Partner Support Service Level Agreement, and brochures repeated the partnership agreement.

Leaf argues that Defendants have no valid grounds to defend against the breach of contract action. Leaf contends that it effectively disclaimed all implied warranties of merchantability and fitness for a particular purpose in the warranty language contained in the lease, and that Defendants waived their defense of non-acceptance or revocation of acceptance when they signed the lease. Leaf contends it relied on this waiver provision in entering into this transaction and advancing funds which enabled the Defendants to purchase the software. Additionally, Leaf argues that Defendants agreed that they would have no right to assert failure of the underlying software in any action by Leaf to enforce the Lease and specifically agreed to make payments required under the Lease whether or not the software operated as expected. Defendants agreed that any remedies available for defects in the software would be asserted solely against N-Able, the software vendor.

Leaf argues that Defendants' understanding as to whether a partnership agreement was created is irrelevant, as it is based solely on parol evidence, which should not be considered and that the plain and unambiguous terms of the Lease indicate that no such partnership was contemplated by the parties.

STANDARD OF REVIEW

The standard for granting summary judgment is high.[4] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[5] "In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party."[6] "When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted."[7]

ANALYSIS

1. The parties entered into a finance lease.

A finance lease is a three-party transaction in which the lessee selects goods from a supplier or manufacturer. The lessee then contracts to have a third party lessor purchase the goods and lease them to the lessee. Delaware adopted Article 2A of the UCC, which defines finance leases and how they are created.[8] Finance leases are created either within the parameters of 6

[4] *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).
[5] Super.Ct.Civ.R. 56(c).
[6] *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).
[7] *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).
[8] 6 *Del. C.* §2A-103(1)(g).

Del. C. §2A-103 or by agreement of the parties.[9]

Defendants claim the Lease is not a finance lease because they were never provided with a copy of the Lease[10] as required by 6 *Del. C.* §2A-103(g)(iii)(A). Defendants also argue that a finance lease was not formed because a finance lease must be based upon the premise that the lessor has no participation in the underlying relationship between the supplier and the seller. Defendants, however, do not provide any Delaware caselaw to support this assertion. Defendants contend that N-able established a "partnership" relationship between itself, its customers (including ACS) and the funding source, Leaf. Defendants rely upon Adams's Affidavit, brochures, and other documents to support the argument that a partnership relationship existed.

Defendants' argument that the Lease is not a finance lease because they were never provided with a copy overlooks the fact that 6 *Del.C.* §2A-103(g)(iii)[11]

only requires that one of the four listed elements be satisfied in order to

[9] *See* Comment to 6 *Del.C.* § 2A-103. "If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify."
[10] Defendants, although claiming they did not receive a copy of the Lease, do not dispute that the Lease was executed and faxed back by its authorized representative, Adams.
[11] *See supra*.

create a finance lease.[12] The statutory language indicates the following elements:

> "Finance lease" means a lease with respect to which: (i) The lessor does not select, manufacture or supply the goods; (ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and (iii) One of the following occurs: (A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract; (B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract; (C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or (D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing: (1) Of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (2) That the lessee is entitled under this Article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (3) That the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and

limitations of them or of remedies.[13] (emphasis added).

The Court finds that the statutory requirements for creating a finance lease exist in this case. First, Leaf did not select, manufacture or supply the goods. Second, Leaf acquired the goods or the right to possession and use of the goods in connection with the Lease. Leaf would not have otherwise acquired the software from N-Able. Third, ACS ordered the software from N-able.[14]

Even if a lease does not meet Delaware's statutory definition of a finance lease, the parties may create such a lease by agreement.[15] In this case, this Lease was signed by Adams and explicitly states the following language under subheading Article 2A Rights and Remedies:

> "You agree that this Lease is a finance lease as that term is defined in Article 2A of the Uniform Commercial Code ("UCC"). You hereby agree to waive any and all rights and remedies granted to you by Sections 2A-508 through 2A-522 of

[13] Defendants make no argument that subsections (B) through (D) are not satisfied.

[14] ACS filed a third-party complaint against N-Able Technologies ("N-Able) for breach of contract. N-Able filed a Motion to Dismiss under Superior Court Rule 12(b)(2). Exhibit A to N-Able's Motion to Dismiss for Lack of Personal Jurisdiction is a copy of the purchase order signed by ACS and N-able.

[15] 6 *Del.C.* § 2A-103, Official Comment "g."

the UCC."[16]

The Court finds that a valid finance lease was formed between ACS and Leaf that the parties explicitly agreed to create such a Lease, and further, that they understood, at the time of signing that they were, in fact, creating such a lease.

2. There was no partnership.

The Court rejects Defendants' argument that a partnership relationship was formed. Defendants rely upon Adams's Affidavit which indicates that "from the beginning, N-Able promoted a partnership relationship between itself, its customers, and its funding source, Leaf."[17] The plain and unambiguous terms of the Lease indicate that no partnership relationship was contemplated by the parties. ACS signed the lease agreement which expressly identified the parties to the lease and the nature of the lease as a finance lease. Further, to find a partnership, the Court must consider parol evidence. The Lease provides it is a fully integrated agreement,[18] and

[16] 6 *Del. C.* § 2A-107 provides that any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.
[17] Defendants' Supplemental Response to Plaintiff's Motion for Summary Judgment, p. 5.
[18] "This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and incorporates all representations made in connection with negotiations of the Lease. The terms hereof may not be terminated, amended, supplemented or modified orally, but only by an instrument duly authorized by each of the parties hereto."

therefore the Court will not consider parol evidence.[19]

The contract language is a clear and unambiguous expression of agreement which should be upheld on its face.[20] Finally, the attempt to contradict the integrated agreement's terms represented in the Lease is forbidden under the UCC.[21]

3. The Defendants' promises under the Lease became irrevocable after accepting the goods.

Under 6 *Del. C.* §2A-515, a lessee's promises, in a non-consumer finance lease, become irrevocable upon acceptance[22] of the goods.[23] This so-called waiver of defense clause is strictly enforceable as a matter of law for three reasons.[24] First, in a finance lease, the lessor's sole obligation is financial; the lessee should look to the supplier for any problems with the product. Secondly, once the lessor pays for the goods, the lessor's

[19] *Addy v. Piedmonte*, 2009 WL 707641 (Del. Ch.)
[20] Similarly, Delaware courts interpret clear and unambiguous contract terms according to their ordinary and usual meaning." *Lorillard Tobacco Co. v. Am. Legacy Found*., 903 A.2d 728, 739 (Del.2006); *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1195 (Del.1992).
[21] 6 *Del. C.* §2A-202. Final written Expression: Parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.
[22] "Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods when the lessee signifies or acts with respect to the goods in a manner which shows that the goods are conforming or that the lessee will take or retain them despite their nonconformity; or the lessee fails to make an effective rejection of the goods." 6 Del. C. §2A-515
[23] 6 *Del. C.* § 2A-407(1).
[24] *In re. O.P.M. Leasing Servs.*, 21 Bankr. 993, 1006 (Bankr. S.D. N.Y. 1982).

obligation is fulfilled. Finally, waiver of defense clauses are essential to the equipment leasing industry as a guaranteed means of security for the lessor's loan.[25]

Here, Defendants argue that they are relieved from all obligations under the Lease because the merchandise was defective. Defendants argue they are authorized to rely upon the warranty sections of the UCC, Sections 6 *Del. C.* §2A-212[26] and 6 *Del. C.* §2A-213.[27] Defendants also argue that they are authorized to rely upon the acceptance and revocation provisions of the UCC, Sections 6 *Del. C.* §2A-508, 6 *Del. C.* §2A-509 and 6 *Del. C.* §2A-517.[28]

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[25] Williston on Contracts, §53:28. *See also, Lyon Financial Services, Inc. v. Woodlake Imaging, LLC*, 2005 WL 331695, (E.D.Pa.2005); *Colorado Interstate Corp. v. The CIT Group/Equipment Financing, Inc*., 993 F.2d 743 (10th Cir.1993); *The Philadelphia Savings Fund Soc. v. Deseret Management Corp*., 632 F.Supp. 129 (E.D.Pa.1985).

[26] Section 6 *Del. C.* § 2A-212 provides that except in a finance lease, a warranty that the goods will be merchantable in a lease contract if a lessor is a merchant with respect to goods of that kind.

[27] Section 6 *Del. C.* § 2A-213 provides that words or conduct relevant to the creation of an express warranty or words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of Section 2A-202 on patrol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

[28] Under these Sections, if a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, or a lessee rightfully rejects the goods or justifiably revokes acceptance of the goods, then with respect to the goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired, the lessor is in default under the lease and the lessee may cancel the lease contract, recover paid rent and security, cover and recover damages for the goods affected, and exercise any other rights or pursue any other remedies provided in the lease contract.

The Court, however, finds that Defendants are not entitled to rely upon the warranty provisions in UCC Sections 6 *Del. C.* §2A-212 and 6 *Del. C.* §2A-213 because the Lease, which was signed by the parties, includes an explicit waiver of all warranties. Under 6 *Del. C.* §2A-214, equipment lessors may disclaim all implied warranties:

> 2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability," must be in writing, and must be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".
>
> 3) Notwithstanding subsection (2), but subject to subsection (4),
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous…

The language in the Lease is bold, capitalized, and conspicuously presented in a section entitled "**NO WARRANTY."** The language informs the lessee that it is taking the equipment "as is" specifically without any warranty. This language also transfers to the lessee all warranty claims which may exist against the manufacturer or supplier.

Defendants are also not entitled to rely upon UCC Sections 6 *Del. C.* §2A-508, §2A-509 and §2A-517 because they specifically waived these rights to do so under the Lease. There is a provision in the Lease prominently titled "ARTICLE 2A RIGHTS AND REMEDIES" which states that ACS "hereby agree[s] to waive any and all rights and remedies granted to [ACS] by Sections 2A-508 through 2A-522 of the UCC." Defendants have cited no authority which would support relieving them of their obligation to comply with this term. Furthermore, Defendants separately executed an addendum to the equipment lease, which includes the provision that Defendants would have no right to assert failure of the underlying software in any action by Leaf to enforce the Lease. Given these waiver provisions, the circumstances or terms of acceptance are irrelevant. Defendants specifically agreed to make payments under the Lease whether or not the software operated as expected.

In addition to waiving their right to rely upon the non-acceptance provisions under the UCC, ACS failed to notify Leaf that it rejected the goods within the timeframe established by the Lease. The Lease provided that the "lease term will commence when the Equipment is delivered and installed. Unless you notify us otherwise in writing within 7 days of installation, you unconditionally accept the equipment." The software was

delivered on January 16, 2006. The installation date was scheduled for February 9, 2006. Defendants contend additional time was required beyond that date because the program had to be installed at client sites as well to assure the product worked properly. However, ACS did not notify Leaf that it rejected the goods until July 11, 2006. Even if some accommodations were made to expand the term "installation" to include other sites, Defendants were aware long before July 11, 2006 that there were difficulties and could have made proper notification. Therefore, ACS accepted the goods under the terms of the Lease.

The Court requested additional information from the parties on August 25, 2009 regarding: (1) the date on which the product was delivered to ACS by N-Able; (2) whether ACS notified Leaf in writing within seven days after delivery that it did not accept the goods; and (3) whether Leaf required ACS to provide Leaf with a signed delivery and acceptance certificate. While the parties could, or would, not agree on any of the above, the record is sufficiently established to allow the Court to determine the date of delivery was at least more than seven days prior to any notification in writing, to Leaf, of any problems. Additionally, it appears Leaf may not have required a signed delivery and acceptance certificate. While Leaf did

not require such a certificate, the right to require one belonged to Leaf, and the Lease affords no remedies to the Defendants.

CONCLUSION

The Court finds that the Lease was clearly a finance lease. Defendants waived all warranty claims and any and all rights and remedies, granted to Defendants, outlined in UCC Sections 2A-508 through 2A-522. ACS failed to notify Leaf that it rejected the goods within the timeframe established by the Lease. Therefore, they accepted the goods, and the promises made by Defendants under the Lease became irrevocable.

There is no genuine dispute of material fact that ACS and Adams, as a personal guarantor, defaulted on the Lease. Defendants remain responsible to Leaf for monies as a result of the default, including costs in pursuing the instant action. Since there are no genuine disputes of material fact in this matter, Plaintiff's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/

M. Jane Brady
Superior Court Judge