FINANCIAL PACIFIC LEASING, LLC, *Respondent*, v. LAW OFFICES OF DAVID A. SHARP, P.A., ET AL., *Appellants*.

NO. 67539-7-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2012 Wash. App. LEXIS 2423

September 11, 2012, Oral Argument
October 15, 2012, Filed

SUBSEQUENT HISTORY: Reported at *Fin. Pac. Leasing, LLC v. Law Offices of David A. Sharp, PA, 2012 Wash. App. LEXIS 2472 (Wash. Ct. App., Oct. 15, 2012)*

PRIOR HISTORY: [*1]

Appeal from King County Superior Court. Docket No: 10-2-30494-1. Judgment or order under review. Date filed: 07/29/2011. Judge signing: Honorable J Wesley Saint Clair.

COUNSEL: For Appellant(s): *Christopher Eller Allen*, Morton McGoldrick PS, Tacoma, WA.

For Respondent(s): *Brian Lawrence Green*, *Ryen L Godwin*, McGavick Graves, P.S., Tacoma, WA.

JUDGES: Authored by Linda Lau. Concurring: C. Kenneth Grosse, Mary Kay Becker.

OPINION BY: Linda Lau

OPINION

¶1 LAU, J. -- Financial Pacific Leasing, LLC (FPL) claims David Sharp defaulted on payments due under a lease agreement related to a copier for his law firm. Because fact issues remain on whether Sharp accepted the copier under the lease agreement and on Marianne Sharp's personal liability, we reverse the summary judgment order and the attorney fees award and remand for trial.

FACTS

¶2 In April 2010, Direct Credit Funding, Inc., leased a Ricoh copier to David Sharp and the Law Offices of David A. Sharp, PA, a Florida corporation. Sharp selected ImageSource, Inc., as the supplier. Direct Credit later assigned its interest in the lease to FPL. As part of the lease agreement, Sharp signed a "Delivery and Acceptance Authorization." (Boldface and capitalization omitted.) Among other things, [*2] the authorization empowered FPL to "[v]erify by phone ... that the Equipment has been examined by Lessee and is in good operating order and condition ... and that Equipment is accepted by Lessee for all purposes under the Lease." The authorization also authorized FPL to "make payment to the Vendor [ImageSource] upon completion of the [verification certificate]."

¶3 FPL funding coordinator Cindy Grover's duties included contacting FPL customers to "confirm that the customer received the equipment covered by the lease agreement, that the equipment is in satisfactory condition, and that the customer authorizes FPL to make payment to the vendor." While speaking with the customer, Grover would complete a "verification certificate"[1] to memorialize the conversation.

1 The one-page verification certificate consisted of preprinted questions and statements organized under one of three headings, "Billing," "Equipment," and "Invoicing." Among other things, the verification certificate sought personal data about the customer, information regarding the vendor and the type and condition of the equipment leased, and confirmation regarding certain invoicing details. Grover apparently completed the verification [*3] certificate by typing

the customer's responses into the blank spaces accompanying each preprinted question.

¶4 On April 22, 2010, Grover phoned Sharp at 12:30 p.m. to confirm his acceptance of the copier. While speaking with Grover, Sharp saw a truck delivering a large box to his building. Believing that the box contained his copier, Sharp told Grover that the equipment was "just being delivered." According to Grover's verification certificate, Sharp specifically confirmed that the copier "has been received, installed and is operating satisfactorily." Grover's verification certificate also indicates that Sharp "authorized FPL to make payment to the Vendor(s) [ImageSource] of this transaction." Later that day, FPL issued a $25,145 check in payment of ImageSource's invoice for the copier.

¶5 ImageSource never delivered the copier. Sharp's declaration testimony claims the failure to deliver came to light after he tried to contact ImageSource and its sales representative Gary Merrill. On May 21, 2010--nearly a month after Grover paid the ImageSource invoice--Sharp mailed FPL a letter demanding cancellation of the lease "for lack of performance on the part of the vendor." FPL did not respond. Sharp [*4] repeated his demands in a second letter dated June 11, 2010. The record does not reveal whether FPL responded to the second letter.

¶6 With the exception of an initial $1,720 payment, Sharp failed to make any of the payments due under the lease agreement. In August 2010, FPL sued Sharp to recover all delinquent payments.[2] FPL successfully moved for summary judgment on its breach of contract claim. Sharp appeals.

2 FPL exercised its right under the lease agreement to accelerate outstanding payments.

ANALYSIS

¶7 Sharp contends the lease agreement is unenforceable for lack of consideration. He argues in the alternative that a genuine issue of fact remains as to whether he "accepted" the copier for purposes of the lease agreement. He claims a right to cancel the lease at any time before acceptance of the copier. Finally, he argues the trial court erred by granting summary judgment against his wife, Marianne Sharp, because a material fact issue remains as to whether she signed a personal guarantee. FPL argues the lease agreement constitutes a valid bilateral contract and that Sharp accepted the copier during his April 22, 2010 phone conversation with Grover. FPL also claims Sharp failed to raise a [*5] genuine issue of fact as to whether Marianne Sharp signed the personal guarantee.

Standard of Review

¶8 When reviewing a summary judgment order, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)*. Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*; *Jones, 146 Wn.2d at 300-01*.

Consideration

¶9 Sharp argues that the lease agreement was unenforceable because "there has been an absolute failure of consideration" where he "never received the copier for which he bargained." Appellant's Br. at 9-10. FPL responds that consideration supports the agreement because FPL promised to lease Sharp the copier, and Sharp promised to pay rent.

¶10 Every contract must be supported by consideration to be enforceable. *King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)*. "Whether a contract is supported by consideration is a question of law and may be properly determined by a court on summary judgment." *Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 195, 840 P.2d 851 (1992)*. [*6] Washington recognizes "bilateral" and "unilateral" contracts. *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 583, 790 P.2d 124 (1990)*. In a bilateral contract, "'it is not performance which makes the contract binding, but rather the giving of a promise by the one party for the promise of the other.'" *Multicare, 114 Wn.2d at 584, 790 P.2d 124* (quoting *Higgins v. Egbert, 28 Wn.2d 313, 318, 182 P.2d 58 (1947)*). In other words, "[a] promise for a promise is sufficient consideration to support a contract." *Omni Group, Inc. v. Seattle-First Nat'l Bank, 32 Wn. App. 22, 24-25, 645 P.2d 727 (1982)*.

¶11 The contract at issue in this case is a statutory finance lease governed by U.C.C. article 2A.[3] A finance lease arises from a three-party transaction involving a lessor, a lessee, and a supplier. The lessor's role is to finance the transaction. The lessor "does not select, manufacture, or supply the goods[.]" *RCW 62A.2A-103(1)(g)(i)*. The lessee selects the goods and chooses the supplier. The lessor then agrees to "acquire[ ] the goods or the right to possession" and to lease those goods to the lessee in exchange for rent.[4] *RCW 62A.2A-103(1)(g)(ii)*.

3 The lease agreement states: "[I]t [*7] is the intent of both parties to this Lease that it qualify as a statutory finance Lease under Article 2A of the Uniform Commercial Code." The parties agree that the lease qualifies as a statutory fi-

nance lease under Washington law. *See* Appellant's Br. at 11; Resp't's Br. at 10 n.5.

4 The resulting lease is a financing device and does not give rise to implied warranties of merchantability or fitness for a particular purpose running from the lessor to the lessee. *See RCW 62A.2A-212* and *RCW 62A.2A-213*; *see also* 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 13-3, at 12 (4th ed. 1995).

¶12 Consideration in a statutory finance lease agreement thus takes the form of a promise for a promise--the lessor promises to acquire the goods or the right of possession from the supplier and to lease them to the lessee, and the lessee promises to pay rent. Here, FPL promised to acquire a copier from ImageSource and to lease it to Sharp and, in return, Sharp promised to make monthly rental payments. We conclude that consideration supported the lease agreement.

Acceptance

¶13 Sharp next argues that even if consideration supported the lease agreement, it was "subject to cancellation" until he accepted [*8] the copier. Appellant's Br. at 11. According to Sharp, since he never accepted the copier, he had a right to cancel the lease. Appellant's Br. at 17. FPL responds that Sharp accepted the copier under the terms of the authorization and that such acceptance rendered Sharp's obligations under the lease agreement irrevocable.

¶14 Under the Uniform Commercial Code (Code), a lessee's promises under a finance lease "become irrevocable and independent upon the lessee's acceptance of the goods." *RCW 62A.2A-407*. This so-called "hell or high water" provision renders the lessee's obligation to pay rent absolute upon acceptance of the goods. If the goods are unsuitable or defective, the lessee's obligation to pay rent remains.[5] *See* 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 13-3, at 10-11 (4th ed. 1995).

5 No Washington court has yet interpreted *RCW 62A.2A-407*. However, other courts have consistently enforced "hell or high water" provisions in finance leases. *See, e.g., C&J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011)*. Here, the lease agreement does not contain an express "hell or high water" provision. However, the official comments to U.C.C. § 2A-407 explain that the "hell [*9] or high water" provision "is self-executing; no special provision need be added to the contract." U.C.C. § 2A-407 cmt. 1.

¶15 The Code provides that acceptance

> occurs after the lessee has had a reasonable opportunity to inspect the goods and:
>
> (a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or
>
> (b) The lessee fails to make an effective rejection of the goods ... .

RCW 62A.2A-515.

¶16 Sharp argues that the Code definition controls. *See* Appellant's Br. at 14. He further argues that because he did not have a reasonable opportunity to inspect the copier, he could not have "accepted" it for purposes of the Code definition. Appellant's Br. at 17. Finally, he argues that since he never accepted the copier, the "hell or high water" provision of *RCW 62A.2A-407* never took effect. Appellant's Br. at 17.

¶17 Sharp improperly relies on the Code definition of "acceptance" because the lease agreement expressly waives "all rights and remedies conferred by U.C.C. 2A-508 through 2A-522." Instead, Sharp is bound by the lease agreement's waiver clause. [*10] *RCW 62A.1-302(a)*[6] provides that parties are free to vary the Code's default rules by agreement so long as the agreement does not disclaim the basic obligations of good faith, diligence, reasonableness, and care.[7]

6 Formerly codified at *RCW 62A.1-102(3)*.

7 Sharp argues for the first time in his reply brief that the Authorization itself is "void and unenforceable because it did not allow a reasonable time for inspection ... ." Appellant's Reply Br. at 4. He also argues that "Financial Pacific's acceptance process should also be disregarded because it is substantively unconscionable." Appellant's Reply Br. at 6. We decline to reach these arguments because "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)*.

¶18 Accordingly, we look to the terms of the authorization (and not to the Code) to determine whether Sharp "accepted" the copier for purposes of the lease agreement. The authorization states:

> Lessee's signature authorizes Lessor to verify by phone with a representative of Lessee the date the Equipment was accepted by the Lessee; the Equipment description, including [*11] the serial numbers; the schedule of lease payments; that all necessary installation has been completed; that the Equipment has been examined by Lessee and is in good operating order and condition and is in all respects satisfactory to Lessee and that Equipment is accepted by Lessee for all purposes under the Lease. This information will be recorded on an Inspection/Verification Certificate, a copy of which will be forwarded to Lessee upon completion by Lessor. Lessee hereby authorizes Lessor to either insert or correct the Lessor and/or Vendor name(s), Equipment description, Equipment location and schedule of Lease payments. Lessee hereby authorizes Lessor to make payment to the Vendor upon completion of the Inspection/Verification Certificate.

FPL argues that Sharp accepted the copier under the authorization's acceptance clause, as evidenced by his April 22, 2010 conversation with Grover and memorialized by Grover's verification certificate. The verification certificate indicates that as of April 22, 2010, Sharp's copier had been "received, installed and is operating satisfactorily." The certificate also states that Sharp "authorized FPL to make payment to the Vendor(s) of this transaction." [*12] Grover's handwritten initials appear next to her typewritten name at the bottom of the certificate.[8]

> 8 Sharp's subsequent letters to FPL corroborate Grover's certifications in part. In a May 21, 2010 letter, Sharp writes, "I was 'duped' into signing off on the contract [lease agreement], and telling your organization that I had received the equipment by a promise from [ImageSource agent] Mr. Merrill that it would be delivered that same day." Similarly, in a June 11, 2012 letter, Sharp writes, "I did verify that I had received the equipment because I had been assured that the machine was 'on the truck' and would be delivered 'within a couple hours.'"

¶19 In contrast, Sharp's declaration states, "The individual from Financial Pacific Leasing inquired whether the copier had been delivered. I explained to this person that it was *just being delivered*." (Emphasis added.) He argues that this statement fails to establish uncontroverted "evidence of acceptance." Appellant's Br. at 14. Construing the record in the light most favorable to Sharp, we conclude that a disputed issue of material fact remains on the key question of whether Sharp accepted the copier under the terms of the lease agreement. [*13] The trial court erred in granting FPL's summary judgment motion on its breach of contract claim.

Summary Judgment Against Marianne Sharp

¶20 The trial court entered judgment against David Sharp, his law office, and Marianne Sharp, jointly and severally. Sharp argues that the court erred in entering judgment against Marianne Sharp because she did not personally guarantee the lease agreement. Appellant's Br. at 3; *see also* Appellant's Reply Br. at 10. FPL argues that no genuine issue of fact exists as to whether Marianne Sharp signed the guarantee. FPL points to Marianne Sharp's handwritten signature, Social Security number, and home telephone number, each of which appears on the appropriate lines of her personal guarantee. In contrast, Marianne Sharp states in her declaration: "I did not sign [the guarantee]." Similarly, David Sharp's declaration asserts, "[Marianne Sharp] did not sign that guarantee ... ." We conclude a material fact issue remains on Marianne Sharp's personal liability.

ATTORNEY FEES AND COSTS ON APPEAL

¶21 FPL requests attorney fees under *RAP 18.1* and costs under *RAP 14.2*. In light of our decision to remand, we deny FPL's request.

CONCLUSION

¶22 Because the record establishes material [*14] disputed facts on David Sharp's "acceptance" of the copier under the terms of the lease agreement and Marianne Sharp's personal liability, we reverse the trial court's summary judgment order and attorney fees award and remand for trial.

GROSSE and BECKER, JJ., concur.

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