[**2] **WELLS FARGO FINANCIAL LEASING, INC., Plaintiff, - against - KO-KOON, INC., d/b/a KOKOON INC., Defendant. Index: 155239/2012**

155239/2012

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 384*; *2013 NY Slip Op 30204(U)

January 25, 2013, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] HON. CAROL ROBINSON EDMEAD, J.S.C.

OPINION BY: CAROL ROBINSON EDMEAD

OPINION

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for breach of an equipment lease agreement, plaintiff Wells Fargo Financial Leasing, Inc. ("plaintiff"), moves (1) pursuant to *CPLR 3211* to strike the affirmative defenses and counterclaims of the defendant Kokoon, Inc., d/b/a Kokoon Inc. ("defendant") and (2) for summary judgment (*CPLR 3212*) in its favor.

Background Facts

This action arises out of an equipment lease between plaintiff, a financial services provider, and defendant, a clothing design company.

On June 8, 2011, defendant, through its CEO Vivian Koo, entered into an equipment lease agreement (the "Lease") with plaintiff for the lease of three copy machines. Pursuant to the Lease, defendant was required to make 63 monthly payments of $1,097.00.

The Lease also provided that plaintiff is a "separate and independent" entity from the supplier or vendor of the equipment (Lease, ¶3) and listed EZ Docs Vista Digital Solutions as the "Supplier."

The Lease further provided that plaintiff was leasing the equipment to defendant "as is"; [**3] defendant's duty to perform under the Lease was "absolute [*2] and unconditional" and no claims by defendant could be made against plaintiff with respect to the equipment (Lease, ¶3); defendant alone selected the equipment; plaintiff disclaimed all applicable warranties; and defendant waived all defenses against plaintiff (see, Lease, ¶6).

Shortly thereafter, the then existing copy machines were removed from defendant's premises and on June 9, 2011, the new equipment was delivered to defendant and its receptionist (Kim San ("San")) signed the "Delivery & Acceptance Certificate" (the "Acceptance Certificate") (exhibit G).

According to plaintiff, defendant made eight payments pursuant to the Lease through January 2012, and thereafter failed to make any subsequent payments and, pursuant to paragraph 11 of the Lease, all of defendant's payment obligations under the Lease were accelerated and became immediately due and payable.

Thus, plaintiff commenced this suit to recover the balance of lease payments pursuant to the Lease in the sum of $60,325.80; for the residual value of the equipment ($5,540.40) plus interest at the rate of one and one-half percent per month from the date of default, February 14, 2012; taxes ($5,845.63); a late fee ($932.52); insurance [*3] payments ($273.13); and attorneys' fees.

Defendant answered and interposed affirmative defenses of *unclean hands* and *defective equipment*, and two counterclaims: for *defective equipment* and *fraud*. In its counterclaims, defendant alleged that at the relevant time prior to signing the lease with plaintiff, defendant had in its possession certain copy machines pursuant to a

lease agreement with another entity, "CIT." Some time in June, 2011, a non-party Timothy Clarkin ("Clarkin") allegedly acting on behalf of a non-party EZ Docs and also as an agent of Wells Fargo, offered to "buy out" the CIT lease and [**4] replace its existing copiers with new, better ones, if defendant signed a new lease with plaintiff (Wells Fargo). Relying on Clarkin's oral representations, defendant's president Vivian Koo, executed the Lease agreement with plaintiff. It is also alleged that at some point after the delivery, defendant discovered that the copiers were of a different model than agreed and that defendant's payment obligations under the lease with CIT remained in effect.

In moving for summary judgment, plaintiff argues that no issues of fact exist requiring a trial. The Lease is a finance lease, governed by [*4] Article 2-A of the Uniform Commercial Code ("UCC"), and pursuant to the *UCC §2-A-407*, upon a lessee's acceptance of the equipment, its promises to a lessor become irrevocable, not subject to cancellation or modification. By the express terms of the Lease, defendant and the vendor agreed upon the equipment to be provided and the price for the equipment; plaintiff specifically relied on defendant's representations in the Acceptance Certificate; defendant's duty to perform under the Lease is "absolute and unconditional"; and defendant cannot make any claims against plaintiff with respect to the equipment (Lease, ¶¶3; 6).

Further, argues plaintiff, none of defendant's defenses or counterclaims have merit.

The first affirmative defense of *unclean hands* should be stricken because it is not properly pleaded pursuant to *CPLR 3016 (b)*; does not give plaintiff proper notice pursuant to *CPLR 3013*; and, it is an equitable defense, unavailable in an action exclusively for damages.

The second and third defenses of *defective equipment* likewise should be stricken, because plaintiff was merely a funding source and did not manufacture or provide any warranties with respect to the equipment; and defendant [*5] waived all defenses against plaintiff by the express terms of the lease. Furthermore, defendant signed the Acceptance Certificate and plaintiff relied [**5] on defendant's representation in the Lease and the Acceptance Certificate. Furthermore, defendant's payments for eight months constitute ratification of its obligation under the lease.

Further, defendant's *first counterclaim* (defective equipment) contains the same allegations as the second and third affirmative defenses and thus, is without merit. The *second counterclaim* (fraud), asserting that certain of plaintiff's employees represented to defendant that defendant's other equipment lease with another entity, CIT, would be paid off, is likewise without merit since Clarkin or his associates have never been employees or representatives of plaintiff; rather, they were employed by the supplier/vendor EZ Docs, which defendant alone selected; and plaintiff was not a party to and was not aware of any alleged representations made by the vendor. And finally, pursuant to paragraph eleven of the Lease, plaintiff is entitled to reasonable attorney's fees.

Defendant opposes the motion, arguing that plaintiff is not entitled to summary judgment because [*6] the Lease is not a "finance agreement" within the meaning of the UCC because defendant did not receive a contract between plaintiff and the vendor as required by the *UCC §2-A-103 (1)(g)*. And, the equipment was not "accepted" by defendant so as to invoke the "hell or high water" provision of the *UCC §2-A-407*. Defendant's receptionist did not have authority to make any of the representations contained in the Acceptance Certificate or to bind the corporate defendant to the statements contained therein. And, defendant did not have a reasonable opportunity to inspect the equipment.

Further, upon inspection of the machines by CEO Koo and defendant's president Stacey Perlick ("Perlick") immediately following the delivery of the wrong model machines, Perlick and San contacted the vendors and plaintiff to complain and to demand that new, conforming [**6] machines be delivered. Defendant continued to make the lease payments despite the fact that the machines did not work, based on the vendors' promises to deliver the "right" machines soon.

Defendant further contends that the Lease is unconscionable, because it contains onerous terms; it improperly excludes many of the warranties; it is barely legible, [*7] consisting of two pages of single-line type blurry text; it was signed by defendant upon the representation of Clarkin [of EZ Docs] that he was an agent of the plaintiff;[1] and defendant relied on Clarkin's representation that the existing lease with CIT would be "bought out."

> 1 Defendant also notes that Clarkin's business associates were recently arrested in Nassau County for "doing exactly what they did to the defendant."

In reply, plaintiff argues that the Lease is a finance lease within the meaning of the *UCC §2-A-103(1)(g)(iii)(D)*. It is undisputed that plaintiff did not manufacture the equipment and defendant itself selected the supplier; it is not a consumer lease, providing that "the Equipment will be used solely for commercial purposes and not for personal, family or household purposes" and defendant instructed plaintiff to purchase the equipment from EZ Docs, whose name is written on the top of the Lease document.

Furthermore, paragraph six of the Lease specifically provides:

> "You acknowledge that You are aware of the name of the Supplier of each item of Equipment and You may contact the Supplier(s) for an accurate and complete statement of those promises and warranties (if any), [*8] including any disclaimers and limitations of them or of remedies."

Pursuant to *UCC §2A-407*, defendant's promise to perform under the Lease is irrevocable. In addition, pursuant to the Lease, defendant's obligations are absolute and unconditional. And even if the Lease does not meet the UCC 2-A requirements for a financial lease, courts permit parties to designate it as such by agreement.

[**7] Plaintiff maintains that defendant unequivocally accepted the equipment as defendant's receptionist signed the Certificate and, as stated in the Verbal Verification Checklist (exhibit B), plaintiff spoke with defendant's CEO Koo by telephone and she confirmed, among other things, that the equipment was delivered and installed on June 9, 2011 (exhibit C). Plaintiff also submits notes of the telephone calls dated June 13 and 14, 2011, five days after the delivery, showing that plaintiff spoke with Koo and defendant's receptionist San, both of whom confirmed the delivery and receipt of the equipment and Koo authorized plaintiff to commence the Lease. Furthermore, defendant ratified the Lease agreement by making payments in the course of eight months.

As to the defenses, defendant has waived the *unconscionability* [*9] defense as it did not assert it in its answer, pursuant to *CPLR 3018 (b)*. Furthermore, the Lease does not violate law or public policy so as to be unconscionable. Defendant did not demonstrate that it lacked a meaningful choice as to whether to enter into the Lease or, that Lease terms unreasonably favor one party. Defendant selected the equipment and the supplier (EZ Docs) and requested that plaintiff finance defendant's use of the equipment. And, the restrictions on the text font size only pertain to consumer leases.

That defendant was not satisfied with the copiers is irrelevant for the purposes of the Lease, as plaintiff was only obligated to provide funds for defendant to obtain the equipment and defendant's obligation to pay is not contingent on its satisfaction with the equipment.

Further, plaintiff had no knowledge of defendant's existing lease with CIT and, by the express terms of the Lease, plaintiff is not a party to any agreement between defendant and the suppler (EZ Docs). And, EZ Docs has never been plaintiff's agent or representative and EZ Docs's employees are not plaintiff's employees.

[**8] Finally, the Lease properly excluded warranties in accordance with *UCC §2A-214 (4)* [*10] that the disclaimer be conspicuous, since the first two sentences are in bold capital letters (*see* exhibit D). And lastly, pursuant to the Lease, plaintiff is entitled to reasonable legal fees.

Discussion

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (*CPLR §3212 [b]*). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]*; *Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]*; *Silverman v Perlbinder, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]*).

Plaintiff has met its *prima facie* burden of establishing its entitlement to judgment as a matter of law by submitting the Lease, the Certificate of Acceptance and an Affidavit of nonpayment by its employee Peter G. Sullivan (*see Preferred Capital, Inc. v PBK, Inc., 309 AD2d 1168, 765 NYS2d 405 [4th Dept 2003]*; *TD Bank Equipment Finance Inc. v R.I. Industries of NY Inc., 2010 N.Y. Misc. LEXIS 3244, 2010 WL 2897849, 2010 NY Slip Op 31820[U] [Sup Ct, New York County 2010]* [*11] [Trial Order], *citing General Elec. Capital Corp. v National Tractor Trailer School, Inc., 175 Misc 2d 20, 27, 667 NYS2d 614 [Sup Ct, Onondaga County 1997]*).

A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev Auth., 98 NY2d 29, 32, 771 N.E.2d 240, 744 NYS2d 358, rearg denied 98 NY2d 693, 775 N.E.2d 1291, 747 NYS2d 411 [2002]*; [**9] *W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162, 566 N.E.2d 639, 565 NYS2d 440 [1990]*). Extrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document (*W.W.W Assocs. v Giancontieri, at 163*).

The court finds that the Lease is a finance lease pursuant to *UCC §2-A-103(1)(g)*, which treats the lessor (plaintiff) solely as a source of financing (*see Direct Capital Corp. v New ABI, Inc., 13 Misc 3d 1151, 822 N.Y.S.2d 684 [Supreme Court, Kings County, 2006]*).

UCC §2-A-103(1)(g) defines a finance lease as 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:
>
> ***
>
> (D) *if the lease is not a consumer lease*, [*12] the lessor, before the lessee signs the contract, informs the lessee in writing (a) 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*, (b) that the lessee is entitled . . . 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 (c) 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. (*UCC §2-A-103[1][g]*[emphasis added]).

"In a finance lease, the lessee negotiates directly with the supplier or manufacturer and then arranges for the lessor to buy the goods to lease them to the lessee" (*Direct Capital, supra, citing General Electric Capital Corp. v National Tractor Trailer School, Inc., 175 Misc 2d 20, 667 N.Y.S.2d 614 [Supreme Court, Onondaga County, 1997]).*

Here, [*13] the Lease meets the above three conditions of *UCC §2-A-103 (1)(g)* of a "finance lease." *First*, it is undisputed that plaintiff did not select, manufacture or supply the copiers to [**10] defendant. The Lease states in relevant part that "[plaintiff is] a separate and independent company from the Suppler [or Vendors], and the Vendors are NOT Our agents" (Lease, ¶3). In fact, defendant admits that Clarkin and his associate were employees of EZ Docs, which is listed on the Lease as a "supplier."

Second, it is undisputed that plaintiff acquired the right to possession of the equipment (see Brian E. Wolkind, Esq. Affirmation, ¶36).

And *third*, it is undisputed that the Lease is not a consumer lease, and the record shows that the Lease meets all three requirements of *§2-A-103(1)(g)(iii)*, part D: defendant does not dispute that it selected and agreed with the vendor/supplier [EZ Docs] upon the copiers to be provided and the price (*see* Sullivan Affidavit, ¶30); the Lease specifically states that "[defendant], not [plaintiff], selected the Equipment and the Vendors based on [defendant's] own judgment" (Lease, ¶3), and that defendant acknowledges that it is "aware of the name of the Supplier" (*id*., ¶6). [*14] Further, the Lease states that

> You [defendant] may be entitled under Article 2A of the UCC to the promises and warranties (if any) provided to Us [plaintiff] by the Supplier [EZ Docs] in connection with or as part of this contract (if any) by which We acquire the Equipment. (*id*.)

And finally, the Lease provides that

> You may contact the Supplier(s) for an accurate and complete statement of those promises and warranties (if any), including any disclaimers and limitations of them or of remedies. (Lease, ¶6).

And even if the transaction did not meet the UCC statutory definition of a "finance lease," the Lease expressly states in paragraph six that the parties "agree that the transaction documented in this Lease is a 'finance lease' under Article 2A of the Uniform Commercial Code" [**11] (*see UCC §2A-103, Official Comment [1][g]*; *CN Funding, LLC v The Ensig Group, Ltd., 52 AD3d 273, 860 NYS2d 34 [1st Dept 2008]*; *General Electric Capital Corporation v National Tractor Trailer School, Inc., 175 Misc 2d 20 667 NYS 2d 614 [Sup Ct 1997]*[holding that although the lease did not meet the UCC definition of a finance lease, the parties may still achieve the same result by agreement]).

Further, pursuant to the *UCC 2-A-407*,[2] [*15] upon a lessee's *acceptance* of the equipment, its promises to a lessor become irrevocable, not subject to cancellation or modification (*see General Electric Capital Corp. v National Tractor Trailer School, Inc., 175 Misc 2d 20, 667 N.Y.S.2d 614*). This is the statutory "hell or high water" clause that makes a lessee's obligations under a finance

lease irrevocable upon acceptance of the goods, despite what happens to the goods afterwards *(id.*). This statutory protection of the plaintiff lessor's rights supplements the specific language of the Lease itself, which provides that "[defendant']s duty to perform [its] obligation [under the Lease] is "absolute and unconditional" and no claims by defendant could be made against plaintiff with respect to the equipment (Lease, ¶3). Thus, if defendant *accepted* the copiers, its obligations under the Lease became irrevocable.

> 2 *UCC 2-A-407* provides that "[i]n the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods."

UCC 2-A-515 outlines the requirements for accepting goods. It states in part that:

> "(1) Acceptance of goods occurs after the lessee has [*16] 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 (*Section 2-A-509 (2)*)."

[**12] *UCC 2-A-509 (2)* provides that "[r]ejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee *seasonably notifies the lessor*" (emphasis added).

Here, the Acceptance Certificate, signed by defendant's employee, states that the equipment was "fully delivered and installed" on June 9, 2011; it was "inspected and tested by Customer and is in good working order to Customer's complete satisfaction, meets all of Customer's requirements and specifications, and is hereby irrevocably accepted" (exhibit G). Thus, the first prong of *UCC 2-A-515 (1)* has been met.

As to the second prong, even assuming, as defendant argues, that acceptance did not occur *at delivery* in the absence of a "reasonable opportunity to inspect" the copiers (*see General Electric Capital Corp. v National Tractor Trailer School, Inc., 175 Misc 2d 20, 667 N.Y.S.2d 614*), [*17] or because defendant's receptionist, who signed the Certificate on behalf of defendant, lacked authority, defendant produced no evidence of "seasonable notice" of rejection to plaintiff [the lessor] as required by *UCC 2-A-509[2]*. The e-mails submitted by defendant show that it complained to the *vendors* about the service of the copy machines (see email dated September 2011). However, the earliest email to *plaintiff* [the lessor], is dated January 2012, approximately *six months* after delivery, and, merely states the models of the copiers and does not indicate rejection. As such, it is insufficient to serve as the requisite "seasonable notice" of rejection (see *General Electric, supra, at 29*).

Moreover, as to plaintiff, defendant accepted the equipment,[3] by first telling plaintiff's [**13] representative over the telephone on June 14, 2011, five days after the delivery of the equipment, that defendant has all of the equipment and plaintiff may commence the Lease (*see* "Call Notes" dated June 14, 2011, exhibit C; and "Verbal Verification Checklist," exhibit B). And second, by making lease payments for eight months, defendant ratified its obligations to plaintiff under the Lease (*see Edison Stone* [*18] *Corp. v 42nd Street Development Corp., 145 AD2d 249, 538 NYS2d 249 [1st Dept 1989]*).

> 3 The court notes that, assuming that defendant conditionally accepted the equipment as nonconforming goods ("wrong" models) with the understanding that the supplier/vendor (EZ Docs or Vista Solutions) would cure the nonconformity by replacing the "wrong model" copiers for the "right" ones, under the UCC, defendant cannot revoke its acceptance with respect to the finance lease (*see UCC 2-A-516[2]*["*In the case of finance lease*, other than a consumer lease [. . .], if made with knowledge of a nonconformity, acceptance cannot be revoked because of it"]; *2-A-517* [acceptance of non-conforming goods can be revoked if the lessee's acceptance was *reasonably induced* by the lessor's assurances]).

Thus, since the Lease is a finance lease and defendant accepted the copiers *as to plaintiff*, defendant's payment obligations under the Lease became irrevocable (*UCC 2-A-407*; *General Electric Capital Corp. v National Tractor Trailer School, Inc., 175 Misc 2d 20, 667 N.Y.S.2d 614*).

Defendant's opposition fails to raise a triable issue of fact as to the above issues. As such, defendant's failure, after making eight payments, to make any other [*19] payments, constitutes a breach of contract as a matter of law, and pursuant to paragraph eleven ("Default") of the Lease, plaintiff is entitled to collect all remaining Lease payments; the residual value of the equipment; interest from the date of the demand to the date paid; taxes; and reasonable attorneys' fees (*Lease*, ¶¶10; 11).

Unconscionability

Procedurally, the defense of unconscionability is an affirmative defense, which must be pleaded (*CPLR 3018 [b]*[4]; *Rzepko v GIA Gem Trade Laboratory, Inc., 115 Misc 2d 755, 454 N.Y.S.2d 495 [Sup Ct,* [**14] *New York County 1982]*; *Barco Auto Leasing Corporation v PSI Cosmetics, Inc., 125 Misc 2d 68, 478 NYS2d 505 [NY Civ Ct, New York County 1984)*. Here, defendant did not assert this defense in its answer. Indeed, while defendant's answer contains allegations of fraud with respect to the buy-out of the CIT lease, the issue of unconscionability in connection with the subject Lease is raised for the first time in defendant's opposition papers. Therefore, this defense is not properly before the court and is not be considered in determining the merits of this motion.

4 *CPLR 3018 (b)* provides as follows:

> "Affirmative defenses. A party shall plead all matters which if not pleaded [*20] would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, [. . .] facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated."

And even if the court deemed this defense pleaded, defendant has failed to set forth facts sufficient to support its claim of unconscionability.[5] Unconscionability requires some showing of "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Matter of State of New York v Avco Financial Service of New York Inc., 50 NY2d 383, 389, 406 N.E.2d 1075, 429 NYS2d 181 [1980])*.

5 While this court is aware that small business owners can be victimized by unconscionable practices, and "courts have not been solicitous of businessmen in the name of unconscionability," (*Barco Auto Leasing Corp. v PSI Cosmetics, Inc., 125 Misc 2d 68, 478 NYS2d 505 [NY Civ Ct, New York County 1984]),* [*21] nevertheless, cases invalidating an agreement in the name of unconscionability in commercial settings, are rare (*id. at 77*), and this is not such a case.

Contrary to defendant's argument that the Lease contains onerous terms as it improperly excludes many warranties, defendant's waiver of the express and implied warranties is in full compliance with *UCC 2-A-214*[6] which governs exclusions of warranties in financial leases (*see Direct Capital Corp. v New ABI Inc., 13 Misc 3d 1151, 822 NYS2d 684 [Sup Ct, Kings County* [**15] *2006]*, *citing Wells Fargo Bank, N.A. v BrooksAmerica Mtge. Corp., 419 F3d 107, 110 [2d Cir 2005]*.

6 *UCC 2-A-214 (1)* provides that "words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other."

UCC 2-A-214 (3)(a) provides that

> "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."

Here, [*22] the provision disclaiming all warranties is clearly conspicuous, in capital letters, on the face of the lease and appear directly above the signatures of the parties to the agreement. The disclaimer appears as follows:

> "6. NO WARRANTIES. WE ARE LEASING THE EQUIPMENT TO YOU "AS IS." WE HAVE NOT MADE AND HEREBY DISCLAIM ANY AND ALL WARRANTIES EXPRESS OR IMPLIED, ARISING BY APPLICABLE LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE." (Lease, ¶6).

Such disclaimer is in conformity with the requirements of the *UCC §§2-A-214* and *1-201[10]*[7]; *see, Commercial Credit Corporation v CYC Realty, Inc., 102 AD2d 970, 477 NYS2d 842 [3d Dept 1984]*; *cf. Direct Capital Corp. v. New ABI Inc., 13 Misc 3d 1151, 822 N.Y.S.2d 684* [disclaimer was buried in the text of a six-page document and the typeface was identical to the surrounding provisions and almost imperceptibly darker than other text]). And although the print of the Lease as a whole is fine and the lines are close together, the actual language is entirely readable (*Gillman v Chase Manhattan Bank, 135 AD2d 488, 521 N.Y.S.2d 729*). Notably, defendant does not cite to any [**16] case law or pro-

vision of the UCC requiring [*23] that the typeset of a finance lease be a specific size.

> 7 The *UCC 1-201* (General Definitions) states that "[a] term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. [. . .] Whether a term or clause is "conspicuous" or not is for decision by the court."

And even assuming the Lease's terms were unreasonably favorable to plaintiff, defendant failed to present evidence that at the time of the agreement, the circumstances in which it entered the Lease deprived it of a "meaningful choice" (*Matter of State of New York, supra*). Defendant does not claim that its principals are not sufficiently sophisticated business persons, unable to protect its own interests, or that the Lease was presented as a take-it-or-leave-it proposition (*see also Gillman v Chase Manhattan Bank, 135 AD2d 488, 521 NYS2d 729 [2d Dept 1987]*[finding no unconscionability in the commercial setting because it is presumed that businessmen deal at arm's length with relative [*24] equality of bargaining power]). Indeed, by defendant's own admission, it had previously entered into an equipment lease for the rental of copiers with CIT.

Furthermore, there is no indication in the record that it was necessary for defendant to have dealt with plaintiff, such that defendant would have had no meaningful choice in accepting the terms of the Lease agreement. Defendant could have easily dealt with other finance companies if it desired that its existing lease with CIT be "bought out."

Thus, the court cannot conclude that the Lease is unconscionable as a matter of law.

First Affirmative Defense: Unclean Hands

It is well settled that the doctrine of "unclean hands" is an equitable defense and thus, does not apply to an action at law (*see generally Board of Educ. v Rettaliata, 78 NY2d 128, 576 N.E.2d 716, 572 N.Y.S.2d 885 [1991]*). Accordingly, this defense is not properly interposed in this "action exclusively for damages" (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc., 24 AD3d 189, 806 NYS2d 480 [1st Dept 2005], citing Hasbro Bradley v Coopers & Lybrand, 128 AD2d 218, 220, 515 N.Y.S.2d 461 [1987], lv dismissed 70 NY2d 927, 519 N.E.2d 344, 524 N.Y.S.2d 433 [1987]*). And in any event, defendant appears to have abandoned this [**17] defense as it failed to assert [*25] any arguments on this point in opposition to plaintiff's motion. Therefore, defendant's first affirmative defense is stricken and dismissed.

Second and Third Affirmative Defenses: Non-Conforming and Defective Equipment First Counterclaim: Defective Equipment

Defendant's arguments that its non-performance should be excused because the copiers were of the wrong models and were defective or not fit for intended purpose, lack merit.

As stated above, the parties agreed by the express terms of the Lease that defendant was leasing the equipment "as is," and the so-called "hell or high water" clause pursuant to which the lease becomes irrevocable and noncancelable and requires the lessee to make payments irrespective of any defects in performance, is fully enforceable in New York in the absence of fraud (*see* discussion below) (*Direct Capital Corp. v New ABI Inc., 13 Misc 3d 1151, 822 NYS2d 684 [Sup Ct, Kings County 2006], citing Wells Fargo Bank, N.A. v BrooksAmerica Mtge. Corp., 419 F3d 107, 110 [2d Cir 2005]*; *UCC 2-A-407*).

Furthermore, it has been held that a lessee's waiver of all defenses against an equipment lessor by the express terms of the lease are binding and preclude such lessee from [*26] later interposing defenses against the lessor (*see Wells Fargo Bank Minnesota, NA v CD Video, Inc., 22 AD3d 351, 802 NYS2d 423 [1st Dept 2005]*). Thus, defendant was obligated to honor the terms of the lease agreement with plaintiff irrespective of any defects or non-conformities (*see Canon Fin. Servs., 300 AD2d at 67, 751 NYS2d 194 [1st Dept 2002]*; *General Elec. Capital Corp., supra*).

Thus, the second and third affirmative defenses, and also the *First Counterclaim* of defective equipment, are likewise stricken and dismissed.

[**18] *Fraud (Second Counterclaim)*

To make out a *prima facie* case of fraud, a party must allege "representation of material fact, falsity, scienter, reliance and injury" (*U.S. Express Leasing, Inc. v Elite Technology (N.Y.), Inc., 87 AD3d 494, 928 NYS2d 696 [1st Dept 2011], citing Small v Lorillard Tobacco Co., 94 NY2d 43, 57, 720 N.E.2d 892, 698 NYS2d 615 [1999]*).

The court finds that defendant's allegations of fraud, collusion and the existence of an agency relationship between EZ Docs and plaintiff are "belied by the express provisions of the lease agreement" (*Preferred Capital, 309 AD2d at 1169, 765 NYS2d 405 [4th Dept 2003]*). Indeed, the Lease executed by defendant expressly states

that [*27] "the Vendors are NOT [plaintiff's] agents"[8] (Lease, ¶3). Thus, if the court were to consider, for pleading purposes, defendant's assertion that Clarkin of EZ Docs made false oral representation on behalf of plaintiff, defendant could not have justifiably relied on such oral representation, which was directly contradicted by the specific term in the Lease (*Jet Acceptance Corporation, Respondent, v Quest Mexicana S.A. de C.V., 87 AD3d 850, 929 N.Y.S.2d 206*; *87 A.D.3d 850, 929 NYS2d 206 [1st Dept 2011], citing Daily News v Rockwell Intl. Corp., 256 AD2d 13, 14, 680 N.Y.S.2d 510 [1st Dept 1998], lv denied 93 NY2d 803, 711 N.E.2d 201, 689 N.Y.S.2d 16 [1999])*. Therefore, defendant's second counterclaim for fraud is also stricken and dismissed.

8 The court notes that it finds no support in the record for a determination that Clarkin had apparent authority to act on behalf of plaintiff. "Essential to the creation of apparent authority are words or conduct of the principal communicated to a third party, that give rise to a reasonable belief that the agent possesses authority to enter into a transaction; and the alleged agent cannot, by his own acts, imbue himself with such authority" *Wood v William Carter Co., 273 AD2d 7, 708 NYS2d 107 [1st Dept 2000]*[internal citations omitted]).

Furthermore, [*28] "an agent's power to bind his principal is coextensive with the principal's grant of authority. One who deals with an agent does so at his own peril, and must make the necessary effort to discover the actual scope of authority" (*Ford v Unity Hospital, 32 NY2d 464, 472, 299 NE2d 659, 346 NYS2d 238 [1973])*. This is especially true where, as here, defendant failed to conduct a reasonable inquiry into the scope of the alleged agent's alleged authority (*see 150 Beach 120th St., Inc. v Washington Brooklyn Ltd. Partnership, 39 AD3d 722, 833 NYS2d 667 [2d Dept 2007])*.

Accordingly, as defendant failed to also raise an issue of fact as to the amounts sought by [**19] plaintiff, plaintiff's motion for summary judgment is granted in its entirety and plaintiff is entitled to recover from defendant the balance of lease payments under the Lease in the sum of $60,325.80; the residual value of the equipment in the amount of $5,540.40, plus interest at the rate of one and one-half percent per month from the date of default, February 14, 2012; taxes in the sum of $5,845.63; a late fee in the sum of $932.52; insurance premiums in the amount of $273.13; and, pursuant to paragraph eleven of the Lease, plaintiff [*29] is entitled to recover reasonable attorneys' fees and costs.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Wells Fargo Financial Leasing, Inc. (1) pursuant to *CPLR 3211* to strike the affirmative defenses and counterclaims of the defendant Calkin, Inc., d/b/a Calkin Inc., and (2) pursuant to *CPLR 3212* for summary judgment is granted in its entirety, and plaintiff is entitled to recover from defendant the balance of lease payments under the Lease in the sum of $60,325.80; the residual value of the equipment in the amount of $5,540.40, plus interest at the rate of one and one-half percent per month from the date of default, February 14, 2012; taxes in the sum of $5,845.63; a late fee in the sum of $932.52; insurance premiums in the amount of $273.13, and the Clerk may enter judgment accordingly; and it is further

ORDERED that all the affirmative defenses and counterclaims in the Answer of the defendant Calkin, Inc., d/b/a Calkin Inc., are hereby stricken and dismissed; and it is further

ORDERED that the remaining issues of the amount of reasonable attorneys' fees and costs due to the plaintiff are hereby severed referred to Hon. Ira Gammerman to hear [*30] and determine; and it is further

[**20] ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the above reference to a Special Referee.

This constitutes the decision and order of the court.

Dated: January 25, 2013

/s/ Carol R. Edmead

Hon. Carol R. Edmead

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