At an IAS Term, Part Comm I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of June, 2007

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

----------X

SNAP-ON CREDIT, LLC,

Plaintiffs,

Index No. 6994/05

- against -

GERSHON MATITEEB AND TIREX, LLC,

Defendants.

----------X

The following papers numbered 1 to 12 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
Opposing Affidavits (Affirmations)	5-9
Reply Affidavits (Affirmations)	10-12
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Snap-On Credit, LLC (plaintiff or Snap-on Credit) moves, pursuant to CPLR 3212, for summary judgment against defendants Gershon Matiteeb and Tirex, LLC (defendants) in the amount of $56,756.83 plus interest at 16% from January 1, 2005, and for attorney's fees, costs and disbursements.

On March 8, 2004, defendants signed a Uniform Commercial Code (UCC) Article 2-A finance lease with Snap-on Tools for a car lift, a wheel aligner with a computer, and

vehicle emission equipment.[1] In accordance with UCC Article 2-A, neither the lessor nor Snap-on Credit warranted the equipment leased. Pursuant to the lease, monthly payments were to commence on May 1, 2004. In addition, paragraph 4 of the lease, entitled "Assignment" provides that the lease could be assigned at anytime. Specifically, this provision states, in pertinent part, that:

> "We may, without notifying you, sell, assign or transfer this Lease, any interest in this Lease, the Payments hereunder, and ownership of the Equipment to anyone (including Snap-on Credit LLC) and you agree that if we do so, the assignee will have the same rights and benefits that we now have, and the assignee will not have to perform any of our obligations. Any assignee will not be subject to any claims, defenses or setoffs that you may have against us."

Further, paragraph 17 of the lease, entitled "ENTIRE AGREEMENT, CHANGES" provides that:

> "This Lease contains the entire agreement between you and us and it may not be altered, amended, modified, terminated or otherwise changed except in writing and signed by both of us."

Counsel for plaintiff states that "[d]uring the regular course of business," plaintiff purchased the lease agreement entered into between defendants and Snap-on Tools. Counsel states that the assignment of the lease is set forth in a document entitled "East Lease Purchase Register Report for Week # 14 - Funding Date: 4/9/04." According to the affidavit of Carol Connelly, Collection Representative for plaintiff, the assignment was

---

[1] The lift raises a car off the ground and the computer determines whether a car's wheel is out of alignment and if so, the manner in which the alignment can be corrected.

performed in accordance with the terms set forth in the January 3, 1999 Amended and Restated Transfer Agreement (the Transfer Agreement) between plaintiff and Snap-on Tools, which assigned all future Snap-on Tools' lease agreements to plaintiff. In July, 2006, plaintiff and Snap-on Tools signed a "Confirmation of Assignment," which in essence confirmed that the assignment occurred on May 1, 2004.

Beginning in May, 2004, defendants made monthly payments to plaintiff until August 31, 2004, when they defaulted. According to plaintiff, on or about October 18, 2004, defendants agreed to surrender the lease equipment to it. The equipment remained at the defendants' shop until plaintiff located a purchaser. On December 17, 2004, Mr. Andre Fuzaylov, president and owner of Blast Auto Repair and Lube, Inc. (Blast Auto), purchased the equipment from Snap-On Tools.

In February, 2005, plaintiff commenced the instant action to recover the funds owed under the lease agreement. Defendants joined issue. Subsequently, plaintiffs moved for summary judgment seeking recovery of the funds owed under the lease agreement. Defendants opposed the motion. Defendants first argued that the leased equipment was defective. In addition, they asserted that the parties had orally modified the lease agreement and subsequently terminated it. In this regard, Mr. Matiteeb stated that:

"I personally notified Frank Benvenuto[2] that Tirex was

---

[2] According to plaintiff's attorney, Mr. Benvenuto is a representative of Snap-on Tools Co. Franchise Dealer, not the plaintiff. According to Mr. Matiteeb, Mr. Benvenuto was the

> willing to continue paying for the lift machine if Snap-On [sic] would provide Tirex with equipment that was not defective. I also proposed that if Snap-On [sic] did not want to provide new equipment, Tirex would return the equipment and would no longer be responsible for lease payments. Mr. Benvenuto agreed that Snap-On [sic] would provide new equipment."

Mr. Matiteeb then stated that plaintiff:

> "shipped Tirex a new alignment lift, but did not ship a new alignment computer . . . Since the computer was not shipped, on behalf of Tirex, I refused to accept the lift. As far as I was concerned, by failing to ship the computer, Snap-On [sic] breached the agreement and Tirex was no longer responsible under the lease."

Finally, defendants asserted that they did not receive a fair credit for the leased equipment, which they voluntarily returned to plaintiff. In this regard, Mr. Matiteeb states in his affidavit that he notified Mr. Benvenuto that he intended to sell the equipment and that he had a buyer prepared to pay $9,000. According to Mr. Matiteeb, Mr. Benvenuto said that all of the equipment had to be returned as a package and he refused to allow Mr. Matiteeb to sell the equipment.

In any event, as relevant here, paragraph 11 of the lease, entitled "REMEDIES," provides, in pertinent part, that:

> "Upon repossession or surrender of any Equipment, we may lease, sell, or otherwise dispose of the Equipment, apply the net proceeds thereof to the amounts owed to us hereunder, provided, you shall remain liable to us for any deficiency. You agree it is commercially reasonable for repossessed

---

"Snap-on representative" who serviced Tirex's account.

> Equipment to be sold at public or private sales (in any state or county we select) to dealers or others in lots or pieces. You shall pay us all costs and expenses, including expenses of repossession and storage, attorneys' fees and costs incurred by us in enforcing any of the terms of this Lease . . ."

Plaintiff contends that the equipment was not defective at the time it was delivered to and accepted by defendants, as evidenced by a document entitled "Delivery and Acceptance Certificate;" that it made no warranties with respect to the leased equipment; that it never agreed to replace any equipment, nor did it have any obligation to do so; and that the $15,000 credit provided to defendants by it for the returned equipment was the equivalent of the fair market value of the equipment.

By order dated January 25, 2006, this court denied plaintiff's first motion for summary judgment, holding, in pertinent part, that "[o]pposing affidavit indicates issue of fact exists as to whether contract upon which plaintiff relies was terminated. Movant failed to demonstrate that there is no issue of fact."

Beginning on or about March 21, 2006, the parties engaged in discovery. On September 20, 2006, the court held a final compliance conference. The order indicated, among other things, that "[d]ispositive motion(s) to be made returnable by December 13, 2006."

Discussion

In support of its present motion for summary judgment, plaintiff argues that the

equipment was not defective; that pursuant to the plain terms of the written lease agreement, it made no warranties with respect to the equipment; that the $15,000 credit provided to defendants by it for the surrendered equipment represented the fair market value of the equipment; that there is no legally-cognizable issue of fact as to whether the lease agreement was terminated pursuant to an oral agreement between Mr. Matiteeb and Mr. Benvenuto; and that Snap-on Tools duly assigned the lease to plaintiff.

Plaintiff has made a prima facie showing that the equipment was not defective via the sworn affidavit of its collection representative, Kim Mellen, who states that when plaintiff delivered the equipment to defendants on March 8, 2004, it installed, inspected and tested it, and confirmed that it was working properly. Further, Mr. Matiteeb verified that the equipment was working properly and that "all training provided with respect to said equipment ha[d] also been completed to Lessee's satisfaction" when it was delivered, by signing a document entitled "Delivery and Acceptance Certificate."

Even assuming the equipment was defective, plaintiff has made a prima facie showing that this would not excuse nonpayment under the lease. In this regard, plaintiff has demonstrated that it adequately disclaimed the relevant warranties of merchantability and fitness for a particular purpose. On the first page of the lease agreement, it states in bold capital letters "**DO NOT SIGN THIS LEASE BEFORE YOU READ IT . . .**" In addition, paragraph 3 of the lease agreement contains a provision which states that:

> "**NO WARRANTIES**. The equipment is subject to any warranties made by the manufacturer and/or licensor and any

> limitations thereof. The Equipment is leased and licensed **'AS IS.' YOU ACKNOWLEDGE THAT WE DID NOT MANUFACTURE THE EQUIPMENT OR CREATE THE SOFTWARE, WE DO NOT REPRESENT THE MANUFACTURER OR LICENSOR, AND YOU SELECTED THE EQUIPMENT BASED UPON YOUR OWN JUDGEMENT. WE MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE. YOU AGREE, REGARDLESS OF CAUSE, WE ARE NOT RESPONSIBLE FOR AND YOU WILL NOT MAKE ANY CLAIM AGAINST US FOR ANY DAMAGES, WHETHER CONSEQUENTIAL, DIRECT, SPECIAL OR INDIRECT."**

UCC 2-316 provides that a party may exclude the implied warranties of merchantability and fitness for a particular purpose if it is in writing and is "conspicuous." "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 . . . is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color" (UCC 1-201[10]). Here, the heading is in bold capital letters. In addition, the text indicating that plaintiff makes no warranties is in contrasting type to the surrounding text of the same size. In addition, the disclaimer is in bold type and readily noticeable. Therefore, plaintiff has demonstrated that the warranty disclaimer is conspicuous as defined under UCC 1-201(10) and thus is an effective disclaimer of the implied warranties of merchantability and fitness (*Naftilos Painting, Inc. v Cianbro Corp.*, 275 AD2d 975 [2000]; *Sky Acres Aviation Servs. v Styles Aviation*, 210 Ad2d 393, 394

[1994]). Finally, the lease at issue is a finance lease under Article 2-A of the UCC and "require[s] the lessee to continue to make lease payments regardless of defects in the equipment" *(Lease Factor v Kemcy Model Agency*, 201 AD2d 624, 625 [1994]; *General Elec. Capital Corp. v National Tractor Trailer Sch., Inc.*, 175 Misc2d 20, 27-28 [1997]).

In opposition, Mr. Maiteeb states in his sworn affidavit that the alignment machine was defective, that the lift was unsafe and that the computer was inaccurate. However, defendants fail to address the arguments made by plaintiff in support of its motion, namely that defendants signed a document stating that the equipment functioned properly when delivered, that plaintiff disclaimed the relevant warranties of merchantability and fitness for a particular purpose in the lease, that the equipment was sold "as is," and that the lease obligated defendants to "continue to make lease payments regardless of defects in the equipment." Thus, defendants have failed to rebut plaintiff's prima facie showing that the equipment was not defective and that, even if it were defective, nonpayment would not be excused under the lease.

As to the issue of the credit given for the equipment defendants surrendered to plaintiff, "[u]nder [UCC] § 9-609 (a) (1) . . . the secured party 'may take possession of the collateral' . . . and then, under section 9-610 (a) . . . 'may sell, lease, license, or otherwise dispose of any or all of the collateral'" *(ESL Fed. Credit Union v Bovee*, 9 Misc 3d 256, 263 [2005]). "However, '[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable'" (*id.*,

citing UCC 9-610 [b]; *see also First City Division of Chase Lincoln First Bank, N.A. v Vitale*, 123 AD2d 207, 212 [1987]). "The burden of proving the commercial reasonableness of every aspect of the disposition of the collateral is upon the plaintiff" (*First City Division of Chase Lincoln,* 124 AD2d at 212).

Here, plaintiff has submitted the sworn affidavit of Mr. David Pincus, a District Sales Manager for the Eastern Region for Snap-on Diagnostics, a division of IDSC Holdings LLC, in which he states, in effect, that the credit given defendants was based directly on the resale of the equipment. He asserts that after a two-month search for a buyer for defendants' equipment (which he says was a reasonable period of time to seek offers), he determined that the highest offer was from Blast Auto, which agreed to purchase the equipment for $20,000. Although Blast Auto paid $20,000 for the equipment, he gave defendants a $15,000 credit because $5,000 was deducted for the cost of removal of the equipment from defendants' repair shop and reinstallation of same at Blast Auto and a one-year warranty provided to Blast Auto. He states that the credit, which was "based upon the actual sale of the Equipment after extensive marketing, [was] fair and reasonable." Plaintiff also annexes the sworn affidavit of Mr. Fuzaylov of Blast Auto, an auto shop repair owner with extensive technical training in vehicle collision, repair and maintenance, who states that the price of the equipment was a "fair deal and representative of what a vehicle shop would expect to pay for equipment of this kind, age and condition . . .". However, Mr. Pincus states in his affidavit that "a purchaser is

required to pay to remove the lift from the original owner's shop and re-install in the new location" at an approximate cost of $5,000-$6,000. Thus, although plaintiff has demonstrated that the $20,000 sale price for the equipment was fair and that the equipment was sold in a commercially reasonable manner in compliance with the terms of the lease(*ESL Fed. Credit Union,* 9 Misc 3d at 263; *First City Division of Chase Lincoln,* 124 AD2d at 212), the credit to defendants should have been the full $20,000 as plaintiff has failed to specify any other costs it actually incurred in disposing of the equipment.

In opposition to the credit given by plaintiff, Mr. Matiteeb states in his affidavit that Tirex had a buyer willing to pay $9,000 for the lift machine and testified, at his deposition, that the buyer was named Pedro. He also states in his affidavit that he did not sign a document entitled the Fair Market Report, indicating a total market value of $15,000. The Court notes that the signature on this document does not match that of Mr. Matiteeb on the finance lease.

However, defendants have failed to raise an issue of fact to rebut plaintiff's prima facie showing of the value of the equipment. But for Mr. Matiteeb's claim of a potential buyer, defendants have failed to submit any proof of an offer by "Pedro." Moreover, as plaintiff argues, defendants' allegation that they attempted to sell the equipment to a third party rather than merely surrendering it to plaintiff is inconsistent with Mr. Matiteeb's claim that plaintiff breached its oral agreement with Mr. Matiteeb relieving defendants of their obligation under the lease. In any event, the credit given to defendants was higher

than the $9,000 defendants may have received from "Pedro." Moreover, "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner" (*Syracuse Supply Co. v Vogel*, 78 AD2d 991, 992 [1980]). Based upon the foregoing, defendants have failed to rebut plaintiff's showing that the five-year old previously-used equipment they surrendered to plaintiff was not reasonably worth more than the $20,000 for which it was sold.

Plaintiff has shown that the express terms of the lease agreement preclude proof of to an oral modification agreement between Mr. Matiteeb and Mr. Benvenuto. Although Mr. Matiteeb stated in his affidavit (submitted in opposition to plaintiff's first summary judgment motion, as well as the instant motion), that Mr. Benvenuto agreed that defendants would continue paying for the lift machine only if plaintiff would give defendants equipment that was not defective, plaintiffs annex the sworn affidavit of Ms. Mellen, who states that "Snap-on never agreed to replace any Equipment, nor does it have any obligation to do so. Any replacement would be by Snap-on Tools Co. Franchise Dealer." This position is consistent with the terms of the lease. Further, the lease provides that it may not be amended or terminated unless there is a writing to that effect signed by both parties.[3] Since defendants concede that the alleged modification was oral,

---

[3] Paragraph 17 of the lease states that "This Lease contains the entire agreement between you and us and it may not be altered, amended, modified, terminated or otherwise except in writing and signed by both of us."

plaintiff properly asserts that defendants' defense - that they are not responsible for making further payments under the lease if plaintiff did not provide new equipment - is without merit (see *Centaur Props., LLC. v Farahdian*, 29 AD3d 468, 469 [2006] citing General Obligations Law § 15-301[1][a written agreement containing a provision prohibiting oral modifications of the agreement cannot be modified to change or add to its terms except in a writing "signed by the party against whom enforcement of the change is sought"]). Moreover, plaintiff correctly asserts that Mr. Matiteeb's statements regarding the oral modification are inadmissible since they constitutes parol evidence which would tend to vary the unambiguous terms of the lease agreement (*id.; Henrich v Phazar Antenna Corp.*, 33 AD3d 864 -[2006] [extrinsic or parol evidence of the parties' intent may be considered only if the agreement is ambiguous];*Public Adm'r v 8 B.W., LLC*, 18 AD3d 458 [2005] [Where terms of the contract are clear, complete, and unambiguous, parol evidence is not admissible to create an ambiguity]).

Finally, plaintiff has established that the lease was properly assigned to it by Snap-on Tools. Plaintiff has submitted a copy of the lease agreement dated March 8, 2004, with Snap-on Tools as the lessor and defendants as lessees. Paragraph 4 of the lease states that Snap-on Tools was authorized to assign the lease to anyone (including plaintiff) and that defendants agreed that if that occurred, "the assignee [would] have the same rights and benefits that [Snap-on Tools] [had], and the assignee [would] not have to perform any of [Snap-on Tools'] obligations." Further, plaintiff submitted the

"Confirmation of Assignment," in which Snap-on Tools and plaintiff confirmed, in writing, that on May 1, 2004, Snap-on Tools, as assignor, assigned the lease to plaintiff, the assignee. In addition, Ms. Connelly states in her February 6, 2007 sworn affidavit that plaintiff took assignment of the lease from Snap-on Tools, that plaintiff and Snap-on Tools entered into a Transfer Agreement, "which assigned all future Snap-on Tools' lease agreements to [plaintiff]", and that "[t]hroughout the course of its business, [plaintiff] has purchased lease agreements from Snap-on Tools in accordance with their [Transfer Agreement]." Moreover, defendants acknowledged at oral argument the validity of the assignment. Finally, and equally significant, Mr. Matiteeb testified at his deposition that he made his monthly payments under the lease to plaintiff, not Snap-on Tools.

Defendants have failed to sustain their argument that plaintiff has no standing to prosecute this action or to demonstrate that the lease was not assigned by Snap-on Tools to plaintiff (*see e.g. CharterOne Auto Finance Corp. v Vaglio*, __ Misc 3d __, 2003 NY Slip Op 50638U, *6 [Sup Ct, Nassau County, Jan 30, 2003] ["There is no sufficient proof to question the assignment by (the car dealership) to Charter One, which, in fact, is clearly permitted by the Contract"]), nor have they disputed that they made their lease payments to plaintiff, as opposed to Snap-on Tools.

Lastly, the court rejects defendants' claim that plaintiff's motion is in fact one to reargue and to renew, and that it should be denied since plaintiff has not advanced any new facts to support its main argument, namely, that the contract was not terminated. As

plaintiff notes, the Court on two occasions contemplated the filing of "any dispositive motions" following denial of the first motion for summary judgment and after discovery was completed.

In view of the foregoing, plaintiff's motion for summary judgment is granted to the extent of $51,756.83 (deducting an additional $5,000 credit from the sum demanded) plus interest at 16 % from January 1, 2005, upon a showing that it is entitled to such interest rate pursuant to the lease agreement, costs, disbursements and attorney's fees. Plaintiff shall submit an affidavit in support of an award of attorney's fees, with a full accounting of the reasonable legal fees incurred.[4]

This constitutes the decision, order and judgment of the court.

ENTER

J. S.C.

HON. CAROLYN E. DEMAREST

[4] The provision for attorney's fees, costs and disbursements upon defendants' default is set forth in the paragraph 11 of the lease.