

**Banc of Am. Leasing & Capital, LLC v Grand  
Photo Inc.**

2010 NY Slip Op 31550(U)

June 16, 2010

Sup Ct, NY County

Docket Number: 104596/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Index Number : 104596/2009  
**BANC OF AMERICA LEASING &**  
VS.  
**GRAND PHOTO INC. D/B/A**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion


**FILED**

JUN 22 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: JUN 16 2010

  
HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 10

-----X  
BANC OF AMERICA LEASING AND CAPITAL, LLC,  
AS ASSIGNEE OF HEWLETT PACKARD FINANCIAL  
SERVICES COMPANY,

**DECISION AND ORDER**

Index No. 104596/09  
Seq. No.: 001

Plaintiff,  
-against-

Present:  
**Hon. Judith J. Gische, JSC**

GRAND PHOTO INC. D/B/A  
GRAND PHOTO SOLUTIONS,

Defendant.

-----X  
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these)  
motion(s):

<b>Papers</b> .....	<b>Numbered</b>
Pltff n/m (3212) w/MLK affirm, TSW affid, exhs .....	1
Def x/m w/ARH affid, exhs .....	2
Pltff opp and reply w/MLK affirm .....	3
Def reply/further support w/ARH affid, exhs .....	4
Pltff sur-reply/further opp w/MLK affirm .....	5
Various stips of adjournment .....	6

-----X  
**Gische J.;**

Plaintiff moves, pursuant to CPLR 3212, for summary judgment. Defendant cross-moves, pursuant to CPLR 1007, to join Hewlett Packard Financial Services Company (Hewlett Packard FSC) as a third-party defendant.

Plaintiff, Banc of America Leasing and Capital, LLC (BOA), as assignee of Hewlett Packard FSC, brings this action to recover amounts due on an equipment lease for a Hewlett Packard laser jet printer. Defendant, Grand Photo Inc. d/b/a Grand Photo Solutions (Grand Photo) contends that, from the inception of the lease, the printer has not worked properly and it has sought to return the equipment.

The following facts are not in dispute: on August 4, 2008, Grand Photo, through its

president, Ahmad Riaz Hameed, entered into a lease agreement (the Lease Agreement) with BOA's predecessor, Hewlett Packard FSC, in order to finance the lease/purchase of a Hewlett Packard Design Jet Printer, Model H 35500. Schedule A of the Lease Agreement required Grand Photo to make 36 monthly payments of \$1,573.35, and provided for an end-of-term buy-out of the printer for \$1.00.

The Lease Agreement also provided that:

YOU WARRANT TO US THAT YOU HAVE RECEIVED, REVIEWED AND APPROVED YOUR VENDOR'S WRITTEN SUPPLY CONTRACT COVERING THE EQUIPMENT TERMS OF SALE AND WARRANTIES. YOU HEREBY AUTHORIZE US TO PURCHASE THE EQUIPMENT IN RELIANCE SOLELY UPON YOUR STATEMENTS HEREIN. BY YOUR RECITALS BELOW, YOU SHALL BE DEEMED TO HAVE IRREVOCABLY ACCEPTED THE EQUIPMENT 10 BUSINESS DAYS AFTER SHIPMENT OF THE EQUIPMENT TO YOU UNLESS WE RECEIVE YOUR WRITTEN REJECTION PRIOR TO THE END OF THE 10-DAY PERIOD

(Kaplan Aff., Ex. D).

It further stated that:

EXCEPT AS TO QUIET ENJOYMENT, WE MAKE ABSOLUTELY NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. You can only make any claim relating to the Equipment against the Vendor or manufacturer and you waive any such claim against us. WE WILL NOT BE LIABLE FOR INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES. YOU AGREE TO MAKE PAYMENTS TO US WHEN DUE, UNCONDITIONALLY, WITHOUT ABATEMENT OR OFFSET AND REGARDLESS OF ANY PROBLEMS WITH THE EQUIPMENT, VENDOR OR US AND YOU WAIVE ANY CLAIM OR DEFENSE TO ANY LEASE PAYMENT . . .

(Kaplan Aff., Ex. D).

The Lease Agreement also provided that: "THIS LEASE SHALL BE DEEMED FULLY EXECUTED AND PERFORMED IN THE STATE OF NEW JERSEY AND SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS THEREOF"

(*id.*).

Shortly thereafter, the printer was delivered and installed at Grand Photo, which was located on West 17<sup>th</sup> Street in Manhattan. On August 26, 2008, Hameed signed a "Delivery and Acceptance Certificate" which stated, in part, as follows:

1. **LEASE ACCEPTANCE.** You hereby acknowledge that the Equipment . . . has been delivered to the Equipment Location specified below, inspected by you and found to be in good operating order and condition, and has been unconditionally and irrevocably accepted by you under the Lease . . .

(Hameed Aff., Ex. A). . . . .

On September 30, 2008, Hewlett Packard FSC assigned the Lease Agreement to BOA.

Hameed alleges that the printer never functioned properly. It did not print on plastic or plexiglass, as promised by the dealer and it printed poor quality pictures. In addition, the machine made excessive amounts of noise and ink leaked from a vacuum (Hameed Aff., Ex. B). Hameed states that on three separate occasions, between September 2008 and December 2008, the dealer, Bensak, sent its technician to fix the machine.

In November 2008, Grand Photo stopped making its lease payments. In January 2009, the dealer (Bensak) organized an Open House at Grand Photo's business location in an effort to sell the printer; the event was unsuccessful.

BOA commenced the within action in April 2009, alleging causes of action for breach

of contract (first cause of action), account stated (second cause of action) and unjust enrichment (third cause of action). Plaintiff seeks to recover the following amounts: past due and future rentals in the amount of \$52,223.02, residual value of the equipment in the amount of \$10,038.29, accrued late charges in the sum of \$65.76, miscellaneous charges due under the Lease Agreement in the sum of \$143.07, and applicable taxes with interest thereon from November 26, 2008. BOA also seeks to recover miscellaneous charges and the costs and disbursements of this action plus attorney's fees in the amount of \$15,617.54. On this motion, plaintiff seeks summary judgment in the amount of \$62,470.14, exclusive of attorney's fees.

Grand Photo contends that BOA is not entitled to summary judgment because: (1) the size of the typeface in the Lease Agreement is too small, (2) BOA did not join Hewlett Packard FSC, which is an indispensable party, (3) the printer is defective, (4) Grand Photo should be credited for any payments it made to BOA, and (5) it is illegal and unenforceable for the Lease to contain a disclaimer of all warranties.

Inasmuch as the parties have designated New Jersey law as controlling, this court will determine the issues presented pursuant to that State's law. The first, and most important issue to be determined, is whether the within Lease Agreement qualifies as a finance lease under Chapter 2A of the New Jersey Uniform Commercial Code, and is thereby subject to the provisions of the Code. The NJUCC (NJSA 12A:2A-103 (1) [g]) defines a finance lease, in relevant part, as follows:

"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: . . . (D) . . . the lessor . . . informs the lessee in writing . . . (b) that

the lessee is entitled under this chapter 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 . . . 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

The NJUCC Comment explains that a finance lease is the product of a three-party transaction. The manufacturer or dealer supplies the goods desired by the lessee. The goods are then either leased or purchased by the lessor, and then the lessor and the lessee enter into a lease or sub-lease of the goods (NJSA 12A: 2A-103, UCC Comment).

Here, the Lease Agreement meets the first two conditions in that the original lessor, Hewlett Packard FSC, did not select, manufacture or supply the printer and Grand Photo acknowledges that it dealt with Bensak, a dealer of Hewlett Packard products in selecting the printer. In addition, Hewlett Packard FSC states, in the Lease Agreement, that it will purchase the desired printer pursuant to Grand Photo's instructions. Finally, the third condition is met inasmuch as the Lease Agreement indicates that Grand Photo represents that it has "received, reviewed and approved [the] vendor's written supply contract covering the equipment terms of sale and warranties."

Contrary to Grand Photo's contention, the Lessor's disclaimer of all warranties is not illegal. The Comment to NJSA 12A: 2A-103, notes that "[d]ue to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties" (NJSA 12A:2A-103, UCC Comment). Under New Jersey law, a promise in a finance lease to make all requisite payments and not to assert any defenses to

payment is valid and enforceable (*Hewlett-Packard Fin. Servs. v One2One, LLC*, 2006 WL 1281335, 2006 US Dist Lexis 27009 \*4, [D NJ 2006]; *AT & T Credit Corp. v Transglobal Telecom Alliance*, 966 F Supp 299, 302 [D NJ 1997], *affd* 261 F3d 490 [3d Cir 2001]).

As to Grand Photo's assertion that Hewlett Packard is an indispensable party, the NJUCC 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" (NJSA 12A: 2A-407 [1]). Such a promise "is effective and enforceable between the parties, and by or against third parties including assignees of the parties . . . . (*id.*, 12A: 2A-407 [2] [a]). Inasmuch as Grand Photo does not dispute that BOA took assignment of the Lease Agreement from Hewlett Packard FSC in good faith and for value, Grand Photo's claims against the dealer and the manufacturer are independent of BOA's claim against Grand Photo (*AT & T Credit Corp. v Transglobal Telecom Alliance*, 966 F Supp at 302). Therefore, Hewlett Packard is not an indispensable party. Nor is Grand Photo's allegation, that the printer is defective, relevant to the issue of its obligation to pay its rent as provided in the Lease Agreement.

As to Grand Photo's assertion that the print in the Lease Agreement is too small, Grand Photo does not cite any provision requiring that the typeset of a finance lease be a specific size. NJUCC 12A: 2A-214 (2) provides in part that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention 'merchantability,' be by a writing, and be conspicuous' . . . [t]o exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous." Section 201 [10] (NJSA 12A: 1-201 [10]) further provides, in part, 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 . . . is conspicuous. Language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color.

Here, the language excluding any warranties is in capital letters as compared to the body of the text, is sufficiently noticeable to comply with NJUCC 316 (2).

Finally, as to Grand Photo’s assertion that it should be credited with all payments it has made, this is not a point in dispute.

On this motion, BOA seeks summary judgment on amounts due under the Lease Agreement, excluding attorney’s fees. BOA requests that this motion is expressly without prejudice to its rights to request its reasonable costs of collection and attorney’s fees at a later date.

BOA is entitled to summary judgment on the amounts due pursuant to the Lease Agreement. In the case of default, the Lease Agreement provides as follows:

If you do not pay or perform any obligation under this Lease within 10 days of when such payment or performance is due . . . we can do any or all of the following: (1) accelerate without notice, all payments provided for in this Lease, (2) immediately repossess the Equipment, (3) collect all costs of collection, including any bad check charges and reasonable attorneys’ fees . . . (Kaplan Aff., Ex. D).

Based upon the above provision, BOA may recover past due unpaid and future rentals in the amount of \$52,223.02 plus interest from November 26, 2008, as well as costs and attorney’s fees. Since the lease agreement provides for a \$1.00 buy-out of the equipment at the

end of the lease term, BOA is not entitled to add the "residual value of the equipment" to its judgment.

As to Grand Photo's cross motion to interpose a third-party complaint against Hewlett Packard FSC, the motion is denied. Grand Photo's claims against the proposed third-party defendant are without merit in that, as noted above, Grand Photo must look to the dealer and/or manufacturer of the equipment to assert any claims for indemnification.

Accordingly, based upon the foregoing, it is

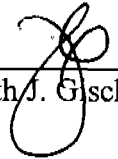
ORDERED that the motion by plaintiff Banc of America Leasing and Capital, LLC for summary judgment is granted and the Clerk shall enter judgment in favor of plaintiff and against defendant in the amount of \$52,223.02, together with interest from November 26, 2008, at the statutory rate, until entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's claim for attorney's fees is severed and shall continue; and it is further

ORDERED that the cross motion by defendant Grand Photo Inc. to interpose a third-party complaint is denied.

Dated: June 16, 2010  
New York, New York

**FILED**  
JUN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC