SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

BANC OF AMERICA LEASING AND CAPITAL, LLC,
as assignee of RICOH BUSINESS SOLUTIONS,

Plaintiff,

- against -

COMPUMED BILLING SOLUTIONS LTD.,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 6564/11
Motion Seq. No.: 01
Motion Date: 07/29/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits and Memorandum of Law	1
Affirmation in Opposition	2
Reply Affirmation and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting summary judgment in its favor and against defendant for the relief demanded in the Verified Complaint and dismissing defendant's Verified Answer with affirmative defenses on the grounds that no triable issues of fact exist. Defendant opposes the motion.

Based upon all of the papers submitted by plaintiff for this Court's consideration, the Court finds that the plaintiff has, *prima facie*, established:

On or about March 10, 2008, defendant by its Vice President, Dan Chumsky, entered into and executed a written Lease Agreement with Ricoh Business Solutions.

On or about March 28, 2008, defendant by its Vice President, Dan Chumsky, accepted the delivery of the business equipment which is the subject matter of the aforesaid Lease Agreement.

On or about August 1, 2000, Ricoh assigned the subject Lease Agreement to Fleet Capital Leasing.

In 2004, Bank of America Corp. merged with Fleet Boston Financial Corp. By virtue of this merger, Banc of America Leasing and Capital, LLC, the plaintiff herein, assumed the herein above described Lease Agreement which is the subject matter of the instant action.

The term of the subject lease was for a period of sixty-three (63) months with monthly payments of One Thousand Five Hundred Forty-Four Dollars and Zero Cents ($1,544.00) each month, plus applicable taxes.

The subject lease in pertinent part provided:

> "3. SELECTION OF EQUIPMENT/DISCLAIMER OF WARRANTIES:
> You have selected the Equipment and the supplier from whom we agree to purchase the Equipment at your request. We are not the manufacturer of the Equipment and we are leasing the Equipment to you "AS-IS". You have selected the Equipment and we MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANT- ABILITY OR FITNESS FOR A PARTICULAR PURPOSE. We transfer to you for the term of this Lease all warranties, if any, made by the manufacturer."

Defendant has defaulted in the payment of the monthly installment payments pursuant to the subject Lease Agreement and has not made any such payment since on or about June 15, 2010.

Defendant has not revoked, denied or disputed the existence of the subject Lease Agreement.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Department, in *Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.*,

207 A.D.2d 880, 616 N.Y.S.2d (2d Dept. 1994). It states,

> "It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue *(State Bank v McAuliffe*, 97 AD2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York supra*, at 562)."

Summary judgment, however, is a drastic remedy which should be granted only when there is no clear triable issue of fact presented. Even the color of a triable issue of fact should foreclose this remedy. Therefore, in deciding a summary judgment motion, the evidence must be scrutinized carefully in the light most favorable to the defendant herein. Issue finding, rather than issue determination, is the key to the proper review of a summary judgment motion. *See Rudnitsky v. Robbins*, 191 A.D.2d 488, 594 N.Y.S.2d 354 (2d Dept. 1993); *Triangle Fire Protection Corp. v. Manufacturers Hanover Trust Co.*, 172 A.D.2d 658, 570 N.Y.S.2d 960 (2d Dept. 1991)

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement, in admissible form, to demonstrate the absence of any material issues of fact. *See JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 795 N.Y.S.2d 502 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974).

Accordingly, based upon this Court's finding that plaintiff has met its *prima facie* burden of proof of showing entitlement to judgment as a matter of law, the burden now shifts to defendant, the party opposing this motion, to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue or issues of fact requiring a trial. *See Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

In opposition to the instant motion, defendant has elected to submit only an Affirmation of its attorney wherein counsel posits:

> ". . . it is respectfully submitted that were the Court to exercise its authority to 'search the record' pursuant to CPLR 3212(b), it would find the legal factual predicate to dismiss the Complaint."

Furthermore, a review of counsel's Affirmation in Opposition finds that there is no representation made in the Affirmation that the attorney has any personal knowledge of the relevant facts herein. Therefore, this Affirmation is without evidentiary value. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The attorney for defendant has not submitted any admissible evidence to rebut the plaintiff's *prima facie* showing of entitlement to judgment as a matter of law. The conclusory and speculative claims of defense counsel set forth in the Affirmation in Opposition to the instant motion are of no probative value and are insufficient to raise triable issues of fact. *See Zuckerman v. City of New York, supra.*

Initially, with respect to the twelve (12) affirmative defenses set forth in the Verified Answer interposed by defendant, the subject Lease Agreement specifically provides:

> "YOUR OBLIGATION TO PAY THE LEASE PAYMENTS AND OTHER LEASE OBLIGATIONS ARE ABSOLUTE AND UNCONDITIONAL AND ARE NOT SUBJECT TO CANCELLATION, REDUCTION, SETOFF OR COUNTERCLAIM. THIS LEASE IS NON-CANCELABLE."

This absolute and unconditional clause is known as a "hell or high water clause.[1]" *See Wells Fargo Bank Minnesota, N.A. v. CD Video, Inc.*, 6 Misc.3d 1003(A), 800 N.Y.S.2d 359 (Supreme Court New York County 2004) (referencing UCC § 2-A-407) *aff'd* 22 A.D.3d 351, 802 N.Y.S.2d 423 (1st Dept. 2005).

Furthermore, an examination of the twelve (12) affirmative defenses finds that each and every affirmative defense is bereft of factual data, patently insufficient and merely alleges

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[1]Must be given full force and effect as a matter of law.

conclusions of law which fail to comply with the degree of particularity required by CPLR § 3013.

Accordingly, the twelve (12) affirmative defenses interposed in defendant's Verified Answer are herewith dismissed. *See Becher v. Feller*, 64 A.D.3d 672, 884 N.Y.S.2d 83 (2d Dept. 2009).

Plaintiff's motion, pursuant to CPLR § 3212, for an order granting summary judgment in its favor and against defendant for the relief demanded in the Verified Complaint and dismissing defendant's Verified Answer with affirmative defenses on the grounds that no triable issues of fact exist is hereby **GRANTED**.

The issue of damages is herewith respectfully referred to the Calendar Control Part (CCP) for an Inquest.

Subject to the approval of the Justice there presiding, and provided that a Note of Issue, together with a copy of this Order, have been served and filed, at least ten (10) days prior thereto, this matter shall appear on the calendar of CCP at 9:30 a.m. on the 14th day of November, 2011.

The directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer this matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 13, 2011