

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>BUSINESS CREDIT LEASING, INC.,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>CITY OF BIDDEFORD and BIDDEFORD SCHOOL DEPARTMENT,</b>	)	
	)	
<b>Defendants and Third-Party Plaintiffs</b>	)	<b>Civil No. 90-0282 P</b>
	)	
<b>v.</b>	)	
	)	
<b>INSTRUCTIONAL SYSTEMS, INC.,</b>	)	
	)	
<b>Third-Party Defendant</b>	)	

**RECOMMENDED DECISION ON PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

Business Credit Leasing, Inc. ("BCL") moves for summary judgment on its breach of contract claim in this diversity action arising out of an equipment lease agreement between it as lessor and defendant Biddeford School Department ("Biddeford") as lessee.<sup>1</sup> Biddeford denies the breach and contends that genuine issues of material fact preclude summary judgment as to liability and damages. For the reasons articulated below, I recommend that this court grant summary judgment on Count I on liability and damages.

**I. SUMMARY JUDGMENT STANDARDS**

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<sup>1</sup> Default was entered against Instructional Systems, Inc., the third-party defendant in this action, on January 30, 1991 for failure to file a timely answer. I denied its motion to set aside default on April 30, 1991.

Fed. R. Civ. P. 56(a) provides in relevant part that "[a] party seeking to recover upon a claim . . . or to obtain a declaratory judgment may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." Such motions must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

## II. FACTS

Both parties filed statements of material facts in accordance with Local Rule 19(b)(2). The undisputed facts may be briefly summarized. On or about September 21, 1989 BCL and Biddeford entered into an equipment lease agreement. Affidavit of Steve Marlette ("Marlette Affidavit") & 3; Exh. 1 ("Lease") to Marlette Affidavit. The Lease was signed by Julie Farrell, a BCL representative, and Robert R. Hodge, superintendent of the Biddeford School Department. *See* Lease at 1; *see also* Affidavit of Robert R. Hodge ("Hodge Affidavit") & 1, 11. It provides for a 60-month rental term for certain computer equipment that Biddeford received and used for approximately one year.<sup>2</sup>

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<sup>2</sup> The Lease also provides that at the end of the lease term Biddeford may purchase the equipment for its then fair market value, renew the Lease or return the equipment. *See* Lease at 1.

Marlette Affidavit & 5; Exh. 1 to Marlette Affidavit. Biddeford made all the required payments pursuant to the Lease until August 1990 when it ceased doing so. Marlette Affidavit & 5-7.

The Lease contains a default clause providing that Biddeford would be in default if, *inter alia*, it "failed to pay any rent or other sum" owing by the due date. See Lease & 18(a). Remedies for default include liquidated damages, interest, expenses and legal fees. See Lease & 19. The Lease also contains an assignment clause that states in relevant part:

10. ASSIGNMENT. Without Lessor's prior written consent Lessee will not sell, assign . . . or remove the Equipment from its location referred to above.

The record does not contain evidence that BCL ever consented in writing to an assignment.

Prior to negotiating the Lease with BCL, Biddeford contracted with Instructional Systems, Inc. ("ISI"), the third-party defendant in this action, to provide the school department with computer-assisted instruction. Hodge Affidavit & 4. The ISI contract contains the following clause:

Biddeford has the right to cancel this agreement after the first year of operation. If Biddeford opts to cancel, Instructional Systems will take over the equipment lease and remove the equipment.

Exh. A to Third-Party Complaint. Prior to signing the Lease with BCL, Superintendent Hodge sent BCL a copy of the ISI contract as requested by BCL. Hodge Affidavit & 10. On or about September 20, 1989 ISI and BCL entered into a best-efforts resale agreement. Affidavit of Benore Buffa dated March 6, 1991 ("Buffa Affidavit I") & 11; Exh. C to Buffa Affidavit I. This remarketing agreement provides, in pertinent part, that

in the event that Biddeford School Dept. . . . defaults on the Lease agreement . . . [ISI] agrees to perform as follows:

Upon written notice from BCL to [ISI] that [Biddeford] . . . is in default on the lease agreement, [ISI] will immediately repossess and store, without charge, the equipment listed on the lease agreement between BCL and [Biddeford].

If requested by BCL, [ISI] shall also use its best efforts to sell and/or release the equipment to another party for the outstanding balance owed to BCL. . . .

By letter dated March 20, 1990 Superintendent Hodge notified ISI that Biddeford was cancelling the contract with ISI effective June 30, 1990. Hodge Affidavit & 13; Exh. A to Hodge Affidavit. A copy of the letter was sent to Julie Farrell at BCL. Hodge Affidavit & 14; Exh. A to Hodge Affidavit. In August 1990 ISI removed all of the computer equipment from the Biddeford schools. Buffa Affidavit I & 14. It then began efforts to resell the equipment pursuant to the remarketing agreement. *Id.* & 16. Although as of March 6, 1991 the Boston Public Schools had purchased some of the equipment and other school departments had evidenced an interest in what remained, ISI had not by then received any monies from its resale efforts. *Id.* && 16-19.

The parties sharply dispute the assignment and default issues. Biddeford asserts that it has not breached the Lease because it properly assigned to ISI its obligations under the Lease. Consequently, Biddeford contends, it is no longer liable to BCL for the remaining lease payments. BCL does not recognize the asserted assignment because it never gave written consent to such an assignment. Therefore, BCL asserts that Biddeford is in default and seeks more than \$500,000 in damages, interest, fees and costs. *See* Complaint, Prayer for Relief.

### III. LEGAL ANALYSIS

Both parties acknowledge that Minnesota law governs the terms of the Lease in this diversity action. *See* Lease & 24; *see also* Memorandum of Defendants City of Biddeford and Biddeford School Department in Opposition to Plaintiff's Motion for Summary Judgment ("Defendants' Memorandum") at 5 n.2; Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Plaintiff's Memorandum") at 3. Minnesota recognizes the parol-evidence rule, under which the unambiguous terms of contracts are enforced. *See, e.g., City of Virginia v. Northland Office*

*Properties Ltd. Partnership*, 465 N.W.2d 424, 427 (Minn. Ct. App. 1991) (whether contract is ambiguous is question of law and extrinsic evidence may be considered only if terms are ambiguous); *Davis v. Outboard Marine Corp.*, 415 N.W.2d 719, 723 (Minn. Ct. App. 1987) (court must give all contract terms their plain, ordinary and popular meaning; extrinsic evidence will be considered only if contract ambiguous); *Deutz & Crow Co. v. Anderson*, 354 N.W.2d 482, 486 (Minn. Ct. App. 1984) (contract is ambiguous when it is reasonably and fairly susceptible of more than one construction); *Jansen v. Herman*, 230 N.W.2d 460, 463 (Minn. 1975) (oral evidence of discussions, negotiations or understandings not admissible to vary or contradict terms of unambiguous contract).

#### A. The Lease

As an initial matter, I find the relevant terms of the Lease to be unambiguous. Therefore, I decline Biddeford's invitation to consider the various discussions and negotiations that preceded the written agreement.<sup>3</sup> The default clause clearly states that Biddeford will be in default if it fails to pay the rent on the due date. Biddeford notified BCL that it would be making its final payment of \$20,000 within a "few days" of June 26, 1990. *See* Exh. 2 to Marlette Affidavit. It also acknowledges that it did not make the October 1990 payment. *See* Plaintiff's Statement of Facts & 3; Defendant's Statement of Material Facts & 3.

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<sup>3</sup> In fact, cases Biddeford cites in its effort to encourage the court to consider such extrinsic evidence involve an interpretation of ambiguous contracts, *see, e.g., Marso v. Mankato Clinic*, 153 N.W.2d 281, 287-88 (Minn. 1967); *Donnay v. Boulware*, 144 N.W.2d 711, 714 (Minn. 1966), or merely restate the parol evidence rule barring extrinsic evidence when interpreting an unambiguous contract, *see, e.g., Jimmerson v. Troy Seed Co.*, 53 N.W.2d 273, 276-77 (Minn. 1952).

Biddeford asserts, however, that it is not in default because it assigned its obligations under the Lease to ISI. This argument has no merit. The assignment clause requires BCL's written consent to any assignment of Biddeford's interests in the Lease. I find no such written consent in this record. Even if there were evidence of BCL's written consent to the assignment, in the absence of a specific assumption by ISI of Biddeford's duties under the Lease -- including the duty to pay rent -- and a release by BCL of Biddeford's obligations thereunder, Biddeford would remain primarily liable to BCL under the Lease. *See Carstedt v. Grindeland*, 406 N.W.2d 39, 42 (Minn. Ct. App. 1987); A. L. Corbin, *Corbin on Contracts*' 866 at 452 (1951). Biddeford has failed to establish the existence of a triable issue. The subject Lease being unambiguous on its face, BCL is entitled to summary judgment on liability as a matter of law.<sup>4</sup>

## B. Damages

It is settled law in Minnesota that, pursuant to a liquidated damages clause,

parties to a contract may stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. A stipulation of this kind is enforceable, at least in those cases where the damages which result from a breach . . . are in their nature uncertain and where the amount stipulated does not manifestly exceed the injury which will be suffered.

*Dean Van Horn Consulting Assocs. v. Wold*, 367 N.W.2d 556, 559 (Minn. Ct. App. 1985) (citations omitted). In addition, `` a contract provision for liquidated damages can be enforced without proving

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<sup>4</sup> I reject Biddeford's suggestion that it may not be bound to the terms of the Lease because the Biddeford School Committee may not have explicitly authorized Superintendent Hodge to execute it. *See Defendants' Memorandum* at 5 n.2. The superintendent signed the Lease on behalf of the Biddeford School Department; the Biddeford School Department appropriated funds to pay for the equipment; the equipment was used by the Biddeford school system for almost one year; and the school board's attorney was involved in drafting the agreement that terminated the lease purchase. *See* last page of Exh. 1 to Complaint. Biddeford performed under the Lease. To now assert that Hodge's signature may not provide the proper authorization is a belated and ineffective defense.

actual damages as long as the amount stated is reasonable." *Id.* at 560 (citation omitted).  
"[L]iquidated damages are allowed when damages are difficult to ascertain. . . . Moreover, the plaintiff need not prove specific amounts of damages suffered. The function of a liquidated damages clause is that the parties agree in advance to a stipulated damage amount, precisely because it would be difficult to prove a specific amount of damages." *Id.*

Biddeford does not contest the reasonableness of the formula provided in the liquidated damages clause; it argues instead that the amount BCL now seeks cannot be considered reasonable because the calculations do not take into account the value of any mitigation that may have occurred.<sup>5</sup> However, the parties themselves, at the time of contracting, considered it reasonable to discount the effects of mitigation. I see no reason to second-guess that judgment.

The liquidated damages clause provides that the parties agreed at the time the Lease was executed that the potential damages were "uncertain and not capable of exact measurement" because the value of the leased equipment at the expiration of the Lease would be uncertain. Paragraph 19 provides for payment of (1) the balance due on the outstanding October 1990 payment (\$125,000.00) (*see* & 19(a)); (2) the three future payments due under the 60-month rental term discounted by 8 percent (\$322,137.12) (*see* & 19(b)); and (3) the residual value of the leased equipment (\$85,000.00) at 20 percent of the original cost (\$425,000.00) (*see* & 19(d)).<sup>6</sup> *See* Marlette Affidavit && 8-11. Further,

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<sup>5</sup> Biddeford returned the computer equipment to ISI in August 1990. Hodge Affidavit && 15-16. Therefore, Biddeford asserts, BCL's losses were mitigated and the value of the returned equipment as well as any rental income realized during the remainder of the original five-year term must be offset against the damages claimed. *See* Defendants' Memorandum at 15-16.

<sup>6</sup> BCL is not seeking relief pursuant to & 19(c) for investment tax credit.

paragraph 21 of the Lease provides that Biddeford's obligation to pay the rent and amounts payable . . . under paragraphs 12 and 19 is unconditional and not subject to any abatement, reduction, setoff or defense of any kind."

In *Gorco Constr. Co. v. Stein*, 99 N.W.2d 69, 74 (Minn. 1959) (citations omitted), the Minnesota Supreme Court stated:

The modern trend is to look with candor, if not with favor, upon a contract provision for liquidated damages when entered into deliberately between parties who have equality of opportunity for understanding and insisting upon their rights, since an amicable adjustment in advance of difficult issues saves the time of courts, juries, parties, and witnesses and reduces the delay, uncertainty, and expense of litigation. Accordingly, this court has long regarded provisions for liquidated damages as prima facie valid on the assumption that the parties in naming a liquidated sum intended it to be fair compensation for an injury caused by a breach of contract and not a penalty for nonperformance.

Although favorably disposed to giving effect to a provision for liquidated damages, this court has not hesitated, however, to scrutinize a particular provision to ascertain if it is one for a penalty or one for damages. In determining the issue neither the intention of the parties nor their expression of intention is the governing factor. The controlling factor, rather than intent, is whether the amount agreed upon is reasonable or unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances.

Under Minnesota law, this court is obliged to give effect to the parties' agreement on liquidated damages except to the extent its prima facie validity has been successfully challenged or the court determines as a matter of law that any one or more of its component parts reflects the imposition of a penalty rather than a fair measure of damages. Biddeford does not question its deliberateness in entering into the remedies portion of the Lease or its equal bargaining power and opportunity to understand the significance of the liquidated damages provision. Thus, the prima facie validity of that provision remains intact. Nor do I find the present obligation imposed on Biddeford to pay the future rent owing over the remainder of the original term, discounted by 8%, to be manifestly

disproportionate to the actual damages which BCL may sustain in the form of lost rental income. This is, after all, a situation where actual damages resulting from Biddeford's breach cannot be specifically determined. *See Gorco*, 99 N.W.2d at 75.

I conclude, however, that the "residual value" damages component, which amounts to \$85,000, is unreasonable and can only be fairly characterized as a penalty. Although Biddeford enjoyed the option of purchasing the equipment at the end of the lease term, it was under no obligation to do so. Thus, BCL has lost none of the inherent value of the equipment itself as a consequence of Biddeford's breach. Indeed, it is likely that the fair market value of the equipment in August 1990 was significantly greater than it will be in September 1994 when the Lease was due to expire.

#### IV. CONCLUSION

For the foregoing reasons, I recommend that BCL's motion for summary judgment on Count I be ***GRANTED*** as to liability and as to the following damages:

- |       |  |                   |
|-------|--|-------------------|
| (i)   | outstanding October 1990 payment   | \$125,000.00      |
|       | 3 future payments discounted by 8%   | <u>322,137.12</u> |
|       |  | \$447,137.12;     |
| (ii)  | interest on \$447,137.12 at the rate of 8% per annum commencing July 1, 1990; and            |                   |
| (iii) | reasonable attorney fees ( <i>see</i> Affidavit Regarding Attorneys' Fees (Docket Item 12)). |                   |

#### ***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 17th day of May, 1991.***

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***David M. Cohen***  
***United States Magistrate Judge***