

FOX ROTHSCHILD LLP

By: Richard M. Meth

Robert J. Rohrberger

Matthew S. Adams

75 Eisenhower Parkway, Ste. 201

Roseland, New Jersey 07068

Tel: (973) 992-4800

Fax: (973) 992-9125

Attorneys for Plaintiff ABCO Leasing, Inc.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ABCO LEASING, INC.,

Plaintiffs,

v.

ALLIED HEALTH CARE SERVICES,
INC. and CHARLES K. SCHWARTZ,

Defendants.

Civil Action No. 10-3558 (DRD)

COMPLAINT

Plaintiff ABCO Leasing, Inc. ("Plaintiff" or "ABCO"), by and through its attorneys, Fox Rothschild LLP, for its Complaint against defendants Allied Health Care Services, Inc. ("Allied") and Charles K. Schwartz ("Schwartz") (collectively, "Defendants"), states as follows:

NATURE OF ACTION

1. Through the instant action, Plaintiff seeks to enforce its rights as lessor arising out of the breaches of two separate equipment leases by Allied as lessee, and for breach of a continuing personal guaranty of these equipment leases by Schwartz who, upon information and belief, is the President of Allied.

PARTIES

2. ABCO is a commercial leasing and equipment finance company for a wide variety of equipment in a broad variety of businesses and industries. ABCO is organized pursuant to the laws of the State of Washington, and its principal place of business is located at 22232 Seventeenth Avenue Southeast, Suite 204, Bothell , Washington, 98021.

3. Allied is a New Jersey corporation with a principal place of business at 89 Main Street, Orange, New Jersey 07051. Allied is purportedly a company engaged in the business of medical equipment rentals.

4. Schwartz is an individual citizen of the State of New Jersey, residing at 37 Timberline Drive, Sparta, New Jersey 07871.

JURISDICTION AND VENUE

5. This court has original jurisdiction over this action pursuant to 28 U.S.C. §1332(a) because the matter in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

6. Venue is proper in this district pursuant to 28 U.S.C. §1391(a) because all defendants reside in New Jersey, because a substantial part of the events or omissions giving rise to the claims occurred in New Jersey, and because a substantial part of property that is the subject of this action is situated in New Jersey.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

7. Allied, as lessee, entered into two separate equipment leases with ABCO, as lessor: (1) Equipment Lease Number 1355-1, dated November 6, 2007 (“Equipment Lease Number 1355-1”); and (2) Equipment Lease Number 1355-2, dated February 12, 2008 (“Equipment Lease Number 1355-2”)

(collectively "Equipment Leases"). True and Accurate copies of the referenced Equipment Leases, each together with: (a) corresponding documentation memorializing Allied's acceptance of the property subject to the Equipment Leases; (b) a corporate resolution by Allied authorizing Schwartz to deal on behalf of Allied with ABCO; (c) Allied's purchase order for the property subject to the Equipment Leases from equipment supplier Donner Medical Marking ("Donner"); (d) sales and use tax exemption documentation for Allied; and (d) Uniform Commercial Code Financing Statements for the subject transactions, are annexed hereto as Exhibits 1 and 2, respectively.

8. To induce ABCO into leasing equipment to Allied, and as security against the risk of ABCO extending credit to Allied, Schwartz executed a continuing personal guaranty to ABCO for the Equipment Leases, dated November 2, 2007 ("Continuing Guaranty"). A true and accurate copy of the executed Continuing Guaranty is annexed hereto as Exhibit 3.

Equipment Lease Number 1355-1

9. Pursuant to Equipment Lease Number 1355-1, ABCO, as lessor, leased to Allied, as lessee, fifty (50) PLV 102 Lifecare Ventilators. These ventilators are medical equipment for use by chronically ill patients with perpetual home ventilation needs.

10. Pursuant to Equipment Lease Number 1355-1, Allied was obligated to pay ABCO sixty (60) monthly installments of \$6,056.93, in addition to certain advance payments.

11. Paragraph 20 of Equipment Lease Number 1355-1 defines an actionable breach by Allied, and reads as follows:

20. **Default.** Lessee shall be in default under this Lease if: (a) Lessee fails to pay when due any rent or other amount which Lessee owes Lessor; (b) Lessee fails to perform any other obligation which Lessee owes Lessor; (c) voluntary or involuntary petition is filed with respect to Lessee under the bankruptcy laws (including without limitation a petition for reorganization, arrangement or extension) or under any receivership or insolvency law; (d) Lessee is insolvent or unable to pay debts as they mature; (e) any property of Lessee is seized or levied upon by

governmental proceedings; (f) Lessee dies or dissolves; (g) Lessee defaults on any other agreement it has with Lessor; (h) any of the foregoing events occur with respect to any of Lessee's guarantors; or (i) Lessor believes in good faith that the prospect for payment or performance of the Lease is impaired.

(See Exhibit 1 at ¶ 20).

12. Paragraph 21 of Equipment Lease Number 1355-1 governs ABCO's remedies against Allied in the event of a default, and reads as follows :

21. **Remedies.** If Lessee is in default, Lessor may: (a) enforce Lessee's obligations under the Lease, including payment of all past due amounts, or recover damages for Lessee's breach thereof; or (b) declare immediately due and recover as **LIQUIDATED DAMAGES** the sum of: (i) all rents and other amounts past due under the lease; (ii) the entire unpaid balance of future rent and other amounts which will become due for the balance of the Lease term; and (iii) Lessor's estimated residual value (as defined in paragraph 13 above). All accelerated future obligations, excluding sales, use, personal property and other tax obligations, but including the residual obligation, shall be discounted to present value at the time of payment or entry of judgment, whichever first occurs, by an annual factor of six percent. In addition, Lessor may enter any premises and take possession of the Property (and all additions and substitutions) without notice, demand or legal process, and without terminating Lessee's obligations under this Lease. If Lessor repossesses the Property, it may sell, re-lease or otherwise dispose of the Property in a commercially reasonable manner and apply the net proceeds realized (after deducting from the gross proceeds the total of Lessor's expenses of repossession, collection and sale, including attorney's fees, whether or not suit has been instituted) against all rent and other amounts due to Lessor from Lessee pursuant to this Lease. Lessee shall remain liable to Lessor for any deficiency. All remedies of Lessor are cumulative and may, to the extent permitted by law, be exercised concurrently or separately and the exercise of only one remedy shall not be deemed an election of remedy, preclude exercise of any other remedy, or terminate Lessee's obligations pursuant to the Lease. Time is of the essence to this Lease, and Lessee's obligations hereunder shall not be affected or excused by acceptance of any past due payment or any delay in enforcement of Lessor's rights hereunder. The **LIQUIDATED DAMAGES** specified in this paragraph are a fair estimation of the actual but difficult to ascertain damages which would result from a breach of the Lease and are not intended as a penalty.

(See Exhibit 1 at ¶ 21).

13. Allied has failed to pay ABCO pursuant to Equipment Lease Number 1355-1 since March 31, 2010. Accordingly, Allied has defaulted on its obligations under Equipment Lease Number 1355-1 pursuant to Paragraph 20, and ABCO has at its disposal the remedies contractually afforded to it Pursuant to Paragraph 21.

Equipment Lease Number 1355-2

14. Pursuant to Equipment Lease Number 1355-2, ABCO, as lessor, leased to Allied, as lessee, thirty (30) PLV 102 Home Care Ventilators.

15. Pursuant to Equipment Lease Number 1355-2, Allied was obligated to pay ABCO sixty (60) monthly installments of \$3,579.41, in addition to certain advance payments.

16. Other than differences in the quantity and model of the equipment, as well as the monthly rental payment, the terms of Equipment Lease Number 1355-2 are nearly identical to the terms of Equipment Lease Number 1355-1.

17. Paragraphs 20 and 21 of Equipment Lease Number 1355-2 are identical to their counterparts in Equipment Lease Number 1355-1, quoted *supra*. (See Exhibit 2 at ¶¶ 20-21).

18. Allied has failed to pay ABCO pursuant to Equipment Lease Number 1355-2 since March 31, 2010. Accordingly, Allied has defaulted on its obligations under Equipment Lease Number 1355-2 pursuant to Paragraph 20, and ABCO has at its disposal the remedies contractually afforded to it Pursuant to Paragraph 21.

The Continuing Guaranty

19. Pursuant to the Continuing Guaranty, Schwartz personally and unconditionally guaranteed the payment of all obligations of Allied under the Equipment Leases.

20. Paragraph 1 of the Continuing Guaranty governs the scope and breadth of Schwartz's personal obligations to ABCO in the event of a default under the Equipment Leases by Allied, and reads as follows:

1. **Obligations Guaranteed.** For purposes of this Continuing Guaranty, the term "Guaranteed Obligations" is used in its most comprehensive sense and include: (a) all monetary and non-monetary obligations of the Lessee to Lessor, including without limitation all voluntary or involuntary indebtedness, advances, debts and other liabilities of the Lessee to Lessor which are made or incurred prior to, at the time of, or after the execution of this Continuing Guaranty; (b) all obligations, whether due or to become due, absolute or contingent, liquidated or unliquidated, disputed or undisputed, determined or undetermined, and whether the Lessee may be liable individually or jointly with others; and (c) any obligations which are or may have become barred by any statute of limitations or which are or may become otherwise uncollectible by Lessor from Lessee.

(Exhibit 3 at ¶ 1).

21. Paragraph 1 of the Continuing Guaranty establishes Schwartz's unconditional duty to perform in the event of a default by Allied:

2. **Performance by Guarantor Upon Default.** If the Lessee fails fully and punctually to pay or perform any Guaranteed Obligation, each Guarantor jointly and severally agrees upon demand to pay or perform the delinquent obligation and to pay all damages that arise as a consequence of the Lessee's nonpayment or nonperformance thereof.

22. Demand was made to Schwartz under the Continuing Guaranty for the total current outstanding debt owed by Allied to ABCO pursuant to the Equipment Leases, including past due rental payments and accelerated payments governed by Paragraph 21, *supra.*, of the Equipment Leases. However, Schwartz failed to respond.

Conclusion

23. Based upon the forgoing, Allied has defaulted on the Equipment Leases, and Schwartz has defaulted on his unconditional personal guarantee to pay or perform Allied's defaulted obligations, and to pay all damages that arise as a consequence thereof.

24. Accordingly, ABCO brings the instant suit, seeking a judgment against Allied for liquidated damages pursuant to the Equipment Leases, as well for the return of the ventilators subject to the Equipment Leases. Further, ABCO seeks a judgment against Schwartz for his failure to honor his personal Continuing Guarantee to ABCO, and an award of attorneys' fees and costs in favor of ABCO.

CAUSES OF ACTION

First Count

(Against Allied For Breach Of Equipment Lease Number 1355-1)

25. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 - 24 above, as if set forth fully herein.

26. Allied has failed to make rental payments to ABCO pursuant to Equipment Lease Number 1355-1 since March 31, 2010.

27. Pursuant to Paragraph 20 of Equipment Lease Number 1355-1, Allied's failure to make rental payments is an actionable default.

28. Pursuant to Paragraph 21 of Equipment Lease Number 1355-1, ABCO is now entitled to liquidated damages.

29. Plaintiffs have demanded payment of said liquidated damages from Allied and Schwartz. Nonetheless, Allied's obligation to ABCO remains unsatisfied.

30. Consequently, Allied has breached the Equipment Lease Number 1355-1, and is liable to Plaintiffs for the liquidated damages caused thereby, as defined by Paragraph 21 of Equipment Lease Number 1355-1, including attorneys fees and costs.

Second Count

(Against Allied For Breach Of Equipment Lease Number 1355-2)

31. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 - 30 above, as if set forth fully herein.

32. Allied has failed to make rental payments to ABCO pursuant to Equipment Lease Number 1355-2 since March 31, 2010.

33. Pursuant to Paragraph 20 of Equipment Lease Number 1355-2, Allied's failure to make rental payments is an actionable default.

34. Pursuant to Paragraph 21 of Equipment Lease Number 1355-2, ABCO is now entitled to liquidated damages.

35. Plaintiffs have demanded payment of said liquidated damages from Allied and Schwartz. Nonetheless, Allied's obligation to ABCO remains unsatisfied.

36. Consequently, Allied has breached the Equipment Lease Number 1355-2, and is liable to Plaintiffs for the liquidated damages caused thereby, as defined by Paragraph 21 of Equipment Lease Number 1355-2, including attorneys fees and costs.

Third Count

(Against Schwartz For Breach Of The Continuing Guaranty)

37. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 - 36 above, as if set forth fully herein.

38. Pursuant to the Continuing Guaranty, Schwartz personally and unconditionally guaranteed the payment of all obligations of Allied to ABCO under the Equipment Leases.

39. Allied is in default under the Equipment Leases, as detailed above.

40. Schwartz is in default under the Guaranty based upon his failure to satisfy all of Allied's obligations under the Equipment Leases after receiving personal notice of Allied's default, and ABCO's demand for payment.

42. By reason of the foregoing, Schwartz is liable to Plaintiffs for, among other things, the liquidated damages due and owing by Allied to ABCO pursuant to the Equipment Leases, including any and all costs and attorneys' fees incurred in the process of enforcing the Equipment Leases and the Continuing Guaranty.

Fourth Count

(Against Allied For Replevin)

43. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 - 42 above, as if set forth fully herein.

44. Pursuant to Paragraph 21 of the Equipment Leases, ABCO is permitted to "enter any premises and take possession of the Property (and all additions and substitutions) without notice, demand, or legal process, and without terminating . . . [Allied's] obligations pursuant to . . . [the Equipment Leases. (See Exhibits 1 & 2 at ¶21).

45. ABCO also has a statutory right to replevin pursuant to N.J.S.A. § 2B:50-1.

46. The ventilators subject to the Equipment Leases are being wrongfully held by Allied, despite ABCO's demand that they be returned.

47. By reason of the foregoing, ABCO is entitled to take possession of the ventilators subject to the Equipment Leases.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

A. An award of liquidated damages in favor of ABCO, and against Allied and Schwartz, pursuant to Paragraph 21 of the Equipment Leases;

B. An Order commanding Allied to return the property subject to the Equipment Leases to ABCO immediately;

C. A Writ of Replevin in favor of ABCO, and against Allied, regarding the property subject to the Equipment Leases;

D. An award of attorney fees and costs in favor of ABCO, and against Allied and Schwartz, pursuant to Paragraph 21 of the Equipment Leases;

E. The imposition of interest and costs of suit against Allied; and

F. Such other relief as the Court deems just and proper.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: s/ Robert J. Rohrberger

Richard M. Meth
Robert J. Rohrberger
Matthew S. Adams

Dated: July 12, 2010

JURY TRIAL DEMANDED

Plaintiff ABCO Leasing, Inc. hereby demands a trial by jury.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: s/ Robert J. Rohrberger

Richard M. Meth
Robert J. Rohrberger
Matthew S. Adams

Dated: July 12, 2010