Court of Appeal No. 270752

Lower Court Case No. 2004-3376-CK

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PREFERRED CAPITAL, INC.

Defendant/Appellant,

vs.

CUSTOM DATA SOLUTIONS, INC.

Plaintiff/Appellee,

BRIEF OF DEFENDANT/APPELLANT

ORAL ARGUMENT REQUESTED

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

LOGAN & ASSOCIATES, P.C.
By: LESLIE ANNE LOGAN (P34909)
P.O BOX 7279
Bloomfield Hills, MI 48302

Attorneys for Defendant/Appellant

RECEIVED
06 JUL 26 PM 4:45
COURT OF APPEALS
STATE APPELLATE DEFENDER OFFICE

EXHIBIT
tabbies
1

Table Of Contents

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

Index Of Authorities

Cases **Page No.**

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

Statutes

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

I. Statement of Jurisdiction

Jurisdiction is properly conferred on this Court pursuant to MCR 7.203(A)(1). This is an appeal as of right from the May 11, 2006 Order from Macomb County Circuit Court (the "trial court"). The May 11, 2006 Order was a final disposition that resolved all claims. Defendant/Appellants filed its claim of appeal on June 1, 2006, within 21 days of the trial court's final determination.

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

II. Statement of Questions Presented for Review

1. Did the Trial court commit reversible error when it determined, as a matter of law, that the subject lease agreements were invalid based on fraud in the inducement by the assignor despite the inclusion of a valid merger clause in each lease agreement itself and despite Plaintiff/Appellee's acceptance of the subject equipment after a reasonable period of inspection?

   Defendant/Appellant answers, "YES"

   Plaintiff/Appellee answers, "NO"

   Trial Court answers, "NO"

2. Did the Trial Court commit reversible error when it determined, as a matter of law, that Defendant/Appellant's lease agreements with Plaintiff/Appellee were invalid based on an assignors failure to perform under separate service agreements and this constitutes a breach of contract?

   Defendant/Appellant answers, "YES"

   Plaintiff/Appellee answers, "NO"

   Trial Court answers, "NO"

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

IV. Statement of Facts & Proceedings

A. Background Facts

Plaintiff/Appellee, CUSTOM DATA SOLUTIONS, INC.'s ("CUSTOM DATA SOLUTIONS") suit against Defendant/Appellant, PREFERRED CAPITAL, INC., ("PREFERRED") stems from equipment leases that were assigned from NorVergence, Inc., a New Jersey corporation ("NorVergence"), to PREFERRED. Appellee entered into numerous agreements with NorVergence to provide a broad range of telecommunication services that included telephone service, computer internet connections and cell phones. NorVergence apparently represented it would be able to offer these services to CUSTOM DATA SOLUTIONS at a substantial savings over their current providers. NorVergence did not perform, in full, under its service agreements with CUSTOM DATA SOLUTIONS. However, CUSTOM DATA SOLUTIONS did receive some of the promised services from NorVergence: specifically cell phone and telephone service. (See Exhibit "A")

NorVergence also entered into equipment rental agreements for telecommunication devices referred to as "matrix boxes." Two (2) of the equipment rental agreements were assigned to PREFERRED. The terms of each of these leases extended for a period of sixty (60) months at a rate of Six Hundred Thirty Five and 86/100 ($635.86) Dollars per month for a total payment of Seventy Six Thousand Three Hundred Three and 20/100 ($76,303.20) Dollars. (Exhibit "A") These two leases were subsequently assigned to PREFERRED for the substantial consideration of Forty Seven Thousand Eight Hundred Ninety Eight and 06/100 ($47,898.06) Dollars. (See Exhibit "B" PREFERRED'S representative's affidavit)

The equipment rental agreements were very specific as to the type of equipment, the disclaimers, rights and the obligations of each party to the contract. (See Exhibit "C"

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

and "D") They contain the final expression of the parties' agreement. As part of both the subject lease agreements, there was an integration clause included in which the parties agreed:

> "to all the terms and conditions shown above and the reverse side of this Rental, that those terms and conditions are a complete and exclusive statement of our agreement and that they may be modified only by written agreement between you and us. Terms or oral promises which are not contained in this written Rental may not be legally enforced."

It should be noted that this specific provision is located on the front page of the lease contracts (Exhibits "C" and "D"). The Plaintiff/Appellee's representative, Michael Nudi the Appellee's Chief Financial Officer, signed beneath this paragraph on the same page of the document. There were additional terms on the reverse side. Mr. Nudi initialed this page as well.

The contract provided Plaintiff/Appellee with ample opportunity to take possession of the subject equipment (i.e. Matrix Boxes) and to examine them. Specifically, CUSTOM DATA SOLUTIONS had the opportunity to inspect the equipment for a period of ten (10) days after receipt to determine its acceptability. In particular both equipment rental agreements provide:

> "RENT/TERM OF RENTAL: You agree to pay us the amount specified in this Rental as the Rental Payment (plus any applicable taxes) when each payment is due. Your acceptance of the Equipment will be conclusively and irrevocably established upon the receipt by us of your confirmation (verbal or written) of such acceptance..."

CUSTOM DATA SOLUTIONS accepted the equipment and the terms of the Rental Lease Agreement. (See Exhibits "E" and "F") Appellee executed these two documents that explicitly articulated the rights and obligations of each. Plaintiff Corporation is a sophisticated organization. Its employees are educated and astute businessmen who

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

are experts in the area of technology. (See Exhibit "A" Deposition Testimony of Michael Nudi).

CUSTOM DATA SOLUTIONS corporate officer, Michael Nudi, the CFO signed the equipment lease agreements, on behalf of Appellee, agreeing to all of their *(identical)* terms. Moreover, a document entitled, "Delivery and Acceptance Certificate" was also executed on November 19, 2003 by Mr. Nudi. This document acknowledged receipt and acceptability of the equipment at issue. It clearly states on the face of that document that,"

> "The equipment conforms with our requirements. There are no side agreements or cancellation clauses given outside the Equipment Rental Agreements. I have had a reasonable opportunity to inspect the goods." (emphasis added) (See Exhibit "B")

Accordingly, CUSTOM DATA SOLUTIONS had possession of the equipment (as did other lessees), had an opportunity to inspect it and reject it as non-conforming if it failed to meet Plaintiff's expectations or was not as promised. Also, it is important to note that PREFERRED did not take assignment until after the Appellee/lessee executed a Delivery and Acceptance Certificate verifying unconditional acceptance (See Exhibit "G" paragraph 2 of the Master Program Agreement and Exhibit "B" Affidavit of Preferred Capital's representative).[1]

B. Proceedings below

The parties in this action filed cross motions for summary disposition in the trial court pursuant to MCR 2.116 (C)(8) and (C)(10). Macomb County Circuit Court Judge,

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

[1] PREFERRED's relationship with Norvergence was not exclusive nor were they involved in any solicitation efforts with Norvergence.

Diane M. Druzinski granted Plaintiff/Appellee's motion and Defendant/Appellant appeals as of right.

1.
THE INCLUSION OF A MERGER CLAUSE IN THE EQUIPMENT RENTAL AGREEMENTS BARS PLAINTIFF/APPELLEE'S CLAIM FOR FRAUD IN THE INDUCEMENT

A. STANDARD OF REVIEW

The trial court's decision to grant Plaintiff/Appellee's motion for summary disposition is reviewed *de novo* on appeal. Ross v. State, Dept. of Treasury, 255 Mich.App. 51; 662 N.W.2d 36 (2003).

B. ARGUMENT

A Fraud in the Inducement claim must rest upon promises of future conduct made under circumstances in which the assertions may reasonably be expected to be relied upon. Samuel D. Begola Services, Inc. v Wild Brothers, 210 Mich App 636, 639; 534 NW2d 217 (1995). It is patently unreasonable for a party to rely on statements or promises not contained within a written agreement when the agreement contains an integration or merger clause. Novak v Nationwide Mutual Insurance Co., 235 Mich App 675, 689; 599 NW2d 546 (1999).

A contract with a merger clause nullifies all antecedent claims. This includes any collateral agreements that were allegedly an inducement for entering into the contract. Parol evidence regarding such false representations would vary the terms of the contract. UAW –GM Human Resource Center v KSL Recreational Corp., 28 Mich App 486 @ 490-502; 579 NW2d 411 (1998). Fraud that relates solely to an oral agreement

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

that was nullified by a valid merger clause would have no effect on the validity of the contract. Id. at 503.

The trial court's reasoning that Plaintiff/Appellee reliance on the assignor's (i.e., NorVergence) alleged promises, which are not contained in the clear and unambiguous language of the subject lease agreements, invalidates the leases themselves is without merit and inapposite to controlling law.

Here, each agreement contains a clear integration clause as follows:

> "to all the terms and conditions shown above and the reverse side of this Rental, that those terms and conditions are a complete and exclusive statement of our agreement and that they may be modified only by written agreement between you and us. Terms or oral promises which are not contained in this written Rental may not be legally enforced." (emphasis added) (See Exhibits "C" and "D")

Any and all prior oral representations were nullified. Custom Data Solutions could not reasonably rely upon them as an inducement to execute the lease agreements.

More poignantly, Custom Data Solutions received the equipment at issue with a ten (10) day period in which to examine and inspect the equipment before confirming and proceeding with the Rental Agreements. On November 19, 2003 Custom Data Solutions, through its Chief Financial Officer, executed two identical Delivery and Acceptance Certificates (attached as Exhibits "E" and "F"). The terms of the identical certificates read as follows:

> "The undersigned certifies that it has received and accepted all the Equipment described in the Equipment Rental Agreement between NorVergence, Inc. (Rentor), and the undersigned CUSTOM DATA SOLUTIONS, INC. (Renter) dated 10/24/03. The Equipment conforms with our requirements. There are no side agreements or cancellation clauses given outside the Equipment Rental Agreement. I have reviewed and all of the terms and conditions of the Equipment Rental Agreement. I AGREE THAT THE RENTAL PAYMENT UNDER THE EQUIPMENT RENTAL AGREEMENT WILL BEGIN 60 DAYS FROM THE DATE OF THIS DELIVERY AND ACCEPTANCE CERTIFICATE AND SHALL CONTINUE THEREAFTER FOR THE FULL LENGTH OF THE STATED INTIAL

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

TERM OF THE EQUIPMENT RENTAL AGREEMENT AND IN ACCORDANCE WITH ITS TERMS AND CONDITIONS.

I was not induced to sign this by any assurances of the Rentor or anyone else. I have had a reasonable opportunity to inspect the goods."

If the equipment did not meet the Appellee's expectations during the ten (10) day inspection period, both the equipment and contract could have been rejected by the Appellee. It is undisputed that Appellee executed both the Rental Agreements and the Delivery and Acceptance Certificates with the full knowledge of what those documents were. It is well settled that there can be no reliance if the party has the opportunity and means to determine that the representation was not true. Montgomery Ward and Co. v Williams, 330 Mich 275, 284; 47 NW 607 (1951). Plaintiff's failure to take advantage of its opportunity to insure that the equipment met its expectations does not release Plaintiff of its obligation under the contract.

Moreover, the trial court's reliance on parol evidence was improper. MCL 440.2202 and MCL 440.2852 preclude the introduction of parol evidence in this situation. The Parol Evidence Rule which has been well settled in Michigan case law excludes the evidence of prior contemporaneous agreements, whether written or oral which contradict, vary or modify an unambiguous writing intended as a final and complete expression of the agreement. Ditzik v Schaffer Lumber Co., 139 Mich App 81, 87-88; 360 NW2d 876 (1984).

> "The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing." UAW, supra @ 492.

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

The trial court simply ignored the undisputed fact that CUSTOM DATA SOLUTIONS had the right to take possession of the equipment in advance of acceptance of the contract. Appellee had ten (10) days in which to inspect and examine the equipment. At the conclusion of ten days, the equipment could have been rejected and the contract terminated.

Despite an easy and viable means to terminate the lease agreements if it did not meet the requirements, the Plaintiff/Appellee did not use their opportunity to inspect. Instead, the CFO of CUSTOM DATA SOLUTIONS executed two (2) identical Delivery and Acceptance Certificates confirming that the equipment met their expectations; reaffirming their agreements and acceptance of the terms of the equipment rental agreements; certifying that they read the agreement; understood the lease terms and further confirming that no other oral or contemporaneous agreements were part of the subject lease agreements.

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

Michigan Court's have acted consistently in requiring able minded adults to read and be bound by the terms of their written agreements. It is undisputed that Appellee Corporation specializes in various technologies and its CFO, Michael Nudi is both able and authorized to contract on behalf of Custom Data Solutions.

Our Supreme Court long ago observed that certainty in contracts is vital. In Draeger v Kent County Savings Association, 242 MICH 486, 219 NW2d 637 (1928), the Court wrote:

"He [Plaintiff] could read and write and had some experience in the purchase of stocks. No artifice, no means fraudulent or otherwise, were used to prevent him from reading the contract, which was simple and understandable to a man of ordinary intelligence...If he had read it, he would have been informed that any statement made by the agent and not contained in the writing was not binding on the association. If he had read it, he would have been informed that it was not the same as the oral contract

which he had made with the agent. It was his duty to read it before signing, not alone for his own protection but as well for the defendant association.

To allow person of intelligence and mature age to repudiate their written contracts, which they have an opportunity to read before signing and can read, would lend uncertainty to business transactions and render the making of contracts unsafe." Id. @ 638

Here, the trial court erred when it allowed Appellee's CFO, Mr. Nudi, to repudiate written agreements, which he had an opportunity to read before signing and further, an opportunity to examine the equipment before accepting. Clearly, the written agreements executed by Custom Data Solutions fully informed it that the terms did not encompass the alleged representations made by NorVergence. The Agreements also clearly state that there is no connection with the service to be provided. The Agreement made clear that the equipment came with no guarantees; no warranties; no warranty of fitness for a particulate purpose; and it was accepted **"as is"** after an opportunity to inspect. Appellee, also, understood by virtue of the clear language of the written agreements that their terms could only be modified *via* written agreement. (See Exhibits "C" and "D")

Therefore, the trial court's finding that Appellee reasonably relied upon NorVergence's oral representations about future performance and the equipment is without merit and contradicts the express language of the written instrument. (See Exhibit "H" Op/Or at 6). It is fundamentally unfair to hold Defendant responsible for oral representations allegedly made by NorVergence. PREFERRED was in the least likely position to protect itself. PREFERRED did nothing more than rely on the express language of the rental agreements. In short, it is simply unreasonable for CUSTOM DATA SOLUTIONS, who specializes in technologies to ignore the express language of its contracts and rely upon the alleged oral representations of NorVergence as to the

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

capabilities of the equipment, which were expressly excluded by the agreements *(ipsum)*.

There can be no fraud where the means of knowledge of the truthfulness of the representations are available to Plaintiff. Plaintiff and the degree of their utilization has not been prohibited by the Defendant. Webb v First of Michigan Corp. , 195 Mich App 470, 474 (1992). Nievs v Bell Industries, Inc., 204 Mich App 459, 464 (1994). Appellee knew, should have known or could have easily discovered that the equipment was not capable of meeting its expectations. Custom Data Solution's failure to avail itself of the opportunity to determine the acceptability of the goods is not indicative of reasonable reliance. (See Exhibit "D" Deposition testimony of Michael Nudi). Again, it is important for this Court to note that PREFERRED did not take assignment until **after** the Appellee/lessee executed a Delivery and Acceptance Certificate verifying unconditional acceptance (See Exhibit "G" paragraph 2 of the Master Program Agreement and Exhibit "B" Affidavit of Preferred Capital's representative).

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

The trial court, clearly, committed reversible err when it permitted Appellee to escape their obligations under the subject lease agreements. Not only does the merger clause preclude resorting to parol evidence regarding the parties intent and agreement, the contract itself negates Plaintiff's claim of fraud. Plaintiff's claim that they relied on NorVergence's oral promises is contradicted by the clear and unambiguous terms of the rental agreements and therefore is precluded by parol evidence. The parol evidence rule addresses the fact that "disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts." UAW, supra @ 492

2.

PLAINTIFF/APPELLEE'S FAILURE TO RECEIVE FULL PERFORMANCE UNDER SEPARATE SERVICE AGREEMENTS WITH AN UNRELATED ENTITY DOES NOT INVALIDATE ITS CONTRACTUAL AGREEMENTS WITH DEFENDANT/APPELLEE WHICH EXPRESSELY WAIVED ALL WARRANTIES AND FULLY PERFORMED

A. STANDARD OF REVIEW

The trial courts decision to grant Plaintiff/Appellee's motion for summary disposition is reviewed de novo on appeal. Ross v. State, Dept. of Treasury, 255 Mich.App. 51; 662 N.W.2d 36 (2003).

B. ARGUMENT

All Plaintiff's claims as to the Breach of Contract claim are based on NorVergence's oral representations that CUSTOM would be receiving the promised telecommunication services from them in the future at a substantial cost savings. The main goal in the interpretation of contracts is to honor the intent of the parties. Mikonczyk v Detroit Newspapers, Inc., 238 MICH APP 347, 349; 605 NW2d 360 (1999). When contractual language is clear, its construction is a question of law. Meagher v Wayne State University, 222 Mich App 700, 721; 565 NW2d 401 (1997). When the contract is clear, unambiguous and has a definite meaning, courts are without the ability to write a different contract for the parties or to consider extrinsic evidence to determine the parties' intent. UAW @ 491.

CUSTOM DATA 's entire claim rests with the alleged oral representations that are specifically precluded from the written contract by the merger clause. Additionally, MCL 440.2202 mandates that the court restrict its inquiry to the four corners of the document on question.

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

The elements for a Breach of Contract claim are: a) a valid contract and b) breach or failure by one or more parties to perform or adhere to one or more of the material terms of the valid contract has occurred. American Parts Co. v American Arbitration Association, 8 Mich App 156, 166; 154 NW2d 5 (1967). CUSTOM DATA not only does not identify any provision of the written agreement that the Defendant has breached, it is unable to produce any evidence to show a breach because there has been NO breach of the Equipment Rental Agreement. There is provisional language in the document that supports the alleged claims that the Rental Contract is part and parcel of the contract for services from NorVergence.

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

Pursuant to the parol evidence rule, evidence of NorVergence's oral representations is not admissible to modify the parties' written agreement. Ditzak v Schaffer Lumber Co., 139 Mich App 81, 87-88; 360 NW2d 876 (1984). Likewise, CUSTOM DATA is unable to come forward and plead ignorance of the terms. Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents. Watts v Polaczak, 242 Mich App 600, 604; 619 NW2d 714 (2000). Plaintiff/Appellee fails to identify any written term that PREFFERED CAPITAL has breached. Appellee's case centers wholly on NorVergence's failures to provide service, in full, and breaches of the alleged oral representations. Again, these alleged breaches by NorVergence relate to separate contracts and ought not invalidate PREFERRED's equipment lease agreements.

The subject lease agreements specifically comport with Michigan Law in adequately disclaiming any and all warranties and representations. The agreements are clear on their face. The Contract enunciates Appellee's obligations to make the

payments for the full term notwithstanding "...EQUIPMENT FAILURE, DAMAGE, LOSS OR OTHER PROBLEM. RENTER IS RENTING THE EQUIPMENT 'AS IS', WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THIS AGREEMENT." This statement is contained in the rental agreements in larger type than the other paragraphs as required by statute. (See Exhibits "C" and "D")

MCL 440.2316 and 440.2864 set out the requirements for exclusion modification of warranties:

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

(1) Words or conduct relevant to the creation of an express warranty and words of conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty..."

(b) If the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.

The Uniform Commercial Code MCL 440.1201(10) defines the term conspicuous as follows:

(10) 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. (See Exhibits "C" and "D")

Michigan law, as set forth above, permits disclaimers of all warranties whether express or implied if done in conformity with the statutes. The Equipment Rental Agreement explicitly states:

A. An intent to negate express warranties;
B. Uses words to exclude the implied warranty of merchantability;
C. Exclusion of all implied warranties;
D. Uses the description "As Is"
E. Disclaims warranty for a particular purpose;
F. Sets out the disclaimer in a conspicuous type-face.

By complying with the requirements of the Uniform Commercial Code in defining to the customer that there were no warranties of any nature on the equipment, Defendant has effectively disclaimed the warranties.

Moreover, the policy of section of Uniform Commercial Code providing that, between merchants, additional, but not different, terms become part of contract if they do not materially alter it and other contracting party does not, within reasonable time, object to additional terms is that parties should be able to enforce their agreement, despite discrepancies between oral agreement and confirmation, or between an offer and acceptance, if enforcement can be granted without requiring either party to be bound to material term to which he has not agreed. MCLA Sec 440.2207

Clearly the trial court erred when it bound Preferred with significant financial losses and relived Custom Data Solutions of its contractual obligations.

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

VI. Conclusion and Relief Requested

Defendant/Appellant, PREFERRED moves this Honorable Court to reverse the trial court and remand this case for further proceedings consistent with the language of the subject lease agreements and controlling law or in the alternative reverse the trial court with instructions to enter judgment for Defendant/Appellant.

RESPECTFULLY SUBMITTED,

LESLIE ANNE LOGAN (P34909)
Attorney for PREFERRED CAPITAL
LOGAN & ASSOCIATES
P.O. Box 7279
Bloomfield Hills, MI 48302
(248) 418-2300

DATED: July 26, 2006

LOGAN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
POST OFFICE BOX 7279
BLOOMFIELD HILLS, MICHIGAN 48302-7279
TELEPHONE (248) 418-2300

RECEIVED
06 JUL 26 PM 4:45
COURT OF APPEALS
TROY OFFICE
SANDRA SCHULTZ FREUND
CHIEF CLERK