IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

ROSENBLUM'S WORLD OF JUDAICA, INC. and AVROM FOX, individually and as the representatives of a class of similarly-situated persons,	)	
Plaintiffs,	)	
v.	)	No. 04 CH 18187
IFC CREDIT CORPORATION, INC.,	)	Judge James Henry
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Defendants IFC Credit Corporation, Inc. ("IFC") filed a motion to dismiss the Plaintiff's First Amended Complaint, pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 and 735 ILCS 5/2-619. Plaintiffs, Rosenblum's World Of Judaica, Inc. and Avrom Fox ("Rosenblum's"), in their Complaint allege two counts: Count I, Violation of the Illinois Consumer Fraud and Deceptive Practices Act ("IFCA") and Count II, Declaratory Judgment. IFC's Motion to Dismiss seeks to dismiss Count I pursuant to Section 2-615 and Count II pursuant to Section 2-619.

I. FIRST AMENDED COMPLAINT

This is a class action claim brought on behalf of all persons in Illinois who leased network computer equipment from the now defunct entity known as Norvergence, Inc. Plaintiff Rosenblum's allege the equipment was documented in a form rental agreement identified as the Norvergence Rental Agreement. Norvergence apparently resold telecommunication services to small businesses throughout Illinois. Norvergence claimed that the use of its equipment would result in discounts of 30 to 60% of the cost of a landline phone, cell phone and high-speed internet services from the major telecommunication service providers, such as Qwest or T-Mobile.

The discounts were to be obtained through the use of equipment rented from Norvergence, called "Matrix" boxes. These boxes would be connected to the landline phone, cell phone and high-speed internet service of each individual claimant. The re-wiring and re-routing was to result in savings of 30 to 60% or even free unlimited local and long distance calling on their respective landline telecommunication systems.

The "Matrix" boxes were designed by a non-party manufacturer and were not designed for the purpose stated by Norvergence. Rosenblum's claims that the supposed "Matrix" box does not even exist. Rather, the box sold was actually an Adtran router box, which is incapable of doing any of the things Norvergence represented. Many of the individual Plaintiffs signed consumer personal guarantees for the equipment. In addition, Norvergence sold each lessee a total solution package to reduce telecommunications costs.

The Norvergence leases ran for up to 60 months time and then Norvergence would assign all or a portion of the lease to a lease financing company, like the Defendant, IFC. In October 2003, IFC and Norvergence signed a Master Agreement, where IFC purchased the Equipment Rental Agreements by paying Norvergence a discounted portion of the total rental price. IFC and Norvergence amended their Master Agreement in March 2004 and June 2004.

On March 25, 2004, Avrom Fox, Rosenblum's President, executed a Norvergence Equipment Rental Agreement ("Rental Agreement"). The Rental Agreement was made in conjunction with a service plan, which included unlimited wireless calling for four cell phones, portability of cell phone numbers from the prior provider, landline phones with unlimited local and long distance calling and high speed internet. Sometime around April 2004,[1] this lease was assigned to IFC. No telephone communication service was ever provided to Rosenblum's by Norvergence. Rather, the box delivered to Rosenblum's, that appeared to be a "Matrix" box, was never installed and has never functioned. However, Rosenblum's sent monthly payments to IFC to avoid default and acceleration.

Rosenblum's allege that the equipment is completely worthless and has been of no use to Rosenblum's. Rosenblum's claim that IFC is aware of Norvergence's

[1] Apparently in error, Plaintiff's alleged in their First Amended Complaint that the lease was assigned to IFC sometime in April 2003.

misrepresentations of the leased equipment and continues to attempt to enforce the lease agreements. In July 2004, Norvergence sought Chapter 11 bankruptcy protection after being forced into court by an involuntary petition for Chapter 11 bankruptcy by three Leasing Company creditors.

Count I of Rosenblum's First Amended Complaint alleges a violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1. *et seq*., claiming Norvergence engaged in a course of trade or commerce that constitutes unfair and deceptive acts or practices under 815 ILCS 505/2.

Count II seeks a Declaratory Judgment that: (a) the Norvergence Rental Agreement is unconscionable and unenforceable; (b) the Norvergence Rental Agreement's waiver of claims and defenses as against the original lessor is void and unenforceable because the Defendants knew or should have known at the time they took assignments from Norvergence that Norvergence was insolvent; (c) the provision in the Norvergence Rental Agreement regarding recovery of the entire remaining rental balance in the event of any default is a penalty and thus unenforceable; (d) Rosenblum's is not bound by its acceptance because it revoked any acceptance; (e) the provisions of the rental agreement are unconscionable; (f) IFC is not a holder in due course; (g) the Rental Agreement is usurious and thus void; (h) the Rental Agreement violates the Uniform Commercial Code ("UCC"), and is thus void; and (i) the Rental Agreement is not a "lease" under the UCC and it is not a "finance lease."

II. SECTION 2-615 AND 2-619 LEGAL STANDARDS

Granting or denying a section 2-615 motion to dismiss addresses the sound discretion of the trial court. See In re Estate of Casey, 222 Ill. App. 3d 12, 19 (1st Dist. 1991). The only question presented by such a motion is whether the Plaintiff has alleged sufficient facts, which if proven, would entitle him to relief. See Kirchner v. Greene, 294 Ill. App. 3d 672, 679 (1st Dist. 1998). To avoid dismissal under this section, a pleading must set forth a legally recognized cause of action, and plead facts bringing the claim within that cause of action. See Vincent v. Williams, 279 Ill. App. 3d 1, 15 (1st Dist. 1996).

A section 2-615 motion attacks the legal sufficiency of the pleading only. See Bryson v. New America Publications, 174 Ill. 2d 77, 86 (1996). Accordingly, all well

pled facts in the pleading and those contained in the exhibits attached thereto are taken as true for purposes of the motion. See id. However, conclusions of law or factual conclusions, which are unsupported by allegations of specific facts, are not taken as true. See Vincent, 279 Ill. App. 3d at 5.

When the legal sufficiency of a complaint is challenged on a Section 2-619 motion to dismiss, all well-pleaded facts and reasonable inferences are accepted as true. See Swavely v. Freeway Ford Truck Sales, 298 Ill. App. 3d 969, 972 (1st Dist. 1998). Subsection 2-619(a)(9) permits dismissal where the asserted claim is barred by other affirmative matter avoiding the legal effect of or defeating the claim. See Klein v. DeVries, 309 Ill. App. 3d 271, 273 (2d Dist. 1999). "Affirmative matter" encompasses any defense other than the negation of the essential allegations of the claim. See id. The initial burden rests with the defendant but the burden shifts to the plaintiff who must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proved. See id. If after considering the pleadings and supporting affidavits, the court finds that the plaintiff has failed to carry the shifted burden, the motion to dismiss based on affirmative matter may be granted. See id.

III. ANALYSIS

Plaintiffs allege that: (1) IFC purchased long-term Equipment Rental Agreements ("lease agreements") for "Matrix" boxes that never functioned and were obtained by Norvergence through fraud; (2) IFC knew of or at least suspected it was purchasing fraudulently obtained leases (as evidenced by the exorbitant price of the Matrix box and the complaints by customers); (3) IFC continued to purchase the lease agreements through the month prior to Norvergence's forced filing of Chapter 11 bankruptcy; (4) Rosenblum's would not have purchased the "Matrix" box had they known of the defect; and (5) Rosenblum's were damaged as a result of signing a lease agreement that was worthless and did not offer the services Norvergence claimed it would provide. Rosenblum's seek relief under the ICFA, 815 ILCS 505/1 *et seq.* These allegations are directed solely at Defendant IFC. The Court will first address the sufficiency of Plaintiffs' allegations with respect to the ICFA and then address the Declaratory Judgment claim.

A. COUNT I – ILLINOIS CONSUMER FRAUD ACT

In order to plead a private cause of action under the ICFA, a plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff; (5) proximately caused by the deception. See Oliviera v. Amoco Oil Co., 201 Ill.2d 134, 149 (2002). An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud. 815 ILCS 505/2; Macinac v. Arcadia National Life Insurance Co., 271 Ill. App. 3d 138, 141 (1995).

A complaint alleging a consumer fraud violation "must be pled with the same particularity and specificity as that required under common law fraud." Connick v. Suzuki Motor Co., 174 Ill.2d 482, 501 (1996). Pleading specificity requires that the plaintiff allege "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated..." Schiffels v. Kemper Financial Servs., 978 F.2d 344, 352 (7th Cir. 1992).

Section two of the ICFA forbids unfair or deceptive acts, or practices, including the use of deception, fraud, misrepresentation or the omission or concealment of any trade or business with the intent that others rely on the deception. People ex rel. Daley v. Grady, 192 Ill.App.3d 330, 332 (1989). Therefore, to fall within the purview of section two, it must be shown that IFC is engaged in a trade or commerce and in unfair or deceptive acts in the conduct of that trade or commerce. See People ex rel. Hartigan v. Knecht, 216 Ill.App.3d 843, 853 (1991).

Rosenblum's assert that IFC seeks to enforce the Rental Agreements even though they are void, and this is deceptive or unfair practice on the part of IFC. Rosenblum's cite to People ex rel. Hartigan v. Knecht Services, Inc., 216 Ill.App.3d 843 (1991), for the proposition that it is a deceptive or unfair practice to collect on a void obligation. The court in Hartigan determined that the defendant, who was in the business of home repair, had charged for work not done, padded time records, performed unnecessary repairs and other similar wrongs. The court determined that these acts amounted to prohibited unfair business practices. The court followed the standard set by the Supreme Court in Federal

Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), for determining whether the conduct complained of rises to the level of an unfair trade practice: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or unscrupulous; or (3) whether it causes substantial injury to consumers. Hartigan, 216 Ill.App.3d at 854.

Here, the Amended Complaint alleges that IFC is culpable for its attempts to enforce payment from Rosenblum's. This Court has stated previously that the actions that could ascribe culpability to IFC are the allegations that, near the time of the Rosenblum's lease and two to three months later, IFC altered their reserve agreement with Norvergence due to complaints by consumers. Under the test set out in Hartigan, that alone does not suffice as a claim for unfair trade practice.

However, Rosenblum's have not only alleged that IFC altered their reserve agreement with Norvergence, but include in their complaint that IFC knew that: (1) Rosenblum's and other Norvergence customers never actually received Matrix boxes; (2) customers who purchased lease agreements had no access to landline phone, cell phone, or internet services through the boxes received; (3) those who did receive the alleged "Matrix" boxes never received any use from them; (4) Norvergence misrepresented equipment capabilities to customers; and (5) the total rent payments in the lease agreements vastly exceeded the value of the product. If IFC participated in the fraud and unethical practice that caused substantial injury to Norvergence customers, then such allegations would rise to the level of unfair trade practice as set out in Hartigan.

IFC asserts that Rosenblum's have only made conclusory allegations that cannot survive a motion to dismiss. IFC states that this case is analogous to Jackson v. South Holland Dodge, Inc., 197 Ill. 2d 39 (2001). In Jackson, the plaintiff brought a class action lawsuit against South Holland Dodge car dealership. 197 Ill. 2d at 41. Plaintiff had purchased a Dodge vehicle from the defendant and also purchased an extended service warranty for $1,099. Id. The contract stated that the entire $1,099 would be paid to Chrysler for the extended service warranty. Id. However, the defendant did not actually pay the full sum listed in the contract to Chrysler, but instead retained a portion of the $1,099. Id. Defendant South Holland Dodge then assigned the retail installment contract to Chrysler. Id. at 42. The Supreme Court held that there were "no specific

factual allegations that, prior to the assignment of the financing statement, Chrysler directly participated in a scheme with the dealership to misrepresent facts to the plaintiff." Id. at 52. The Supreme Court further stated that the plaintiff's "conclusory allegations of 'actual knowledge'" were nothing more than a claim that Chrysler knowingly received the benefits of another's fraud. Id.

Jackson can be distinguished from the case at hand. In Jackson the plaintiff based her claim on Chrysler's alleged omission in its installment contacts of a provision required for sellers by the Federal Trade Commission, in consumer credit contracts. 197 Ill. 2d at 42. Furthermore, the plaintiff alleged that Chrysler was liable because the manner in which the price was disclosed was deceptive and misleading, thereby violating the ICFA. Id. The Supreme Court in Jackson held that Chrysler's conduct complied with the federal Truth in Lending Act ("TILA") and was, therefore, not responsible for the misrepresentations made by the dealer. Id. at 57.

Here, there is no allegation that IFC failed to disclose certain information or that the contracts did not contain certain provisions. Unlike the circumstances found in Jackson, IFC has not asserted that because it is in compliance with TILA it cannot be liable under the ICFA. Despite IFC's argument that the allegations made by Rosenblum's are merely conclusory and are not sufficient to withstand a Section 2-615 motion to dismiss, Rosenblum's have brought forth sufficient facts, which if proven, would entitle them to relief. As set forth herein, this Court is of the opinion that sufficient facts have been alleged to survive a 2-615 motion. Discovery will be helpful to provide additional factual input.

This Court recognizes that knowingly accepting the benefits of a deceptive practice does not constitute Consumer Fraud liability. Zekman v. Direct Am. Marketers, Inc., 182 Ill.2d 359 (1998). However, allegations of participation in misrepresentations can be sufficient for a Consumer Fraud claim. See Saltzman v. Enhanced Serv. Billing, Inc., 348 Ill.App.3d 740 (1st Dist. 2004).

In Saltzman, the defendant Infodex was a telecommunications information service provider that furnished information when a consumer would phone a particular "900" number. 348 Ill.App.3d at 742. The plaintiff alleged receiving telephone bills from Ameritech that included a charge for defendant Infodex's service, but claimed he did not

know anything about the service and had never used the service. Id. at 743. The charge was listed on his phone bill as coming from ESBI, another defendant in the case. Id. Plaintiff's complaint alleged that ESBI violated section two of the ICFA by adding charges to customer's telephone bills for which it had no contract or authorization to do so. Id. ESBI argued that it was simply performing a data processing function and that ESBI had no way of knowing whether a charge on a customer's telephone bill was erroneous. Id. at 744.

In Saltzman the court distinguished the circumstances from those found in Zekman v. Direct Am. Marketers, Inc., 182 Ill.2d 359 (1998), and held that plaintiff's complaint alleged more than merely an allegation that the ESBI knowingly received the benefits of Infodex's deceptive practices. Id. at 749. The court noted that the complaint alleged it was ESBI's practice to receive billing information from Infodex that included evidence of authorization and "place the 'bogus' charge on the victim's telephone bill." Id. This action constituted participation in the misrepresentation, allowing plaintiff's IFCA claim to stand.

Similarly, Rosenblum's allege that IFC knew of the fraudulent practices performed by Norvergence. Rosenblum's contend that in March and June 2004, IFC amended their agreement with Norvergence due to customers never receiving Norvergence equipment they paid for and customers not receiving services promised by Norvergence. IFC's response to these issues was to raise the amount of money they held back from Norvergence on each lease form from 5% to 25%. IFC also required Norvergence to notify them about whether customers received the equipment and services. In addition, IFC included in the amended agreement that Norvergence had to notify IFC of the default rate of customers, or the number of customers who did not receive services and then refused to make payments. Furthermore, the amendments included a clause as to IFC's options if Norvergence went into default in their payments to IFC. If default of payments occurred, IFC required the reversion of leases back to Norvergence. Such allegations, if proven, may demonstrate participation in the misrepresentations made by Norvergence.

IFC cites to several cases to support its proposition that Illinois law provides that it had no duty of active inquiry into the conduct of Norvergence and therefore, cannot be

held liable for fraud on the part of Norvergence. Citing to Chicago Titled & Trust v. Walsh, 34 Ill.App.3d 458 (1975), IFC argues that a purchaser of commercial paper need only look to the face of a document to determine whether the transaction is sound. In Walsh, an escrow was opened at Chicago Title & Trust Company ("Chicago Title") by two attorneys. The escrow was not to be amended without one of the attorneys present. 34 Ill.App.3d at 461. However, Chicago Title accepted an amendment signed only by one of the two attorneys, allowing the escrowee to accept directions from Jack Walsh as to dispursements. Id. The amendment allowed Walsh to act fraudulently. Id. Walsh funded the escrow with a forged check and Chicago Title was induced to issue bank drafts to creditors of Walsh, including Gale Marcus and Max Munson. Id.

The court in Walsh held that Marcus and Munson were holders in due course because there was no evidence that Marcus or Munson should have been suspicious of the Chicago Title drafts. Id. at 468. The court noted that the creditors had no duty of active inquiry and further stated that the circumstances should have reassured Marcus and Munson of the validity of the instruments.

In contrast, though IFC had no duty to actively inquire as to the validity of the agreements between Norvergence and its customers, IFC is not free from all responsibility when "warnings" are apparent. See e.g., Winter & Hirsch, Inc. v. Passarelli, 122 Ill.App.2d 372 (1970) (stating in *dicta* that a party purchasing negotiable paper at a great discount has a duty to inquire into the initial transaction to determine if the borrower has a defense to the note). Rosenblum's allege that IFC had knowledge that the Rental Agreements between Norvergence and its customers were fraudulent. IFC amended its agreements with Norvergence on two occasions, seemingly due to problems with Norvergence not furnishing the equipment and services it promised to its customers. IFC was also on notice of the number of customers that refused to pay under the Rental Agreements because they did not receive equipment or services. Therefore, the First Amended Complaint is sufficient to surpass a motion to dismiss.

B. COUNT II – DECLARATORY JUDGMENT

Arguing under 735 ILCS 5/2-619, IFC contends that the Rental Agreement's Waiver of Defense provision bars Rosenblum's from seeking a declaratory judgment that the Rental Agreement is unenforceable. IFC asserts four primary arguments: (1) under

Article 2A of the Uniform Commercial Code ("UCC"), Rosenblum's lease is irrevocable upon its acceptance of the equipment and the lease's "hell or high water" clause requires payment regardless of the equipment's condition; (2) the agreement is a lease agreement subject to Article 2A and not a security interest; (3) IFC is a holder in due course and therefore, the waiver of defense clause is enforceable; and (4) the lease is not unconscionable.

First, IFC asserts that Article 2A of the UCC states that promises under a lease contract become irrevocable upon the lessee's acceptance of the goods. Section 2A-407 provides:

> Irrevocable promises; finance leases.
>
> (1) In 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.
> (2) A promise that has become irrevocable and independent under subsection
> (1):
>   (a) is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and
>   (b) is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.
> (3) This Section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

810 ILCS 5/2A-407 (2005). IFC argues that the lease's "hell or high water" clause, which requires payment regardless of the equipment's condition, operates to bar any claims made by Rosenblum's. IFC asserts that, according to Section 2A-407 and the "hell or high water" clause, equipment functionality is not a consideration when determining the obligation to pay under the Rental Agreement. Therefore, IFC contends it is entitled to payment regardless of the condition of the equipment.

A "hell or high water" clause of a lease is an unconditional obligation on the part of the lessee to pay rent regardless of problems the lessee has with the leased equipment. See Siemens Credit Corp. v. Kakos, No. 94 C 5365, *3 (Jan. 24, 1995); see also Co. Interstate Corp. v. The CIT Group/Equip. Fin., Inc., 993 F.2d 743, 749 (10th Cir. 1993). In essence, rent payments continue to be paid, come hell or high water, without any

offset. Co. Interstate Corp., 993 F.2d at 749. These clauses are strictly enforced because without strict enforcement, when a finance company loans to a lessee, its only security would be repossession of equipment with a diminished value. Id. However, courts uniformly enforce such clauses only "[w]here a lease is valid." Siemens Credit Corp., No. 94 C 5365, *3.

IFC cites to Bus. Info. Group, Inc. v. Bell Atlantic Sys. Leasing Int'l, Inc., No. 90 C 20291 (Oct. 8, 1992), to support the proposition that Illinois courts enforce "hell or high water" provisions. In Business Information Group, plaintiff leased computer equipment from the defendant. No. 90 C 20291 at *6. The lease between the two parties included a "hell or high water" clause. Id. at *5. The plaintiff refused to make further payments on the lease when the defendant refused to move the equipment to plaintiff's new location or to allow plaintiff to relocate the computers. Id. at *4. The court enforced plaintiff's obligation to pay because its responsibility of payment was independent of the sales agreement. Id. at *5. Essentially, the court held that even if the defendant was wrong to withhold consent to move the leased equipment, the lease agreement required payments to continue. Id. at *5.

In contrast, here, Rosenblum's contend that the lease is not a valid lease. Therefore, the "hell or high water" clause that is included in the Norvergence lease may be unenforceable. Furthermore, Rosenblum's alleged fraud and deceit on the part of Norvergence and IFC. Such a claim may defeat the provision requiring unconditional payment included by Norvergence in its leases. See Co. Interstate Corp. v. The CIT Group/Equip. Fin., Inc., 993 F.2d at 749 (holding that in the absence of fraud or deceit, the parties should be held to their agreement).

IFC also cites to Siemens Credit Corp. v. Kakos, No. 94 C 5365, *3 (Jan. 24, 1995), to support its argument that Rosenblum's should pay IFC under the Norvergence lease agreement. In Kakos, the defendant, a dentist, entered into an equipment lease agreement with Siemans Credit Corporation, a financing arm of Seimans Corporation, for state-of-the-art dental equipment. No. 94 C 5365, *1. Siemans was not the vender of the equipment but the record is silent regarding what type of agreement Siemans had, if any, with the vender of the equipment. Id. The "hell or high water" clause in defendant's lease obligated him to pay all amounts due regardless of any dissatisfaction with the

equipment. Id. at *4. The clause also stated that Seimans Credit was only a financier in the transaction and disclaimed all warranty liability. Id. The lease directed the defendant to make claims arising out of problems with the equipment to the vendor directly. Id.

The court in Kakos denied Siemans Credit's motion for summary judgment, holding that an issue of fact existed as to whether the vendor and Seimans Credit operated as alter egos of one another and whether the vendor breached its warranty. Id. at *9. The court also noted that the lease was valid and that no misrepresentations were made about the terms of the lease. Id. at *6.

Here, there are sufficient allegations to support Rosenblum's theory that the lease for equipment was not valid. In addition, misrepresentations were purportedly made by Norvergence to Rosenblum's and to the members of the putative class. Moreover, Rosenblum's had no contact with IFC prior to signing the lease agreement with Norvergence and they were never informed that IFC would be taking over the lease agreement until IFC contacted them directly to demand payment. Therefore, the "hell or high water" clause in the Norvergence Rental Agreement is not unconditionally enforceable and does not, on its face, require Rosenblum's to pay.

Second, Rosenblum's contend that the Rental Agreement does not fall within the purview of Article 2A because it is a security interest and not a lease. IFC asserts that the Rental Agreement is a true lease and should be governed by Article 2A of the UCC.

A "lease" is defined as the:

> Transfer of the right to possession and use of goods for a period in return for consideration, but a sale, including a sale on approval or a sale or return, retention or creation of a security interest, or license of information is not a lease.

810 ILCS 5/2A-103(j). A security interest is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." 801 ILCS 5/1-201(37). Section 1-201 further provides that determining whether an agreement is a lease of a security interest is determined by the facts of each case. 801 ILCS 5/1-201(37). A transaction is a security interest if "the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee," and "the original term of the lease is equal to or greater than the remaining economic life of the goods." Id.

In the present case, Rosenblum's assert that the Rental Agreement meets two requirements of a security interest: (1) the Rental Agreement states that it cannot be terminated by Rosenblum's; and (2) the Rental Agreement's original term of five years is equal or greater than the remaining economic life of the goods. These items are sufficiently pled and will await further developments during discovery.

Third, Rosenblum's argue that under Article 9-403 of the UCC, the waiver of defense clause is unenforceable because the Rental Agreement was induced by fraud or because IFC is not a holder in due course. IFC contends that it had no notice of claims or defenses when IFC took the assignment and, because it has no duty of active inquiry, it is a holder in due course.

A holder in due course is an innocent third party. Kedzie and 103rd Currency Exchange, Inc. v. Hodge, 156 Ill.2d 112, 122 (1993). The holder in due course rule is a concept intended to facilitate commercial transactions because it eliminates the need for complex investigation of the nature of the drafting of an instrument or the nature for which an instrument is initially exchanged. Hodge, 156 Ill.2d at 122. A true holder in due course takes an instrument in good faith, for value, and lacks knowledge of the circumstances surrounding the initial exchange of the instrument. See 810 ILCS 5/3-302.

The Court adopts Rosenblum's argument that the question as to whether IFC was on notice, or whether IFC is a holder in due course, requires the resolution of an essential element of material fact before it is proved. Here, Rosenblum's allege that IFC is not a holder in due course for several reasons, including allegations that IFC knew: (1) the rented equipment was worth only a small fraction of the stated price; (2) that the equipment could not function as claimed by Norvergence and Norvergence need to provide services for the equipment to purportedly function; (3) customers were refusing to pay under the Rental Agreements; and (4) Norvergence was having difficulties because IFC increased its cash retention in its agreements with Norvergence. Therefore, the question of whether IFC was a holder in due course, or on notice as to Norvergences' practices, is not properly determined at this stage.

Fourth, with regard to Rosenblum's unconscionability claim, IFC contends that this Court cannot rewrite contract terms to make an agreement more equitable. IFC

argues that, because parties are free to contract, this Court cannot relieve Rosenblum's simply because of a bad bargain.

Unconscionability can be either procedural or substantive or a combination of both. Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co. and Leland Tube Co., Inc., 86 Ill.App.3d 980, 989 (1980). "Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice." Frank's Maintenance & Engineering, Inc., 86 Ill.App.3d at 989. Any provision limiting the defendant's liability must have been bargained for or brought to the purchaser's attention. Id. at 990. Substantive unconscionability concerns the question of whether the terms themselves are commercially reasonable. Id.

In the present case, Rosenblum's and the potential member class signed Rental Agreements for a piece of electronic equipment. Representations were made concerning the nature and usage of the device. Allegedly, the representations made by Norvergence were false. Due to the nature of the equipment a person, such as the agent for Rosenblum's, would not have the ability to learn or discover the true nature of the instrument. It is clear that the weaker party to the transaction was Rosenblum's. In addition, the true effect of the language does not appear to be readily apparent to Rosenblum. The Rental Agreements were on printed forms with no apparent ability to change or alter the terms. The only inserted information related to the nature of the equipment, the monthly lease payment, and the length of the lease term. The warranties and the individual terms do not appear to be negotiable.

Rosenblum's appear to make sufficient allegations for unconscionability. However, there must be an examination of the Rental Agreement's terms to determine if they are harsh, one sided, or oppressive. See Larned v. First Chicago Corp., 264 Ill.App.3d 697, 700 (1994). As stated in their First Amended Complaint, the price paid over the lease term exceeded the value of the equipment. Furthermore, in signing the Rental Agreement, Rosenblum's and other members of the putative class waived any claims they may have had as to the operative ability of the equipment. Finally, this Court previously stated that the impact of the movable jurisdiction provisions render the Rental Agreements such that no average person would enter into such an agreement.

Therefore the motion to dismiss as to Count II is denied.

IV. ORDER

IT IS HEREBY ORDERED:

A. Defendants' Motion to Dismiss is DENIED to the extent outlined in this Memorandum of Opinion and Order;

B. Defendants are given 28 days from the date of this Order to file an Answer to Plaintiff's Complaint, with discovery to proceed;

C. The matter is set for a status conference on March 29, 2006 at 9:45 a.m.

JAMES F. HENRY

Entered: DEC 28 2005

Circuit Court - 1526

Judge James F. Henry
Circuit Court of Cook County, Illinois
County Department, Chancery Division
Calendar "6"