

Cause No. A-173174-C

PARTY PROPS, INC.	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
VS.	§	58 <sup>TH</sup> JUDICIAL DISTRICT
	§	
POPULAR LEASING USA, INC.,	§	
	§	
Defendant.	§	JEFFERSON COUNTY, TEXAS

**SUMMARY JUDGMENT**

On June 21, 2006, the Court heard and considered:

1. Plaintiff's Second Amended Motion for Summary Judgment, as supplemented (collectively "Plaintiff's Motion");
2. the special exceptions ("Plaintiff's Special Exceptions") of Party Props, Inc. ("Plaintiff") to the objections of Popular Leasing USA, Inc. ("Defendant") to the Affidavit of William G. Waites (the "Waites Affidavit"); and
3. Plaintiff's objections ("Plaintiff's Objections") to the affidavits of R. Daniel Kinealy and John R. Jones and subject exhibits thereto.

On October 13, 2006, the Court heard and considered Defendant's Supplemental Objections to the Affidavit of William G. Waites.

Plaintiff and Defendant appeared at those hearings through their respective counsel and presented argument. Plaintiff's counsel announced that Plaintiff was withdrawing its request for summary judgment only as to *res judicata*. The Court, having reviewed the summary judgment record and having heard the argument of counsel, is of the opinion that Plaintiff's Motion should be granted in all respects, except as to *res judicata*. Accordingly,

IT IS, THEREFORE, ORDERED that Plaintiff's Motion is granted in all respects, except as to *res judicata*.


IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff is granted summary and declaratory judgment of, from, and against Defendant that:

1. the rental acceleration clause set forth in the paragraphs of the Rental Agreement captioned "DEFAULT" and "REMEDIES" is a penalty and void and unenforceable; and
2. the "floating" forum selection and choice of law provisions in the Rental Agreement are unenforceable, and that the Rental Agreement, and that the Rental Agreement is governed by Texas law;
3. the Rental Agreement is actually a secured transaction, is within the scope of Texas usury laws, and is not within the scope of Article 2A of the UCC;
4. the Rental Agreement is not a "finance lease;"
5. Defendant violated Texas usury laws by charging at a rate in excess of that permitted by law;
6. the "Hell or High Water" clause in the Rental Agreement does not apply to the Rental Agreement or Plaintiff;
7. the waiver of claims and defenses in the Rental Agreement does not apply to the Rental Agreement or Plaintiff;
8. Defendant is not entitled to recover any rentals or other damages in connection with the Rental Agreement because it has failed to mitigate its damages; and
9. there has been a complete failure of consideration for Plaintiff in regard to the Rental Agreement;
10. Plaintiff is a "consumer" under and as defined in the Texas Deceptive Trade Practices – Consumer Protection Act (the "DTPA"), and thus has standing to assert the DTPA as claims and defenses against Defendant;
11. Defendant is vicariously liable for and bound by the fraudulent and wrongful conduct of its business partner, Norvergence, Inc.;
12. Defendant itself violated the DTPA by grossly overcharging for the Equipment;
13. Defendant itself violated the DTPA by representing to Plaintiff that it was entitled to accelerate the "rental" balance it claimed to be owed under the Rental Agreement
14. Plaintiff is entitled to rescission of the Rental Agreement;
15. the conduct of Defendant's business partner, NorVergence, was a producing cause of actual economic damages to Plaintiff;
16. the Rental Agreement is unenforceable;

17. Defendant take nothing by its counterclaim; and
18. Plaintiff is entitled to recover reasonable attorney's fees and expenses incurred in connection with this case.

The use of the terms and phrases "Rental Agreement" and "rental" in this Summary Judgment and any other judgment or order in this case is used for brevity, reference, and due to the caption on the Rental Agreement, especially inasmuch as this Court has determined and granted judgment that the Rental Agreement is actually a secured transaction.

SIGNED on the 8<sup>th</sup> day of November, 2006.

  
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THE HONORABLE JOHN MEHAUFFY  
JUDGE PRESIDING *JAMES*