

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED LEASING, INC.,)	
)	
Plaintiff,)	
vs.)	CASE NO. 3:17-CV-00023-RLY-MPB
)	
BALBOA CAPITAL CORPORATION,)	
)	
Defendant.)	

PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS COMPLAINT

Comes now Plaintiff, United Leasing, Inc., by counsel, David L. Jones of Jones • Wallace, LLC; and, for Plaintiff’s Response to Defendant’s Motion to Dismiss Complaint, says:

STANDARD OF REVIEW

The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of the complaint, not to resolve the case on the merits. *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir.1990). In order to withstand a motion to dismiss under 12(b)(6), a plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). In evaluating the motion, the court accepts as true all well-pleaded factual allegations in the complaint, and any inferences reasonably drawn from those facts are construed in the light most favorable to the plaintiff. *Roots P’ship v. Lands’ End, Inc.*, 965 F.2d 1411, 1416 (7th Cir.1992). Pursuant to the federal notice pleading standard, a complaint need only provide “a short and plain statement of the claim” showing that the plaintiff is entitled to relief and sufficient to provide the

defendant with fair notice of the claim and its basis. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). “[D]etailed factual allegations” are not required, but the plaintiff must allege facts that “state a claim to relief that is plausible on its face” and raise the possibility of relief above the “speculative level.” *Id.* at 545, 570. “*Bell Atlantic* must not be overread. The Court denied that it was ‘requir[ing] heightened fact pleading of specifics,’” *Limestone Development Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir.2008).

“Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny, federal courts sitting in diversity apply state substantive law using federal procedural rules.” *Goesel v. Boley Int'l (H.K.) Ltd.*, 806 F.3d 414, 419 (7th Cir. 2015).

Where terms of a contract are clear and unambiguous, Indiana courts will apply the plain and ordinary meaning of the terms and enforce the contract according to its terms. *Claire's Boutiques, Inc. v. Brownsburg Station Partners LLC*, 997 N.E.2d 1093, 1098 (Ind.Ct.App.2013). The four corners rule states that where the language of a contract is unambiguous, the parties' intent is to be determined by reviewing the language contained within the "four corners" of the contract, and "parol or extrinsic evidence is inadmissible to expand, vary, or explain the instrument..." *Adams v. Reinaker*, 808 N.E.2d 192, 196 (Ind.Ct.App.2004).

ARGUMENT

Defendant has warranted that facts contained in Operative Documents are true and correct.

Paragraph 1 of the Master Discounting Agreement states:

Scope and Term. This Master Agreement shall apply to all Leases that are sold and assigned from time to time by SELLER to PURCHASER pursuant to this Agreement.

Paragraph 4 of the Master Discounting Agreement states:

Conditions to Funding. As to each Lease approved by PURCHASER under Section 3, subject to SELLER not being in default under this Agreement and each of the representations and warranties set forth in Sections 6 and 7 being true and correct as of the date of the purchase of such Lease, PURCHASER shall purchase such lease for its purchase price as determined pursuant to Section 5.

Paragraph 6 of the Master Discounting Agreement, states in part:

(d) The Lease was originated in the United States and the rental payments and other amounts due thereunder are payable in U.S. dollars by a LESSEE domiciled in the United States, and the LESSEE is not an affiliate of Seller or a principal or employee of SELLER.

(k) ... "Without limiting or qualifying any of preceding representations and warranties of SELLER, all numbers, dates, Equipment descriptions and all other statements of fact contained in the Operative Documents are true, correct, complete and not misleading as of the date of the transfer of the Lease to PURCHASER and all written information heretofore furnished by or made available by SELLER to PURCHASER for purposes of or in connection with the Lease is true and correct in all material respects on the date as of which such information was stated or certified and remains true and correct in all material respects as of the date of transfer of the Lease to PURCHASER." (emphasis added)

Paragraph 7 of the Master Discounting Agreement, states:

Representations, Warranties and Certain Covenants as to SELLER states as follows:

(d) ...SELLER's representations and warranties under Section 6 and this Section 7 shall survive the sale and assignment of any Lease to PURCHASER and any termination of this Master Agreement.

(e) SELLER has delivered full and complete originals, or conforming copies, marked as such, of the following documents to PURCHASER for each Lease:

- 1) SELLER's complete credit and application file.
- 2) The Lease.
- 3) All Guaranties of any kind, including but not limited to those by individuals, affiliated or related companies or entities of Lessees, or any vendors or manufacturers of any equipment.
- 4) All vendor or manufacturer warranties.
- 5) The notice to Lessee of assignment and acknowledgment of Lessee in form acceptable to PURCHASER.
- 6) All original invoices for purchase of the equipment.
- 7) The delivery and acceptance receipts duly executed by Lessee.
- 8) All other schedules and documents related to such Lease. Collectively those documents shall be referred to as the "Purchase Documents" or "Operative Documents."

Included within the Operative Documents definition is the credit and application file and all other schedules and documents related to such Lease. Since the Seller, without regard to its knowledge, warrants that the "facts contained in the Operative Documents, are true, correct, complete and not misleading as of the date of the transfer of the Lease to Purchaser" there can be no doubt that the unambiguous statement that as of the date of the transfer of the Lease to Purchaser that all statements of fact contained in the Operative Documents listed in Paragraph 7(e) are true and correct. Therefore, Plaintiff's Complaint under the standard of review for a Motion to Dismiss meets the test of legal sufficiency in that the allegations of Plaintiff in the Complaint establish a set of circumstances under which Plaintiff would be entitled to relief from Defendant. Defendant has misread and/or misstated the terms of the Master Discounting Agreement.

Defendant is correct that the Master Discounting Agreement is a “non—recourse” agreement. This merely means that if all of the representations and warranties of Plaintiff used to induce Plaintiff to purchase the transaction are true and correct, and Plaintiff does not receive payment from the underlying lessee Plaintiff would have no recourse against Defendant for lessee’s failure to pay. However, non-recourse does not mean that Plaintiff accepts all risks or there would be no purpose and no reason for any of the representations and warranties to be contained in the Master Discounting Agreement. Non-recourse agreements generally mean that the buyer takes the credit risk. In other words, if the buyer of the “deal” misjudges the credit worthiness of the underlying borrower or lessee, then the buyer of the lease or promissory note will have no recourse against the seller of the note. However, where the purchase decision (and therefore the credit decision) made by Plaintiff was made dependent upon the fact that the “numbers, dates, Equipment descriptions and all statements of fact contained in the Operative Documents are true, correct, complete and not misleading...,” then the non-recourse is only with regard to a decision that turns out to be unfortunate (i.e. even if the facts given to Plaintiff to make its purchase decision were true and Plaintiff made a bad decision, then it would have no recourse for Plaintiff’s bad decision). However, Plaintiff in this case has recourse under the specific terms of the Agreement where the facts in the Operative Documents were not true.

Defendant attempts to insert into the contract a requirement that it possess actual knowledge of false, incorrect or misleading facts. Attempts to use various grammatical artifices notwithstanding, the Court must determine the meaning of the Master Discounting Agreement by the four (4) corners of the document. Paragraph 6

contains a preamble that in essence makes little sense if, in fact, all of the warranties contained in 6(a) through 6(m) are limited by Seller's actual knowledge. First, there is no definition of Seller's actual knowledge. In Paragraph (c) the actual knowledge requirement is included again. This would not be needed if the actual knowledge requirement refers to all of the subparagraphs of Paragraph 6.

Many of the warranties are not the types of warranties that would be subject to the actual knowledge of Seller. For example in Paragraph 6(g), Seller makes the affirmative statement that it is not in default with respect to its obligations under any lease or transaction which gave rise to any lease and no event has occurred over the passing of time or the giving (sic) notice would constitute an event of default hereunder. This is one of a number of statements in Paragraph 6 that are either true or not true and are not normally nor logically subject to Seller's actual knowledge. Similarly, Paragraph 6(j) allows for a separate disclosure by Seller. Again, it would make no sense if 6(j) were subject to Seller's actual knowledge. The same would hold true of 6(k), Seller has either received such a notice or has not received such a notice.

Paragraph 6(k) makes no sense if, on the one hand, Seller makes to Plaintiff a specific representation and warranty, in order to induce Plaintiff to buy the deal, that "...all numbers, dates, Equipment, descriptions and other statements of fact contained in the Operative Documents are true, correct, complete and not misleading as of the date of transfer of the Lease to PURCHASER and all written information heretofore furnished by or made available by SELLER to PURCHASER for purposes of or in connection with the Lease is true and correct in all material respects..."

That specific statement is either true or false. The statement itself is not preconditioned, encumbered or burdened by actual knowledge of falsity by Seller. The statement is either or it is not true.

Plaintiff does not yet know when Defendant became aware of various misrepresentations or falseness of facts. The relative Operative Documents do not require Defendant to have had actual knowledge of them at any time. However, as discovery proceeds in this matter Plaintiff may determine that Defendant had or may have had actual knowledge of the falseness of the facts set forth in the Operative Documents.

WHEREFORE, Plaintiff, United Leasing, Inc., requests that the Court deny Defendant's Motion to Dismiss and award Plaintiff all other relief the Court deems just and proper.

Respectfully submitted,

JONES • WALLACE, LLC

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading or paper has been filed with the Court through the Court's electronic filing system, and served upon the following person electronically through the Court's electronic filing system on this 31st day of March, 2017:

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