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No. 70854-6-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

DIMENSION FUNDING, LLC ,

Respondent/Plaintiff,

vs.

CALL-O-CALL, INC., a New York corporation, ANDREY
TOVSTASHY, and DOES 1 TO 10,

Appellants/Defendants.

REPLY BRIEF OF APPELLANTS
CALL-O-CALL, INC. and ANDREY TOVSTASHY

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I. APPELLANTS' REPLY TO RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The final three paragraphs set forth on page "7" of Respondent Dimension Funding's ("Dimension") answering brief contain argument, rather than statements of fact, which warrant a reply from Appellants' Call-O-Call, Inc. and Tovstashy (both hereinafter "Call-O-Call"). Dimension argues that "the parties' disagreement over how many separate items the leased equipment consisted of was of no consequence to Dimension's summary motion for several reasons." The foregoing assertion by Dimension could not be further from the truth, as the parties' disagreement over how many separate items the leased equipment consisted of is *inherently* an issue of fact, which warranted denial of Dimension's motion for summary judgment.

Dimension misstates the facts in the final three paragraphs of page "7" of its brief where it asserts that "Call-O-Call announced its refusal to return one of the leased items to Dimension, thereby repudiating its obligation to do so." This never happened. The Court is respectfully referred to the chain of e-mails set forth in the record which led up to the breakdown of the business relationship between the parties (CP 251-256). By e-mail dated 1/19/2007 (CP 253) Call-O-Call explains that "we are legally unable to return leased items to Dimension Funding," and offers an

explanation why. Call-O-Call sought understanding from Dimension, and was not blatantly refusing to comply. This statement by Call-O-Call, which is the equivalent of "We *cannot* do it" is distinct from "We *will not* do it" as asserted by Dimension. In response to this e-mail of 1/19/2007, Dimension responded with its own e-mail of 1/19/2007 in which it demanded more equipment than what was already leased.

Therefore, in light of Dimension's further e-mail of 2/5/2007 in which Michael Wagner of Dimension states that "Nothing less [than three pieces of equipment] will be accepted" as satisfaction of Call-O-Call's obligation under the lease, it is submitted that *Dimension's* statement made it clear that any attempt by Call-O-Call to return the equipment would have been futile. It is respectfully requested that this Court carefully consider the chronology of the e-mails set forth in the record (CP 251-256), which will confirm that it was indeed Dimension that made this statement prior to any purported repudiation or breach by Call-O-Call. As described in detail below, Dimension's refusal to accept the return of the equipment relieved Call-O-Call from taking the pains to do so, as the return of the equipment would have been a futile act.

Furthermore, Dimension's argument on page "7" of its brief that the parties' disagreement over quantity of the leased equipment was of no consequence to its motion for summary judgment because it "necessarily

conceded for purposes of that motion that there were two pieces of equipment" is disingenuous. It is respectfully submitted that this entire lawsuit and the chain of events leading up to this appeal are based upon Dimension's assertion that it was entitled to two E1/T1, 155 Boards rather than one E1/T1, 155 Board.

II. APPELLANT'S REPLY TO RESPONDENT'S ARGUMENT

On the issue of repudiation (and whether or not Dimension repudiated the lease when it refused to accept the return of the equipment leased to Call-O-Call without additional equipment which it never actually leased to Call-O-Call), Dimension disingenuously states that it simply "demanded the return of those items specifically identified on Schedule A of the lease." The record is clear that *at no time*, did Dimension ever take any steps in good faith to reconcile the conflicting information it had regarding the quantity of the E1/T1, 155 Board as described in its own inspector's report, against what was explained to them by Call-O-Call. *At no time*, did Dimension ever take any steps to check its own internal records regarding what was actually leased by it to Call-O-Call, and *at no time*, did Dimension make any effort to reach out to John Minert, the NACT representative that provided Dimension with this equipment, and who would have easily cleared up the dispute regarding nomenclature of the equipment (and clarified, as he did in his two declarations, there were

only two items). (CP 275-281) Again on the issue of repudiation, Dimension argues that repudiation or an anticipatory breach of a contract by a party can only occur before the time for the performance of such obligations is due. Although this may be the case for anticipatory breach, it is submitted that Dimension's argument fails to respond to Call-O-Call's argument (made throughout its opening brief on appeal and throughout the record) that the return of the equipment would have been a futile act, thus excusing Call-O-Call from further performance under the lease. It is one of the oldest and most established principles of contract law that "An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. It appears, then, that to excuse a failure to make an actual tender, there must be an existing capacity to perform, coupled with a state of facts which establishes the futility of making the tender." Carlson v. Leonardo Truck Lines, Inc., 13 Wash. App. 795, 805, 538 P.2d 130, 135 (1975) (citing to Kane v. Borthwick, 50 Wash. 8, 13, 96 P. 516, 518 (1908)).

In the case at bar, the futility of taking the pains to return the equipment to Dimension in light of Dimension's refusal to accept it, could not be more clear. As explained in the record, this equipment was not a small item that could merely be boxed up and mailed to Dimension via

first class mail. Indeed, the packaged equipment was a large item which required it to be palletized and shipped under special arrangements to its final destination, at a large expense. Time and time again, Dimension, in its brief, refers to paragraph "16" of the lease agreement in support of its argument that this paragraph required Call-O-Call to return the equipment, no more, no less. Dimension specifically states on page "14" of its brief that "the agreement in the present case is silent regarding acceptance of delivery of the equipment by Dimension at the end of the lease." This "silence" is problematic, in that the lease agreement completely fails to contemplate a situation in which Dimension refuses to accept the return of its own equipment, and which potentially places an undue burden and additional liability on the party returning the equipment, subjecting that party to additional storage charges and/or fees for the return of the equipment to the shipper after Dimension refuses to accept delivery. In such a situation, and in light of the well settled rule in contract law that ambiguities are to be construed against the drafter of a contract, it is submitted that the futility of returning the equipment without a guarantee that Dimension would accept it had justified Call-O-Call's failure to return the equipment, especially when there was no guarantee that Call-O-Call would be indemnified for additional storage charges and/or fees for the return of the equipment.

In reply to the arguments set forth on page "11" of Dimension's brief, Call-O-Call takes issue with Dimension's disingenuous argument that "Call-O-Call has not identified any item of equipment that Dimension insisted upon having returned to it that was not furnished by Dimension or not identified on Schedule A to the lease." The foregoing statement completely disregards the evidence in the record which speaks to the contrary, and in particular, the chain of e-mails described above, which sparked the "two versus three" argument described in detail in Call-O-Call's Appellant's Brief.

III. CONCLUSION

In conclusion, for the reasons set forth above and in Call-O-Call's opening brief on appeal, it is respectfully submitted that the Trial Court erred in granting summary judgment in favor of Dimension when (i) there were genuine triable issues of fact regarding the quantity of equipment leased by Dimension to Call-O-Call under the Lease, and whether or not Dimension repudiated the Lease, and (ii) Dimension's actions and demand for more equipment than had been leased absolved Call-O-Call of further performance under the Lease.

The summary judgment should be reversed, and this matter remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 21st day of March 2014.

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CERTIFICATE OF SERVICE

The undersigned counsel of record for appellants certifies that on March 21, 2014, he caused the original of Appellants' Reply Brief to be filed with the Clerk of the Court of Appeals, Division One, and a true and correct copy to be served on Roy Stegena, Esq., counsel for respondent/plaintiff, by mailing the same by First Class Mail, postage prepaid, to his business address of prepaid, to his business address of Krista L. White & Associates, 1417 4th Avenue, Suite 300, Seattle, WA 98101-2242..

Dated: March 21, 2014


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