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No. 67539-7-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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FINANCIAL PACIFIC LEASING, LLC,  
a Washington limited liability company,

Respondent

v.

LAW OFFICES OF DAVID A. SHARP, P.A., a Florida corporation,  
DAVID A. SHARP, individually, and MARIANNE SHARP,

Appellants,

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On Appeal from the Superior Court of King County  
The Honorable J. Wesley Saint Clair  
Cause No. 10-2-30494-1-KNT

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OPENING BRIEF OF APPELLANT

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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**A. Introduction**

This case raises the issue of whether an equipment finance lease is enforceable when the vendor fails to deliver to the lessee the equipment that is the subject of the finance lease.

David Sharp entered into an equipment finance lease for the purchase of a copier for his law firm. The vendor never delivered the copier to Mr. Sharp. Nevertheless, the leasing company, Financial Pacific Leasing, LLC (“Financial Pacific”), filed this lawsuit to enforce the terms of the finance lease. Financial Pacific filed a motion for summary judgment asking the trial court to find the defendants were responsible for the balance owed on the lease. The trial court agreed and entered summary judgment finding that the defendants are liable for the balance owed on the finance lease. The trial court subsequently entered an order granting Financial Pacific’s motion for an award of attorneys’ fees and costs.

Mr. Sharp asserts that the trial court erred in finding the equipment lease enforceable. Mr. Sharp argues that the lease is not enforceable because the copier that was the subject of the equipment finance lease was never delivered to the defendants. Because the copier was never delivered to the defendants, there was a complete failure of consideration. Mr. Sharp

respectfully requests this Court to reverse the decision of the trial court and remand this matter for trial.

**B. Assignments of Error.**

**1. Assignments of Error.**

a. The trial court erred in granting plaintiff's motion for summary judgment and entering judgment against the defendants.

b. The trial court erred in granting plaintiff's motion for an award of attorneys' fees and costs.

**2. Issues Pertaining to Assignments of Error.**

Whether a lessee is liable to the finance leasing company for the balance owed on an equipment finance lease when the lessee does not receive the equipment that is the subject of the equipment finance lease?

**C. Statement of Case.**

David Sharp is an attorney whose law office, the Law Offices of David A. Sharp, P.A., is located in Clearwater, Florida. In the spring of 2010, Mr. Sharp looked to purchase a copier for his law firm. (CP 80). He located such a copier at Image Source Automation, an office supply store located in Pinellas Park, Florida ("Image Source"). (CP 80).

Mr. Sharp elected to finance the purchase of the copier. A representative from Image Source Automation referred Mr. Sharp to

Direct Credit Funding, Inc. (CP 80). At that time, Direct Credit Funding was in the business of providing equipment leasing financing.

Direct Credit agreed to finance Mr. Sharp's law firm's purchase of the copier. (CP 81). The terms of the financial arrangements were documented in a lease agreement. (the "Lease") (CP 81, 83-87). Mr. Sharp signed the Lease on April 7, 2010. (CP 81, 83-87). As required by the terms of the Lease, on April 8, 2010, Mr. Sharp made the first lease payment to Direct Credit Funding. (CP 81, 88). The check was issued to Direct Credit Funding before the copier was to be delivered to Mr. Sharp's office.

There appears to be some discrepancy as to when the Lease Agreement was accepted by Direct Credit Funding. According to the Assignment Agreement between Financial Pacific and Direct Credit Funding, the Lease was accepted by Direct Credit Funding on April 22, 2010. (CP 53-54).

Mr. Sharp also signed a guarantee of the Lease on April 7, 2010. (CP 83-87). It is disputed, though, that Mrs. Sharp signed a guarantee of the Lease. (CP 77, 82). Financial Pacific contends that Mrs. Sharp signed a guarantee dated April 17, 2010. (CP 37) Both Mr. and Mrs. Sharp deny that she signed the Guarantee. (CP 77, 82). Financial Pacific acknowledges that it is not clear who provided the Guarantee alleged to

have been signed by Mrs. Sharp. (CP 37). What is clear is that both Mr. and Mrs. Sharp dispute that any guarantee was signed by Mrs. Sharp.

Direct Credit Funding was the originator of the lease. Direct Credit Funding subsequently assigned its interest in the Lease to Financial Pacific. (CP 37, 53-54). According to documents submitted by Financial Pacific, the assignment occurred on April 22, 2010. (CP 53-54).

On or about April 22, 2010, Mr. Sharp received a phone call from Gary Merrill, who was a sales representative with Image Source and who was assisting Mr. Sharp with the purchase of the copier. (CP 81). Mr. Merrill informed Mr. Sharp that the copier would be delivered to his office later that day. (CP 81). Later on the same day, Mr. Sharp received a call from someone claiming to be a representative of Financial Pacific. (CP 81). Mr. Sharp does not recall the person's name. (CP 81). This was Mr. Sharp's first contact with Financial Pacific. Coincidentally, at the same time that he was having the conversation with Financial Pacific's representative, a delivery truck was delivering a large box to the building where Mr. Sharp's office is located. (CP 81). Mr. Sharp believed at that time that his copier was being delivered to his office. (CP 81). The Financial Pacific representative inquired whether the copier had been delivered. (CP 81). Mr. Sharp explained to this person that it was being

delivered. (CP 81). That was the extent of Mr. Sharp's conversation with the Financial Pacific representative.

Mr. Sharp's belief was mistaken. (CP 81) Image Source did not deliver the copier to Mr. Sharp's office. (CP 81) Mr. Sharp attempted to contact Mr. Merrill, who had assisted Mr. Sharp with the purchase of the copier. (CP 81). Mr. Sharp's efforts were unsuccessful and he was unable to reach Mr. Merrill. (CP 81).

Mr. Sharp also repeatedly attempted to contact Image Source directly. (CP 81). Mr. Sharp soon discovered that the store had been closed. He later learned that Image Source's business license had been revoked. (CP 81). According to the records maintained by Florida's Division of Corporations, the corporation has been administratively dissolved. (CP 81, 89-90).

It became apparent to Mr. Sharp, after he had made repeated efforts to contact Mr. Merrill and Image Source that the copier was not going to be delivered. At that point, Mr. Sharp sent a letter to Financial Pacific stating that he had not received the copier and requested Financial Pacific to cancel the Lease. (CP 81-82, 91) The letter was dated May 21, 2010. (CP 91).

Financial Pacific did not respond to the letter. Instead, in a letter dated June 8, 2010, Financial Pacific informed Mr. Sharp that he was

delinquent on the lease payments and demanded payment. Mr. Sharp responded in a letter dated June 11, 2010, stating that he had never received the copier that had been promised by the vendor. (CP 82, 92). He repeated his demand that Financial Pacific cancel the Lease and refund his initial deposit. (CP 82, 92). This lawsuit ensued.

On June 11, 2011, Financial Pacific filed its motion for summary judgment. (CP 22-34). The hearing on Financial Pacific's motion was heard on July 14, 2011, and the trial court entered an order granting Financial Pacific's motion for summary judgment. (CP 100-102). The trial court subsequently entered an Order Granting Plaintiff's Motion for Attorneys' Fees and Costs on July 29, 2011. (CP 131-132).

**D. Summary of Argument.**

It is black letter law of contracts that every contract must be supported by consideration to be enforceable. In the present case, there has been an absolute failure of consideration, namely, Mr. Sharp never received the copier for which he bargained. Pursuant to the specific terms of the Lease, Financial Pacific agreed to lease the copier to Mr. Sharp. Because Mr. Sharp did not receive the copier, he is relieved of his obligations to make the lease payments.

The fact that the Lease is a statutory finance lease governed by Article 2A of Washington's Uniform Commercial Code does negate or

otherwise alter the fact that there has been a lack of consideration and that the Lease is therefore unenforceable. Financial Pacific cannot rely upon the legal protections of the “hell or high water” clause contained in the Lease. Such clauses, which are authorized by RCW 62A.2A-407, make a lessee's obligation under a finance lease irrevocable upon acceptance of the goods, despite what happens to the goods afterwards. In this case, Mr. Sharp never had an opportunity to accept the copier for the reason that the copier was never delivered to him. Accordingly, Mr. Sharp’s financial obligations under the Lease never became irrevocable, and Mr. Sharp is entitled to cancel the Lease.

The trial court erred in granting Financial Pacific’s motion for summary judgment and its subsequent motion for an award of attorneys’ fees. Mr. Sharp respectfully requests this Court to reverse the decision of the trial court.

**E. Argument.**

**1. Standard of Review.**

This matter was decided on summary judgment entered by the trial court against the defendants on July 14, 2011. Accordingly, the standards for review of summary judgment rulings apply.

A grant of summary judgment is reviewed de novo. *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009). A

moving party is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988) (quoting CR 56 (c)). The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment. *Id.* All reasonable inferences must be resolved against the moving party and the motion should be granted "only if reasonable people could reach but one conclusion." *Id.* (quoting *Detweller v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108 751 P.2d 282 (1988)).

In the present case, the trial court erred in granting the motion for summary judgment and the motion for award of attorneys' fees.

**2. The Sharps are not liable on the Lease because the Lease fails for lack of consideration.**

It is well settled that every contract must be supported by consideration to be enforceable. *King v. Riveland*, 125 Wash.2d 500, 504, 886 P.2d 160, 164 (Wash.1994), *superseded by statute on other grounds as stated in Dependency of Q.L.M. v. State Dept. of Social and Health Services*, 105 Wash.App. 532, 20 P.3d 465 (Wash.App.Div.2001).

Consideration will support and render a promise enforceable if it was

something bargained for. *Huberdeau v. Desmarais*, 79 Wash.2d 432, 440, 486 P.2d 1074, 1078 (Wash.1971), *citing* W. Shattuck, *Contracts in Washington, 1937–1957*, 34 Wash.L.Rev. 24, 49 (1959). Where there is a failure of consideration, the contract is not enforceable. *Huberdeau*, 79 Wash.2d at 439–40, 486 P.2d at 1078. *See also Wilkinson v. Sample*, 36 Wash.App. 266, 273-274, 674 P.2d 187, 192 (1983), holding that the failure of consideration will justify rescission of a contract.

In the present case, there has been an absolute failure of consideration, namely, Mr. Sharp never received the copier for which he bargained. Pursuant to the specific terms of the Lease, Financial Pacific agreed to lease the copier to Mr. Sharp. The Lease states “Lessor, hereby Leases to Lessee, and Lessee hereby hires and takes from Lessor all property described in this Lease or hereafter and made a part hereof (collectively, together with any substitutions or replacements thereto, the “Equipment”).” (CP 41) (Emphasis added). Unquestionably, the Lease contemplates that Mr. Sharp would receive the copier in exchange for making the lease payments. Otherwise, the statement in the Lease, which provides that the lessee shall take all property described in the Lease, is meaningless. The specific item for which Mr. Sharp bargained was the copier. It is certainly reasonable for Mr. Sharp to expect that he would not

be required to make the lease payments unless and until the copier was delivered.

This expectation is confirmed by the statement of Dawn Pearce that was filed in support of Financial Pacific's motion for summary judgment. In her statement, Ms. Pearce provides a general description of equipment finance leasing. (CP 36). She then provides an explanation of the nature of the bargain between Financial Pacific and the lessee. Ms. Pearce states "The lessor agrees to purchase the equipment and lease the equipment to lessee in exchange for customer's promise to lease the equipment for a fixed period of time as provided by the terms and conditions of the lease agreement." (CP 36) (Emphasis added).

Clearly, both the Lease Agreement and Ms. Pearce contemplate that Mr. Sharp would have possession of the copier. Because Mr. Sharp never received possession of the copier, there has been a complete failure of consideration. The Lease is not enforceable and the defendants are relieved from their obligations to make the lease payments. *Huberdeau v. Desmarai, supra*. See also *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 37, 578 P.2d 1292, 1302 (1978) holding that failure of consideration is grounds for repudiation of the contract. The trial court erred in finding the Lease enforceable.

**3. The Lease did not create an irrevocable promise obligating the Defendants to make the lease payments.**

The fact that the Lease is a statutory finance lease governed by Article 2A of the Uniform Commercial Code (“UCC”) does negate or otherwise alter the fact that there has been a lack of consideration and that the Lease is therefore unenforceable. Finance leases typically contain the aptly named “hell or high water” clause. In general, a hell or high water clause makes a lessee's obligation under a finance lease irrevocable upon acceptance of the goods, despite what happens to the goods afterwards. *GreatAmerica Leasing Corp. v. Star Photo Lab, Inc.* 672 N.W.2d 502, 504 (Iowa App., 2003). Washington’s version of the UCC authorizes such “hell or high water” provisions in a statutory finance lease. See RCW 62A.2A-407.

RCW 62A.2A-407 provides that a statutory finance lease becomes irrevocable and not subject to cancellation upon lessee’s acceptance of the goods.<sup>1</sup> Significant, then, to the application of this statute is whether there

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<sup>1</sup> RCW 62A.2A-407 states:

(1) In the case of a finance 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) of this section:

(a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

has been acceptance of the goods. It is significant because until Mr. Sharp had “accepted” the copier the Lease remained cancellable.

“Acceptance” is deemed to have occurred only after the lessee has had a reasonable opportunity to inspect the goods, and either (i) signifies acceptance, (ii) fails to make an effective rejection, or (iii) does any act that signifies acceptance. RCW 62A.2A-515<sup>2</sup>. The question of whether a buyer has accepted goods, for purposes of the UCC, is a question of fact. *Colonial Pacific Leasing Corp. v. J.W.C.J.R.*, 977 P.2d 541 (Utah Ct. App., 1999); *First Nat. Bank of Litchfield v. Miller* 285 Conn. 294, 939 A.2d 572 (Conn., 2008).<sup>3</sup>

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(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.

<sup>2</sup> RCW 62A.2A-515 states:

(1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and:

(a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(b) The lessee fails to make an effective rejection of the goods (RCW 62A.2A-509(2)).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

<sup>3</sup> It does not appear that a Washington court has addressed or interpreted RCW 62A.2A – 407 or RCW 62A.2A-515 as it applies to statutory finance leases. However, as noted in RCW 62A.1-102, one of the underlying purposes and policies of Washington’s Uniform Commercial Code is to make uniform the laws among various jurisdictions. *Rainier Nat. Bank v. Inland Machinery Co.* 29 Wash.App. 725, 739, 631 P.2d 389, 398 (1981).

The overwhelming majority of courts that have considered the issue of whether acceptance has occurred have uniformly held that taking possession of the goods is not determinative of acceptance, nor is the signing of a form acceptance before receipt of the goods, nor the making of a lease payment. See *Colonial Pacific Leasing Corp.*, *supra* at 545, and the case cited therein; *Capitol Dodge Sales v. Northern Concrete Pipe*, 131 Mich.App. 149, 346 N.W.2d 535, 538-39 (1983). Instead, courts have held that acceptance can only occur after there has been a reasonable time to inspect the goods. *Colonial Pacific Leasing*, *supra*. The lessee must be permitted an “opportunity to put the product to its intended use, or for testing to verify its capability to perform as intended.” *Id.* quoting *Capital Dodge Sales*, *supra*. See also *See also Info. Leasing Corp. v. GDR Investments, Inc.* 152 Ohio App.3d 260, 265, 787 N.E.2d 652, 655 - 656 (2003) holding that in the case of finance leases, acceptance occurs only after the lessee has been given a reasonable time to inspect the goods and either (1) signifies acceptance, (2) fails to make an effective rejection, or (3) does any act that signifies acceptance. The requirement that the lessee be given a reasonable time to inspect the goods cannot be circumvented. *Id.*

It is axiomatic that Mr. Sharp did not have an opportunity to accept the copier because it was never delivered. Because the copier was never

delivered, Mr. Sharp never had a reasonable time to inspect the copier to verify that the copier functioned properly. There was no acceptance of the copier as required by RCW 62A.2A-515(1). Mr. Sharp is entitled to cancel the lease because of a lack of consideration.

It is anticipated that Financial Pacific will argue that the Mr. Sharp accepted the copier or somehow waived the opportunity to inspect the copier during his phone conversation with a Financial Pacific representative on April 22, 2010. There is simply no evidence to support this contention. Mr. Sharp states that he informed the Financial Pacific representative that he believed that the copier was being delivered. (CP 81). This is not evidence of acceptance of the copier. Financial Pacific was aware or should have been aware that the copier could not be accepted until such time as Mr. Sharp had a reasonable opportunity to inspect the copier and to verify that the copier functioned properly, and that could not occur until Mr. Sharp had possession of the copier.

At most, Mr. Sharp's statement that the copier was in the process of being delivered to his office is akin to signing an acceptance certificate before taking delivery of the goods. Under similar circumstances, courts have routinely held that signing an acceptance certificate before taking delivery of the goods is not determinative of acceptance. *See Colonial Pacific Leasing Corp. v. J.W.C.J.R., supra* at 545; *Info. Leasing Corp. v.*

*GDR Investments, Inc., supra*, at 265. This result was also reached in *JAZ, Inc. v. Foley*, 104 Hawai'i 148, 85 P.3d 1099 (2004), a decision that involves facts nearly identical to the facts in this case.

The central issue in the *JAZ* case was whether the lessee was liable for lease payments even though the equipment was never delivered to the lessee. *Id.* at 151. In that case, the lessee had signed an acceptance certificate before the equipment was to be delivered. *Id.* Upon receipt of the acceptance certificate, the financing company paid the vendor for the purchase price of the equipment. *Id.* Although the equipment was never delivered to the lessee, the lessee made several lease payments. *Id.* When the lessee ceased making lease payments, the leasing company filed a lawsuit to collect the balance owed.

The trial court ruled in favor of the leasing company and entered a judgment against the lessee. On appeal, the appellate court reversed, holding that because the equipment was never delivered, the lessee did not have a reasonable time to inspect the equipment. The appellate court held that signing an acceptance certificate before delivery does not mean a lessee has accepted the goods. The lessee must have a reasonable time for inspection, which requires that lessee have actual possession of the goods. *Id.* at 153.

In the present case, Mr. Sharp never had actual possession of the copier to allow him to have a reasonable time for inspection. Accordingly, the Lease is not enforceable and the trial court erred in granting summary judgment.

Finally, even had the copier been delivered to Mr. Sharp on April 22, 2010, as Mr. Sharp anticipated, Mr. Sharp's verbal confirmation that the copier was being delivered was not determinative of his acceptance of the copier. *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604 (Tex.App.1985) is instructive on this point.

The *Tri-Continental Leasing* case also involved a dispute regarding the leasing of a copier. Unlike the present case, the copier was actually delivered to the lessee. At the time that the copier was delivered, the lessee signed a Delivery and Acceptance Receipt. *Id.* at 605. Soon after the delivery, the copier malfunctioned and could not be repaired. *Id.* One month after the copier had been delivered, the lessee sent a letter to the finance company requesting the company to cancel the lease and remove the copier. *Id.*

The finance company filed a lawsuit to collect the balance owed on the finance lease. The finance company argued that the finance lease effectively disclaimed any warranties regarding the copier, that as a matter of law the lessee was obligated to make the lease payments, and that the

lessee's only claim relating to the defective copier was against the vendor. *Id.* at 606.

In reaching its decision that the finance lease was not enforceable, the court found that the copier never performed its intended function and that this constituted a complete failure of consideration. *Id.* The court further held that there had been no acceptance of the copier even though the lessee had signed an acceptance form acknowledging the equipment was satisfactory and in working order. *Id.* at 608. In reaching its conclusion, the court focused on the lessee's lack of opportunity "to test the working order of the machine" before he was compelled to sign the acknowledgment in finding that there was no "reasonable opportunity to inspect the goods." *Id.*

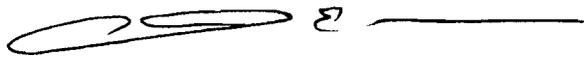
In this case, Financial Pacific concedes that the copier was never delivered to Mr. Sharp and his law firm. Accordingly, Financial Pacific cannot establish that Mr. Sharp and his law firm had a reasonable opportunity to inspect the copier. Because Mr. Sharp did not have a reasonable opportunity to inspect the copier, Financial Pacific cannot establish that Mr. Sharp accepted the copier. Because Financial Pacific cannot establish that Mr. Sharp and his law firm accepted the copier, Financial Pacific cannot rely upon the legal protections afforded a statutory finance lessor by RCW 62A.2A-407. The Lease did not create an

irrevocable promise obligating Mr. Sharp and his law firm to make the lease payments. The trial court erred in granting Financial Pacific's motion for summary judgment.

**F. Conclusion.**

As has been demonstrated herein, the trial court erred in granting Financial Pacific's motion for summary judgment, entering summary judgment against the defendants and awarding attorneys' fees to Financial Pacific. The Lease is not enforceable because there was a complete failure of consideration. Mr. Sharp and his law firm did not receive the copier that was the subject of the Lease. The decision of the trial court should be reversed.

DATED this 3<sup>rd</sup> day of November, 2011.



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