SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

January 7, 2008

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Re: *Barr International, Inc. v. Paradise Produce Company, Inc.*;
C.A. No. 06C-12-016

Date Submitted: October 23, 2007

Dear Counsel:

Before the Court is Plaintiff's Motion for Summary Judgment. The Motion is granted for the reasons set forth herein.

Factual and Procedural Background

The subject of the pending dispute between the parties is a Master Lease Agreement for the lease and service of several vehicles ("the Lease Agreement"). Pursuant to the Lease Agreement, Paradise Produce Company, Inc. ("Paradise Produce"), a Delaware corporation, would lease vehicles from Barr International, Inc. ("Barr"), also a Delaware corporation. The parties executed the Lease Agreement on April 8, 2005. On April 10, 2005, John W. Allen ("Allen") executed an "Unlimited Personal Guarantee", whereby he agreed to assure payment for the vehicles Paradise Produce leased

pursuant to the Lease Agreement. According to the Lease Agreement, the leased vehicles were to be listed on a "Schedule A" attached thereto. On April 8, 2005, Allen executed a Schedule A to the Lease Agreement that described two vehicles to be leased by Paradise Produce. On June 20, 2006, Allen executed a second Schedule A to the Lease Agreement that purported to identify four vehicles to be leased by Paradise Produce. This second Schedule A identified three vehicles specifically and partially described the fourth vehicle. The parties dispute what happened when Paradise Produce informed Barr that it would not be needing the fourth vehicle; specifically, Barr alleges Allen agreed to pay a termination fee to Barr but Allen and Paradise Produce deny this assertion.

In any event, in September 2006, Paradise Produce failed to make its monthly lease payments pursuant to the Lease Agreement. Barr alleges it properly notified Paradise Produce of its breach of the Lease Agreement and that Paradise Produce failed to correct its breach. Barr then repossessed all five vehicles that Paradise Produce was leasing from it pursuant to the Lease Agreement. The parties agree that as of October 31, 2006, the unpaid monthly charges totaled $18,032.76. Barr demanded that Paradise Produce purchase the five leased vehicles as required by the Lease Agreement. Paradise Produce failed to purchase the vehicles and Barr initiated this lawsuit.

Allen and Paradise Produce have filed an Answer to Barr's Complaint, in which they essentially admit all material allegations contained in the Complaint concerning the issue of the breach of the Lease Agreement. Allen and Paradise Produce do, however, assert that Barr has failed to state a claim upon which relief may be granted with respect to its claim for a termination fee for the fourth vehicle partially identified in the second executed Schedule A. Moreover, Allen and Paradise Produce assert that the amount of damages sought by Barr is in excess of the amount that is permitted under 6 *Del. C.* §2A-528.

On August 2, 2007, Barr filed a Motion for Summary Judgment. Pursuant to this Motion, Barr withdrew its claim for damages based upon the breach of the Lease Agreement with respect to the fourth vehicle partially identified in the second executed Schedule A. Barr argues that Allen and Paradise Produce's statutory affirmative defense fails because the parties agreed to terms that control, as 6 *Del. C.* §2A-528 explicitly provides. Accordingly, Barr argues it is entitled to the damages sought in its Complaint. Paradise Produce and Allen failed to file an Answering Brief and this matter was submitted to the Court for decision on October 23, 2007, based on the pleading filed.

Discussion

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v.. Sizemore,* 405 A.2d 679, 680 (Del. 1979). Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted. *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991), *cert. denied,* 504 U.S. 912 (1992); *Celotex Corp., supra.* If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts

before it, summary judgment is inappropriate. *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

Merits

Barr argues that the Lease Agreement provides the proper method for determining damages for the breach of the Lease Agreement. The Lease Agreement reads, in relevant part:

> **C. Elective Termination.** If Customer fails to cure a Default within seven (7) days after written notice has been mailed to Customer, Lessor may elect within thirty (30) days to terminate this Lease with respect to any or all Vehicles. Upon such termination, Lessor may at its option demand that Customer purchase within ten (10) days all or any of said Vehicles in accordance with Section 11.F, without prejudice to other remedies Lessor may have under this Agreement or at law.
> . . .
> **F. Purchase of Vehicles.** In the event Customer, pursuant to this Article 11, shall be required, or shall have the option to, purchase any of the Vehicles, Customer shall purchase said Vehicles at or within the time aforesaid for an amount, payable in case, equal to the Original Value of each Vehicle, as shown on the applicable Schedule A, less the sum of the applicable Depreciation Credits earned during the term of this Agreement (the "Depreciated Value"), plus any sales, excise, or use tax arising from the purchase. Additionally, at the time of purchase, Customer must pay Lessor any unpaid charges accrued pursuant to this Agreement, and any unexpired licenses, taxes and other expenses previously paid by Lessor for the Vehicles, including personal property taxes and Federal Heavy Vehicle Use Tax.

Lease Agreement, Article 11.

Paradise Produce and Allen assert in their first affirmative defense that Barr is limited in its request for damages pursuant to 6 *Del. C.* § 2A-528, which provides:

> (1) *Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A-504) or otherwise determined pursuant to agreement of the parties (Section 1-302 and Section 2A-503)*, if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 2A-523(1) or 2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the

> goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default.

6 *Del. C.* § 2A-528(1) (emphasis added).

Barr rightly points out that Allen and Paradise Produce ignore the very language of the statute that provides for the parties' ability to determine their own method for measuring damages; that is, the statute explicitly limits its application to those situations where the parties do not "otherwise determine" their damages by agreement. Accordingly, Article 11 of the Lease Agreement controls. Pursuant to that language, Barr is entitled to recover damages from Allen and Paradise Produce as specified in Barr's counsel's letter to Paradise Produce and Allen[1], less the sale price of the three of the trucks, which were able to be sold for $66,000 each.

The Lease Agreement also provides, "Customer shall pay all Lessor's costs and expenses, including reasonable attorney's fees, incurred in collecting amounts due from Customer or enforcing any rights of Lessors hereunder." Lease Agreement, Article 7(A).

Thus, the total amount presently due pursuant to the Lease Agreement is $270,159.35, plus interest, court costs and attorneys' fees, less any further reduction from the sale of the remaining two trucks. Counsel for Barr shall prepare an Affidavit of Attorneys' Fees forthwith.

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[1] This letter can be found attached as Exhibit C to both the Complaint and Plaintiff's Motion for Summary Judgment. I note that the letter takes into account any Depreciation Credits to which Defendants are entitled pursuant to the Lease Agreement.

Conclusion

For the reasons set forth herein, the Plaintiff's Motion for Summary Judgment is hereby granted and Defendants are ordered to pay damages to Plaintiff in accordance with this decision.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

oc: Prothonotary