IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MAXUS CAPITAL GROUP, LLC, *et al.*	)	**CASE NO. CV 11 750485**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
TIMCO ENGINE CENTER, INC., *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

The plaintiffs filed their complaint for breach of contract, unjust enrichment, replevin, and breach of guaranty on March 8, 2011. With their complaint the plaintiffs also filed a motion for an order of possession pursuant to Chapter 2737 of the Ohio Revised Code.

The defendants opposed the substance of the motion and moved to stay a hearing on the motion for immediate possession. The court reserved a decision on the motion to stay and a hearing on the replevin motion was held on March 28. This entry follows.

Chris DiLillo, the president and chief executive officer of both of the plaintiff companies, is the only witness who testified at the hearing. Plaintiffs' Exhibits 1 through 14 were admitted into evidence, as were the March 18 and March 24 affidavits of Kevin Carter, the treasurer of defendant TIMCO Engine Center, Inc.

Maxus Leasing Group, Inc., was started by DiLillo about 18 years ago.[1] Leasing, Inc., is, as its name suggests, in the business of leasing equipment. The kind of equipment the company leases may include a whole factory's worth of machinery. For example, the leased equipment in

[1] Because three different entities use Maxus as the first word in their name, Maxus Leasing Group, Inc., will be referred to throughout this entry as "Leasing, Inc."; Maxus Capital Group, LLC, will be referred to as "Capital Group, LLC"; and Maxus Capital SPE I, LLC, will be referred to as "SPE I, LLC."

this case consists of everything necessary to overhaul a CFM 56-3 jet engine. The equipment covers about 50,000 square feet of space.

DiLillo testified that in a typical transaction a lessee will select equipment it wants to lease and his company and the lessee will then agree on the rental payment and the term of the lease. Ordinarily, the lease also includes various options for what will occur at the end of the lease term.

On April 15, 2005, Maxus Leasing Group, Inc., and TIMCO Engine Center, Inc., entered into Master Lease No. 1288. At the same time, they also agreed to three separate schedules (bearing the numbers 001, 002, and 003), all of which were incorporated into the master lease. Defendant TIMCO Aviation Services, Inc. is a corporate guarantor of the lease and schedules. The schedules are essentially lists of separate equipment. The master lease and schedules included the following terms that are relevant to the issues in this case:

Master Lease No. 1288

> MASTER AGREEMENT OF TERMS AND CONDITIONS FOR LEASE ("Master Agreement") made as of April 15, 2005 between **Maxus Leasing Group, Inc.**, an Ohio corporation, having its chief executive offices at 31300 Bainbridge Road, Cleveland, Ohio 44139 ("Lessor") and **TIMCO Engine Center, Inc.**, a Delaware corporation having its executive offices at 623 Radar Road, Greensboro, NC 27410 ("Lessee").
>
> 1. LEASE
>
> On the terms and conditions of this Master Agreement, Lessor shall lease to Lessee, and Lessee shall hire from Lessor, the items of personal property (collectively the "Equipment." And individually an "Item") described in the Schedule(s) which shall incorporate this Master Agreement. Each Schedule shall constitute a separate and independent lease and contractual obligation of Lessee. The term "Lease" shall refer to an individual Schedule which incorporates this Master Agreement. In the event of a conflict between this Master Agreement and any Schedule, the language of the Schedule shall prevail. The Lease shall be effective upon execution by Lessor at its offices.

2. TERM

(a) The term of the Lease shall be comprised of a Delivery Term, Installation Term and Base Term, as the Base Term is defined in each Schedule. The Delivery Term for each item shall commence on the date the item is delivered to Lessee and shall end on the Installation Date. The Installation Term shall commence on the Installation Date and terminate on the first day of the month following the Installation Date for the last item to be installed (the "Base Term Commencement Date"). The Base Term of the Lease shall begin on the Base Term Commencement Date, and may, subject to Subsection 2(b), terminate on the last day of the last month of the Base Term. The date of installation (the "Installation Date") for any item shall be the earlier of either (i) the date on which the entity responsible for installing such item certifies that the item is installed and placed in good working order, or (ii) if Lessee has caused a delay in the installation of an item, seven days from the date the item is delivered to the equipment location specified in the Schedule, or (iii) if Lessee is to install the item, the third day after delivery. In the event the Equipment is already installed at the equipment location of Lessee, there shall be no Delivery Term and the Installation Date shall be the date on which the Lessor pays for the Equipment.

(b) A Lease may be terminated as of the last day of the last month of the Base Term by written notice given by either Lessor or Lessee not less than six (6) nor more than nine (9) months prior to the date of termination of the Base Term. If the Lease is not so terminated at the end of the Base Term, the Base Term shall be automatically extended for successive six (6) month periods until such six (6) month notice is given. The Base Monthly Rental shall continue to be due and payable by Lessee throughout any extension term(s). No notice of termination may be revoked without the written consent of the other party.

3. RENTAL

(a) The rental amount payable to Lessor by Lessee for the Equipment will be as set forth on the applicable Schedule. . .

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5. NET LEASE

. . . Lessee's agreement to pay all obligations under the Lease, including but not limited to Base Monthly Rental, is absolute and unconditional and such agreement is for the benefit of Lessor and its Assignee(s). . . The Lease shall be binding upon the Lessee, its successors and permitted assigns and shall inure to the benefit of Lessor and its Assignee(s).

6. FINANCE LEASE STATUS

The parties agree that this lease is a "Finance Lease" as defined by section 2A-103(g) of the Uniform Commercial Code ("UCC"). . .

7. INSTALLATION, RETURN AND USE OF EQUIPMENT

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(d) Lessee shall, at the termination of the Lease, at its expense, de-install, pack and return all, but not less than all, the Equipment to Lessor . . . If the Equipment is not redelivered to Lessor upon the termination of the Base Term or, if applicable, any Extension Term, then in addition to any other rights and remedies Lessor may otherwise have under the Lease, rental shall be payable by Lessee with respect to such Equipment at the then current Base Monthly Rental.

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9. OWNERSHIP, LIENS AND INSPECTIONS

(a) Lessee shall . . . affix and maintain tags, decals or plates furnished by Lessor on the Equipment indicating ownership and title to the Equipment in Lessor or its Assignee(s). . .

(b) Lessee shall execute and deliver such instruments, including Uniform Commercial Code financing statements, as are required to be filed to evidence the interest of Lessor and its Assignee(s) in the Equipment and the Lease. . .

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11. ASSIGNMENT BY LESSOR

(a) Lessee acknowledges and understands that Lessor may assign to a successor, financing lender and/or purchaser (the "Assignee"), all or any part of Lessor's right, title and interest in and to the Lease and the Equipment and Lessee hereby consents to such assignment(s). . .

(b) . . . No such assignment or conveyance shall relieve Lessor of its obligations under the Lease and Lessee agrees it shall not look to any Assignee to perform any of Lessor's obligations under the Lease. No such assignment shall increase Lessee's obligations nor decrease Lessee's rights hereunder.

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20. GENERAL

(a) THIS LEASE SHALL IN ALL RESPECTS BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE INTERNAL LAWS OF THE STATE OF OHIO (THE "STATE"), INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. LESSEE AGREES TO SUBMIT TO THE JURISDICTION OF THE STATE AND/OR FEDERAL COURTS IN THE STATE AND AGREES THAT ANY SUCH COURT SHALL BE AN APPROPRIATE VENUE. . .

(b) . . . The covenants, conditions, terms and provisions of the Lease may not be waived or modified orally. The Lease may not be amended or discharged except by a subsequent written agreement, entered into by duly authorized representatives of Lessor and Lessee.

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Schedule No. 001, dated April 15, 2005

Incorporating by reference Master Agreement No. 1288 . . .

Equipment Description: . . .

1.	Base Monthly Rental:	Months 1 to 12 = $33,712.00 and months 13 to 48 = $50,568.00

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4.	Base Term Commencement Date:	April 15, 2005
5.	Base Term:	48 Months, terminating on April 14, 2009

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8. Special Terms:

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(e) End of Base Term Option: . . . Lessee shall have the option at the end of the Base Term, contingent on the restrictions below and upon notice to Lessor given as provided in Section 2(b) of the Master Agreement, to: i) purchase all, but not less than all, of the Equipment for a purchase price equal to $1,085,505.00; or (ii) renew the Lease for an Extension Term of 12 months or greater at a monthly rental to be determined by Lessor and Lessee. . .

(f) End of Extension Term Option: At the end of the Extension Term, if any, Lessee has the option to either (1) purchase all the Equipment for $442,470.00 or (2) return all the Equipment to Lessor in the condition as specified in the Lease to the Equipment Return Location.

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Schedules 002 and 003 have the same language as Schedule 001, but the base monthly rental and purchase price options are different. Schedule 002 has a base monthly rental of $46,284 and a purchase at the end of the extension term option price of $404,985. Schedule 003 has a $23,148 base monthly rental and an end of extension term purchase price option of $202,544.

During the base term, Leasing, Inc. assigned its interest in the equipment to Capital Group, LLC and SPE I, LLC. Later, SPE I, LLC assigned an interest in schedules 001 and 003 to Morgan Stanley. Morgan Stanley is not a party to this lawsuit.

When the base rental term ended in April, 2009, the parties agreed to a 12-month extension term as allowed in Section 8(e) of the schedules. The extension term ended on April 14, 2010.

During the extension term, Kevin Carter sent an e-mail to DiLillo to the effect that TIMCO would buy the equipment in all three schedules for a total of $650,000, *i.e.*, $400,000 less than the option purchase price of $1,050,000. After Carter made that offer, the extension term expired without an agreement, and TIMCO did not exercise either of its two contract options: buying all of the equipment for $1,050,000 or returning it.

But Carter's offer did lead to discussions about other alternatives, including possible arrangements for Morgan Stanley to finance TIMCO's purchase of the equipment. DiLillo testified that despite these negotiations, the base monthly rental was still owed during the holdover period.

Eventually Morgan Stanley declined to finance TIMCO's purchase so, in the fall of 2010, Carter offered $750,000 to purchase all of the equipment. In the end, DiLillo and Carter never agreed on a purchase price.

Over ten months after the end of the extension term, on February 21, 2011, TIMCO sent Capital Group, LLC a check for $1,050,000 in an attempt to exercise the purchase option. However, Capital Group, LLC, returned the $1,050,000 check to TIMCO on the basis that the purchase option had long since expired.

As DiLillo's associate was composing correspondence to reject the check and return it to TIMCO, Carter wired $970,000 to Capital Group, LLC and asked for the return of the check. The wired amount represented the full purchase price of $1,050,000 less an $80,000 deposit TIMCO made at the start of the lease, and was intended to replace the check. However, Capital Group, LLC was unaware of TIMCO's reasons for remitting $970,000 and so retained the wired money and applied it to holdover rent for schedule 002.

The plaintiffs then filed this lawsuit, claiming that TIMCO defaulted by not buying the equipment at the end of the extension term or returning it and that TIMCO owes rent for the holdover period that began when the extension term expired.

The defendants' first argument is that the case should be stayed. In their motion to stay, the defendants assert that the jurisdictional priority rule requires this court to refrain from any decisions until the disposition by the General Court of Justice of Guilford County, North Carolina, of a related lawsuit. The related case was filed by TIMCO Engine Center, Inc., against Maxus Leasing Group, Inc., and Maxus Capital Group, LLC, on February 25, 2011. The North Carolina complaint was then amended on March 18 – ten days after the Ohio lawsuit was filed – to include TIMCO Aviation Services, Inc. as a plaintiff and Maxus Capital SPE I, LLC as a defendant.

The plaintiffs in the North Carolina case claim that the three Maxus entities have breached the contract by not honoring TIMCO's option to buy and they seek a declaratory

judgment that TIMCO is the titled owner of the equipment by virtue of Capital Group, LLC's retention of the wired funds. There is no evidence that a claim for a pre-judgment order of possession pursuant to North Carolina General Statutes Section 1-472, *et seq*. – the equivalent of the replevin statute at Ohio Revised Code Chapter 2737 – has been made in the North Carolina case.

The plaintiffs oppose the motion to stay for several reasons: the Ohio case was pending first; the contract is governed by Ohio law; and Maxus Capital SPE I, LLC, is not subject to personal jurisdiction in North Carolina.

"The fact that an action is pending in another state does not constitute a defense to an action between the same parties over the same cause of action in Ohio. An Ohio court's options, in this situation, are to grant a stay pending the resolution of the earlier action outside Ohio, or to maintain the action in this state."[2] The decision to grant a stay is discretionary. Reasons favoring a stay include "the interest of avoiding duplicity of action and the interest of interstate comity."[3] Unlike the jurisdictional priority rule – which applies only where the same action is pending in two or more Ohio courts of concurrent jurisdiction – the decision on a motion to stay where the same case is pending in courts of different states is not dictated by which action was filed first. The order of filing is only one of many considerations. Moreover, for all practical purposes, the two cases here were filed at the same time given that the complaints were filed only 11 days apart and no activity went on in North Carolina before this case was filed.

The more important considerations here are that the parties agreed by contract to submit to Ohio's jurisdiction and be governed by Ohio law, and that the Ohio case includes a motion for an order of possession that must be addressed at the outset of the case. These considerations

[2] *Hoppel v. Greater Iowa Corp.* (1980), 68 Ohio App. 2d 209, 210.
[3] *Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp.* (1995), 106 Ohio App. 3d 477, 487.

weigh against a stay. While this court has no doubt that the North Carolina court is perfectly capable of deciding questions of Ohio law, the fact that the North Carolina case was filed less than two weeks before this one hardly serves to justify burdening another state's court with a dispute where the parties not only agreed to follow Ohio law but also agreed to jurisdiction and venue in Ohio. Moreover, deferring a decision on the plaintiffs' motion for a pre-judgment order of possession until the North Carolina case – which does not include a similar claim – concludes has the effect of summarily denying the motion, a result that would be unjust if the plaintiffs have a meritorious claim. Therefore, the defendants' motion for a stay is denied and the motion for an order of possession will be decided on the evidence of record here.

The defendants' other arguments against granting the motion for order of possession are: that the plaintiffs' ownership of the equipment is in doubt; TIMCO has sold the equipment and is no longer in possession, foreclosing the possibility of replevin; the plaintiffs cannot show they are entitled to the property at the conclusion of this lawsuit; accord and satisfaction; and the $1,050,000 ($970,000 in wired funds plus the $80,000 security deposit) constitutes adequate security in the event the plaintiffs do prevail.

By statute, a hearing on a pre-judgment motion for an order of possession of property is limited to a consideration of whether there is probable cause to support the motion.[4] "Probable cause to support the motion" means:

> . . . that it is likely that the movant will obtain judgment against the respondent that entitles the movant to permanent possession of the specific personal property that is the subject of a motion filed pursuant to section 2737.03 of the Revised Code.[5]

The plaintiffs' predecessor, Leasing Group, Inc. began with possession of the equipment. That possessory interest was transferred to TIMCO by the lease for a finite term. Upon the

[4] Ohio Revised Code Section 2737.07(B).
[5] R.C. §2737.01(C).

expiration of that term, possession reverts to the plaintiffs (as Leasing Group, Inc's successors) unless the lessee buys the equipment. The current right to possession turns first on whether TIMCO's transfer of $970,000 to Capital Group, LLC on February 24 effectively executed its purchase options under Section 8(f) of the schedules. If so, the equipment is TIMCO's and the plaintiffs have no possessory interest; if not, the plaintiffs must still show that they are entitled to possession of the equipment.

The contract gave TIMCO the option to buy the equipment "at the end of the extension term."[6] The extension term ended on April 14, 2010, and the evidence is unequivocal that TIMCO did not purchase the equipment at the specified price or time. Instead, TIMCO attempted to negotiate a lower purchase price. From a practical perspective, nothing in the contract prevented TIMCO from trying to get a better deal. But TIMCO did so at the risk of holding over the lease term and incurring liability for monetary damages. Not only that, but failing a negotiated purchase, TIMCO also risked an action by the plaintiffs demanding specific performance of the contract provision requiring a return of all equipment at the expiration of the extension term. That risk has materialized since TIMCO's obligations under the lease were never "amended or discharged" by a "subsequent written agreement."[7]

Nor was the lease orally modified. Even though the lease prohibits oral modification, an oral modification can still be made where it has the elements of any other contract: offer, acceptance, and consideration. Those elements were not satisfied here, leaving only the original written contract terms. Because TIMCO's purported purchase was not made on those terms, it was invalid and did not transfer title to the equipment. Since TIMCO did not buy the equipment, the lessor has a contractual right to its return.

[6] Schedules 001, 002, and 003, Section 8(f).
[7] Lease, Section 20(b).

TIMCO's other arguments against an order for the return of the property are without merit. First, the available evidence does not support an accord and satisfaction. Common law accord and satisfaction occurs when there is a contract between a creditor and a debtor for settlement of a claim by some performance other than that which is due.[8] Proof of an accord and satisfaction requires proof of mutual assent to the settlement. That proof is lacking here. DiLillo testified that he never reached any agreement with TIMCO, and that his retention of the $970,000 was to cover rent during the holdover period. Given that he had just rejected a check for the $1,050,000 contract purchase price and that the $970,000 was wired without explanation, that testimony is credible. Moreover, no evidence was produced by TIMCO that the $970,000 was settlement for an amount "other than that which is due." Indeed, TIMCO's claim is that it was paid under the terms of the original contract, not some subsequent settlement.

Next are TIMCO's related assertions that ownership of the property is in doubt – because it appears Morgan Stanley has an interest in Schedules 001 and 003 – and that an order of possession cannot issue against TIMCO because it is no longer in possession, having sold the property. DiLillo testified that Morgan Stanley has a security interest in the schedules (even though Morgan Stanley is not named on any of the UCC financial statements) but that Maxus SPE I is the owner. That evidence was not contradicted. Additionally, even if Morgan Stanley has a possessory interest superior to the interests of Capital Group and SPE I, those entities have a right to possession ahead of TIMCO since TIMCO's rights terminated in April, 2010. Finally, TIMCO was well aware that this was a finance lease, which by definition may involve a lessor with a possessory, but not ownership, interest.

As to TIMCO being out of possession of the equipment, replevin is available even though a defendant did not have actual possession of the property when suit was filed where the

[8] *A.F.C. Interiors v. DiCello* (1989), 46 Ohio St.3d 1, 2.

defendant sold the property just prior to the actual filing of the action and the plaintiff was without knowledge of the fact.[9] Besides, there is considerable doubt about whether TIMCO's unidentified buyer currently possesses the equipment. Carter's first affidavit says only that the equipment "was sold" but doesn't say that it was shipped.[10] That, combined with the hearing testimony about the magnitude of the effort and expense needed to certify the equipment, suggests that the property remains exactly where it was on February 24.

TIMCO's fall-back position is that if there is probable cause to support the motion then the $970,000 and the $80,000 security deposit constitute adequate security for the plaintiffs. That position seems logical since R.C. §2737.11 allows a defendant in replevin to post a cash bond in an amount equal to the approximate value of the property. But the statute does not contemplate a pre-suit posting of a bond, and to allow it in this case would shift the risk of not properly executing the purchase option at the end of the extension term from TIMCO – who could, in essence, satisfy the option by transmitting the purchase price at any time, as long as a replevin action hasn't been filed – to the plaintiffs, who would be *de facto* obligated to file for replevin on the day the extension term ended so as not to sustain any loss for holdover rent. That result would be unfair by distorting the reasonable expectations of the contracting parties.

For all of these reasons, the motion for immediate possession is granted as separately journalized at the same time as this entry.

IT IS SO ORDERED:

_____ Date: _____
JUDGE JOHN P. O'DONNELL

[9] Black v. City of Cleveland (1978), 58 Ohio App. 2d 29, 33.
[10] Carter March 18, 2011, affidavit, ¶23.

SERVICE

A copy of this journal entry was sent by e-mail, this 9th day of May, 2011, to the following:

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