IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DE LAGE LANDEN FINANCIAL SERVICES, INC.	:	
v.	:	**NO. 04-3712**
MAXIMUS, INC., SOLARCOM LLC, and SOLARCOM HOLDINGS, INC.	:	

Diamond, J. **October 12, 2004**

MEMORANDUM

In this breach of contract suit, Defendants move to dismiss. Because I may not consider all of Defendants' arguments at this early stage, I deny the Motion without prejudice.

Background

Defendant Solarcom LLC leases computer equipment to other businesses. In September 1999, Solarcom LLC entered into a Purchase Agreement with Plaintiff De Lage Landen Financial Services, Inc. ("DLL" or "Bank"), giving DLL an option to buy computer leases from Solarcom LLC. (Compl. at ¶ 13.) The Agreement set out the parties' obligations in the event any of the lesee companies failed to make required rental payments:

> If a Lessee Default occurs under a Bank Lease and is continuing, within 15 business days after Bank notifies Vendor thereof, Vendor shall either (at Vendor's Option) (i) repurchase the Rentals under the Lease from Bank . . . for a cash price equal to the Repurchase Price of the Lease, or (ii) convey the Retained Rights to Bank pursuant to a Bill of Sale . . . ."

(Compl. at Ex. B: "Purchase of Paper Agreement § 7.") In December 1999, Solarcom Holdings, Inc. guaranteed Solarcom LLC's obligations under the Agreement.

On February 11, 2003, Strategic Partners International, Inc. ("SPI") agreed to lease computer equipment from Solarcom LLC. (Compl. at ¶ 27.) DLL exercised its option and bought the SPI Lease Agreement from Solarcom LLC. (Compl. at ¶ 35.)

On July 11, 2004, SPI defaulted after it failed to make a required rental payment. (Compl. at ¶¶ 40-41.) DLL alleges that by July 12, 2004, Solarcom LLC had notice of this default. (Compl. at ¶ 66.) Accordingly, under the Agreement, Solarcom LLC had 15 business days -- until August 2, 2004 -- in which either to buy back the SPI leases or to convey the retained lease rights to DLL. (Compl. at ¶ 67.) DLL alleges that Solarcom failed to do either. (Compl. at ¶¶ 67, 75.) On August 5, 2004, DLL filed this suit against Solarcom LLC, Solarcom Holdings, Inc., and Maximus, Inc. (which later acquired SPI), seeking damages for breach of the September 1999 Agreement and the December 1999 Guaranty.

On August 16, 2004, Solarcom LLC executed a Bill of Sale that purported to convey to DLL Solarcom LLC's retained rights in the SPI lease agreements. (Mot. to Dismiss at 2-3.) On August 17, 2004, Solarcom LLC and Solarcom Holdings moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that they performed their contractual obligations..

Standard of Review

In considering a Rule 12(b)(6) motion to dismiss, I "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether under any reasonable reading of the pleadings the plaintiff may be entitled to relief." See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420-21 (3d Cir. 1997); see also Tlush v. Mfrs. Res. Ctr., 315 F. Supp. 2d 650, 654 (E.D. Pa. 2002) (internal citations omitted). I may look at any documents, such as contracts, that are essential to the plaintiff's complaint and which form the basis of its claims. See Lum v. Bank of America, 361 F.3d, 217, 222 n.3 (3d Cir. 2004); see also Tlush, 315 F. Supp. 2d at 654. I may also consider those documents whose authenticity Plaintiff does not dispute. See Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993); see also Cuchara v. Gai-Tronics Corp., CIV No. 03-6573, 2004 U.S. Dist. LEXIS 11334 (E.D. Pa. April 8, 2004). I may grant the motion only if I conclude that the plaintiff can prove no set of facts that could entitle it to relief. See In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1420-21.

Applicable Law

The Agreement provides that "it shall be governed by Georgia law," and the parties agree that the Court should apply Georgia law to this dispute. (Compl. at Ex. B: "Purchase of Paper Agreement § 17"; Mot. to Dismiss at 5 n.3.; Opp. to Mot. to Dismiss at 9 n.4). Accordingly, I will apply Georgia law in deciding this Motion. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995) (choice of law provisions should be enforced); see also Hatfield, Inc. v. Robocom Sys. Int'l, CIV No. 98-4004,1999 U.S. Dist. LEXIS 563, *3 (E.D. Pa. 1999).

Discussion

Defendants here moved to dismiss on three grounds.

First, Defendants argue that they did not breach the Agreement because they conveyed their retained rights to Plaintiff on August 16, 2004. DLL acknowledges that Defendants conveyed the Bill of Sale on August 16th, but contends that it was without legal effect. (Opp. to Mot. to Dismiss at 12.) I agree with DLL. Defendants ignore the plain language of Section 7 of the Agreement, which states that they must either repurchase the lease or convey the retained lease rights *within 15 business days* after the Bank notifies them of a Lessee Default. (Compl. at Ex. B: "Purchase of Paper Agreement § 7.") Here, Plaintiff has pled that Defendants were on notice of SPI's default as of July 12th. (Compl. at ¶ 66.) Section 7 of the Agreement thus required Defendants to take action no later than August 2nd. (Compl. at ¶ 67.) Obviously, Defendant's August 16th conveyance to Plaintiff was fourteen days late, and so violated the Agreement. See Health Srvcs. Ctr. v. Boddy, 359 S.E.2d 659, 380 (Ga. 1987) (contracts will be interpreted and enforced as written); see also Blockum v. Fieldale Farms Corp., 573 S.E. 2d 36, 39 (Ga. 2002).

Defendants next argue that extrinsic evidence shows that they had conveyed their retained lease rights to Plaintiff before August 2nd. In a July 30, 2004 letter to Defendants, Plaintiff apparently stated that it was "exercising its rights under Section 12 and is retaining all of its rights and interests to the Collateral, including without limitation, any Retained Rights." (Reply Mot. to Dismiss at Ex. A.) If Defendants' factual contentions are correct, this could well be dispositive. See Burnam v. Wilkerson, 124 S.E. 2d 389, 393 (Ga. 1962) (performance is waived if it is a "useless formality"); see also Spence v. Coney, 25 S.E. 316, 318 (Ga. 1895)

(performance waived if it is a mere formality). Unfortunately for defendants, the July 30th letter is not "essential to the plaintiff's Complaint." Moreover, Plaintiff contends that Defendants have mischaracterized the letter's contents and import. (Surreply Opp. to Mot. to Dismiss at 5.) Accordingly, I may not consider the letter at this early stage. See Pension Benefit Guar. Corp., 998 F.2d at 1196.

Finally, Defendants contend that Section 13(b) of the Agreement provides them with a 15 day cure period, which they reason begins from the time that they receive written notice that they are in default. (Reply Mot. to Dismiss at 3-4.) The only written default notice Defendants contend they received from Plaintiff is the instant Complaint, which Plaintiff filed on August 5th. (Id. at 3.) Thus, Defendants believe they had 15 additional days -- until August 20th -- to perform. (Mot. to Dismiss at 2-3.) Having conveyed the retained lease rights to Plaintiff on August 16th, Defendants contend that they complied with the Agreement. (Reply Mot. to Dismiss at 3.)

Defendants have misinterpreted the Agreement. Section 13(b) applies to general "Events of Default" involving only the parties to the Agreement: DLL and Solarcom, Inc. (Compl. at Ex. B: "Purchase of Paper Agreement § 13(b).") "Lessee Defaults" -- such as those committed by SPI – are explicitly addressed in Section 7 alone. (Compl. at Ex. B: "Purchase of Paper Agreement § 7.") Under Georgia law, when there is an apparent conflict "between a [contractual] clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former." See Central Georgia Elec. Membership Corp. v. Georgia Power Co., 121 S.E. 2d 644, 646 (Ga. 1961). Thus, "the specific clause takes effect to the exclusion of the general clause." See Texas & P. R. Co. v. Callender, 183 U.S. 632, 636, 22 S.

Ct. 257, 46 L. Ed. 362 (1902); American Sav. & Loan Ass'n v. Pembroke Lakes Regional Center Assoc., Ltd., 908 F.2d 885, 889 (11th Cir. 1990) ("the general clauses must yield to the specific clauses"); Central Georgia Elec. Membership Corp., 121 S.E. 2d at 646. Here, because the specific clause -- Section 7 -- applies to Lessee SPI's default, the general clause -- Section 13(b) -- necessarily does not. Accordingly, Defendants had 15 business days from learning of SPI's default to perform their Section 7 obligations.

Plaintiff has pled that Defendants had notice of SPI's default on July 12th. (Compl. at ¶ 66.) Defendants have suggested that the July 12th notice was inadequate. (Reply Mot. to Dismiss at 2 n.1). Once again, if Defendants are correct, this could well be dispositive. See Forrester v. State Farm Mut. Ins. Co., 103 S.E.2d 619, 622 (Ga. Ct. App. 1958) (failure of one party to give notice as required obviates the other party's contractual obligations). At this early stage, however, I must accept DLL's allegation that Defendants were on notice by July 12th. See In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1420-21 (3d Cir. 1997) (courts must take plaintiff's allegations as true when deciding Rule 12(b)(6) motions). Thus, Section 7 obligated Defendants to perform by August 2nd. (Compl. at ¶ 67.) Defendants performed on August 16th. (Mot. Dismiss at pp. 2-3.) At this early stage, I am obligated to conclude that DLL has pled adequately that Defendants breached the Agreement by purporting to perform late.

I deny the Motion to Dismiss without prejudice. Should Defendants choose, they may raise their arguments once again at summary judgment. An appropriate Order follows.

BY THE COURT.

_____ _____

Date Paul S. Diamond, J.

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v.	:	**NO. 04-3712**
MAXIMUS, INC., SOLARCOM LLC, and SOLARCOM HOLDINGS, INC.	:	

ORDER

AND NOW, this 12th day of October 2004, for the reasons given in the accompanying Memorandum Opinion, it is ORDERED that the Motion of Defendants Solarcom LLC and Solarcom Holdings, Inc. to Dismiss the Complaint is **DENIED** without prejudice.

BY THE COURT.

_____ _____

Date **Paul S. Diamond, J.**