

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

RELATIONAL FUNDING CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 01-821-SLR  
 )  
 TCIM SERVICES, INC., )  
 )  
 Defendant. )

**MEMORANDUM ORDER**

**I. INTRODUCTION**

On December 11, 2001, plaintiff Relational Funding Corporation ("RFC") filed this action against defendant TCIM Services, Inc. ("TCIM") alleging that TCIM breached a contract under a lease by failing to provide notice of its intent to terminate the lease and by failing to return the equipment of the lease. Consequently, RFC is seeking return of the equipment, plus damages. Currently before the court is TCIM's motion for leave to file amended pleading. (D.I. 57) For the reasons stated below, TCIM's motion is denied.

**II. BACKGROUND**

On December 16, 1997, defendant TCIM entered into a Master Lease Agreement ("Lease"), as lessee, with Varilease Corporation ("Varilease") (a non-party), as lessor, for certain computer equipment. (D.I. 1 ¶ 5) On January 1, 1998, Varilease sold all of the equipment in dispute, assigning all of its rights, title,

and interest in the Lease to plaintiff RFC through the Purchase and Sale Agreement and Assignment of Lease ("Assignment Agreement"). (D.I. 37, Ex. A)

RFC alleges that TCIM defaulted under the terms of the Lease by failing to give the required notice of its intent to terminate the Lease in accordance with Paragraph 2(b) of the Lease. (D.I. 1 ¶ 14) RFC also alleges that TCIM has defaulted under the terms of the Lease because the majority of the equipment under the Lease has not been returned and a substantial portion of the equipment that was returned did not match the equipment that was given out under the Lease. (Id.)

TCIM counterclaimed alleging RFC breached the Lease by failing to provide notice to TCIM of the alleged sale and assignment. (D.I. 37 ¶¶ 45-66) On February 14, 2002, the court granted RFC's motion to dismiss the counterclaims. (D.I. 55) TCIM now attempts to amend its answer to re-assert the dismissed counterclaims.

### **III. DISCUSSION**

Defendant argues that it should be permitted to amend its answer to re-assert counterclaims based on evidence obtained during discovery. The evidence presented, however, is not relevant to the court's previous determination that the

counterclaims must be dismissed based on the plain language of the Lease.<sup>1</sup>

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<sup>1</sup>Under the terms of the Lease:

10. Assignment

- (a) Lessee acknowledges and understands that Lessor may assign to a successor, financing lender and/or purchaser (the "Assignee"), all or any part of the Lessor's right, title and interest in and to the Lease and the Equipment and Lessee hereby consents to such assignment(s). In the event Lessor transfers or assigns, or retransfers or reassigns, to an Assignee all or part of Lessor's interest in the Lease, the Equipment or any sums payable under the Lease, whether as collateral security for loans or advances made or to be made to Lessor by such Assignee or otherwise, Lessee covenants that, upon receipt of notice of any such transfer or assignment and instructions from Lessor,
- (i) Lessee shall, if so instructed, pay and perform its obligations under the Lease to the Assignee (or to any party designated by Assignee), and shall not assign the Lease or any of its rights under the Lease or permit the Lease to be amended, modified, or terminated without the prior written consent of Assignee; and
- (ii) Lessee's obligations under the Lease with respect to Assignee shall be absolute and unconditional and not be subject to any abatement, reduction, recoupment, defense, offset or counterclaim for any reason, alleged or proven, including, but not limited to, defect in the Equipment, the condition, design, operation or fitness for use of the Equipment or any loss or destruction or obsolescence of the Equipment or any part, the prohibition of or other restrictions against Lessee's use of the Equipment, the interference with such use by any person or entity, any failure by Lessor to perform any of its obligations contained in the Lease, any insolvency or bankruptcy of Lessor, or

Defendant disputes the court's prior reliance upon the "hell or highwater" provision of the Lease (paragraph 10(a)(ii)) noting "that only 'upon receipt of notice' of an assignment will TCIM have any obligations to the assignee 'and' that only 'upon receipt of notice' will TCIM's obligations to that assignee be absolute and unconditional." (D.I. 58 at 23) The court agrees. However, the "hell or highwater" provision is not essential to the court's conclusion that the proposed counterclaims have no merit. As the court previously stated, "the Lease only requires notification for the purpose of directing TCIM's payment and performance to the proper party. **Prior to notification, TCIM is performing under the Lease if it directs payment to the original lessor. The Lease does not purport to place any affirmative obligation upon the Lessor or Assignee to notify the Lessee of the assignment.**" (D.I. 55) (emphasis added)

As the Lease does not place an affirmative obligation upon the Lessor or Assignee to notify the Lessee of the assignment, the Lessor or Assignee cannot breach the Lease by failing to notify the Lessee of the assignment. While lack of notification may be a defense to claims by the Assignee, lack of notification does not give rise to a claim for breach of contract.

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for any other cause[.]

(D.I. 1, Ex. A at ¶ 10(a)(i)-(ii))

Defendant's additional evidence does not change the plain language of the Lease.<sup>2</sup>

#### **IV. CONCLUSION**

Therefore, at Wilmington, this 29th day of April, 2003;

IT IS ORDERED that defendant's motion for leave to file an amended pleading (D.I. 57) is denied.

Sue L. Robinson  
United States District Judge

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<sup>2</sup>Defendant also re-argues its position that TCIM is a third-party beneficiary under the assignment. Re-argument is appropriate if the movant demonstrates at least one of the following: (1) a change in the controlling law; (2) availability of new evidence not available when summary judgment was granted; or (3) a need to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Café ex-rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). Defendant has failed to demonstrate any of the aforementioned grounds to warrant a reconsideration of the court's February 14, 2003 opinion.