STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____________________

AT__________ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

HITACHI CAPITAL AMERICA CORP, *Plaintiff*, vs. **HENRY C. DOWNS, JR., MD,** *Defendant*.	Case No. **CV 2011 1339** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed by Hitachi Capital America Corp. (Hitachi) on September 8, 2011.

On February 9, 2011, Hitachi filed its Complaint against defendant Henry Downs, Jr., M.D. (Downs), alleging breach of a lease of medical equipment entered into on April 29, 2008, via Downs' failure to make a lease payment on January 15, 2009, "or any payments due thereafter despite demand for the same". Complaint, p. 2, ¶ 9. In April of 2008, Downs entered into a lease agreement with Laser Leasing, Inc. (Laser) as lessor; "…the financing, authorization, and approval of the equipment funding and installation payments were made by DeLage Lunden Financial Services (DLL)." Plaintiff's Response in Opposition to Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 2. Laser limited its communication with Downs to

leasing the medical equipment and securing Downs' signature on the lease. *Id.* In April 2009, DLL assigned its interest in the subject lease to Hitachi. *Id.*

On June 13, 2011, Downs filed a motion to dismiss, or alternatively, to stay proceedings and an affidavit of his counsel in support thereof. Downs argued to this Court that Laser does not now, and did not at the time the lease was entered into, possess a valid Certificate of Authority to do business in Idaho and, therefore, dismissal under Idaho Code § 31-1-1502 was proper. Hitachi filed its Plaintiff's Response and the supporting Affidavit of Sean Boutz on July 5, 2011. Hitachi argued its possession of a Certificate of Authority results in an exception to the general requirement that all foreign corporations, i.e. Laser, possess a Certificate of Authority in light of Hitachi's being a successor to Laser. Plaintiff's Response in Opposition to Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 3. Downs did not reply to Hitachi's Response. On August 30, 2011, the Court issued its Memorandum Decision and Order Denying Defendant's Motion to Dismiss or in the Alternative, Motion to Stay Proceedings. In that decision, this Court addressed Downs' argument that Laser did not possess a Certificate of Authority. This Court held:

> There is nothing in I.C. § 30-1-1502 which requires Laser to have been incorporated in any state, [or] requires Laser to have had a certificate of authority. As mentioned above, I.C. § 30-1-1502 reads:
>
> > A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation ***<u>or</u>*** its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.
>
> Hitachi has a certificate of authority. The statute is written in the *disjunctive*. To grant the relief Downs requests, this Court would have to find both Laser and Hitachi lacking a certificate of authority, and there is no dispute Hitachi has a certificate of authority. The statute requires: "A court may stay a proceeding commenced by a foreign corporation [this was initiated by Hitachi]…until it determines whether the foreign corporation [Hitachi] …requires a certificate of authority." Hitachi has a certificate of authority. Even if this Court could be convinced to read this

> statute as: "A court may stay a proceeding commenced by a foreign corporation [litigation was commenced by Hitachi, not Laser, but for the sake of argument we will insert Laser here], its successor, or assignee [Hitachi is Laser's assignee] until it determines whether the foreign corporation [Laser] or its successor [Hitachi] requires a certificate of authority." Hitachi has a certificate of authority.

Memorandum Decision and Order Denying Defendant's Motion to Dismiss or in Alternative, Motion to Stay Proceedings, p. 7.

On September 8, 2011, Hitachi filed its Motion for Summary Judgment, Plaintiff's Statement of Facts in Support of Motion for Summary Judgment, Plaintiff's Memorandum in Support of Motion for Summary Judgment, and Affidavit of Sean P. Boutz (Hitachi's counsel) in Support of Plaintiff's Motion for Summary Judgment. On September 21, 2011, Downs filed Defendant's Memorandum in Opposition to Summary Judgment and the Affidavit of Clayton G. Andersen (Downs' counsel). On September 28, 2011, Hitachi filed Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, a Supplemental Affidavit of Sean P. Boutz in Support of Plaintiff's Motion for Summary Judgment, and the Affidavit of Maurice Richeme in Support of Plaintiff's Motion for Summary Judgment. Oral argument on Hitachi's motion for summary judgment was held on October 5, 2011.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct.

App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 662 (1982).

III. ANALYSIS.

Hitachi seeks an order granting it summary judgment in light of Downs' failure to make any payments pursuant to the lease agreement after December 2008. Hitachi asserts this is a material breach. Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 1. Pursuant to the language of ¶ 7 of the lease and I.C. §§ 12-120 and 121, Hitachi seeks an award of costs and fees incurred, including pre- and post-judgment interest. *Id.,* p. 2. Hitachi argues Downs has materially breached the lease agreement between the parties by not having made any payment since December 2008. *Id.,* pp. 2-3 (citing *Aldape v. Lubcke,* 107 Idaho 316, 318, 688 P.2d 1221, 1223 (1984). Hitachi also notes Downs personally guaranteed all obligations. *Id.,* p. 4. Hitachi states, pursuant to ¶ 7 of the lease agreement, Hitachi is entitled to accelerate all amounts due, collect late charges and default interest at 18% per year, and recover the costs of collection, including attorney's fees and costs. *Id.,* p. 5. Because the amount owed by Downs is liquidated and can be exactly determined, Hitachi states it is entitled to pre-judgment interest. *Id.* And, because of the lease provision concerning remedies on default, Hitachi states it is entitled to 18% post-judgment interest.

Downs responded by filing his memorandum in Opposition to Summary Judgment on September 21, 2011. Downs concedes he executed the lease at issue, and attached to the Affidavit of Sean P. Boutz as Exhibit 1. Defendant's Memorandum in Opposition to Summary Judgment, p. 2. The entirety of Downs' opposition to the instant motion for summary judgment, and presumably his defense to the action as a whole, is that there is no lease agreement between Downs and DLL; "[t]hus the assignment [presumably Downs means agreement] that was entered into by Downs and [Laser] was not properly assigned to Hitachi." *Id.,* p. 4. Downs notes the record contains an assignment of the lease from Laser to DLL, and a statement that the lease has been assigned to Hitachi is also recognized as being part of the record by Downs. *Id.* But, Downs argues, these assignments do not "cure the defect as there is no assignment from DDL to Hitachi of the Lease between Downs and [Laser]." *Id.*

> Downs has alleged in his answer that Hitachi was not a real property [sic] in interest, the assignments from DLL to Hitachi were defective (See Answer Affirmative Defenses paragraphs 2 and 4) because it was apparent from the documents attached to Hitachi's complaint in Exhibit B that DLL and Downs did not have a Lease together so this Lease could not be assigned to Hitachi.

Id., pp. 4-5. Downs also argues the Affidavit of John Casey, President of Laser, is hearsay as to any statements made by Casey regarding DLL because "[t]here is no record that Casey has any relationship with DDL." *Id.,* p. 2.

Hitachi replies to Downs' argument regarding John Casey's purported hearsay statements by stating Mr. Casey was president of Laser, and had personal knowledge of the facts at issue, because he was so employed during the relevant time period. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 3. Hitachi then cites at length to the "Master Contract", the agreement entered into by DLL and Laser on May 4, 2006, which "sells, assigns and transfers and sets over to DLL, its

successors and assigns all of its right, title and interest" in any contract submitted to and accepted by DLL, any payments due, all purchase orders and invoices, and all of Laser's rights and remedies. Exhibit A to the Supplemental Affidavit of Sean P. Boutz. Further, Hitachi states, it was John Casey who executed this Master Contract on behalf of Laser. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 6. Hitachi argues there is no dispute that DLL assigned its interest to Hitachi, and that written notice of such assignment was provided to Downs. *Id.,* p. 7. "Thus, as the assignee of the Lease, DLL did maintain a "Lease Agreement" with Downs and it was permitted at any time, pursuant to the Lease's assignment clause, to assign the Lease to Hitachi." *Id.*

Finally, and dispositive, the plain language of the Lease Agreement permitted Laser the right to sell, assign, or transfer the Lease to a third party. Hitachi correctly argues:

> The Lease is explicit in its terms and provided for [Laser] to assign its interest to DLL, which subsequently assigned its interest to Hitachi. Downs claims the assignments were unsupported, but as set forth *supra*, both the Affidavit of Mr. Casey and the related documents thereof prove that Hitachi is the real party in interest.

Id., p. 8.

This Court, in its August 30, 2011, Memorandum Decision and Order determined Mr. Casey's statements were not hearsay. Memorandum Decision and Order Denying Defendant's Motion to Dismiss or in the Alternative to Stay, pp. 6-7. Again, Mr. Casey's statements were based on his personal knowledge and do not fall within the definition of hearsay. Mr. Casey, as signatory to the Master Contract between Laser and DLL, had knowledge of DLL's role as in financing and authorizing funding and payments and of Laser's assignment of the lease to DLL.

Downs' argument with regard to any alleged defect in the assignments from Laser to DLL and from DLL to Hitachi must also fail. The lease, which Downs admits having executed, states:

> You [Downs] agree that we [Laser] may sell, assign, or transfer ("Transfer") the Lease to a third party, and the third party will have our Transferred rights, but none of our obligations, and such rights will not be subject to any claims, defenses, or setoffs that you may have against us or any supplier.

Exhibit 1 to the Affidavit of Sean P. Boutz. The Court is constrained to give the contract language its plain meaning and no party before the Court has set forth any purported ambiguity. *Hill v. American Family Mut. Ins. Co.,* 150 Idaho 619, ___, 249 P.3d 812, 815 (2011) ("A contract must be interpreted according to the plain meaning of the words used if the language is clear and unambiguous.") Here, the plain language of the Lease not only permits Laser to assign it's the lease to a third party, but also provides a third party with all transferred rights, presumably including the right to transfer.

The RESTATMENT (SECOND) OF CONTRACTS § 317 (2011) states with regard to assignments:

> § 317. Assignment of a Right
>
> (1) An Assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.
> (2) A contractual right can be assigned unless
> a) The substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
> b) The assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
> c) Assignment is validly precluded by contract.

Although not explicitly adopted by the Idaho Supreme Court, this section of the RESTATEMENT (SECOND) OF CONTRACTS is at the very least instructive. In *Christensen v. City of Pocatello,* 142 Idaho 132, 124 P.3d 1008 (2005), the Supreme Court wrote:

> When urged to adopt a provision of the Restatement, we will decline to do so if it is inconsistent with Idaho law, the case can be resolved by another formulation, or if it can be resolved by current law. *See Estate of Skvorak v. Security Union,* 140 Idaho 16, 22, 89 P.3d 856, 862 (2004). As is evident from the above discussion, none of the reasons not to adopt it are present. No Idaho decision is contrary to it, the issue cannot be resolved by another formulation, and current law does not answer the direct question.

142 Idaho 132, 137, fn. 3, 124 P.3d 1008, 1013, fn. 3. Here, no reasons exist for the Court not to adopt the reasoning for determination of whether a contractual right can be assigned. And, no reason exists for not permitting assignment of a contractual right within the meaning of § 317, *supra.* Down's obligations were not impacted by the assignment(s), assignment is not forbidden by statute or public police, and the language of the Lease explicitly permits assignment.

There is no dispute of fact that Laser assigned its interest in Downs' lease to DLL. There is no dispute of fact that DLL assigned its interest in Downs' lease to Hitachi. Downs' argument that "There is no such lease agreement between Downs and DDL" (Defendant's Memorandum in Opposition to Summary Judgment, p. 4), while entirely true, wholly misses the point. Laser had the ability to assign its rights under the lease to DDL (and did), and DDL had the ability to assign its rights under the lease to Hitachi (and did). All these assignments were legal, and Downs authorized those assignments when he signed the lease because that right to assign is in the explicit terms of the lease.

Downs has not set forth any cogent support or authority for his argument. At oral argument on the motion for summary judgment, Downs raised, for the first time, the

argument that the Uniform Commercial Code (UCC) required Downs be given notice of the assignment. Because Downs received no such Notice of Assignment, Downs now argues summary judgment cannot be granted in favor of Hitachi. In effect, Downs is attempting to use the UCC notice of assignment "shield" as a "sword." Section 9-406 of the UCC provides that a debtor may discharge his obligation by paying an assignor until notification of the assignment is received by the debtor. UCC § 9-406(a). After receipt of a properly authenticated notification, a debtor may discharge his obligation only by paying the assignee. *Id.* This UCC language results in a debtor being entitled to receive proper notice of an assignment before the debtor could be required *to pay an assignee*. Essentially, this is a "shield" or a defense that a debtor can use if the debtor gets no notice of an assignment, he still receives credit for all payments paid to the creditor until the debtor receives notice of the creditor's assignment to a new party.

However, in the present case, Downs has *never made any payment* to Laser, DLL or Hitachi. The "shield" or defense is not available to Downs because he has made no payment. It matters not if he received notice of an assignment because he made no payments. Downs argument that he can now somehow turn this "shield" (which is not even available to him), into a "sword" (to avoid summary judgment on his breach) is completely lacking in any legal basis. The UCC protections would only become relevant were Downs claiming payments made to Laser and/or DLL were not being credited toward his obligation to Hitachi. Hitachi is entitled to judgment as a matter of law and no disputed questions of fact remain with regard to Downs' default and the rights of the parties under the Lease.

However, Hitachi's entitlement to summary judgment on: all amounts due, late charges, default interest at 18% per year, and the costs of collection, including attorney's fees and costs pursuant to ¶ 7 of the Lease (Exhibit 1 to the Affidavit of Sean

P. Boutz), remain to be established. Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 2.

Primarily, this is because Hitachi has not made it clear how Hitachi arrives at the "amount due". In its Complaint, Hitachi claims it is owed $86,071.60, under the lease from Downs. Complaint, p. 3, ¶ 1. No calculations are made within the Complaint to show how that amount was reached. On summary judgment, Hitachi claims it is due the principal balance of $74,709.71. Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 6. Again, no calculations are provided as to how Hitachi reached that amount. It would seem implied by the parties arguments, that Downs made payments for eight months, from May to December 2008, but no party has set forth by affidavit any such fact. Eight monthly payments would total $11,702.40 ($1,462.80 x 8). All sixty months of the lease at $1,462.80, totals $87,768.00, less the eight payments, leaves $76,065.60 owed, which is different than the two amounts claimed by Hitachi.

Hitachi claims it is entitled to attorney's fees pursuant to the lease and under I.C. § 12-120 and § 12-121. Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 2*,* Complaint, p. 3, ¶ 2. Nothing further is provided. The lease provides for attorney fees: "Upon default, you will also pay all expenses including but not limited to reasonable attorney fees...". Exhibit 1 to the Affidavit of Sean P. Boutz, ¶ 7. This Court finds Hitachi to be the prevailing party. Hitachi has prevailed on its claims and Downs has not prevailed on any of his affirmative defenses. This Court finds this to be a commercial transaction under I.C. § 12-120(3) in which the prevailing party is entitled to reasonable attorney fees. As such, this Court need not analyze attorney fees under I.C. § 12-121. As prevailing party, Hitachi is entitled to its costs under I.R.C.P. 54(d)(1).

Hitachi claims: "Hitachi is also entitled to post-judgment interest pursuant to the terms of the Lease, which provides for eighteen percent (18%) per year on all outstanding sums due until paid in full." Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 5. That is simply not the way post-judgment interest works in Idaho. I.C. § 28-22-104(2).

IV. CONCLUSION AND ORDER.

For the reasons set forth above, summary judgment in favor of Hitachi against Downs is proper as to Downs' default and the rights of the parties under the Lease (specifically, that the assignments are valid). All other issues will have to wait until a later day.

IT IS HEREBY ORDERED Hitachi's Motion for Summary Judgment against Downs is GRANTED as to Downs' default, and the rights Hitachi under the Lease (specifically, that the assignments from Laser to DLL, and from DLL to Hitachi) are legally valid and without any factual dispute.

IT IS FURTHER ORDERED Hitachi is the prevailing party in this case.

Entered this 7th day of November, 2011.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of November, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Sean P. Boutz	509-455-3632	Clayton Andersen	664-1684

____
Jeanne Clausen, Deputy Clerk