

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

VARILEASE FINANCE, INC.,

Plaintiff,

v

Case No. 15-148562-CB

Hon. Wendy Potts

DEEPFLEX, INC. and DEEPFLEX DO
BRASIL INDUSTRIA DE DUTOS FLEXIVEIS
E PARTICIPACOES LTDA.,

Defendants.

**OPINION AND ORDER RE: PLAINTIFF'S MOTION TO COMPEL IMMEDIATE
COMPLIANCE WITH LEASE TERMS**

At a session of Court
Held in Pontiac, Michigan

On
NOV 02 2015

This matter is before the Court on Plaintiff's Motion to Compel Immediate Compliance with Lease Terms. The Court is exercising its discretion to decide the motion without a hearing. MCR 2.119(E)(3).

On August 13, 2015, Plaintiff Varilease Finance, Inc. filed this action, claiming that Defendants defaulted under the parties' Master Lease Agreement and supplementary agreements with regard to a specialized undersea flexible pipe installation system (hereinafter referred to as the "equipment"). Plaintiff's Complaint asserts claims for breach of contract, guaranty, specific performance, and declaratory judgment.

By way of background, the parties entered into a series of agreements whereby Plaintiff was tasked to build the afore-mentioned pipe installation system for Defendants. Pursuant to the

agreements, Plaintiff advanced millions of dollars to various manufacturers for the development of the equipment. Defendants allegedly failed to meet their monetary obligations under the agreements and on account of their default, Plaintiff terminated the Master Lease Agreement on August 11, 2015. According to Plaintiff, Defendants currently have in their possession certain, related equipment known as: the Carcass machine parts, located in Houston, Texas; the large wheel assembly, located in Galveston, Texas; and several under rollers and a tensioner, located in Pensacola, Florida.

On August 19, 2015, Plaintiff filed its Motion to Compel Immediate Compliance with Lease Terms, requesting this Court to enter an order to compel Defendant to: (1) immediately insure the equipment pending delivery to Plaintiff; (2) immediately pay all outstanding storage charges and duties related to the equipment; and (3) immediately return the equipment to a location designated by Plaintiff. Plaintiff contends that it seeks specific performance of the Master Lease Agreement in order to protect the equipment and allow for its return. Plaintiff maintains that it is likely to prevail on the merits of its claims because of Defendants' breach of the parties' agreements. Plaintiff argues that it will suffer irreparable harm due to the risk that the unique, specialized equipment will be scrapped, sold, or encumbered by the landlords currently holding the equipment. Since Defendants are not presently utilizing the equipment, Plaintiff claims that it would suffer the greater harm as it could permanently lose the equipment.

In response, Defendants argue that Plaintiff's requests for relief are matters for which money, not an injunction, is the remedy and therefore, Plaintiff cannot satisfy the requirement of "irreparable harm." Additionally, Plaintiff's motion fails to cite any Michigan court rule upon which relief may be granted¹. Defendants contend that Plaintiff has also failed to demonstrate

¹ The Court rejects Defendants' argument since both parties are substantively treating Plaintiff's motion as an injunction motion. Plaintiff cites to MCR 3.310 Injunctions - in its accompanying Brief in Support of the motion.

that the requested injunctive relief serves the public interest. Finally, Defendants maintain that they have obtained the requisite insurance as of August 1, 2015. In its reply, Plaintiff asserts that Defendants' default entitles Plaintiff to have the equipment returned as requested by its motion.

As a preliminary matter, the Court notes that Plaintiff's request for the payment of insurance has been rectified by Defendants and is no longer at issue for purposes of this motion.

When deciding a motion for injunctive relief, the Court considers (1) whether the applicant will suffer irreparable injury if the injunction is not granted; (2) the likelihood that the applicant will succeed on the merits; (3) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if the injunction is granted; and (4) the harm to the public if the injunction issues. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

Plaintiff maintains that it will suffer irreparable harm – absent injunctive relief - should its unique, specialized equipment be permanently lost on account of Defendants' failure to: (1) immediately pay all outstanding storage charges and duties related to the equipment, and (2) immediately package and return the equipment to a designated location. Plaintiff argues further that the equipment is one-of-a-kind since it requires custom-built components that take months to manufacture and assemble. Notwithstanding Plaintiff's argument, the Court finds that the equipment components are not one-of-a-kind or irreplaceable as they can be remanufactured and reassembled, if necessary.

An injury is irreparable if it is a "noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." In other words, "economic injuries are not irreparable because they can be remedied by damages at law." *Thermatool, supra* at 377.

To the extent that the equipment is sold, scrapped, or encumbered if Defendant fails to immediately pay the outstanding charges or immediately return the equipment, Plaintiff's injury is economic where damages can be measured and determined with sufficient certainty. The Court finds that Plaintiff has an adequate remedy at law through its claims for breach of contract and guaranty because its injury from the loss or encumbrance of the equipment can be rectified by money damages.

It is the opinion of this Court that Plaintiff has failed to establish that it will suffer any irreparable harm if the Court does not enter the requested injunctive order, compelling Defendants to immediately pay all outstanding storage charges and duties related to the equipment and to immediately return the equipment to a designated location.

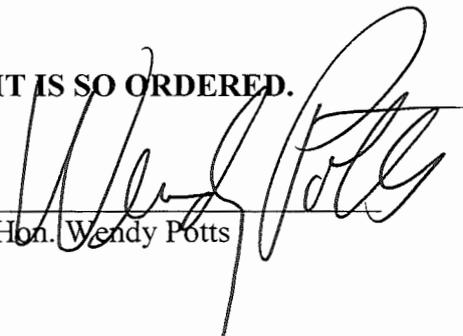
Because a showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction, *Mich Coalition of State Employee Unions v Mich Civil Service Comm'n*, 465 Mich 212, 225-26; 634 NW2d 692 (2001), and Plaintiff has failed to prove irreparable harm in this matter, the Court hereby denies Plaintiff's Motion to Compel Immediate Compliance with Lease Terms without prejudice.

The Court further orders the parties to enter into facilitation within 14 days of the date of this Opinion and Order. The parties shall notify the Court as to the name of the facilitator by 12:00 pm noon on Friday, November 6, 2015.

NOV 02 2015

Dated:

IT IS SO ORDERED.


Hon. Wendy Potts