

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA, OFFICE
OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,

Plaintiff,

vs.

Case No. 2004 CA 2515

COMMERCE COMMERCIAL LEASING, LLC,
COURT SQUARE LEASING CORP.,
DOLPHIN CAPITAL CORP.,
IFC CREDIT CORP., NATIONAL CITY
COMMERCIAL CAPITAL CORP., f/k/a,
INFORMATION LEASING CORP.,
IRWIN BUSINESS FINANCE ,
LIBERTY BANK LEASING,
POPULAR LEASING U.S.A., INC.,
PREFERRED CAPITAL LLC, and
STERLING NATIONAL BANK,

Defendants.

ORDER DISMISSING FIRST AMENDED COMPLAINT

THIS CAUSE came before the court upon the Motion to Dismiss filed by defendant COURT SQUARE LEASING CORP., the Motion to Dismiss filed by defendants COMMERCE COMMERCIAL LEASING, LLC, DOLPHIN CAPITAL CORP., NATIONAL CITY COMMERCIAL CAPITAL CORP., f/k/a, INFORMATION LEASING CORP., IRWIN BUSINESS FINANCE , LIBERTY BANK LEASING, F.S.B., PREFERRED CAPITAL LLC, and STERLING NATIONAL BANK, and the Motion to Dismiss filed by defendant POPULAR LEASING U.S.A.. All three motions were filed on April 4, 2005 and are directed towards the First Amended Complaint filed by the Attorney General's Office on March 14, 2005. Hearing on

the motions was held April 25, 2005.

The First Amended Complaint seeks to enforce the provisions of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Sections 501.201 - 501.213, Florida Statutes (2004), and Rule 2-18.002, Florida Administrative Code. The Attorney General seeks (1) a declaration from this court that certain agreements held by the Defendants are unlawful and unenforceable, (2) an injunction prohibiting the defendants from enforcing the agreements at issue and striking certain terms from the agreements, (3) a monetary award for consumers' damages incurred as a result of the agreements, and (4) penalties against the defendants, including costs and fees of this lawsuit.

The facts alleged in the First Amended Complaint set forth the following. NorVergence, Inc. and NorVergence Capital LLC (NorVergence) were engaged in the business of offering telecommunication services and equipment to businesses and non-profit organizations in Florida and other states. NorVergence offered discounted telephone service to the customers if the customers leased certain equipment to obtain the service. Shortly after the clients signed Equipment Rental Agreements with NorVergence, NorVergence sold the leases to the defendant finance companies. NorVergence then declared bankruptcy and can no longer provide the telephone services it agreed to provide the clients. The defendants now holding the interests in the rental

agreements continue to demand payment of the agreed-upon equipment rental payments, and the Attorney General seeks to establish that the defendants are not entitled to such payments. The Attorney General argues that the terms of the leasing agreements were unconscionable, unfair, and unenforceable and that the overall plan of NorVergence and the defendants constituted an unfair or deceptive act or trade practice prohibited by section 501.204, Florida Statutes.

The contents of the motions to dismiss of defendants COURT SQUARE LEASING and the COMMERCE COMMERCIAL LEASING group are substantially similar and raise the same issues. The motion to dismiss by defendant POPULAR LEASING raises many of the same issues as Court Square and Commerce Commercial, and adds issues regarding Popular Leasing's obligation or lack of obligation to look behind the agreement to discover the circumstances under which the agreements were reached and the presence or lack of direct wrongdoing by Popular Leasing.

Having considered the motions, the plaintiff's responses, the First Amended Complaint, and having heard argument of counsel at the hearing held April 25, 2005, the court finds that dismissal of the amended complaint should be granted as follows. Count I - Deceptive and Unfair Trade Practices in Violation of s. 501.204(1), Fla. Stat.

The defendants argue that section 501.204 does not provide a

cause of action against them because Section 501.212, Florida Statutes provides in pertinent part:

Application.--This part does not apply to:

(1) An act or practice required or specifically permitted by federal or state law.

* * *
(4) Any person or activity regulated under laws administered by:

* * *
(b) Banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission;

(c) Banks or savings and loan associations regulated by federal agencies;

The court finds that defendant COURT SQUARE LEASING CORP. is a subsidiary of Provident Bank and Maryland State Bank, regulated by federal agencies including the FDIC. Defendant DOLPHIN CAPITAL CORP. is a subsidiary of Capital Crossing Bank of Boston Massachusetts, regulated by the FDIC. Defendant NATIONAL CITY COMMERCIAL CAPITAL CORP. is a subsidiary of National City Bank, a federally chartered bank regulated by the Office of the Comptroller of the Currency. Defendant LIBERTY BANK LEASING is now known as LIBERTY BANK, FEDERAL SAVINGS BANK and is regulated by the Office of Thrift Supervision. Defendant STERLING NATIONAL BANK is a national bank regulated by the Office of the Comptroller of the Currency. Defendants COMMERCE COMMERCIAL LEASING, IRWIN BUSINESS FINANCE and PREFERRED LEASING LLC are finance companies engaged in lease financing of business equipment rentals. The court further finds that financing

commercial obligations by banks is an activity regulated by federal agencies, including the FDIC. Accordingly, the leases at issue are activities regulated by the Office of Financial Regulation, etc. as contemplated by sections 501.212(4)(b) & (c), Florida Statutes.

In addition, even if the some of the defendants are subject to the FDUTPA, the activities and terms of the agreements at issue are permitted by Florida law. While the businesses which entered the leases with NorVergence were "consumers" under section 501.203, Florida Statutes, and the Attorney General is authorized to enforce the FDUPTA on these consumers' behalf, the leases at issue are not "consumer leases" under section 680.1031(e), Florida Statutes because the items leased were not to be used for personal, family, or household purposes. The challenged unconditional obligation to pay ("Hell or High Water") term is permitted by sections 679.4031, 680.407, and 680.508, Florida Statutes. The Forum Selection clause is valid and enforceable under Florida law as announced in Manrique v. Fabbri, 493 So.2d 437 (Fla. 1986) and Golden Palm Hospitality Inc. v. Stearns Bank Nat'l Ass'n., 874 So.2d 1231 (Fla. 5th DCA 2004). The Waiver of Defenses and Warranties clause is permitted under section 680.214(3)(a), Florida Statutes. The First Amended Complaint does not allege that the Notice of Assignment, Waiver of Defenses, Unconditional Obligation to Pay and Forum Selection

clauses were not conspicuous in the agreements or that the consumer/businesses were not given a reasonable opportunity to review and understand the provisions of the agreements. In light of the foregoing, the court finds that the provisions the Attorney General asserts make the rental agreements unfair and deceptive are permitted by state law, and that Part II of Chapter 501 is not applicable here.

Count II-Violation of Rule 2-18, Florida Administrative Code

The Attorney General alleges in the First Amended Complaint that the defendants have violated Rule 2-18.002, Florida Administrative Code, which defines certain failures by sellers of "future consumer services" as unfair and deceptive acts. However, the defendants counter that this administrative rule applies only to contracts "for future consumer services" and the equipment leases assigned to the defendants are not contracts for future consumer services.

The defendants' argument regarding Count II is well taken. The agreements at issue are titled Equipment Rental Agreements and do not involve maintenance or other services to be performed by the defendants for the lessees. The Attorney General has not quoted or attached to the complaint any provisions of the agreements which obligate the defendant assignees to perform any "future consumer services." The agreements are merely equipment rental agreements not involving services.

Other Issues Raised in Motions to Dismiss

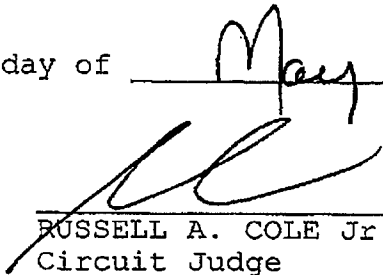
Dismissal of the First Amended Complaint is not warranted for failure to join an indispensable party, namely NorVergence, and failure to attach the contracts which gave rise to the Attorney General's complaint. Rule 1.130, Florida Rules of Civil Procedure requires that contracts "upon which action may be brought or defense made" be attached or incorporated in the pleading. However, this action is not brought upon the contracts, such as an action to enforce or rescind the contracts. The Attorney General's action is based upon the business practices of the defendants rather than the terms of the contracts themselves. Although the text of the contracts is helpful to establish the offending language constituting the alleged unfairness, in this case the failure to attach the documents does not require dismissal.

Likewise, the failure to join NorVergence does not require dismissal. An indispensable party is "one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder." Dept. of Health & Rehabilitative Services v. Cobb, 472 So.2d 790, 791 (Fla. 1st DCA 1985). The issue is not whether the party has an interest, but whether the party is indispensable to the lawsuit and maintenance of the lawsuit is impossible without the party. Phillips v. Choate, 456 so.2d 556 (Fla. 4th DCA 1984). The Attorney General has chosen

to proceed without NorVergence in this action and the court finds that the absence of NorVergence does not hamper the current defendants' abilities to defend this case or require dismissal of the First Amended Complaint.

For the foregoing reasons, it is hereby ORDERED and ADJUDGED that the First Amended Complaint is hereby DISMISSED with prejudice.

DONE AND ORDERED this 25^r day of May,
2005.



RUSSELL A. COLE Jr.
Circuit Judge

copies to: all parties