

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

HINKEL EXCAVATION &
CONSTRUCTION, INC., and CURTIS
HINKEL,

Plaintiffs,

vs.

CONSTRUCTION EQUIPMENT
INTERNATIONAL, LTD.; CASE
CREDIT CORPORATION; and,
AMERILEASE CORP.,

Defendants.

No. C00-4090MWB

**MEMORANDUM OPINION AND
ORDER REGARDING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND DEFENDANT
AMERILEASE'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

This matter is before the court pursuant to plaintiffs', Hinkel Excavation Construction, Inc. ("HEC") and Curtis Hinkel, Motion for Summary Judgment and defendant's, Amerilease Corp. ("Amerilease"), Cross-Motion for Summary Judgment. Defendants, Case Credit Corporation ("Case") and Amerilease have responded and opposed plaintiffs' motion. Plaintiffs, however, have not responded to Amerilease's cross-motion.¹ Defendant Construction Equipment International, Ltd. ("CEI") has not appeared in this action.²

A. The Parties

Plaintiff HEC is incorporated under the laws of the State of Iowa with its principal place of business in Sergeant Bluff, Iowa. Curtis Hinkel, who is the president of HEC, is a citizen of the State of Iowa. Case is a Delaware corporation with its principal place of business in Racine, Wisconsin. Amerilease is a California corporation with its principal

¹Plaintiffs did not file a reply brief in response to Case's contention regarding the "hell or high water" clause, and, in fact, tellingly failed to address or even mention the "hell or high water" clause in their motion for summary judgment.

²In their motion, plaintiffs move for summary judgment against CEI, claiming that HEC is entitled to cancel the agreement between HEC and CEI, because CEI failed to deliver the paving machine that it agreed to sell to it. The court notes that CEI has never appeared in this action. On October 20, 2000, plaintiffs filed a Written Application for Default against CEI. This court denied plaintiffs' application because they had not sought entry of default from the clerk of court in accordance with Federal Rule of Civil Procedure 55(a). To this date, plaintiffs have not satisfied the requirements of this rule. Moreover, it is questionable that CEI has even been properly served pursuant to Federal Rule of Civil Procedure 4(h) or Iowa Rules of Civil Procedure 56.1 and 56.2.

place of business in Newport Beach, California.

Case had an ongoing business relationship with Amerilease pursuant to which Amerilease would lease construction equipment, industrial equipment or other equipment to various lessees. In exchange for Case providing the proceeds to fund the acquisition of the equipment to be leased to the lessee, Amerilease would assign to Case the Finance Lease Agreement for the equipment and obtain execution by the lessee of other documents, such as a personal guaranty and security agreements, used to secure the amount due pursuant to the lease. The transaction for the lease of the equipment at issue here by Amerilease to plaintiffs followed the same course.

B. Factual Background

Plaintiffs HEC and Curtis Hinkel originally filed suit in the Iowa District Court of Woodbury County on July 20, 2000, seeking equitable relief with respect to three written agreements. On August 25, 2000, the case was removed from Iowa District Court to this court by virtue of 28 U.S.C. § 1441. In their complaint, plaintiffs specifically seek the rescission of the following three agreements: The first agreement concerned the purchase of a paving machine to be used by HEC; the second agreement concerned the financing of the paving machine under the terms of a Finance Lease Agreement executed by HEC; the third agreement concerned a guaranty of the Finance Lease Agreement by Curtis Hinkel. Plaintiffs also request a declaratory judgment that all three of the agreements be cancelled and that they be released from the obligations under the terms of the agreements. Lastly, plaintiffs request judgment for the amounts previously paid by them to the defendants.

The dispute between the plaintiffs and the defendants in this case emanates from a series of transactions that occurred on May 18, 1999. On May 18, 1999, Amerilease and HEC entered into a written lease agreement (referred to as the “Finance Lease Agreement”) wherein Amerilease agreed to lease a used paving machine, specifically a

1997-1432 Pav-Saver Maxi-Pav HD Slipform Paver, to HEC. At the same time of the signing of the Finance Lease Agreement, Curtis Hinkel executed a personal guaranty for the extension of such credit. Later that same day, Amerilease assigned the Finance Lease Agreement for consideration to Case. Case had already approved the Finance Lease Agreement for the paving machine to HEC. After receiving the assignment of the lease agreement, on May 21, 1999, Case paid the sum of \$120,450.00 to the vendor of the paving machine, CEI.

HEC commenced making the monthly payments under the terms of the lease agreement, but the paving machine never arrived. CEI never delivered the paving machine to HEC. Because of the non-delivery, on June 18, 1999, HEC ceased making the monthly rental payments to Case pursuant to the Finance Lease Agreement. The paving machine is currently in Mexico and the \$120,450.00 paid by Case is still presumably in the hands of CEI.³

C. Procedural Background

In their motion for summary judgment, HEC argues that it is entitled to damages from CEI, because CEI failed to deliver the paving machine that it agreed to sell to HEC. HEC asserts that it is entitled to cancel its agreement with CEI and to recover from CEI what has been paid thus far, citing IOWA CODE § 554.2711(1). Additionally, with respect to the claims plaintiffs have asserted against Case and Amerilease, plaintiffs argue that the risk of loss remains with Case and Amerilease under the provisions of IOWA CODE §§ 554.13219, 554.13220, and 554.13221. Plaintiffs argue that no fault can be attributed to them in regard to such loss, and that because the paving machine is currently outside the boundaries of the territorial United States, the loss is a “total” loss pursuant to

³In its resistance, Amerilease refers to CEI as a “now defunct entity.”

§ 554.13221(1). Therefore, plaintiffs contend that they are entitled to have the Finance Lease Agreement voided and the Guaranty signed by Curtis Hinkel also voided.

In response, Case argues that the “hell or high water” provision in the Finance Lease agreement is enforceable and precludes the plaintiffs’ alleged defenses. Case also argues that Curtis Hinkel is absolutely and unconditionally liable to make the lease payments pursuant to the Guaranty, and, further, that plaintiffs should be equitably estopped from asserting a claim for rescission pursuant to the doctrine of unclean hands or equitable estoppel. Amerilease asserts the same arguments as Case with the exception of the equitable estoppel and doctrine of unclean hands arguments. Moreover, unlike Case,⁴ Amerilease has filed a cross-motion for summary judgment based on the “hell or high water” provision and the personal Guaranty.

Plaintiffs HEC and Curtis Hinkel are represented by Wil L. Forker, Sioux City, Iowa. Defendant Case is represented by Richard J. Sapp and Thomas H. Walton of Nyemaster, Goode, Voigts, West, Hansell and O’Brien, Des Moines, Iowa. Defendant Amerilease is represented by Michael F. Lacey and Michael S. Jones of Patterson,

⁴In its brief, Case states “not only are Plaintiffs not entitled to summary judgment, but in the event this matter proceeds in this court, Case Credit will assert counterclaims against Plaintiffs based upon breach of lease, breach of guaranty, indemnification, fraud and equitable estoppel. When the time is right, Case Credit will move for summary judgment on each of these claims and will be entitled to such a judgment.” Case’s Brief at 3. On November 20, 2000, this court entered a conditional stay, stating that this case would be stayed unless or until the Superior Court in California rules that it does not have jurisdiction over the plaintiffs. On December 18, 2000, the California Court ruled that it did not have jurisdiction over the plaintiffs. Thus, on February 27, 2001, this court lifted the conditional stay and reinstated the pending motions for summary judgment. Despite reinstating the pending motions for summary judgment, thereby allowing “this matter to proceed in this court,” Case has not filed any counterclaims nor has it moved for summary judgment.

II. LEGAL STANDARDS

A. Standards for Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to FED. R. CIV. P. 56 in a number of prior decisions. See, e.g., *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 61 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firststar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Schreiber. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). Thus, the court will not consider those standards in detail here. Suffice it to say that Rule 56 itself provides, in pertinent part, as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's

⁵The court notes that both plaintiffs and defendant Amerilease retained new counsel in this matter after the motions for summary judgment had been filed and fully briefed by their previous counsel. Only the names of the parties' new counsel are identified above.

favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. See *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same). Before turning to the motions for summary judgment, the court must first

determine which state's law applies.

B. Which State's Law Applies?

This court has previously considered the often knotty problem of what law applies to specific common-law claims in a diversity action. See *L&L Builders Co. v. Mayer Associated Services, Inc.*, 46 F. Supp. 2d 875, 881 (N.D. Iowa 1999); *Dethmers Mfg. Co., Inc. v. Automatic Equip. Mfg. Co.*, 23 F. Supp.2d 974, 1001 (N.D. Iowa 1998); *Jones Distrib. Co., Inc. v. White Consol. Indus., Inc.*, 943 F. Supp. 1445, 1458 (N.D. Iowa 1996); *Harlan Feeders, Inc. v. Grand Labs., Inc.*, 881 F. Supp. 1400 (N.D. Iowa 1995); *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1251-54 (N.D. Iowa 1995). These and other precedents suggest the following principles for answering choice-of-law questions.

In a diversity action, a federal district court must apply the substantive law of the state in which it sits, including its conflict-of-laws or choice-of-law rules. See *id.*; *Harlan Feeders, Inc.*, 881 F. Supp. at 1403-04 (citing, *inter alia*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)); accord *National Continental Ins. Co. v. Empire Fire & Marine Ins. Co.*, 157 F.3d 610, 612 n. 4 (8th Cir. 1998) ("In diversity cases, the forum state's choice of law rules govern," citing *Klaxon Co.*, 313 U.S. at 496); *Colonial Ins. Co. of Cal. v. Spirco Envtl., Inc.*, 137 F.3d 560, 561-62 (8th Cir. 1998) ("Federal district courts must apply the choice-of-law rules of the state in which they sit when jurisdiction is based on diversity of citizenship," quoting *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1320 (8th Cir. 1991)); *Penney v. Praxair, Inc.*, 116 F.3d 330, 333 n. 4 (8th Cir. 1997) ("Sitting in diversity, a district court is bound to apply the choice of law rules of the state in which it sits. . . ."). Thus, Iowa conflict-of-laws or choice-of-law rules apply here.

Ordinarily, before any choice of law need be made, there must be a "true conflict" between the laws of the possible jurisdictions on the pertinent issue. See *Harlan Feeders*, 881 F. Supp. at 1404 (citing, *inter alia*, *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th

Cir. 1995)). When there is no conflict or difference between the laws, then the law of the forum applies without a choice of law analysis being necessary. See *Phillips v. Marist Soc'y*, 80 F.3d 274, 276 (8th Cir. 1996) (finding that when the relevant laws of two different jurisdictions do not differ, the court need not engage in a choice-of-law analysis). Neither party asserts that there is a substantive difference between Iowa contract law and California contract law relative to the issues at bar. For example, Case explicitly states that “at this time Case Credit does not argue for the application of Iowa law over California law as a choice of law matter because the law of both jurisdictions is the same with respect to the enforceability of the “hell or high water” clause and Case Credit’s status as a holder in due course.” See Docket #27 ¶ 7. Additionally, the plaintiffs and Amerilease do not even raise the choice of law issue; rather they both rely on, and cite to, Iowa law. Here, because all the parties rely upon Iowa case-law and Iowa statutes in their respective briefs and because there does not appear to be a difference between the law of Iowa and California on the relevant issues, the court will apply Iowa law to the contract claims at issue. See *Phillips*, 80 F.3d at 276.

C. Plaintiffs’ Motion for Summary Judgment

In their motion for summary judgment against Case and Amerilease, plaintiffs contend that the risk of loss—that is, the non-delivery of the paving machine—remains with Case and Amerilease under the provisions of IOWA CODE § § 554.13219, 554.13220, and 554.13221. Plaintiffs contend, albeit in a conclusory fashion, that no fault can be attributed to them with respect to such loss. Moreover, plaintiffs contend that because the paving machine is currently outside the boundaries of the territorial United States, the loss is a “total” loss pursuant to § 554.13221(1). Plaintiffs argue that they are entitled to rescission of the Finance Lease Agreement, as well as recission of the Guaranty signed by Curtis Hinkel.

1. Plaintiffs' claims against Case

Under Iowa law, rescission is indeed a recognized remedy upon proof of breach. *Beckman v. Kitchen* 599 N.W.2d 699, 701 (Iowa 1999) (citing *Krotz v. Sattler*, 586 N.W.2d 336, 339 (Iowa 1998)). Three requirements must be met before rescission will be granted: (1) the injured party must not be in default, (2) the breach must be substantial and go to the heart of the contract, and (3) remedies at law must be inadequate. *Clark v. McDaniel*, 546 N.W.2d 590, 595 (Iowa 1996) (citing *Potter v. Oster*, 426 N.W.2d 148, 151 (Iowa 1988)). Regarding plaintiffs' motion for summary judgment, therefore, the question is whether plaintiffs have shown that defendants breached the contract, or in this case, specifically whether plaintiffs have shown that the defendants breached the Finance Lease Agreement, and the Guaranty, as a matter of law based on the non-delivery of the paving machine.

Case contends that plaintiffs may not rely upon the non-delivery of the paving machine as a basis for rescission of the Finance Lease and Guaranty because paragraph 5 of the Finance Lease Agreement for the paving machine contains what is known as a "hell of high water" provision. Case contends that plaintiffs are not entitled to summary judgment because the "hell or high water" provision in the Finance Lease Agreement for the paving machine is enforceable, thereby making HEC absolutely and unconditionally obligated to make the lease payments to Case as provided for in the lease, despite the non-delivery of the paving machine. Additionally, Case contends that it is a holder in due course, and as an assignee of the Finance Lease Agreement, it holds the agreement free of any defenses such as failure of consideration and risk of loss. Case further contends that Curtis Hinkel is absolutely and unconditionally liable to make the lease payments pursuant to the Guaranty, which included a "waiver of defense" provision. The court will address Case's assertions in turn.

a. Hell or high water provision of the Finance Lease Agreement

Paragraph 5 of the Finance Lease Agreement provides:

Absolute Obligation/Indemnification

I AGREE THAT MY OBLIGATION TO PAY THE RENTAL PAYMENTS IS ABSOLUTE AND UNCONDITIONAL AND WILL NOT BE SUBJECT TO ANY DELAY, REDUCTION, DEFENSE, SET-OFF, COUNTERCLAIM OR RECOUPMENT FOR ANY REASON WHATSOEVER, INCLUDING ANY DAMAGE TO, OR LOSS OR MALFUNCTION OF, THE EQUIPMENT OR ANY BREACH OF REPRESENTATION OR WARRANTY BY DEALER OR THE MANUFACTURER OF THE EQUIPMENT.

See Plaintiffs' Petition, Exhibit B, ¶ 5. The Finance Lease Agreement's unambiguous language in this paragraph clearly indicates an intent on the part of HEC that HEC would be under an unconditional obligation to make the lease payments which was separate and distinct from any contractual obligation of Amerilease (the dealer) or CEI (the manufacturer).

In *Citicorp of North America, Inc. v. Lifestyle Communications Corp.*, 836 F. Supp. 644, 655-657 (S.D. Iowa 1993), the undersigned, while a United States Magistrate Judge in the Southern District of Iowa, discussed at length the rationale supporting "hell or high water" clauses in leases. Specifically, the court explained that "hell or high water" clauses are common in the commercial leasing industry, and noted the following:

"Under the hell or high water provision, the lessee undertakes to pay rentals . . . once the lessee has formally accepted the property. . . . Whether the property functions satisfactorily, is useful to the lessee, is suitable for the purpose intended, or is lost, stolen, condemned, or destroyed, and whether the lessee has any right of offset against the lessor or the lenders, is irrelevant. In short, rent payments continue to come hell or high water, without any reduction or offset, even if the lessee is wrongfully dispossessed of the equipment by the lessor. . . ." *Colorado Interstate Corp. v. CIT Group/Equipment Fin.*, 993 F.2d 743, 749 (10th Cir. 1993) (quoting 1 Bruce E. Fritch & A. Reisman, *Equipment Leasing- Leveraged Leasing* 152-53

(3d ed. 1988)).

Id. at 656 (footnote omitted). In a footnote, the court documented one commentator's thoughts on "hell or high water" clauses, stating:

Finance leases frequently contain a "hell or high water" rent commitment. Under this type of obligation, a lessee is required to unconditionally pay the full rent when due. He is not permitted to make any deduction even though he has a legitimate claim against the lessor for money owed. This is not as bad as it sounds for a lessee, since he can still bring a lawsuit against the lessor for any claims. Richard M. Contino, *Legal and Financial Aspects of Equipment Leasing Transactions* 29 (1979).

Id. at 656 n.20.

Federal courts, including the court in *Citicorp*, have uniformly upheld the validity of "hell or high water" provisions, concluding that a lessor's, or vendor's/manufacturer's, breach of its duty to perform is a separate and distinct issue from the lessee's duty to make its lease payments. See *Colorado Interstate Corp. v. CIT Group/Equipment Fin.*, 993 F.2d at 743, 751 (10th Cir. 1993); *Leasetec Corp. v. Orient Systems, Inc.*, 85 F. Supp. 2d 1310, 1317 (S.D. Fla. 1999); *Siemens Credit Corp. v. Kakos, D.D.S., Ltd.*, 1995 WL 29618, *4 (N.D. Ill. Jan. 24, 1995); *First Bank Nat'l Ass'n v. Scripps Howard, Inc.*, 1995 WL 548845 (S.D.N.Y. Sept. 15, 1995); *Benedictine College, Inc. v. Century Office Products, Inc.*, 853 F. Supp. 1315, 1323-25 (D. Kan. 1994); *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1484 (D. Minn. 1991), *aff'd*, 967 F.2d 1208 (8th Cir.), *cert. denied*, 506 U.S. 956 (1992); *In re ICS Cybernetics, Inc.*, 123 B.R. 467 (Bankr. N.D.N.Y. 1989) *aff'd*, 123 B.R. 480 (N.D.N.Y. 1990); *Philadelphia Sav. Fund Soc'y v. Deseret Management Corp.*, 632 F. Supp. 129, 135-36 (E.D. Pa. 1985); *In re O.P.M.*

Leasing Serv., Inc., 21 B.R. 993, 1006-07 (Bankr. S.D.N.Y. 1982).⁶ The reasoning underlying such decisions was set out by the United State Court of Appeals for the Tenth Circuit in *Colorado Interstate*:

“To deny this clause its full force and effect would effectively reconstruct the contract contrary to the intent of the parties, which reconstruction would be impermissible.

Moreover, it is a well-settled principle that 'parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract. . . . It follows that contractual limitations upon remedies are generally to be enforced unless unconscionable.'

. . . .

The essential practical consideration requiring liability as a matter of law in these situations is that these clauses are essential to the equipment leasing industry. To deny their effect as a matter of law would seriously chill business in this industry because it is by means of these clauses that a prospective financier-assignee of rental payments is guaranteed security for his outright loan to the lessor. Without giving full effect to such clauses, if the equipment were to malfunction, the only security for this assignee would be to repossess equipment with substantially diminished value.”

Colorado Interstate, 993 F.2d at 748 (quoting *In re O.P.M. Leasing Serv., Inc.*, 21 B.R. at 1006-07).

⁶Neither Iowa appellate court has considered the issue of the validity of “hell or high water” lease provisions in a written decision. However, appellate courts in other states have uniformly upheld the general validity of such provisions. See e.g. *Colonial Pacific Leasing Corp. v. McNatt, et al.*, 486 S.E.2d 804 (Ga. 1997); *Emlee Equipment Leasing Corp. v. Waterbury Transmission, Inc.*, 626 A.2d 307 (Conn. App. Ct. 1993); *Chemical Bank v. Rinden Professional Ass’n*, 498 A.2d 706, 711 (N.H. 1985); *Stewart v. United States Leasing Corp.*, 702 S.W.2d 288, 290 (Tex. Ct. App. 1985); *Dillman & Assoc., Inc. v. Capitol Leasing Co.*, 442 N.E.2d 311, 317 (Ill. App. Ct. 1982); *Dixie Groceries, Inc. v. Albany Business Machines, Inc.*, 274 S.E.2d 81, 88 (Ga. Ct. App. 1980); *St. Paul Leasing Co. v. Winkel's, Inc.*, 244 N.W.2d 661, 662 (Minn. 1976).

With this background in mind, the court directs its attention to contentions asserted by HEC and Case. In this case, HEC took the offensive by filing suit seeking to rescind the Finance Lease Agreement with Case, *inter alia*, on the ground that the risk of loss⁷—that is, the non-delivery of the paving machine and its current location outside the territorial United States—remains with Case pursuant to IOWA CODE § § 554.13219, 554.13220 and 554.13221. Case contends that the Finance Lease Agreement’s “hell or high water” provision is enforceable and precludes HEC from asserting the affirmative defense of risk of loss. Additionally, Case points out that the Iowa statutes upon which the plaintiffs rely are wholly inapplicable because they do not pertain to finance leases. The court agrees with Case.

The court finds the logic of the *Colorado Interstate* decision upholding the validity of “hell or high water” provisions to be persuasive, and, therefore, the court concludes that the Finance Lease Agreement’s “hell or high water” provision severed HEC’s duty to make the lease payments from Amerilease’s duty, or CEI’s duty, to perform its obligations under the contract. *Id.* at 749. Moreover, the court finds that the individual claim—risk of loss—asserted by HEC against Case does not, as a matter of law and on the record before this court, render this provision of the Finance Lease Agreement inoperable. Therefore, HEC’s assertion that its duty to pay rent only continued as long as the paving machine was delivered is without merit. When HEC agreed to the terms of the “hell or high water” provision, it agreed to continue making rent payments despite any claim it might have against either CEI or Amerilease. HEC’s sole remedy was limited to bringing an action against CEI or Amerilease while continuing to make rent payments to Case. Neither the assignment nor CEI’s alleged defunct status relieved HEC of this obligation. As the Tenth

⁷Neither the plaintiffs nor the defendants have cited any Iowa case-law in which the Iowa courts have considered the risk of loss defense.

Circuit Court of Appeals in *Colorado Interstate* explained: “Essentially, [HEC] assumed the risk of [CEI’s and Amerilease’s] non-performance.” *Colorado Interstate*, 993 F.2d at 747.

HEC attempts to avoid this result by citing the defense of “risk of loss” and pointing to three Iowa statutes, to wit: IOWA CODE § § 554.13219, 554.13220 and 554.13221. As pointed out by Case, however, the statutes upon which HEC relies are, indeed, irrelevant. IOWA CODE § 554.13219, captioned “Risk of Loss,” clearly provides for an exception “in the case of a finance lease.” The other two statutes refer to the risk of loss described in IOWA CODE § 554.13219. Therefore, because the lease agreement at issue in this case is identified as “Finance Lease Agreement,” these statutes are inapplicable. As the moving party, the plaintiffs bears “the initial responsibility of informing the district court of the basis for their motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323); *see also Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1107 (8th Cir.1998); *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). Here, the plaintiffs rely on statutes that are wholly inapplicable to their claim that they are entitled to judgment as a matter of law. Therefore, the court concludes that HEC is not entitled to judgment as a matter of law in its favor against Case for the rescission of the Finance Lease Agreement based on the defense of risk of loss. Furthermore, even if the court were to construe plaintiffs' risk of loss defense tantamount to a failure of consideration defense, the court would still not enter judgment in plaintiffs' favor.

i. consideration

The burden of proof is on the plaintiffs to show that there was a failure of consideration. *Citizens First Nat'l Bank of Storm Lake v. Turin*, 431 N.W.2d 185, 187 (Iowa Ct. App. 1988); *Northwestern Nat'l Bank of Sioux City v. Verschoor*, 230 N.W.2d 505, 507 (Iowa 1975). Consideration has been defined by the Iowa Supreme Court as "'a

benefit to the promisor or a loss or detriment to the promisee.'" *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61, 66 (Iowa 1992) (quoting *Test v. Heaberlin*, 118 N.W.2d 73, 74 (1962)). As the Iowa Supreme Court explained in *Woods*:

There is a substantive difference between lack of consideration and failure of consideration. A lack of consideration means no contract is ever formed because no consideration exists or none was intended to pass. *Johnson [v. Dodgen]*, 451 N.W.2d [168] at 172 [(Iowa 1990)]; *Hart [v. Hart]*, 160 N.W.2d [438] at 444 [(Iowa 1968)]. In contrast, a failure of consideration means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been given. *Johnson*, 451 N.W.2d at 172; *Hart*, 160 N.W.2d at 444. In *Johnson* we described in detail what failure of consideration could encompass and what remedies were available because of it: Failure of consideration covers every case where a contractual obligation is not performed irrespective of the fault of the breaching party. Thus, a failure of consideration may describe nonperformance which does not constitute a breach. A failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but is nonetheless a failure of consideration discharging the other party from his duty to perform under the contract, giving him the right to the restitution of payments already made or other benefits conferred. *Johnson*, 451 N.W.2d at 172.

Failure of consideration can be total or partial. *Hart*, 160 N.W.2d at 444. A partial failure of consideration occurs when "only a part or portion of the consideration originally contemplated by the parties actually moved from obligee to obligor." *Id.* A total failure of consideration, on the other hand, happens when a party has "failed or refused to perform a substantial part of what the party agreed to do." *Johnson*, 451 N.W.2d at 172.

Woods, 480 N.W.2d at 66.

There is, however, an important corollary to any failure of consideration analysis. A party accorded the status of a holder in due course takes free of personal defenses such

as a failure of consideration. *Citicorp*, 836 F. Supp. at 660-61 (and cases cited). The obvious significance of application of this rule in this case is that plaintiffs' assertion of the personal defense of failure of consideration is an invalid defense against Case if it is a holder in due course of the assignment. Case asserts that it received assignment of the Finance Lease Agreement in good faith, for value and without knowledge of any claims or defense the plaintiffs may have had at the time of the assignment against Amerilease and CEI, if any, and therefore, is in the position of a holder in due course. Without deciding whether Case is, indeed, a holder in due course of the assignment, the court finds that Case has generated a genuine issue of material fact that plaintiffs should be equitably estopped or barred by the doctrine of unclean hands from seeking rescission of the Finance Lease Agreement and Guaranty.

ii. equitable estoppel and doctrine of unclean hands

Equitable estoppel can be asserted as a bar to relief to a party seeking to recover on a breach of contract. See, e.g., *Utica Mut. Ins. Co. v. Stockdale Agency*, 892 F. Supp. 1179, 1192 n.7 (N.D. Iowa 1995). As this court explained in *Utica Mutual*, “Equitable estoppel is a doctrine invoked to avoid injustice.” *Id.* (quoting *Hawkeye Land Co. v. Iowa Power & Light Co.*, 497 N.W.2d 480, 486 (Iowa Ct. App. 1993), in turn citing *Bricker v. Maytag Co.*, 450 N.W.2d 839, 841 (Iowa 1990)); accord *In re Marriage of Gallagher*, 539 N.W.2d 479, 482 (Iowa 1995) (“Equitable estoppel is a doctrine based on fair dealing, good faith, and justice.”). The elements of equitable estoppel are the following: (1) a false representation or concealment of material facts by the party against whom estoppel is asserted, here the plaintiffs; (2) a lack of knowledge of the true facts on the part of the actor, here Case; (3) the intention on the part of the plaintiffs that the false representation or concealment be acted upon; and (4) reliance upon the representation of the plaintiffs by Case to Case’s prejudice and injury. *Id.* (citing *Hawkeye Land Co.*, 497 N.W.2d at 486); accord *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 493 (Iowa 2000); *In re*

Marriage of Gallagher, 539 N.W.2d at 482; *Bowles v. Schilling*, 581 N.W.2d 192, 194 (Iowa Ct. App. 1998); *City of Marshalltown v. Reyerson*, 535 N.W.2d 135, 137 (Iowa Ct. App. 1995) (describing the above as the elements of the affirmative defense of equitable estoppel).

The doctrine of unclean hands considers whether the party seeking relief has engaged in inequitable conduct that has harmed the party against whom he seeks relief. *Liberty Bank & Trust of Mason City v. Alpana Aluminum Products, Inc.*, 2001 WL 195075, *5 (Iowa Ct. App. Feb. 28, 2001) (citing *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 279 (Iowa 1996)). The doctrine stands for the principle that a party may be denied relief in equity based on their inequitable, unfair, dishonest, fraudulent, or deceitful conduct. *Id.* (citing *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987)).

Case asserts that in the Finance Lease Agreement, the plaintiffs represented to Case that they had received and examined the paving machine, and that it was in good working order and condition and as described. See Plaintiffs' Petition, Exhibit B. Case contends that plaintiffs' representation that the paving machine had been delivered and accepted by plaintiffs was false, and that they knew it was false. Case contends that it relied upon this representation in funding the purchase of the paving machine, and that due to this misrepresentation, plaintiffs should not be able to seek rescission of the Finance Lease Agreement and Guaranty. Case argues that there is a genuine issue of material fact as to whether plaintiffs should be equitably estopped or barred by the doctrine of unclean hands from seeking and receiving rescission of the Finance Lease Agreement and Guaranty. The court agrees with Case.

The court notes that plaintiffs failed to respond to this assertion, much less any assertion, raised by Case. Nonetheless, the court finds that there is a genuine issue of material fact with respect to this issue. Indeed, all the court has to do is review plaintiffs'

petition in which they specifically state that "[c]ontrary to the statement that the 'Equipment' was received and examined and is in good operating order and condition, Plaintiff Hinkel Excavation & Construction, Inc., has not received said Equipment. . . ." See Plaintiffs' Petition at ¶ 7. Therefore, the court finds that Case has generated a genuine issue of material fact whether or not plaintiffs' should be able to seek rescission based on equitable estoppel and the doctrine of unclean hands.

b. Waiver of defense provision

The second key provision at issue here is the "waiver of defense" provision found in paragraph 6 of the personal Guaranty signed by Curtis Hinkel. It states:

IT IS THE MUTUAL INTENTION OF THE PARTIES HERETO THAT THE GUARANTOR SHALL BE BOUND NOTWITHSTANDING ANY CLAIM OR DEFENSE DEBTOR MAY HAVE OR RAISE, AND GUARANTOR WAIVES ANY DEFENSE DEBTOR MAY HAVE. GUARANTOR AGREES TO PAY REASONABLE ATTORNEYS FEES AND ALL COSTS AND OTHER EXPENSES INCURRED BY A SECURED PARTY IN COLLECTING OR COMPROMISING ANY OF THE OBLIGATIONS FOR AND ENFORCING THIS GUARANTY AGAINST GUARANTOR.

See Plaintiffs' Petition, Exhibit C at ¶ 6. Moreover, the guaranty signed by Curtis Hinkel provides:

GUARANTOR, PURSUANT TO THE TERMS OF THIS GUARANTY, UNCONDITIONALLY GUARANTEES THE PAYMENT, PERFORMANCE AND COMPLETE FULFILLMENT OF THE OBLIGATIONS OF THE DEBTOR(S) TO SECURED PARTY, IN THAT CERTAIN FINANCE LEASE AGREEMENT DATED 5/18, 1999, BY AND BETWEEN DEBTOR AND AMERILEASE CORP. STATING TOTAL PAYMENTS OF \$180,027.00, AND REVISIONS, RENEWALS, CONSOLIDATIONS AND EXTENSIONS THEREOF, ANY OF WHICH MAY BE MADE WITHOUT NOTICE TO THE GUARANTOR

(HEREINAFTER “OBLIGATIONS”).

Id. at ¶ 1. In their motion for summary judgment, plaintiffs summarily state that "the Guaranty signed by Plaintiff, Curtis Hinkel, should also be avoided." Presumably, Curtis Hinkel's assertion that the Guaranty should be rescinded is contingent upon the same "risk of loss" argument pertaining to the Finance Lease Agreement. In response, Case argues that, pursuant to the terms of the Guaranty, Curtis Hinkel has waived any right to rely upon any defenses or claims that his company may have or may allege as a basis to void its obligations under the lease agreement or to rescind the agreement. Case contends that, as a matter of law, Curtis Hinkel will be liable to make any and all lease payments due Case pursuant to the terms of the Finance Lease Agreement, despite any defenses or claims his company may have or attempt to make.

In *Aetna Life Ins. Co. v. Anderson*, 848 F.2d 104 (8th Cir. 1988) (applying Iowa law), the Eighth Circuit Court of Appeals concluded that a waiver of defense in a personal guaranty is valid and enforceable. In that case, the Eighth Circuit Court of Appeals explained that “a guarantor’s liability is primarily defined, however, by the guaranty, and in the guaranty a guarantor may waive defenses he otherwise would be entitled to raise. *Id.* at 107 (citing *Brenton Bank & Trust Co., Clarion v. Beisner*, 268 N.W.2d 196, 199 (Iowa 1978) and *Valley Nat’l Bank v. Cownie*, 145 N.W. 904, 905 (1914)). In this case, Curtis Hinkel expressly agreed that he, as the guarantor, waives any defense debtor—that is, HEC—may have. Thus, nothing in the language of the Guaranty indicates that Curtis Hinkel did not intend to waive the “risk of loss” defense, assuming that it is applicable here, when he waived “any defense”⁸ HEC may have. Thus, the court concludes that on the present record before the court, Curtis Hinkel is not entitled to rescind the Guaranty as

⁸In *Aetna Life Ins. Co.*, the Eighth Circuit Court of Appeals dropped a footnote, specifically footnote 10, stating the breadth of the waiver does not render it invalid. *Id.* at 107 (citing cases).

a matter of law.

2. Plaintiffs' claims against Amerilease

The plaintiffs assert the same defense against Amerilease as they asserted against Case, namely, risk of loss, as a basis for rescission of the Finance Lease Agreement and the Guaranty. Thus, the court will not recapitulate plaintiffs' argument here. In response to plaintiffs' assertion that they are entitled to rescind the Finance Lease Agreement and Guaranty against Amerilease, Amerilease asserts that the "hell or high water" provision binds HEC and precludes it from raising any defenses. Further, Amerilease asserts that Curtis Hinkel is personally bound by his absolute Guaranty and liable for the default of HEC. Moreover, Amerilease not only resists plaintiffs' motion for summary judgment, but it filed a motion for cross-summary judgment, contending that it is entitled to judgment as a matter of law based on the "hell or high water" provision and the personal Guaranty. Although plaintiffs fail to respond to Amerilease's cross-motion for summary judgment, the court disagrees that Amerilease is entitled to summary judgment.

In its motion for summary judgment, Amerilease relies exclusively on this court's decision in *Citicorp* for the proposition that it is entitled to summary judgment.⁹ While the analysis in *Citicorp* regarding "hell or high water" provisions is applicable, Amerilease overlooks the fact that Case, as the assignee, not Amerilease, is in the same position as was Citicorp in *Citicorp*. Here, Amerilease is the lessor/assignor and thus the "hell or high water" provision does not provide protection to Amerilease as it does Case. Indeed, the "hell or high water" provision in the Finance Lease Agreement expressly provides: *I agree that my obligation to pay the rental payments is absolute and unconditional and will not be subject to any delay, reduction, defense, set-off, counterclaim or recoupment for any reason*

⁹It must be noted that the decision rendered in *Citicorp* followed a bench trial. Therefore, unlike the situation here, this court in *Citicorp* had the benefit of having a full record before it.

whatsoever, including any damage to, or loss or malfunction of, the equipment or any breach of representation or warranty by dealer or the manufacturer of the equipment. While Amerilease's contention that HEC is subject to the dictates of the "hell or high water" provision is correct, this provision does not preclude the plaintiffs from asserting breach of contract claims against Amerilease. Indeed, the provision is unambiguous in that it prevents HEC from withholding or recouping rent as against Amerilease's assignee, Case. Plaintiffs can claim directly against Amerilease (the dealer) or CEI (the manufacturer) for breach of contract. Thus, Amerilease cannot seek refuge under the "hell or high water" provision because it is inapplicable to them—it assigned¹⁰ its rights to Case. Accordingly, Amerilease is not entitled to summary judgment based on the "hell or high water" provision or the personal guaranty, because plaintiffs are not precluded from asserting claims, such as risk of loss or failure of consideration, against Amerilease or CEI. Therefore, Amerilease's cross-motion for summary judgment against plaintiffs is denied.

Although plaintiffs are not precluded from asserting claims against Amerilease, the court finds it improper for plaintiffs to seek rescission of the Finance Lease Agreement against Amerilease. This is so because Amerilease assigned to Case the Finance Lease Agreement between Amerilease and HEC on May 18, 1999. Specifically, the assignment provided that Amerilease was assigning to Case "all rights, powers and remedies of Dealer hereunder and all rights, title and interest (including any security interest) of Dealer in and to the Equipment, warranty rights concerning the Equipment and claims for damages in connection therewith." See Plaintiffs' Petition, Exhibit B. Therefore, plaintiffs would only be able to seek rescission of the Finance Lease Agreement against Case, and not

¹⁰An assignment is a transfer to another of the whole of any property or right in the property. In such transfers, the assignee assumes the rights, remedies and benefits of the assignor. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 533 (Iowa 1995) (citations omitted).

Amerilease. Accordingly, plaintiffs' motion for summary judgment against Amerilease is denied.

III. CONCLUSION

Therefore, for the reasons stated above, the court concludes that the plaintiffs are not entitled to summary judgment against Case and Amerilease for the rescission of the Finance Lease Agreement and Guaranty. Accordingly, plaintiffs' motion for summary judgment against Case and Amerilease is **denied**. Similarly, for the reasons stated above, the court concludes that Amerilease is not entitled to summary judgment against plaintiffs. Therefore, Amerilease's cross-motion for summary judgment against plaintiffs is also **denied**.

Additionally, plaintiffs cannot establish that they are entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56 against CEI when they have not made a *prima facie* showing that CEI has been properly served pursuant to Federal Rule of Civil Procedure 4(h) or Iowa Rules of Civil Procedure 56.1 and 56.2. Therefore, plaintiffs' motion for summary judgment against CEI is **denied**. The plaintiffs shall have **thirty (30) days** to demonstrate that they have made service of process on CEI that complies with Federal Rule of Civil Procedure 4(h). If such service of process on CEI has not been demonstrated within the prescribed thirty days, the court shall dismiss this action without prejudice as to CEI pursuant to Federal Rule of Civil Procedure 4(m).

IT IS SO ORDERED.

DATED this 10th day of April, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA