

5-8-2009

# Triad Leasing & Financial, Inc. v. Rocky Mountain Rogues, Inc. Appellant's Reply Brief 2 Dckt. 35659

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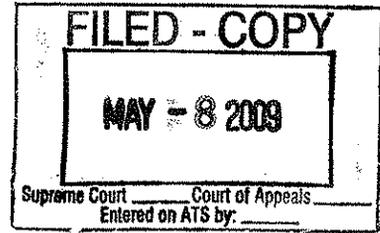
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IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO



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Supreme Court Case Number :35659      District Court Case Number CV-OC-0614439

**TRIAD LEASING & FINANCIAL, INC.,**

PLAINTIFF-COUNTERDEFENDANT-RESPONDENT

vs.

**ROCKY MOUNTAIN ROGUES, INC., a Wyoming Corporation; JAMES  
BLITTERSDORF, an individual; and GLENNA BLITTERSDORF-CHRISTOFFERSON,  
an individual,**

DEFENDANTS-COUNTERCLAIMANTS-APPELLANTS

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**ROCKY MOUNTAIN ROGUES, INC., a Wyoming Corporation; JAMES  
BLITTERSDORF, an individual; and GLENNA BLITTERSDORF-CHRISTOFFERSON,  
an individual,**

THIRD PARTY PLAINTIFFS-APPELLANTS

vs.

**G. ALAN MCRAE, personally, d/b/a LUND MACHINERY, an administratively dissolved  
Idaho and Utah corporation,**

THIRD PARTY DEFENDANT-RESPONDENT

**APPELLANT'S REPLY BRIEF**

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Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County

Hon. KATHRYN A. STRICKLEN, District Judge

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Ronald L. Swafford and Darren K. Covert  
Swafford law Office, Chartered  
525 9<sup>th</sup> St  
Idaho Falls, ID 83404  
Attorneys for the Appellants

S. Bryce Farris  
Ringert Clark, Chartered  
PO Box 2773  
Boise, ID 83701  
Attorney for Respondent Triad  
Leasing & Financial

Lance Schuester  
Beard St. Clair Gaffney  
2105 Coronado St.  
Idaho Falls, ID 83404  
Attorney for Respondent G. Alan  
McRae, d/b/a Lund Machinery

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## SUMMARY OF THE ARGUMENT

The Respondents' briefs fail to address the real issues on appeal. Summary judgment against Rocky Mountain was improper as the District Court did not address the initial purchase agreement between Rocky Mountain and Lund. This agreement was not and cannot be impacted by any agreement with Triad as it was an independent agreement.

Additionally, once removed from consideration with the Triad agreement, summary judgment for Lund was improper on the Fraud claim by Rocky Mountain. The statements made by Lund were possible in the agreement between Lund and Rocky Mountain and should not be excluded pursuant parole evidence as there was no written document between Lund and Rocky Mountain.

The District Court erroneously found Rocky Mountain in breach of contract. This error stems from the improper interpretation of the contract by the District Court to require a payment before April 20, 2006.

The District Court erroneously relied on the testimony of Vickie Turner for the purposes of verifying delivery and thereby acceptance of the contract. Ms. Turner's testimony on the matter is seriously flawed and contradicted by overwhelming evidence and even Triad's representative's own testimony.

## ARGUMENT

In each of the briefs provided by the Respondents in this matter, the Respondents attempt to complicate the issues on appeal and offer irrelevant arguments in an attempt to have the rulings of the District Court upheld. The following argument will address each Respondent and the issues on appeal relevant to that Respondent individually to clarify the questions presented.

Issues on Appeal with G. Alan Mcrae d/b/a Lund Machinery

### Summary Judgment Against Rocky Mountain

In Rocky Mountain's Third-party Complaint against Lund, Rocky Mountain claims both a breach of contract against Lund both as an individual and as an agent for Triad. (Record pg. 62) This is additionally supported by the District Court's statements on the first day of trial when that Court stated, "Their motion only went to whether they were parties to the Triad contract." (Transcript pg. 44) Lund now attempts to state that the Motion for Summary Judgment applied to all claims. (Respondent's Brief pg. 7) However, Lund ignores the remainder of the statements made during the hearing on its Motion for Summary Judgment where it clearly stated that the motion was on agency. In that hearing, Lund also stated, "... quite simply, we should be given summary judgment on this breach of contract claim for the simple reason that Lund Machinery was not a party to this contract between Triad and Mr. Blittersdorf." (Transcript pg. 5.)

In granting summary judgment for Lund, the District Court, in its original order stated that Lund was not an agent for Triad, and therefore summary judgment would be granted. (see

generally *Memorandum Decision and Order*, Record pg. 75) In that order, after discussing the various requirements under the law and rules for summary judgment, the District Court stated, “The contract between Rocky Mountain and Triad is clear and unambiguous. Lund is not a party to it, and assumed no obligations under it.” *Id.* at 80. The District Court would continue to rule that Lund was not an agent of Triad and therefore could not have any obligations under the contract between Triad and Rocky Mountain. *Id.* Throughout the entire decision, the District Court **only** addresses the Triad contract and Lund as an agent.

As argued in Rocky Mountain’s opening brief, an agreement was reached between Rocky Mountain and Lund **before** the Triad contract came into existence. The agreement is acknowledged by Lund in its reply brief when it states, “In 2006, Lund agreed to sell the previously rented forklift to Rocky Mountain.” *Respondent’s Brief* pg. 2. The purchase was to be financed through a third-party, Triad. In the hearing on the Motion for Summary Judgment, Lund states, “All we did was sell him the vehicle. We’re not a party to the transaction between Triad and Mr. Blittersdorf. All we did is we got paid for the equipment.” (Transcript pg. 24.)

The start of the entire issue is when Lund and Rocky Mountain agreed to turn the previous lease into a purchase. (Record pg. 75.) This agreement included the credit for a portion of the lease payments and the additional purchase of the jib boom. *Id.* pgs. 75-76 This agreement was reached before any agreement or issue with Triad. *Id.* There were only two parties, Rocky Mountain and Lund. This agreement was not discussed or decided in the Motion for Summary Judgment filed by Lund. Evidence of this agreement could not be excluded based on the parole

evidence rule as requested by Lund because there was no written agreement. Lund is not excused from this agreement because of Triad, because it was reached without involvement from Triad.

The District Court, in entering its decision on the Motion for Summary Judgment did not consider this separate agreement with Lund. The District Court clearly said so in the decision and again at trial. That Court only decided that Lund was not an agent for Triad. In doing so, the District Court left the breach of the original agreement to sell and to buy the forklift and jib still pending.

#### Present Facts or Future Performance

Lund's arguments on the fraud issue of the statements made being present facts or future performance also fail on the same reasoning as stated above. These statements were made between Lund and Rocky Mountain, and were not communicated by Triad. This being the case, Lund cannot then try to have the statements excluded based on the parole evidence rule. There is no written document between Lund and Rocky Mountain and therefore parole evidence is non-existing. Lund's arguments on the present facts or future performance also fail once removed from the contract with Triad.

#### Issues on Appeal with Triad Leasing & Financial, Inc.

##### The District Court Committed Error in Finding Rocky Mountain in Breach

Triad claimed that Rocky Mountain breached the contract by not providing required payments pursuant to the contract. (Record pg. 10.) In its letters to Rocky Mountain and at trial,

Triad would argue that the breach occurred by Rocky Mountain not providing the security deposit at the time of signing the contract, calling it an “upfront payment.” (Transcript pgs. 77, 116-117.) The District Court found Rocky Mountain had breached the contract by not providing this payment. (Record pg. 92.) This was again expressed to Rocky Mountain in the letter sent from Triad on April 11. (Transcript pg. 126.) As is clearly and unambiguously stated on the contract, and by Triad at trial, the initial payment was due on April 20, 2006. (Record pg. 13, Transcript pg. 131.) At the time of signing the contract, or at the time of accepting the contract, there was no payment due. *Id.* Triad noted that the contract itself stated a onetime payment of zero was due upon acceptance of the contract. (Transcript pg. 150.)

By not having a payment due till April 20, 2006 and no payment due at the time of signing the contract or accepting it, Rocky Mountain could not have breached the agreement by not providing required payments at any time prior to April 20, 2006. However, Triad claimed and the District Court found that Rocky Mountain breached the contract prior to the April 20, 2006 date for not providing a security deposit. ( Triad’s Demand letter claiming breach on April 11, 2006 – Transcript pgs. 116, Record pg. 91- Rocky Mountain’s \$5,600 check did not clear the bank and this was not remedied.)

It is also clearly laid out in Rocky Mountain’s brief how the District Court committed error in finding the contract accepted by Rocky Mountain based solely on the testimony of Ms. Turner. As noted in the opening brief, Ms. Turner testified that she could not verify exactly who called her, saw there was no jib boom in the verification photo and that she verified if they have

received their 1997 Hi Reach Forklift. (Transcript at 202.) It is clearly erroneous to rely on this one person's testimony when the volume of evidence suggests the exact opposite. Even Mr. Wakefield stated that only "most of" the equipment was delivered. (Transcript pg. 174.)

## CONCLUSION

In this case, there were two agreements reached. The first is the agreement between Lund and Rocky Mountain for the purchase of the forklift and the jib boom. This agreement occurred prior to any involvement with Triad and should be considered separate from that agreement. The second agreement resulted in Triad financing Rocky Mountain's purchase.

The District Court failed to adequately address the initial agreement between Rocky Mountain and Lund. The District Court attempted to summarily dismiss this claim by referring to its previous order granting Lund's Motion for Summary Judgment on Lund as an agent for Triad. As noted in this appeal, not only was that decision by the District Court clearly erroneous based on the prior decision, the decision, if taken on the evidence, is erroneous based on the valid claims from Rocky Mountain. Summary Judgment was improper.

The District Court also improperly interpreted the Triad lease agreement in finding a payment due before April 20, 2006. Based on the document and testimony at trial, there clearly was not default even possible based on Triad's claims until April 20, 2006. Triad's claim of breach was premature and not supported by the evidence once there is a proper interpretation of the contract.

These erroneous errors by the District Court denied Rocky Mountain justice and should therefore be reversed.

Respectfully submitted this 6<sup>th</sup> day of May, 2009

A handwritten signature in black ink, appearing to read "D. Covert", written over a horizontal line.

Larren K. Covert, Esq.

Of Swafford Law Office, Chartered

**CERTIFICATE OF MAILING**

I certify that two copies of the foregoing document were mailed on May 6, 2009 to the following individuals via U.S. Mail:

S. Bryce Farris  
Ringert Clark, Chartered  
PO Box 2773  
Boise, ID 83701  
Attorney for Respondent Triad Leasing & Financial

Lance Schuester  
Beard St. Clair Gaffney  
2105 Coronado St.  
Idaho Falls, ID 83404  
Attorney for Respondent G. Alan McRae, d/b/a Lund Machinery

Dated May 6, 2009

A handwritten signature in black ink, appearing to read 'DKC', is written over a horizontal line. The signature is stylized and cursive.

Larren K. Covert, Esq.  
Of Swafford Law Office, Chartered  
Attorney for the Appellants