

E. Lee Martin, Inc. v Saks & Co.

2005 NY Slip Op 30374(U)

December 5, 2005

Supreme Court, New York County

Docket Number: 602710/05

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCANNED ON 12/7/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 602710/2005

E. LEE MARTIN, INC.

vs
SAKS & COMPANY

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 9/14/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):


FILED

DEC 7 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12/5/05


HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: LAS PART 56

-----X
E. LEE MARTIN, INC.,
Plaintiff,

Index No. 602710/05

-against-

SAKS & COMPANY,
Defendant.

**DECISION
AND ORDER**

-----X

RICHARD B. LOWE, III, J.:

Defendant Saks & Company ("Saks") moves to dismiss the complaint by plaintiff E. Lee Martin, Inc. ("ELMI"). ELMI cross-moves for discovery.

BACKGROUND

This matter concerns the validity of a consignment agreement. Plaintiff consignor commenced this action against defendant consignee for claims that arose prior to the signing of a consignment agreement containing a release provision, which bars the claims at issue if the release provision is enforced as written.

ELMI is in the business of providing fine jewelry and other luxury items on consignment to upscale retailers including Saks. Since 1992, ELMI had a "rolling inventory relationship" with Saks. According to Ms. Emilie Lee Martin ("Martin"), president of ELMI, under this rolling inventory relationship, by Saks' request, ELMI forwarded specific items including fine jewelry and other luxury items to Saks and its various stores. This created a continuous flow of rolling inventory in Saks' possession. Since 1992, ELMI alleges that thousands of pieces of jewelry and other luxury items have been entrusted by ELMI to Saks for sale on this rolling

physical inventory basis. ELMI alleges that throughout its course of dealing with Saks, Saks has “as part of an overall plan and course of action, systematically, knowingly, and willfully under-reported and under-paid its sales of Plaintiff’s consigned items due to misplaced, lost or misdirected items of jewelry” (Complaint ¶ 10). ELMI has allegedly requested a full reconciliation or accounting on repeated occasions for its consignment items, however, Saks has failed to provide a full reconciliation as of the date of this action.

The Consignment Agreement

In late 2001 or early 2002, an employee of Saks requested that Martin sign a Consignment Agreement (“Consignment Agreement”). Martin believes the employee who requested this agreement is Jack Hubert¹. The Consignment Agreement is dated as of January 9, 2001². The Consignment Agreement contains approximately five pages of provisions set forth as 18 sections and an additional 4 pages of signatures and listing of store locations affected by the agreement. Section 6 of the Consignment Agreement is titled “Consignor Representations and Warranties.” Subsection (h) states:

as of the effective date of this Agreement, Consignor [ELMI] has no claim or cause of action of any kind or nature against Consignee [Saks], legal or equitable, known or unknown, and any such claim Consignor has or may have against Consignor are hereby forever released and discharged. (Metzner Aff., Ex. 2)

On or about January 11, 2002, Joseph T. Murray (“Murray”), allegedly counsel for ELMI during the relevant period on or about late 2001 to early 2002, delivered a letter to Kenneth L. Metzner, Esq., Vice President and Associate General Counsel for Saks (“Metzner”), on behalf of ELMI, enclosing three originals of the Consignment Agreement and 26 U.C.C.-1 Financing Statements. The letter from Murray to Metzner asks that if the Consignment Agreement is in

¹ Mr. Hubert’s title is not disclosed (Martin Aff. ¶ 10)

² The effective date of the Consignment Agreement is January 2002. The use of the year “2001” instead of “2002” is a typographical error.

acceptable form, then Metzner should return two of the originals to Murray along with the U.C.C.-1 Financing Statements. (Metzner Aff., Ex. 3). Despite Murray's interaction with Saks, Martin alleges that she was told that the Consignment Agreement was a customary consignment agreement by Saks, so she did not have her lawyer look over it.

ELMI commenced an action against Saks alleging that Saks has neither accounted for nor paid it for at least three million dollars of its items since 1992 and that Saks' actions have been knowing, intentional, and unlawful. ELMI alleges causes of action for (1) Breach of Contract (2) Replevin (3) Breach of Bailee's High Standard of Care and Trust; (4) Conversion, (5) Breach of Implied Covenant of Good Faith and Fair Dealing; (6) Fraud, and; an (7) Accounting.

Now, Saks has moved to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (7). Saks contends that the Consignment Agreement bars ELMI's claims as a matter of law because the Consignment Agreement set forth (a) a clear and unambiguous representation by ELMI that it had no claims or causes of action against Saks; (b) a waiver of any claims or causes of action that did exist; and (c) a release in favor of Saks of any such claims or causes of action. In opposition, ELMI contends that the contract is ambiguous or alternatively unconscionable.

ELMI has made a cross motion for discovery to shed light on the intent of the parties in entering into the Consignment Agreement.

DISCUSSION

In a motion to dismiss, all facts in the complaint are alleged as true, and all reasonable inferences are made in favor of the nonmovant (*Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 [1st Dept 2005]).

[* 5]

When an agreement is set forth in a clear, complete document, it should as a rule be enforced according to its terms, and evidence outside of the four corners as to what was really intended but unstated or misstated is generally inadmissible to add to vary the writing. (*C.R. Cook v David Rozenholc & Assoc.*, 226 AD2d 311 [1st Dept 1996]; *B&R Children's Overalls Co. v NY Job Development Auth.*, 257 AD2d 368 [1st Dept 1999]). Therefore, this court must first determine whether the agreement lends itself to ambiguity.

No Evidence of Ambiguity

First for discussion is whether Section 6 of the Consignment Agreement or the Consignment Agreement as a whole lends itself to ambiguity. ELMI contends that by signing the Consignment Agreement, it did not intend to waive its ability to assert claims against Saks, including the recovery of allegedly millions of dollars of its merchandise consigned to Saks over its course of dealing prior to the signing of the agreement. ELMI contends that since it did not intend to be bound by the provisions in the Consignment Agreement, that there is ambiguity as to the contract's meaning. However, ELMI does not contend that the contract was not intended to fully encompass the parties' business relationship, nor does it contend that the terms of the agreement are ambiguous.

The terms of the Consignment Agreement are set forth in a five page contract containing 18 provisions designated with headings and subheadings. Further, Section 6 of the Consignment Agreement is titled "Consignor Representations and Warranties." Section 6 contains Subsection "H" which sets forth the warranties that the consignor is agreeing upon in signing the Consignment Agreement. The provision in dispute under Section 6 is stated in detail to fully encompass the waiver of any past claims as of the date of the signing of the Consignment Agreement between the parties. In light of the detailed and express provisions of the agreement,

the Consignment Agreement is not ambiguous on its face and ELMI's contention that it did not intend to agree on the Section 6 release provision of the Consignment Agreement does not render the agreement ambiguous.

No Evidence of Fraud

Despite a finding of an unambiguous contract, a contract is voidable if it is entered into with fraud. (*Kamerman v Curtis*, 33 NE2d 530 [1941]; *Gordon v Bialystoker Center and Bikur Cholim, Inc.*, 45 NY2d 692 [1978]). Fraud can be established if a party induces another party to enter into the contract with false representations. However, if there is an unambiguous contract, then the plaintiff has the burden of overcoming the presumption of a valid contract. Further, the plaintiff is required to demonstrate that his or her reliance upon any alleged misrepresentations was reasonable. (*NY School Construction Auth. v Koren-DiRista Const. Co.*, 249 AD2d 205 [1st Dept 1998]; *Stuart Silver Assocs., Inc. v. Baco Development Corp.*, 245 AD2d 96 [1st Dept 1997]).

Accordingly, this court should determine whether there was any fraud or coercion in the contract's inducement. ELMI has provided no evidence of fraudulent inducement or coercion. ELMI has produced no evidence that Saks forced it to sign the Consignment Agreement before it had the opportunity to review the document or have it reviewed. In fact, after receiving the Consignment Agreement, counsel on behalf of ELMI, Joseph T. Murray, returned the Consignment Agreement to Saks and requested for Saks' counsel to indicate its further acceptance of the Consignment Agreement by returning signed copies back to it. Notwithstanding Martin's allegation that she did not ask Murray to review the Consignment Agreement, the interaction between Murray and Saks indicates that ELMI had both an opportunity to review the documents and had access to have the document reviewed by counsel.

Moreover, as set forth in *New York School Construction Auth.*, Plaintiff would be required to demonstrate that its reliance upon any alleged misrepresentations had been reasonable. (*New York School Construction Auth.* at 739). Here, assuming that ELMI's allegations of Saks' misrepresentations are true, ELMI still fails to demonstrate that its reliance on the alleged misrepresentation is reasonable. ELMI alleges that the release clause of Section 6 was not brought to its attention by Saks and/or that Saks misrepresented the Consignment Agreement by indicating that it was a standard agreement. However, ELMI has been in the consignment business since at least 1992, and it is reasonable for this court to infer that Martin had at the minimum the experience necessary to review the contract or have the contract reviewed before signing it and binding ELMI to the agreement, and therefore, ELMI fails to demonstrate that its reliance on any alleged misrepresentation is reasonable.

No Evidence of Unconscionability

A contract can be unenforceable if it is unconscionable. An unconscionable contract is one which is 'so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.' (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]; citing Corbin on Contracts § 128, p 400; *Mandel v Liebman*, 303 NY 88 [1951]). A contract can either be procedurally or substantively unconscionable (*Gillman*, at 10).

A. Procedural Unconscionability

A contract is procedurally unconscionable where one party has a lack of meaningful choice in the contract formation process (*Gillman*, at 11). In *Gillman*, the Court of Appeals held that in the absence of fraud or deception, the contract could not be deemed procedurally unconscionable based on a plaintiff's claims that he was unaware of the provision at issue, that

the provision was never called to the plaintiff's attention, that no one read the provision to him, and that he did not know of its existence, in light of the fact that the plaintiff did not lack experience or expertise (*id.* at 10).

Here, as previously discussed, ELMI fails to proffer evidence that Saks engaged in fraud by using high pressure tactics to induce ELMI to sign the Consignment Agreement. On the contrary, counsel on behalf of ELMI returned the Consignment Agreement to Saks and asked for Saks' signature on the Consignment Agreement and for Saks to return the agreement to ELMI. Also as previously discussed, Martin, the President of ELMI, has been in the consignment business with Saks for approximately ten years, which indicates that she did not lack the expertise to review or at the least have the Consignment Agreement reviewed before signing the agreement. Notwithstanding Martin's allegation she was informed that this was a standard consignment agreement and did not ask for her attorney to review the Consignment Agreement before ELMI's attorney corresponded with Saks over the signing of the agreements, this court finds the letter dated January 11th from Murray to Metzner, counsel for Saks, as sufficient evidence to adduce that ELMI was not at a gross disadvantage because ELMI had access to counsel for purposes of reviewing this Consignment Agreement.

Lastly, although Martin contends that she did not see the release provision, there is no evidence that the provision, Section 6 of the agreement, was in any way hidden. The release provision was one of 18 provisions set forth in a five page agreement; each provision was marked with headings and subheadings. The Consignment Agreement is consistent in font and format. Section 6 of the Consignment Agreement is titled "Consignor Representations and Warranties." Therefore, the evidence proffered by ELMI regarding the contract itself or the contract's formation does not amount to procedural unconscionability.

B. Substantive Unconscionability

A contract is substantively unconscionable where the terms of the transaction itself are unreasonably favorable to the party against whom unconscionability is urged (*id.* at 12). Here, ELMI contends that the release is unconscionable because it bars ELMI to any past claims to its merchandise that is in Saks' possession. However, ELMI fails to show that the contract demonstrates a bargain that is grossly unreasonable in light of the mores and business practices. Although pursuant to the Consignment Agreement, ELMI waives its ability to bring claims that were incurred prior to the signing of the agreement, it derives many benefits from the contract. ELMI receives the benefit of clearly defined consignment terms, the right to distribute its goods through dozens of Saks store across the country, U.C.C. financing statements signed by Saks confirming ELMI's interest in the consigned goods and Saks' agreement to insure the consigned goods when in Saks' possession, and Saks' acknowledgement that it bore all risk of loss once it took possession of the consigned goods. Whether the Consignment Agreement gives a greater advantage to one party relative to the other party is an issue of business judgment between the parties. Therefore, the evidence proffered by ELMI does not amount to substantive unconscionability.

Since ELMI has presented insufficient evidence to support a finding of ambiguity in the contract or fraud, the consignment agreement should be upheld according to its express terms. The terms of the contract bar ELMI's claims arising before the signing of the agreement as a matter of law. Therefore, Saks' motion to dismiss will be granted.

ELMI has made a cross motion for discovery. Since the complaint has been dismissed in its entirety, the cross motion for discovery is moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that Saks' motion to dismiss the complaint is granted; it is further

ORDERED that ELMI's cross motion for discovery is denied.

This shall constitute the Order and Decision of the Court.

Dated: December 5, 2005

ENTER:



RICHARD B. LOWE, III, J.S.C.

CLERK OF THE SUPREME COURT
JULY 1978 - APRIL 2005

FILED
DEC 7 2005
COUNTY CLERK'S OFFICE
NEW YORK