Pludeman v Northern Leasing Systems, Inc.
2006 NY Slip Op 30354(U)
August 29, 2006
Supreme Court, New York County
Docket Number: 0101059/2004
Judge: Sherry Klein Heitler
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 9/18/2006
[* 1]

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

PRESENT: SHERRY KLEIN HEITLER PART 30
Justice

KEVIN PLUDEMAN, CHRIS HANZSEK d/b/a HANZSEK AUDIO, SARA HUSH, OZARK MOUNTAIN GRANITE & TILE CO. and DENNIS E. LAUCHMAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

- v -

NORTHERN LEASING SYSTEMS, INC., JAY COHEN, STEVE BERNADONE, RICH HAHN and SARA KRIEGER,

Defendants.

INDEX NO. 101059/04

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is hereby

ORDERED that this motion is decided in accordance with Memorandum / Decision dated 8-29-06

FILED
SEP 18 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-29-06

SHERRY KLEIN HEITLER J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

---------------------------------------X

KEVIN PLUDEMAN, CHRIS HANZSEK d/b/a HANZSEK AUDIO, SARA HUSH, OZARK MOUNTAIN GRANITE & TILE CO. and DENNIS E. LAUCHMAN, on behalf of themselves and all other similarly situated,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN, STEVE BERNADONE, RICH HAHN and SARA KRIEGER,

Defendants.

---------------------------------------X

Index No. 101059/04

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Motion sequence #004, #005, #006 and #007 are consolidated herein for disposition. Motion sequence #004, plaintiffs move for an order granting class certification; for an order determining the plaintiffs to be adequate representatives of the class; for an order appointing Krishnan S. Chittur, Esq., of Chittur & Associates, P.C., as counsel for the class; and for an order providing that defendant, Northern Leasing Systems, Inc. ("NLS"), pay the cost of notice to the class.

The defendant NLS and the individual defendants, officers of NLS, cross move for an order dismissing this action for failure to join necessary parties.

The amended complaint alleges a purported class action against the defendant NLS and the individual defendants based upon the defendants' scheme to defraud the plaintiffs, generally small

FILED SEP 18 COUNTY CLERK'S OFFICE NEW YORK

businesses, which entered into finance lease agreements with NLS for credit card point of sale terminals, and the principals of those businesses, who personally guaranteed the lease agreements, by concealing material terms of the agreement unfavorable to the putative class.

The amended complaint alleged causes of action for violations of the Federal Racketeering Statue, the Electronic Fund Act, fraud, negligent misrepresentation, breach of implied covenant of good faith and fair dealing, breach of contract, unjust enrichment and money had and received. This court dismissed all of the causes of action, for insufficiency, with the exception of the claims for fraud, unjust enrichment and money had and received.

NLS is a New York-based company engaged primarily in financing lease agreements, containing personal guarantees, in connection with the leasing of credit card equipment, less than $10,000, to generally small businesses through a system of nationwide equipment vendors/independent sales organizations ("vendors").

This action involves the leases financed by NLS from 1999 onward, approximately 300,000 leases with more than 5,000 vendors, who provided the leased credit card equipment, during the purported class period. NLS maintains that the vendors are not their sales representatives but rather independent sales organizations with which it has an arms-length business relationship. The agreements between NLS and its vendors provide for charge backs in certain

situations where the lease agreement is terminated. The vendors have not been named as parties in this action and NLS and the individual defendants, officers of NLS, cross move to dismiss this action for failure to join the vendors, who they maintain are necessary parties.

Although, NLS, by its Vice President of Operations, Sara Krieger alleges NLS has not utilized the identical lease agreement since 1999 and that in just the past two years it has had approximately seventy different forms, for purposes of this motion, this court shall address the lease agreement that is in booklet form and contains four pages consisting of one sheet of paper, folded into two, with writing on the front and back of each page. The bottom left hand corner of the front page states, "Page 1 of 4". The front page of the lease contains information concerning the leased equipment, the schedule of monthly payments and the minimum lease term, along with a section entitled "ABOUT YOUR BANK" that includes the Bank Name, Routing and Account number and a space for the lessee to initial thereby permitting direct withdrawals from the lessee's bank account. It further states that in the event the Lessee terminates such ACH authorization, the Lessor may deem such event a default under paragraph 11 hereof. The front page does not contain any numbered paragraphs and Paragraph 11 entitled "DEFAULT" is found on page three of the lease. Additionally, included within the "ABOUT YOUR BANK" section is a merger clause. The front page

also contains the signature page for acceptance of the lease and below the acceptance, the personal guaranty, which provides that it is governed by New York law, and that the guarantor consents to New York jurisdiction and waives trial by jury.

The amended complaint alleged plaintiffs were mislead into believing that the four page lease agreement and personal guaranty was a single page document as both the lease's acceptance and the personal guaranty are on the first page; that the first page of the document contains nothing incorporating the remaining three pages, which would alert the plaintiffs to the existence of additional pages; that the defendants' representatives or salespersons never discussed, mentioned or even referred to the remaining three pages; that they were manipulated into signing in a hurry; that the lease agreement was clipped on a clipboard making it appear that the agreement was a single page document; that they were not given a copy of the lease agreement at the time they signed and that they had to telephone a special number and request a copy.

The affidavits of the plaintiffs, Kevin Pludeman, Chris Hanzsek, Sarah Jane Hush and Dennis E. Lauchman, submitted in support of plaintiffs' motion for class certification, continued to make substantially the same allegations concerning NLS's sales representatives. Each of the affidavits alleges NLS's representative did not tell them about the existence of additional pages in the lease, did not inform them of the contents of those

additional three pages, or mention or even refer to those pages or their content. Mr. Lauchman's affidavit also alleges that NLS's representative had him sign the first page in haste.

Counsel for plaintiffs clearly aware of the difficulties of obtaining class certification on a common-law fraud claim, as such claims may necessitate individualized issues of reliance, has attempted to advance a new theory. The conduct of the individual vendors, which included, *inter alia*, attempting to conceal the additional three pages by use of a clipboard, hurrying the lessee to execute the lease and failing to inform the lessee of the additional three pages, is no longer relevant since such is precluded by the merger clause contained on the first page of the lease. Instead, plaintiffs' counsel argues that NLS, committed a nationwide fraudulent marketing scheme, through use of its standard lease agreement, which concealed a monthly charge of $4.95 for a Loss and Destruction Waiver ("LDW"), resulting in higher monthly automatic withdrawals from the lessee's bank account.

Paragraph 10, found on page three, entitled "INSURANCE", provides that the lessee shall keep the Equipment insured and "in the event Lessee failed to provide such evidence of insurance coverage, Lessee is deemed to have chosen to buy the Loss and Destruction waiver at the price in effect, which Lessor reserves the right to change from time-to-time". There is no indication in the four pages concerning either the amount of the LDW charge or the

[* 7]

frequency of the charge.

The court shall first address plaintiffs' class certification motion.

CPLR 901(a) provides: One or more members of a class may sue or be sued as representative parties on behalf of all if:

(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

(2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

This court shall address each of the above factors.

CPLR 901(a)(1) Numerosity.

The purported class is all lessees who have entered into lease agreements with NLS, since January 1, 1999. There is no dispute that since January 1, 1999, NLS has financed approximately 300,000 leases. Clearly, the requirement of numerosity has been met.

CPLR 901(a)(2) Commonality.

As previously stated plaintiffs' amended complaint as well as the

[* 8]

plaintiffs' affidavit in support of this motion, allege that the form of the lease along with the actions of the various vendors, including, *inter alia*, their failure to either mention or refer to the other three pages, hurrying lessees into signing the lease and physically presenting the lease in a manner to conceal the last three pages, mislead them into believing that the lease was a single page agreement. The amended complaint, in addition to damages, seeks recession of the last three pages of the lease, since the pages were not called to the lessee's attention.

The law in New York is well settled that class action certification is not available in common-law fraud cases where class members have been exposed to differing misrepresentations or omissions as necessarily individual issues will predominate over common ones, because of the diversity of representations made to the putative class members (*Carnegie v H&R Block, Inc.*, 269 AD2d 145 [1st Dept 2000], *appeal dismissed* 95 NY2d 844 [2000]; *De Filippo v Mutual Life Insurance Co.*, 13 AD3d 178 [1st Dept 2004]).

NLS, from 1999 to present, has utilized the services of approximately 5,000 vendors in negotiating the subject lease agreements. Clearly, the representations made by these vendors and the facts surrounding execution of each of the leases would have to be examined, including whether the lessee read the first page; whether the lessee noticed the notation indicating page one of four on the first page and made inquiry; whether the notation, in some

manner was concealed from the lessee; whether the lessee noticed the reference to paragraph 11 in the "ABOUT YOUR BANK" section and made inquiry since page one did not include any numbered paragraphs; whether the lease was presented by the vendor in some manner that prevented notice of the additional pages; whether the vendor hurried the lessee; and whether the vendor informed the lessee of the existence of the additional pages.

Plaintiffs argue that cases such as *Carnegie* and *DeFilippo* are not applicable since the claims, therein, involved consumer fraud claims under New York General Business Law, which requires deceptive sales techniques and individual proof, rather than common-law fraud. The allegations in the amended complaint and the plaintiffs' affidavits in support of this motion, however, involve the same inquiry as a claim under GBL §349, since the allegations have implicated the "point-of-sale" conduct of NLS's vendors.

In attempting to avoid this bar to class certification, counsel for plaintiffs has attempted to convert their claim into a "top-down" nationwide fraudulent marketing scheme, maintaining that the subject lease concealed a monthly LDW charge of $4.95, which was automatically withdrawn from the lessee's bank account.

In fact, counsel for plaintiffs now argues that the conduct and representations made by the vendors are no longer an issue, since the merger clause on the first page precludes parol evidence.

The above is an incorrect statement of the law as a general

merger clause does not bar parol evidence of fraud in the inducement (*Merrill Lynch v Wise Metal Groups, LLC*, 19 AD3d 273 [1st Dept 2005]). Additionally, plaintiffs, have improperly attempted to shift the nature of this suit from a "point-of-sale" claim to a "top-down" fraudulent marketing scheme, without seeking leave to serve an amended complaint. Finally, even accepting plaintiffs' new theory, this court finds that class certification would still be inappropriate.

Plaintiffs contend that the omission of the LDW charge, in the subject leases, is an issue common to the whole class permitting the court to find a presumption of reliance, especially, herein, where the omission was material and actionable.

While courts have recognized a presumption of reliance in cases involving Securities Fraud (*Affiliated Ute Citizen v United States*, 406 US 128 [1972]; *Titan Group v Faggen*, 513 F2d 234 [2d Cir 1975], *cert den* 423 US 840 [1975]) breach of fiduciary duty (*Brandon v Chefetz*, 106 AD2d 162 [1st Dept 1985]) and negligent misrepresentation (*Ackerman v Price Waterhouse*, 252 AD2d 179 [1st Dept 1998]), the reliance presumption does not apply in garden-variety fraud cases (*Small v Lorillard Tobacco, Co.*, 252 AD2d 1 [1st Dept 1998], *affirmed* 94 NY2d 43 [1999]).

Further, there can be no presumption of reliance, in this case, as the lessees had access to information that reasonably should have lead to discovery of the alleged concealment. The issue of whether

the lessees were aware of the LDW charge is an individual issue. In fact, 15,357 lessees, prior to the commencement of their leases, opted not to accept the LDW program and instead provided proof of insurance; 8,542 lessees opted out of the program, after commencement of their leases; and 2,708 lessees were provided with replacement equipment under the LDW program.

There is also evidence that prior to NLS funding of any lease, NLS's Verification Department, verified with the lessee, *inter alia*, the amount of the monthly lease payment, plus tax and LDW, if applicable.

Additionally, the monthly withdrawal from the guarantor's bank account, in excess of the monthly rental, would have immediately placed said individual on notice to make inquiry. Further, contrary to plaintiffs' claim that the omission was material, the deposition testimony of plaintiff Kevin Pludeman, is to the contrary, as Pludeman testified that although he was aware that his bank account was being charged in excess of the lease agreement, he didn't consider it to be a major problem. Therefore, the issue of materiality would require an individual examination as to whether a lessee would have entered into the lease, if aware of the LDW charge.

Finally, plaintiffs' claim that reliance need not be proved in this action, as circumstances establish a causal connection between the omission and plaintiffs' injury, does not apply to common-law

fraud claims (*Fiala v Metropolitan Life Insurance Co.*, NYLJ, June 2, 2006, at 22, col 3 [Sup Ct, NY County, Cahn, J.]).

Accordingly, this court finds that plaintiffs have failed to demonstrate that common questions will necessarily predominate over individualized issues with respect to the common-law fraud claim.

This court also finds that the other two remaining causes of action for unjust enrichment and money had and received are dependent on plaintiffs' fraud claim. If plaintiffs fail to prevail upon their fraud claim, there exists a valid lease agreement and "quasi-contract" theories may not be implied in the face of an express contract on the same subject matter (*EBCI I, Inc. v Goldman Sachs Co.*, 5 NY3d 11 [2005]). Therefore, these claims are not independently certifiable.

This court based upon the above findings finds no need to address whether plaintiffs have met their burden of establishing any of the other prerequisites necessary for class certification.

Accordingly, plaintiffs' motion for class certification is denied and the other branches of plaintiffs' motion are denied as moot.

In light of this court's denial of the motion for class certification, defendants' cross-motion to dismiss this action for nonjoinder of the vendors, alleged necessary parties, is denied.

Motion sequence #005, defendants move for an order striking the plaintiffs' demand for a jury trial. Defendants maintain that

plaintiffs' waived the right to a jury trial in that the lease contains a jury waiver clause on the first and last pages of the lease and that, in any event, plaintiffs also waived such right by joining both equitable and legal claims arising out of the same wrong or transaction.

Plaintiffs contend that the waiver contained in the lease is not applicable based upon their claim of fraudulent inducement challenging the validity of the lease. The allegations contained in the complaint and affidavits submitted by the plaintiffs, however, do not allege that they were fraudulently induced into signing the first page of the lease, which, in fact, contains a jury waiver clause.

Therefore, the jury waiver clause contained on the first page of the lease constitutes a waiver of plaintiffs' rights to a jury trial.

This court also finds that plaintiffs' claims, seeking declaration that the lease is voidable and seeking a declaration that pages two through four are unenforceable, and for a refund of amounts collected in excess of those specified on page one, makes the thrust of this action equitable in nature.

Therefore, this court further finds that plaintiffs have waived their right to a jury trial by the nature of their pleadings (*Phoenix Garden Restaurant, Inc. v Chu*, 234 AD2d 233 [1st Dept 1996]; *Goshen v Mutual Life Insurance Co.*, 286 AD2d 229 [1st Dept 2001]).

[* 14]

Accordingly, the defendants' motion for an order striking the plaintiffs' demand for a jury trial is granted.

Motion sequence #008, plaintiffs seek an order quashing a subpoena for the deposition of non-party Rosemarie Richards, the wife of plaintiff Dennis Lauchman.

The motion for an order quashing the subpoena is granted without prejudice to defendants serving a new subpoena upon Ms. Richards. Ms. Richards was apparently present during her husband's meeting with the vendor, when Mr. Lauchman, executed his lease agreement, and, therefore, discovery is authorized by CPLR §3101.

Motion sequence #007, defendants seek an order granting an open commission to take the deposition of nonparty Peri Kettle.

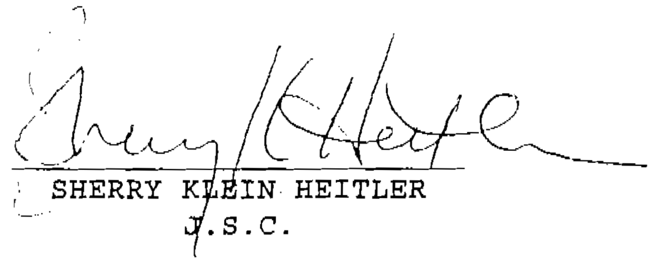
While Ms. Kettler submitted an affidavit in opposition to defendants' motion to dismiss this action for insufficiency, her affidavit was not considered by this court. In light of this court's decision denying class certification, this court finds that the deposition of Ms. Kettler, with respect to this action is irrelevant.

Accordingly, the motion for an open commission is denied.

This constitutes the decision and order of this court.

DATED: AUGUST 29 2006

COUNTY CLERK'S OFFICE NEW YORK
SEP 18 2006
FILED



SHERRY KLEIN HEITLER
J.S.C.