

Thyssenkrupp EI. Corp. v Gristedes's Foods, Inc.

2006 NY Slip Op 30629(U)

February 27, 2006

Supreme Court, New York County

Docket Number: 601693/04

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARCY S. FRIEDMAN

Index Number : 601693/2004
THYSSENKRUPP ELEVATOR

PART 57

vs
GRISTEDE'S FOODS

Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

Notice of Motion/ and cross-motion ~~Order to Show Cause~~ — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1, 1a, 2
3
M1-M3

Manos of Law
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

MAR - 2 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/27/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

THYSSENKRUPP ELEVATOR CORPORATION,

Plaintiff,

- against -

GRISTEDES’S FOODS, INC., et al.,

Defendants.

_____ x

Index No.: 601693/04

DECISION/ORDER

This is an action to recover unpaid maintenance and other charges allegedly due under escalator service contracts for two Gristedes supermarkets – one located at 251 West 86th Street (“86th Street store”) and one located at 2101 Broadway (“Broadway store”) in Manhattan.

Plaintiff moves for summary judgment on its complaint. Defendants Gristede’s Foods, Inc., Red Apple Company, Inc. and Gristede’s/Red Apple Company (collectively “Gristede’s”) cross-move for leave to serve an amended answer.

Plaintiff moves for summary judgment based on an account stated. “An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time.” (Bartning v Bartning, 16 AD3d 249, 250 [1st Dept 2005]; Manhattan Telecoms. Corp. v Best Payphones, Inc., 299 AD2d 178 [1st Dept 2002], lv denied 100 NY2d 507 [2003].) Plaintiff makes a prima facie showing of an account stated for unpaid invoices for monthly maintenance and repair charges under the contracts for the two stores, for the period through March 2004, in the amount of \$58,601.34. In support of this claim, plaintiff submits the

affidavit of its credit manager, Steven Szykuc, who attests that invoices for this amount were sent to Gristede's in the regular course of business, and that Gristede's never objected to the invoices or complained about any deficiencies in plaintiff's work.

Gristede's fails to raise a triable issue of fact in opposition. Notably, defendants wholly fail to address plaintiff's averment that it retained the invoices at issue without objection. Instead, defendants argue that plaintiff's maintenance of the escalators was defective and that they were required to perform extensive work on the escalators after plaintiff ceased to perform work under the contracts. However, absent any showing that defendants objected to the invoices, the claim that plaintiff breached the contract is unavailing.¹

Defendants also fail to raise a triable issue of fact based on defendants' other defenses and counterclaims. Defendants' showing of the merits of these claims is either wholly conclusory or based merely on the assertions of defendants' counsel.

Plaintiff also claims that it is entitled to a service charge on overdue balances. The contracts for both of the stores provide for a "service charge of 1 ½ % per month" on delinquent or overdue accounts. Contrary to defendants' contention, this charge is enforceable, given the absence of any evidentiary showing on this record of unconscionability. (See Warren Elcc. Supply Inc. v Davidson, 284 AD2d 869 [3d Dept 2001]; Bloom v Trepml Constr. Corp., 29

¹It is noted, moreover, that defendants' assertions of breach of contract are primarily made by defendants' attorney, who does not purport to have personal knowledge of the facts and whose statements are therefore without probative value. While defendants' attorney annexes repair proposals by another elevator company, dated between March and September 2004, defendants do not show that the repairs were needed as a result of improper maintenance by plaintiff. Moreover, while defendants cite the deposition testimony of Steven Moskowitz, who was responsible for Gristede's maintenance, that plaintiff did not properly perform maintenance, defendants fail to cite any testimony by Moskowitz or any other witness that defendants objected to plaintiff's bills on this, or any other, ground.

AD2d 951 [2d Dept 1968], affd 23 NY2d 730.) However, defendants' computation of the 1 ½ % service charge includes charges on accelerated maintenance payments for 2005. As discussed below, a triable issue of fact exists as to plaintiff's entitlement to accelerate such payments. Computation of the service charge will therefore be held in abeyance pending determination of this issue.

Plaintiff claims accelerated maintenance payments under the Broadway contract which provides in pertinent part: "A service charge of 1 ½ % per month, or the highest legal rate, whichever is less, shall apply to overdue accounts. If you do not pay any sum within sixty (60) days from the billing date, we may also choose to do one of the following: 1) suspend all service until all amounts due have been paid in full, or 2) declare all sums for the unexpired term of this agreement due immediately and terminate this agreement."

Contrary to defendants' contention, the acceleration clause is enforceable. It is well settled that whether such a clause is an enforceable liquidation of damages or an unenforceable penalty is a question of law for the court. (See JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005].) It is the burden of the party seeking to avoid liquidated damages to show that the stated liquidated damages are a penalty. (Id. at 380; Hunts Point Multi-Serv. Ctr., Inc. v Terra Firma Constr. Mgt. & Gen. Contr., 5 AD3d 183, 184 [1st Dept 2004][internal citation omitted].)

As the Court of Appeals has recently explained, "[t]oday the trend favors freedom of contract through the enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation." (JMD Holding Corp., 4 NY3d at 381.) It has long been held that agreements providing for the acceleration of the entire debt upon default will be

enforced “[a]bsent some element of fraud, exploitive overreaching or unconscionable conduct.” (See Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc., 46 NY2d 573, 577 [1979]; JMD Holding Corp., 4 NY3d at 380 [citing with approval Fifty States Mgt. Corp.].) Here, defendants, which are sophisticated business entities with numerous stores, do not show or, indeed, even allege, that such circumstances exist.

Nor do defendants make any showing “either that damages flowing from a prospective early termination were readily ascertainable at the time [the contracts were made] or that the early termination fee is conspicuously disproportionate to these foreseeable losses.” (See JMD Holding Corp., 4 NY3d at 380; Truck Rent-A-Ctr. v Puritan Farms 2d, 41 NY2d 420 [1977] .) In this regard, it is noted that had a liquidated damages clause not been included in the contract, plaintiff’s measure of damages would have been “the present value of the balance owed by defendant under the contract less the costs reasonably saved by plaintiff as a result of the breach.” (See American List Corp. v U.S. News & World Report, Inc., 75 NY2d 38, 44 [1989]; PJI 3d 4:20.1 [Supplemental Charge][2006].) Defendants do not show or even claim that the costs that plaintiff could have saved in the event of breach would have been reasonably ascertainable or that the liquidated damages provision is disproportionate to the foreseeable losses.

While the acceleration provision is therefore enforceable, the court cannot find on this record that plaintiff was entitled to accelerate the payments due under the contract. Plaintiff claims that it terminated the contract by letter dated “March, 2004” and accelerated all remaining payments due under the contract. (Szykuc Aff., ¶ 19.) Plaintiff identified the letter as Exhibit 27, but failed to attach it to the Szykuc affidavit. In any event, defendants raise a triable issue of fact as to whether the contract was ever terminated, based on the testimony of plaintiff’s

* 6]
service supervisor, David Mann, that plaintiff continued to perform service for Gristede's notwithstanding its non-payment of bills. (See Mann Dep. at 84-92.)

Finally, plaintiffs have demonstrated their entitlement to attorney's fees in an amount to be determined, as requested, at a hearing. The contract for the 86th Street store provides for recovery of attorney's fees in the event an attorney is hired to enforce the contract. The contract for the Broadway store authorizes attorney's fees where, as here, plaintiff is the prevailing party.

Turning to defendants' cross-motion, defendants seek leave to amend their answer to assert affirmative defenses alleging that plaintiff had a duty to mitigate damages; that the acceleration clause is an unenforceable penalty; and that plaintiff has no "standing" to sue under the contract for the 86th Street store.

Leave to amend should be freely granted in the absence of prejudice. (See CPLR 3025[b]; McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp., 59 NY2d 755 [1983].) However, leave to amend should not be granted if the proposed amendment is plainly lacking in merit. (See Koss v Board of Trustees of the Fashion Inst. of Tech., 281 AD2d 200 [1st Dept 2001]; Sharon Ava & Co. v Olympic Tower Assocs., 259 AD2d 315 [1st Dept 1999].)

For the reasons stated above, leave to assert a defense that the liquidated damages clause is a penalty is denied. The defense of mitigation of damages must also fail, as it settled that "where a contract contains a valid liquidated damages clause, mitigation is irrelevant." (Crown It Servs., Inc. v Koval-Olsen, 11 AD3d 263, 266 [1st Dept 2004].)

The defense of standing is also without merit. Defendants contend that plaintiff may not maintain its claims relating to the 86th Street store because the service contract for that store was made between defendants and plaintiff's assignor, and defendants never consented to the

[* 7]
assignment. Contracts, other than personal services contracts, are assignable without the defendant's consent. (Eisner Computer Solutions, LLC v Gluckstern, 293 AD2d 289 [1st Dept 2002].)

The court has considered defendants' remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that plaintiff's motion is granted to the following extent:

It is ORDERED that plaintiff is awarded judgment against defendants Gristede's Foods, Inc., Red Apple Company, Inc. and Gristede's/Red Apple Company, jointly and severally, in the amount of \$58,601.34; and it is further

ORDERED that entry of judgment shall be held in abeyance pending trial of plaintiff's remaining claims; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 57 of this Court on March 30, 2006 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
February 27, 2006

FILED

MAR - 2 2006

NEW YORK
COUNTY CLERK'S OFFICE


MARCY FRIEDMAN, J.S.C.