

Serene 7, Inc. v Hand Held Films, Inc.

2007 NY Slip Op 31685(U)

June 11, 2007

Supreme Court, New York County

Docket Number: 0111882/2004

Judge: Shirley W. Kornreich

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

PRESENT: ~~HON. SHIRLEY WERNER KORNREICH~~

PART 54

Index Number : 111882/2004
SERENE 7, INC.
VS.
HAND HELD FILMS, INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 111882/2004
MOTION DATE 4/19/07
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

this motion to/for SJ

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-5

6,7

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED
JUN 19 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/11/2007

HON. SHIRLEY WERNER KORNREICH
[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 54

-----X
SERENE 7, INC.,

Plaintiff,

-against-

INDEX NO. 111882/2004
DECISION & ORDER

HAND HELD FILMS, INC.,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover damages suffered when film production was abandoned due to allegedly defective equipment rented to plaintiff by defendant. Plaintiff states causes of action under both tort and contract law. Defendant now moves for summary judgment.

I. Facts

A. Defendant's Proof

Defendant presented the following evidence in the deposition of Marc Paturet, president of defendant corporation, and in copies of the rental agreements. Defendant, inter alia, rents motion picture cameras and related equipment to customers. On or about March 8, 2002, and continuing on through April 25, 2002, defendant leased cameras and other equipment to plaintiff. Defendant submitted copies of over 25 rental contracts signed by plaintiff during this time period. On the front of each rental contract, above the signature lines, the following language appears:

We have read the above terms and conditions and those on the reverse side and agree to all terms. Lessee has inspected and tested the above equipment and agreed Hand Held Films, Inc. has not made any warranties, expressed or implied as to the condition or

performance of the above equipment. Lessee acknowledges the equipment to be in good working condition and frees Hand Held Films, Inc. from all responsibility.

On the reverse side, the following language appears under the title "No Warranties":

Lessee acknowledges that the equipment listed herein has either been examined and tested by a representative of the Lessee, or that the opportunity to examine and test said equipment was permitted; and that said equipment is in good, workable condition and accepts the same "as is" without any reduction in rental fee or claims thereof. Lessee acknowledges that this equipment is leased without warranty or guarantee of any kind, express or implied. Lessor assumes no responsibility, express or implied, in fact or in law, for the performance or nonperformance of said equipment other than as expressly agreed herein, whether the failure is caused by the negligence of the Lessee, the Lessor or any other person or entity. Lessee agrees to notify Lessor immediately upon discovery that equipment is not in workable condition and to return all such nonworking equipment to Lessor at Lessee's sole cost and expense. Lessee expressly agrees to bear all risk of loss, direct and consequential, for any equipment found to be not in workable condition. Lessor's only obligation shall be to use reasonable efforts to repair or replace any damaged or defective equipment where such defect existed at the time of delivery and was not readily apparent upon inspection; or to refund all or part of any rental payment for such defective equipment.

Each contract is signed on the first signature line by an employee of plaintiff. The second signature line is blank on all the rental contracts. It is unclear whether the second signature line is intended for defendant lessor or a second lessee. Deponent states it is not defendant's custom to sign the rental agreements, but rather have only the lessee sign.

The following evidence was also provided in Mr. Paturet's deposition. At the time of each rental, plaintiff's assistant camera woman, Claire F. Cairo, tested all rented equipment at defendant's premises before accepting the equipment. Plaintiff conducted extensive tests over a period of a few days to achieve the desired look for the film and at no point was there any question of improper or undesirable adjustments with the equipment. During production, however, plaintiff found that most of its production suffered from soft focus problems. On various occasions during filming, defendant made adjustment to lenses and performed other

maintenance relating to the alleged defective equipment. Deponent and a technician visited the film set on one occasion to test and adjust the equipment so that it performed to plaintiff's expectation. Defendant also had some equipment replaced at plaintiff's request. Defendant has included several memoranda detailing these adjustments and repairs.

According to defendant's president, plaintiff took video dailies, which have 1/6th the resolution of film dailies, the professional standard. These video dailies were viewed by plaintiff on a 4 inch diagonal screen. Defendant states that once the problem was discovered, plaintiff continued to shoot.

Defendant also submitted a report by plaintiff's Focus Investigator obtained through discovery. The report stated that the 16 mm film used by plaintiff requires a sharp focus standard twice as demanding as normal 35 mm film. While the rental house checks each piece individually, it is the responsibility of the camera assistant to check that the lens and camera body work together. The investigation confirmed that most of the film was too soft, including some shots that were so out of focus, the expert wondered how the operator could not have noticed the problem in the viewfinder while filming. The report concluded that defendant did its best to maintain and adjust the equipment during production. The expert felt the problems fell into a "gray area" between rental house maintenance and pre-rental checks by plaintiff. The expert opined that it would have been wise to halt production for a few days of intensive camera testing, and that video dailies were not a reliable indicator of final film results.

B. Plaintiff's Proof

Plaintiff presents the same rental agreements and memoranda used by defendant. Plaintiff also includes a few copies of repair invoices from defendant. However, plaintiff claims

that it has not had an adequate, full and fair opportunity to conduct discovery and that defendant is in sole possession of information that would bear on the appropriateness of summary judgment.

II. Arguments

Defendant argues the following: (1) plaintiff's cause of action for negligence must be dismissed because plaintiff is only claiming consequential damages, which are precluded by the economic loss rule; (2) plaintiff has not put forth enough evidence to support a gross negligence cause of action; and (3) plaintiff's cause of action for breach of contract must be dismissed because the contract put the obligation for consequential damages solely on plaintiff, while defendant's only obligation was to use reasonable effort to repair or replace any defective equipment.

Plaintiff, on the other hand, argues: (1) plaintiff has not had a fair and full opportunity for discovery and thus defendant's motion for summary judgment is premature; (2) the economic loss rule does not preclude plaintiff's negligence cause of action because damage to the equipment itself is not being claimed, and because the rule does not apply to the post-rental service and repairs negligently performed by defendant; (3) the rental agreement does not disclaim defendant's liability for consequential damages; and (4) more discovery is needed to show that defendant's series of negligent repairs constitute gross negligence.

III. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hospital*, 68 N.Y.2d

320, 324 (1986). Upon this showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Id.*

A. *Negligence Claim for Consequential Damages is Barred by Economic Loss Rule*

Defendant has met its burden in showing that the consequential damages sought by plaintiff are unrecoverable under tort law because of the economic loss rule. In *Bocre Leasing Corp. v. General Motors Corp.*, 84 N.Y.2d 685 (1995), the Court of Appeals denied recovery under negligence and strict products liability theories for economic losses stemming from damage to the product itself and lost profits. *Bocre* adopted the bright line rule and policy considerations expounded by the U.S. Supreme Court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), which held a commercial purchaser cannot use tort theory to recover purely economic losses stemming from injury to the product itself. *See, also 7 World Trade Center Co. v. Westinghouse Elec. Corp.*, 256 A.D.2d 26 (1st Dept. 1998). In the present case, plaintiff is seeking economic damages which directly flow from the defective products. The rental of motion picture equipment is directly tied to the production of a film—any defect in the former will certainly disrupt the latter. This is nothing more than a contractual dispute, and “tort law should not be bent so far out of its traditional progressive path and discipline by allowing tort lawsuits where the claims at issue are ... essentially contractual, product-failure controversies. Tort law is not the answer for this kind of loss of commercial bargain.” *Bocre* at 694.

Plaintiff’s contention that the economic loss rule does not apply to the post-rental service performed by defendant is not supported by any case law. The sole case cited by plaintiff,

Progress Ins. Co v. Monaco Coach Corp., 819 N.Y.S.2d 212 (Sup. Ct., Nassau Co., 2006), only notes that the complaint for breach of service first mentioned in the bill of particulars should have been placed in the original complaint. It does not reach the conclusion that service repairs, as a matter of law, fall outside the economic loss rule. In *Bristol-Myers Squibb, Indus. Div v. Delta Star, Inc.*, 206 A.D.2d 177 (4th Dept. 1994), the court found no difference between product nonperformance and negligently performed service under the economic loss rule. The court stated that “the economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort.” *Id.* at 181. In the present case, the service performed by defendant was part of the bargained-for consideration, and included on the reverse of each rental agreement under the “No Warranties” provision. Defendants were contractually obligated to use reasonable effort to repair or replace equipment that had a defect which was not readily apparent during initial inspection. The fact that the products were leased rather than sold is unimportant. Defendant had no legal duty to plaintiff prior to the rental agreements. Since the only duty imposed on the defendant is through contract, plaintiff may only seek recovery under contract. *See Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 (1992); *Suffolk Laundry Services v. Redux Corp.*, 238 A.D.2d 577, 578 (2d Dept. 1997).

B. Plaintiff Assumed Liability for Consequential Damages

Defendant has met its burden that plaintiff assumed liability for consequential damages under the rental agreement. New York law allows consequential damages to be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Uniform Commercial Code—Leases § 2-A-503(3). As a matter of law, New York courts regularly uphold

clauses limiting consequential damages in commercial transactions, even if the exclusive remedy provided fails. *See, e.g. Suffolk Laundry, supra*, at 579; *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 20 (4th Dept. 1983); *Laidlaw Transp., Inc. v. Helena Chemical Corp.*, 255 A.D.2d 869, 870 (4th Dept. 1998); Uniform Commercial Code—Leases § 2-A-108 .

In the case at bar, both parties are business entities. Plaintiff could have easily leased equipment from another company if it did not wish to assume consequential damages as stated in defendant's rental agreement. Even if plaintiff's exclusive remedy of reasonable repair service or refund failed, the damage limitations clause still applies.

Plaintiff does not contest the unconscionability of the clause, but instead contests the definitions of "workable condition" and "risk of loss." While plaintiff contends that the law disfavors agreements limiting liability by citing *Molina v. Games Management Services*, 89 A.D.2d 69 (2d Dept. 1982), that case did not deal with two commercial parties. As stated *supra*, New York courts regularly uphold such clauses in commercial transactions. Plaintiff's contention that "workable" equipment can fail to produce a motion picture with acceptable focus has no merit. The dictionary definition of workable is "capable of being worked" and in the context of a complex machine, the dictionary definition of work is "to function or operate in the desired or required way." The American Heritage Dictionary of the English Language (3d ed 1992). Plaintiff's own investigator stated that rental houses normally run focus tests on the lens, but that the lessee checks that the camera body and lens work together. Plaintiff's contention that a camera that produces an out-of-focus image should be deemed workable goes against common business sense.

Plaintiff is correct that "risk of loss" is a term of art, defined as "[t]he danger or

possibility that a party will have to bear the costs and expenses for the damage, destruction, or inability to locate goods or other property.” Black’s Law Dictionary (8th ed 2004). However, while the technical definition of a term of art is usually preferred when interpreting a lease, an exception is made when another intention is established. *Madison Ave. Leasehold, LLC v. Madison Bentley Associates, LLC*, 30 A.D.3d 1, 8 n.4 (1st Dept. 2006). The syntax of the sentence unambiguously shows that the phrase was meant to include consequential costs and expenses due to non-working equipment, as well as the direct costs that plaintiff emphasizes: “Lessee expressly agrees to bear all risk of loss, *direct and consequential*, for any equipment found to be *not in workable condition*,” (emphasis added). Where the meaning of a contract is clear, it will “not [] be subverted by straining to find an ambiguity which otherwise might not be thought to exist.” *Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 341 (1998) (quoting *Loblaw Inc. v. Employers’ Liab. Assur. Corp.*, 57 N.Y.2d 872, 877 (1982)).

Plaintiff also claims that the limitation clause does not apply to the post-rental service performed by defendant. If the service contributed to, or caused, the focus problems, then the exclusive remedy “failed of its essential purpose” and plaintiff may be entitled to another remedy. Uniform Commercial Code–Leases § 2-A-503(2). However, as discussed *supra*, the limitation on consequential damages will still be enforced.

Plaintiff further claims that the second signature line left blank on all the rental agreements presents a material issue of fact. Defendant has presented evidence that it is not the custom of defendant to sign the agreements, and plaintiff has presented no evidence otherwise. Moreover, a lease only needs to be signed by the party against whom it is enforced. Uniform Commercial Code–Leases § 2-A-204. Therefore, as a matter of law, the rental agreement is a

valid lease contract and may be enforced against plaintiff.

C. *Gross Negligence*

In sum, as a matter of law, plaintiff's negligence cause of action is barred by the economic loss rule. Furthermore, plaintiff is only claiming consequential damages, and any negligent service performed by defendant would not preclude enforcement of the clause limiting defendant's liability for consequential damages. However, while commercial contracts may limit liability for ordinary negligence, a party is forbidden from limiting its liability for grossly negligent conduct. *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823 (1993). In this context, gross negligence is defined as "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Id.* If defendant was grossly negligent, then the clause limiting its consequential liability will not be enforced.

Defendant has met its burden of demonstrating that the facts presented do not give rise to a cause of action for gross negligence. Defendant presents evidence that plaintiff's investigator determined that defendant did its best to maintain and adjust the equipment during production. Plaintiff gives no evidence that defendant's conduct constituted a reckless disregard for plaintiff's right or any suggestion of intentional wrongdoing. But, plaintiff contends that more discovery is needed to determine whether defendant acted with gross negligence.

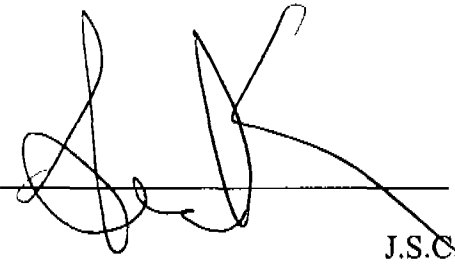
Though 25 months passed between when issue was joined and defendant's motion for summary judgment, the preliminary discovery conference was not held until December 21, 2006. Defendant sat on its rights by not coming into court, and thus defendant's motion for summary judgment is premature. Discovery is necessary to determine the gross negligence issue. The court, however, cautions the parties that, in light of the 25 month delay, the dates in the

preliminary conference order will be strictly enforced. Accordingly, it is

ORDERED that the motion of defendant Hand Held Films, Inc. for summary judgment dismissing the complaint, is granted to the extent of dismissing the causes of action for breach of contract and negligence, and denied as to gross negligence, with leave to move again following the completion of discovery; and it is further

ORDERED that the cause of action based on gross negligence is severed and shall continue.

Dated: June 11, 2007



J.S.C.

FILED
JUN 19 2007
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