

**Trans-Lux Corp. v Spencer-Winston
Sec. Corp.**

2007 NY Slip Op 33434(U)

October 17, 2007

Supreme Court, New York County

Docket Number: 0107794/2006

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

TRANS-LUX CORPORATION,
Plaintiff,

Index No.: 107794/06

Motion Date: 06/26/07

- v -

Motion Seq. No.: 01

SPENCER-WINSTON SECURITIES CORPORATION,
Defendant.

Motion Cal. No.: 129

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

| PAPERS NUMBERED |
|-----------------|
| 1 |
| 2, 3 |
| 4 - 6 |

Cross-Motion: Yes No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Upon the foregoing papers,

The court shall grant the defendant's cross-motion for summary judgment dismissing the complaint and deny plaintiff's motion for similar relief in this action concerning payments due under an equipment lease.

There is no dispute that the parties entered into a three-year equipment lease dated April 6, 1999, for nine live stock quote displays supplied by the plaintiff. Plaintiff is seeking lease payments allegedly due and not paid by the defendant for a period after the May 2002 expiration of the lease. Plaintiff claims that the lease governs the instant dispute because of the

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):

automatic renewal provision in Paragraph 11 of the lease which states

Upon expiration of the initial term of this lease, it shall be deemed renewed on the same terms and conditions, including all interim price on the same terms and conditions including all interim price index adjustments as herein provided below, for further successive periods of 1 year unless either party shall have given to the other party written notice not less than ninety (90) days prior to the expiration of the initial term for any such succeeding renewal period of its election not to renew this lease, in which event this lease shall be terminated upon the expiration of either the initial term or any renewal period for which such notice shall have been given. The monthly rentals and other charges as provided for herein and in Schedule A shall be subject to change by Trans-Lux upon written notice given by Trans-Lux one hundred-twenty (120) days prior to the expiration of the initial term or any succeeding renewal term.

The lease also contains a merger clause that requires all changes or modifications to the lease to be in writing.

However, the court agrees with defendant's argument that the renewal provision is unenforceable under General Obligations Law 5-901 which states that

No provision of a lease of any personal property which states that the term thereof shall be deemed renewed for a specified additional period unless the lessee gives notice to the lessor of his intention to release the property at the expiration of such term, shall be operative unless the lessor, at least fifteen days and not more than thirty days previous to the time specified for the furnishing of such notice to him, shall give to the lessee written notice, served personally or by mail, calling the attention of the lessee to the existence of such provision in the lease. Nothing herein contained shall be construed to apply to a contract in which the automatic renewal period specified is one month or less.

Plaintiff raises no issue of fact that the statute was not complied with in this case. In view of plaintiff's "failure to comply with General Obligations Law § 5-901, the subject leases were never effectively renewed for a definite term and may be cancelled by [defendant] at any time." Concourse Nursing Home v Axiom Funding Group, Inc., 279 AD2d 271 (1st Dept 2001). "Thus, even though defendant made payments after the . . . termination date, the . . . contract was not renewed." Protection Industries Corp. v DDB Needham Worldwide, Inc., 306 AD2d 175 (1st Dept 2003).

Plaintiff claims in the affidavit submitted in support of the motion that sometime in December 2005 defendant directed the plaintiff to disconnect and remove the leased equipment. Defendant claims that in April 2004 it requested the plaintiff remove the leased equipment at that time. Plaintiff submits no affidavit or other evidence to contradict defendant's claim that it notified the plaintiff that it wished the equipment be removed in April 2004. Plaintiff's assertion that the defendant continued to seek removal of the equipment as late as December 2005 fails to raise any issue of fact that the plaintiff was first notified that the defendant wished to cancel the month-to-month lease in April 2004. Accordingly, the court must hold in the absence of any evidence to the contrary that the lease was cancelled as of April 2004. As plaintiff's monetary claims here

are solely based upon periods after the equipment leases had been terminated by the defendant, those claims must be dismissed. Defendant, however, would not be entitled to any refund of amounts paid for use of the equipment prior to the cancellation. See Concourse Nursing Home v Axiom Funding Group, Inc., 279 AD2d 271 (1st Dept 2001) ("cited statute does not operate to entitle plaintiff to continue knowingly and willingly to accept the benefit of the leased equipment without compensating defendant lessor").

Accordingly, it is

ORDERED and ADJUDGED that defendant's cross-motion for summary judgment dismissing the complaint is GRANTED and the Clerk is directed to enter judgment DISMISSING this complaint in its entirety; and it is further

ORDERED that plaintiff's motion for summary judgment is DENIED.

This is the decision and order of the court.

Dated: October 17, 2007

ENTER:

DEBRA A. JAMES J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).