

**Health Ins. Plan of Greater N. Y. v  
Photobition N. Y., Inc.**

2008 NY Slip Op 30961(U)

February 4, 2008

Supreme Court, New York County

Docket Number: 0601984/2004

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

**FILED**

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HEALTH INSURANCE PLAN OF GREATER  
NEW YORK,

Plaintiff,

-against-

PHOTOBITION NEW YORK, INC., FERRANTI,  
INTERNATIONAL, INC. and GREELY  
ACQUISITION LLC

Defendants.

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Index No. 601984/04

**CAHN, J.**

Plaintiff Health Insurance Plan of Greater New York ("HIP") brought breach of contract claims against defendant Photobition New York, Inc. ("Photobition"), contending that it breached its sublease with HIP.<sup>1</sup>

A bench trial was held, at which the parties presented arguments and testimony both orally and in writing.

<sup>1</sup> Originally, HIP also sued Ferranti International, Inc., arguing that it controlled Photobition and that its corporate veil should be pierced. Following discovery, HIP offered to discontinue the action against Ferranti, however Ferranti made a motion for summary judgment and sought attorneys' fees. Pl Pre-Trial Br, n4. At trial, HIP conceded that it had no valid cause of action against Ferranti. Trial Transcript (the "Trial Tr") at 10. At that time, counsel moved to dismiss the action against Ferranti, and that request was granted. *Id.*

HIP also brought unjust enrichment claims against the original landlord, Greeley Acquisition LLC, which never answered the Complaint or appeared in this action.

**Background:**

Photobition was a graphics design company. On or about December 2, 1998, Photobition's predecessor, Katz Digital Technologies, Inc., entered into a 15-year lease for commercial space in the office building located at 132 West 31<sup>st</sup> Street, New York, New York (the "Prime Lease"). Under the terms of the Prime Lease, subletting any portion of the space was prohibited without the prior written consent of the landlord.<sup>2</sup>

HIP, a large health insurance and HMO provider, was also a tenant in this office building. On April 2, 2002, HIP sublet from Photobition a portion of the 16<sup>th</sup> floor (the "Sublet Premises") in the office building. Photobition rented the Sublet Premises to HIP for less than its own monthly rental payments for the space. The term of the Sublease was essentially co-terminus with the Prime Lease, both expiring in 2014. To obtain the owner's consent to the sublet, HIP committed itself to pay the amount of rent Photobition paid for the Sublet Premises, under the Prime Lease, if the Prime Lease was terminated. Consent to Sublease (the "Consent Agreement") ¶ 6 (b) (iii). The Sublease itself specified that Photobition would not voluntarily terminate or modify the Prime Lease in a way that would have an adverse impact on HIP, without HIP's prior written consent. Sublease § 27 (a).

However, Photobition's parent company was in administrative receivership in the United Kingdom. Def Pre-Trial Br at 5. As part of the parent company's restructuring, it was decided

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<sup>2</sup> Although Greeley Acquisition LLC was the landlord when HIP and Photobition entered into a sublease with each other, on December 10, 2003 the building's title was conveyed to Penn Com Partners, which then sold the building to Penn Tower LLC on July 14, 2004. Def Pre-Trial Br at 11. Nothing in the record establishes that these sales changed any of the rights and/or obligations at issue in this action. *Id.* at n5

that Photobition, and its other businesses operating in the United States, should be sold. An unaffiliated entity, Color Edge, Inc., agreed to purchase the Photobition stock for approximately \$4,000,000,<sup>3</sup> but would not do so unless Photobition first restructured its lease obligations in the building, including surrendering the 16<sup>th</sup> and 17<sup>th</sup> floors. Def Pre-Trial Br at 8; Trial Tr at 63.

On December 12, 2002, Photobition terminated the Prime Lease, with respect to a number of floors, including the Sublet Premises, without HIP's prior written consent. Photobition also did not notify HIP of the termination of the 16<sup>th</sup> floor lease. The owner notified HIP of the termination and advised it that it would be responsible for rent payments directly to the owner, at the fixed rent due under the Prime Lease, which was higher than the fixed rent set forth in the sublease. Thus, the owner claimed that HIP was required to pay the full rental obligation specified in the Prime Lease. Recognition, Non-Disturbance and Attornment Agreement and Modification of Sublease (the "Modification Agreement") ¶ 4 (a) (i).

It is clear that Photobition terminated the Prime Lease without first obtaining HIP's written consent. HIP here seeks to recover damages comprised of the difference between its fixed rent under the Sublease, and the larger amount it claims that it was required to pay after Photobition terminated its Prime Lease. HIP seeks this difference for monies it has already paid, with interest running from November 2004, when it started paying the higher rent, as well as the additional monies it may need to pay in the future, discounted to present cash value. Alternatively, as to monies for future payments, discounted, HIP seeks a declaration that Photobition is liable to HIP for the rent differential between the Prime Lease and the Sublease, as

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<sup>3</sup> With regard to this action, Photobition USA is defending Photobition pursuant to an indemnity agreement in connection with the sale to Color Edge and the defense being asserted is on behalf of Color Edge. Trial Tr at 60.

[ 4 ]

those amounts become due. Finally, HIP seeks attorneys' fees, as provided for in Section 9 (b) of the Sublease.

**Discussion:**

In order for HIP to succeed on a breach of contract cause of action, it must establish a prima facie showing of the following elements: (1) a valid and enforceable contract; (2) its own performance under the contract; (3) breach by the other party; and (4) damages. *Terwiller v Terwiller*, 206 F3d 240, 245-46 (2d Cir 2000); *see also Furia v Furia*, 116 AD2d694, 695 (2d Dep't 1986).

Here, the first two elements set forth above are not in dispute. Although the parties assert differing interpretations of portions of the Sublease, both contend it is a valid and enforceable contract. Further, HIP's own performance under the Sublease is not in dispute. However, the remaining elements, Photobition's breach of the Sublease and damages, are disputed.

Photobition's Breach

Photobition makes numerous arguments to assert its lack of liability to HIP.

It argues that it had understood that HIP's rent obligations would remain unchanged after the termination of the Prime Lease and, therefore, it did not believe either that HIP was being economically disadvantaged by the termination or that it needed HIP's consent to terminate. Shinehouse Aff ¶ 11. As consideration for terminating the Prime Lease, Photobition made a \$1,000,000 release payment to the owner. Fourth Amendment and Partial Surrender of Lease ¶ 1 (b). Photobition maintains that this payment precluded the owner from receiving additional amounts under the Sublease. Def Pre-Trial Br at 1; Trial Tr at 65. Photobition avers that it did not "think to tell" HIP of the termination because it did not believe "anything negative was going to happen." Trial Tr at 65-66. It claims that it was the owner who wronged HIP, arguing that

the extracted additional rent was a form of “double dipping or receiving double payment.” *Id.* at 46. However, the Court notes that Photobition can provide no document or representation in which the owner agreed that HIP would not have to pay the additional rents. *Id.* at 68.

Photobition contends that any obligation for HIP to pay the higher rental amount was waived and, therefore, it cannot now be recovered from Photobition. In fact, the owner apparently billed HIP the higher amount, and HIP simply refused to pay it, paying only the sublease amount. It maintained this position for approximately twenty months, until it decided to surrender all of its space in the building to enable it to move to a different location.<sup>4</sup> For almost two years, HIP paid the lower, sublease, rental amount which was accepted with no threat of eviction or other proceedings. Photobition argues that the acceptance of the lesser amounts tendered by HIP, and the failure to take any affirmative steps to obtain higher rents, resulted in an effective waiver of any violation there might have been.

The claimed arrears were paid by HIP to the owner in October, 2004.

Photobition argues that the payment of the purported arrears, in October 2004, was voluntary. It asserts that HIP did so to obtain a separate consent to sublease, which HIP sought to enable it to move from the building, and that the owner required payment of all purported arrears including the ones at issue here, as a condition precedent to consenting to HIP’s request to sublet its space. Def Pre-Trial Br at 11. Thus, Photobition contends that the payments were

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<sup>4</sup> Photobition contends that HIP considered moving out of the building entirely as early as May, 2002, to avail itself of financial incentives by city, state and federal agencies to rebuild the downtown area following the September 11, 2001 attacks. HIP’s incentive package, including from the landlord of the downtown building HIP was considering moving into, was approximately \$84,000,000. Def Pre-Trial Br at 11.

voluntary, and made for consideration other than use of the Sublet Premises. Therefore, Photobition urges that it is not liable for the amount of the payment.

Further, Photobition contends that it only needed HIP's written consent to terminate the Prime Lease under two scenarios, and that neither scenario reflects what transpired. It contends the Sublease required HIP's consent if it (1) voluntarily terminated the Prime Lease, or (2) amended or modified the Prime Lease in a manner that would adversely affect HIP. Photobition contends that because its stock was sold to another company, and Color Edge continued the Prime Lease and/or the landlord continued the Sublease with HIP, the Prime Lease was not actually terminated. And, as noted above, it asserts that nothing in its surrender of the Sublet Premises adversely affected HIP. Def Pre-Trial Br at 3. Accordingly, Photobition avers that neither condition requiring HIP's consent occurred.

These arguments are without merit.<sup>5</sup> Section 27 of the Sublease clearly prohibited Photobition from terminating or modifying the Prime Lease without obtaining HIP's prior written consent. Indeed, its admission that it did not "think to tell" HIP that it was terminating the Prime Lease supports the conclusion that Photobition was not adequately cognizant of its obligations. Even if Photobition actually made a determination that such consent was not

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<sup>5</sup> Photobition asserted additional arguments, that are equally unpersuasive. These included contending: that when HIP signed the Consent to Sublease, it understood that it might be required to pay the higher rent amount and, therefore, these higher payments are not an "economic disadvantage"; that "economic disadvantage" is not a defined term in the Sublease and is therefore ambiguous, and as the section requiring consent was drafted by HIP's counsel, any ambiguity must be construed against it; that the Consent Agreement rendered moot Photobition's requirement to obtain "prior written consent" from HIP; that the landlord became the *pro tanto* assignee of Photobition, stepping into the rights of and becoming the assignee of Photobition, with Photobition no longer having any contractual obligations or liability to HIP; and that HIP could have rescinded the Sublease and/or Consent as early as December 2002, but by waiting until June 2004 to commence the action, it waived any claim to fraudulent inducement.

required, for any of the numerous reasons it put forth, that conclusion was erroneous. The dispositive fact is that Photobition was indeed required to obtain HIP's prior written consent if it modified or terminated the Prime Lease, and it breached its contract with HIP when it failed to do so.

### Damages

Pursuant to the clear terms of the contract at issue, the Sublease, Photobition indemnified HIP "from any liability, damage, cost or expense, including [HIP's] reasonable attorneys' and consultants' fees and disbursements" incurred by HIP as a result of "any acts, omissions (where there is a duty to act) or negligence of" Photobition. Sublease § 9, 9 (i). Photobition's breach of Section 27 of the Sublease, is most assuredly an "act" that resulted in HIP incurring damages of attorneys' fees. As such, HIP is entitled to be compensated for reasonable attorneys' fees by Photobition.

As for the issue of damages, however, HIP has failed to meet its burden of proof. It "is axiomatic that the party 'complaining of injury has the burden of proving the extent of the harm suffered.'" *City of New York v State*, 27 AD3d 1, 4 (1st Dep't 2005) (internal citations omitted) *See also J.R. Loftus, Inc. v White*, 85 NY2d 874, 877 (1995). First of all, it appears that the owner was not pursuing its rights to claim the higher rent set forth in the Prime Lease. But for HIP's need to have the owner consent to its own further subletting its premises, it might never have pursued its claims under the Prime Lease. Further, HIP moved out of the building to avail itself of tens of millions of dollars in government incentives regarding the redevelopment of New York's downtown area, and this triggered the issue of the larger rent. Additionally, HIP has been collecting rent from its own sublease of the Sublet Premises, which HIP had the right to do. HIP failed to sustain its burden that, after taking these steps, it sustained damages on account of

the termination of the Prime Lease. Inasmuch as the Court finds that Plaintiff failed to prove such damages, HIP's damages from Photobition are limited to attorneys' fees incurred by HIP in this action.

The issue of the amount of reasonable attorneys' fees to which HIP is entitled, is respectfully referred to a Special Referee to hear and report.

Accordingly, it is

ORDERED that HIP is awarded its reasonable attorneys' fees in brining this action, from Photobition; and it is further

ORDERED that the issue of the amount of such attorneys' fees is referred to a Special Referee to hear and report.

Dated: February 4, 2008

ENTER:

*[Handwritten Signature]*

J.S.C.

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