

**US Express Leasing Inc. v Elite Tech. (NY),
Inc.**

2009 NY Slip Op 30474(U)

March 2, 2009

Supreme Court, New York County

Docket Number: 600305/08

Judge: Barbara R. Kapnick

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

PRESENT:

BARBARA R. KAPNICK
J.S.C.

PART 39

Index Number : 600305/2008
US EXPRESS LEASING, INC.,
vs.
ELITE TECHNOLOGY (NY), INC.,
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 600305-08
MOTION DATE _____
MOTION SEQ. NO. #007
MOTION CAL. NO. _____

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 ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 2/2/09

[Signature]
BARBARA R. KAPNICK s.c.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

-----X
US EXPRESS LEASING INC.,

Plaintiff,

DECISION/ORDER
Index No. 600305/08
Motion Seq. No. 001

- against -

ELITE TECHNOLOGY (NY), INC.,
d/b/a ELITE TECHNOLOGY INC.,
ELITE TECHNOLOGY INC. and
MICHAEL PAVONE,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

This is an action for: (i) breach of representations, warranties and covenants under a Master Purchase Agreement and Assignment of Leases ("Master Agreement") for the purchase of equipment leases (first cause of action); (ii) fraud (second cause of action); and (iii) negligent misrepresentation (third cause of action).

Defendants Elite Technology (NY), Inc. d/b/a Elite Technology, Inc. ("Elite"), Elite Technology, Inc., and Michael Pavone ("Pavone") now move for an order dismissing the Complaint in its entirety pursuant to CPLR § 3211 (a) (1) and (7), or, in the alternative, dismissing the second cause of action pursuant to CPLR § 3016 (b).

Background

Plaintiff US Express Leasing ("USXL"), an equipment leasing and financing company, funds the purchase of equipment from vendors

and leases the equipment to the vendors' customers. According to plaintiff, USXL does not sell equipment.

Defendant Elite is a vendor/distributor of business equipment, including copiers and printers. Defendant Pavone was allegedly Elite's "sales agent".¹

USXL and Elite ("Seller") entered into the Master Agreement signed by defendant Pavone, as "V.P." of Elite, on October 26, 2006, and by Eric A. McGriff, as Chief Credit Officer of USXL on November 30, 2006. The Master Agreement provides in relevant part, as follows:

In consideration of the mutual promises contained below and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Program. Seller from time to time may offer to sell lease, rental, or finance agreements for equipment and/or software sold or distributed by Seller (the "Equipment") to certain qualified customers (each a "Customer") of Seller. Each such financing will be referred to herein as a "Lease", which includes all of Seller's rights, title and interest to the Equipment, the Lease evidencing the financing, all payments under the Lease (the "Lease Payments"), all insurance policies and any manufacturer's warranties related thereto. Nothing contained herein will require Seller to refer any Customers to USXL or require USXL to approve any Customers or Leases referred by Seller.

2. Purchase Conditions. USXL will approve Leases based on its own credit criteria as then in effect. Such credit approvals will remain good for ninety (90) days (the

¹ Pavone, who was not a party to the Master Agreement, is named in connection with the second and third causes of action only.

"Approval Period"). USXl shall have no obligation to enter into a Lease with a Customer or Purchase the equipment from the Seller, and will not be liable to the Seller or the Customer, even if it has previously issued a credit approval for the proposed Lease, ...

The Complaint alleges that in or about April 2007, pursuant to the Master Agreement, Pavone, on behalf of Elite, offered to sell to USXL a Rental Agreement for a Savin 8055 spf Digital Imaging System (the "equipment") to an entity called National International Marketing Group, Inc. ("National") with a purported address at 323 Post Avenue, Westbury, New York 11590. The purchase price for the equipment was \$96,543.21, payable to Elite.

The Complaint further alleges that Pavone induced USXL to purchase the Lease and to fund the purchase price of the equipment, by

(i) presenting to USXL purportedly audited financial statements for National for the year ending December 31, 2006 with an Independent Accountant's Report attesting that the financial statements had been audited in accordance with Generally Accepted Auditing Standards (GAAS) and that the financial statements referred to represented fairly in all material respects the financial position of National as of December 31, 2006 and the results of its operations and its cash flows for the year then ended in conformity with Generally Accepted Accounting Principles (GAAP), purporting to show, among other things, a net worth of \$4,530,386.00, net sales of \$64,613,323.00, and net income of

\$1,5551,404.00, and that it was doing business as a going concern; and

(ii) by representing on or about April 30, 2007 that the Lease would be guaranteed by John A. Samuel, who Pavone represented to be the President of National.

On or about May 7, 2007, USXL executed a Rental Agreement directly with National. Elite was not a party to the Rental Agreement.

On or about the same date, Pavone allegedly procured the "Authorized Signature" of "John Samuel President" and of "John Samuel" for a Personal Guaranty of the Lease, as well as a Certificate of Delivery for the equipment which represented that the equipment had been delivered to National's Westbury address.

National immediately defaulted in its payment obligations under the Rental Agreement.

In the first cause of action, plaintiff alleges that Elite breached various representations and warranties contained in paragraph 7 of the Master Agreement, which provides, in relevant part, as follows:

1. Representations and Warranties.
Seller represents, warrants and covenants to USXL that, as of the date of the delivery and acceptance of Equipment in respect of each Lease: (a) Seller has

obtained written authorization for USXL to obtain a "consumer report" as defined by the Federal Fair Credit Reporting Act, as amended from any principal, owner, partner, officer and/or personal guarantor of the applicant for whom personal information has been included in the application and such application also includes a statement of the applicant's rights under the Equal Credit Opportunity Act; (b) All documents contained in each application and/or executed by Customer in connection with any Lease are legal, valid, genuine, duly executed by Seller (if required by the terms of the documents) and Customer, and are enforceable in accordance with their terms, and each lease delivered to USXL, shall be certified by Seller as the sole original counterpart for chattel purposes; ... (d) no express or implied warranties have been made by Seller to Customer, except as contained in such purchase agreement or purchase order; ... (f) the Equipment will be delivered to the Customers' address indicated in the applicable Lease, properly installed (if applicable) and will be in good working order, condition and repair, conforming to specifications; ... (h) Seller has no knowledge of any fact or circumstance which would impair the validity or collectability or constitute a default under any Lease, nor has Seller committed any fraudulent act or participated in any fraudulent activity in connection with its performance hereunder; [and] (i) Seller will diligently perform its obligations under any contract for maintenance, service or warranty on the Equipment; ...²

In the second cause of action, plaintiff alleges that Elite and Pavone made false and misleading representations with the intent to deceive USXL (or with reckless disregard for their truth or falsity) in order to induce it, to its detriment, to fund the purchase of the equipment for defendants' benefit.

² On or about October 29, 2007, USXL sent to Elite, by overnight delivery, a written demand (i) alleging that Elite had breached its representations, warranties and covenants under the Master Agreement thereby causing losses to USXL, and (ii) requesting that Elite pay the Repurchase Price (as defined and calculated under paragraph 9 of the Master Purchase Agreement) within ten (10) days after receipt of the demand, in the total sum of \$119,766.83, as of October 8, 2007. Defendants thereafter refused to repurchase the Lease.

Specifically, plaintiff claims that: (a) National was a shell entity with no material assets and no business operations; (b) the financial statements were false in every material respect and omitted to state National's true financial condition; (c) the financial statements were not audited; (d) the purported "Independent Accountants' Report" affixed to the financial statements was bogus and no "independent" accountant (or CPA) had audited or otherwise attested to the financial statements; (e) the accountant's business card affixed to the "Independent Accountants' Report" was from someone who neither prepared, attested to nor had any involvement with the financial statement; (f) the financial statements had not been audited in accordance with GAAS; (g) the financial statements did not present fairly in all material respects the financial position of National as of December 31, 2006 and the results of its operations and its cash flows for the year ended in conformity with GAAP; (h) National did not have a net worth of \$4,530,386.00 as of December 31, 2006 and its net sales worth, if any, was materially overstated; (i) National did not have net sales of \$64,613,323.00 in 2006 and its net sales, if there were any, were materially overstated; (j) National did not have net income of \$1,551,404.00 for 2006 and its income, if it had any, was materially overstated; (k) National was not doing business as a going concern; (l) National did not have the business operations described in the notes to the financial statement; (m) John A. Samuel never agreed to guarantee any obligation of National, had no affiliation with National, was not the President of National, and did not authorize any guaranty on his part; (n) Samuel's signatures, as procured by Pavone, were unauthorized and forged;

(o) the Certificate of Delivery for the equipment was false and the signature thereon was forged; and (p) the equipment (if it existed at all) had not been delivered to, nor was it located at the Westbury address.

USXL claims that it would not have purchased the equipment and entered into the transaction with National "had Elite and Pavone not made the foregoing false representations and omissions", and that it has thereby been damaged in the sum of at least \$96,543.21, with interest from May 7, 2007.

In the third cause of action, plaintiff alleges that there was a special and/or privity-like relationship between USXL and the defendants imposing a duty on the part of each of them to procure and impart correct information to USXL in connection with the Master Agreement and transactions contemplated thereby, including the Lease; that the documents and information imparted to USXL by defendants were materially incorrect; that USXL materially relied on such documents and information in purchasing the Lease and funding such purchase; and that defendants knew or should have known that such documents or information were incorrect, and that they would be relied upon by USXL in purchasing the Lease, to its detriment.

Discussion

Defendants argue that the first cause of action for breach of representations and covenants under the Master Agreement must be dismissed on the ground that it is contrary to documentary evidence

and fails to state a cognizable claim because defendants were not parties to the Rental Agreement.

Defendants contend that the Master Agreement only applies to Elite's sale and assignment to USXL of leases entered into by Elite with its customers, and does not apply to the Rental Agreement entered into directly by USXL with National.

Notably, USXL is named in the Rental Agreement as the "Owner" of the equipment. In contrast, paragraph 8(a) of the Master Agreement specifically provides that "[a]ll documentation for Leases will name [Elite] as the owner for such Leases." Defendants argue that the representations and warranties contained in paragraph 7 of the Master Agreement were thus never intended to apply to the subject Rental Agreement.

Plaintiff, on the other hand, contends that the Master Agreement is applicable to the subject transaction and forms the basis of all dealings between Elite and USXL. Thus, plaintiff asserts that it was in the context of the Master Agreement under which Elite introduced plaintiff to National and presented the Rental Agreement.

Plaintiff further argues that paragraph 2 of the Master Agreement expressly contemplates that USXL may, but has no obligation to, enter into a Lease with a Customer referred to it by Elite. Plaintiff argues that said provision would be meaningless if the Master Agreement were interpreted as urged by defendants.

Plaintiff contends that where, as here, USXL does, in fact, enter into such a Lease, the representations, warranties and covenants made by Elite to USXL in the Master Agreement apply.

However, while the parties may have contemplated that USXL might enter into a lease agreement directly with a Customer, there is nothing in the language of the Master Agreement to support the conclusion that the representations and warranties contained in paragraph 7 were to apply to such an agreement. Moreover, paragraph 1 of the Master Agreement specifically defines the term, "Lease", as "lease, rental, or finance agreements ... to certain qualified Customers ... of Seller", i.e., Elite. The Rental Agreement between USXL and National, of which Elite was not a party, would not meet this definition, and is thus not subject to the provisions of paragraph 7.

Accordingly, that portion of defendants' motion seeking to dismiss the first cause of action is granted.

Defendants next argue that the second and third causes of action based on tort theories of fraud and negligent misrepresentation must be dismissed on the grounds that plaintiff has not identified that "a legal duty independent of the contract itself has been violated." See, *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). See also, *Non-Linear Trading Co. v Braddis Assoc.*, 243 Ad2d 107, 118 (1st Dep't 1998).

However, it is well settled that "[w]here a party has fraudulently induced the plaintiff to enter a contract, it may be liable in tort (citations omitted), or where a party engages in

conduct outside the contract but intended to defeat the contract, its extraneous conduct may support an independent tort claim (citations omitted)." *New York Univ. v Continental Insur. Co.*, 87 NY2d 308, 316 (1995).

Based on the papers submitted and the oral argument held on the record on November 5, 2008, this Court finds that the second cause of action sufficiently sets forth the required elements of a cause of action for fraud, to wit, "representation of a material existing fact, falsity, *scienter*, deception and injury" (citation omitted) (*New York Univ. v Continental Insur. Co.*, *supra* at 318); i.e., the second cause of action specifically alleges that defendants fraudulently induced plaintiff to purchase the equipment and to enter into the Rental Agreement with National, by making several false representations with the intent to deceive plaintiff and that plaintiff was injured as a result.

Accordingly, that portion of defendants' motion seeking to dismiss the second cause of action is denied.

Finally, defendants argue that the third cause of action must be dismissed on the ground that, contrary to the allegations contained therein, there was no special and/or privity-like relationship between USXL and the defendants.

The Court of Appeals has held that liability for negligent misrepresentation may be imposed "only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party

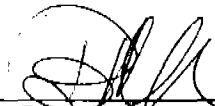
such that reliance on the negligence misrepresentation is justified." *Kimmell v Schaefer*, 89 NY2d 257, 263 (1996). See also, *Korea First Bank of N.Y. v Noah Enters., Ltd.*, 12 AD3d 321 (1st Dept 2004). The Complaint does not specifically allege, nor is there any evidence, that defendants possessed such specialized expertise or were in a special position of confidence and trust with plaintiff.

Accordingly, that portion of the motion seeking to dismiss the third cause of action is granted.

Defendants are directed to serve an Answer to the second cause of action of the Complaint only within 20 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of this Court.

Dated: March 2, 2009



BARBARA R. KAPNICK
J.S.C.

FILED
MAR - 3 2009
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA H. KAPNICK
J.S.C.