

Keos, Inc. v Helgen Indus., Inc.

2009 NY Slip Op 32326(U)

September 28, 2009

Supreme Court, Nassau County

Docket Number: 1888/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

KEOS, INC.,

Index No. 1888/07

Plaintiff(s),

**Motion Submitted: 7/10/09
Motion Sequence: 001, 002**

-against-

HELGEN INDUSTRIES, INC.,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....X

Motion by plaintiff Keos Inc. ("Keos"), for summary judgment pursuant to CPLR §3212 in its favor on its claim for rescission of the subject lease on the grounds of mutual mistake, is granted. The further request by third-party defendants David and Wendy Williams for judgment pursuant to CPLR §3211 dismissing the third-party complaint, is also granted.

Cross-motion by defendant/third-party plaintiff Helgen Industries, Inc. ("Helgen") for judgment pursuant to CPLR §3211 dismissing the complaint is denied.

Keos was looking for newer and larger rental space for its printing and mail-order business. According to plaintiff this business required the use of large equipment. Keos was shown the subject premises by its own broker, pursuant to a listing by Sutton and Edwards, wherein the property was represented to be 7,800 square feet costing \$7.25 per square foot.

The listing was on a page that contained a disclaimer at the bottom that although the information furnished “is from sources deemed reliable,” such “information has not been verified” and is “subject to errors.”

Keos viewed Helgen’s premises when it was essentially empty on more than one occasion, and then signed a lease for the space on August 28, 2006 and tendered a check to Helgen for \$32,962.50. The lease does not provide the square footage of the rented space and identifies it as “portion of rear steel building on easterly side of 431 Bayview Avenue, Amityville, New York.” No Schedule A has been provided in the record. Annual rent for the first year of the lease was to be \$56,550.00, which plaintiff points out is exactly $\$7.25 \times 7800$, together with various additional charges for energy costs and common building maintenance costs.

The lease contains a provision stating that Sutton Edwards is the broker and that the Landlord agrees to pay the commission pursuant to a separate agreement. The lease also contains a boilerplate merger clause. Third party defendants, David and Wendy Williams, the principals of Keos, signed a guaranty of the lease payments.

Approximately three weeks after execution of the lease, when Keos was in the process of approximating new locations for its equipment at the empty demised premises, it discovered that the premises was not 7,800 square feet. After measuring the premises, Keos learned that it was approximately 700 feet less than represented.

When Keos sought to rescind the lease, it was told by Helgen that at no time did Helgen make any representation as to the actual square footage or size of the leased premises, and that all representations merged in the lease. Helgen argues that the listing gave approximate dimensions, and that the listing contained a disclaimer regarding accuracy. After Helgen refused to rescind, Keos repudiated the lease. According to Helgen, the premises has remained vacant to date.

In early 2007, Keos commenced this action for the return of its \$32,962.50 by filing a complaint containing five causes of action, namely: breach of contract, fraud, rescission for “mutual mistake,” violation of General Business Law §349, and failure of a condition precedent. Helgen’s answer contains four affirmative defenses and three counterclaims for unpaid rent in the amount of \$19,687.50, liquidated damages of \$256,366.56, and attorneys fees of \$5000. In its reply Keos alleges affirmative defenses of misrepresentation and failure to state a cause of action.

At the same time that it served its answer, in May 2007, Helgen served a third-party complaint on David and Wendy Williams for payment pursuant to their guaranty. In their

answer to the third-party complaint, David and Wendy Williams allege affirmative defenses of mutual mistake and incorporation by reference of Keos' reply to Helgen's counterclaims.

On this motion Keos seeks summary judgment pursuant to CPLR §3212 rescinding the lease and dismissal pursuant to CPLR §3211 of the third-party complaint on the grounds of failure to state a cause of action. Helgen seeks denial of Keos' motion, and cross-moves for dismissal of the complaint based upon the parol evidence rule.

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk Cty. Dept. of Social Services on behalf of Michael V. v. James M.*, 83 N.Y.2d 178, 182, 630 N.E.2d 636, 608 N.Y.S.2d 940 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 82, 790 N.E.2d 772, 760 N.Y.S.2d 397 (2003); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Summary judgment shall not be defeated by mere conclusions or unsubstantiated allegations. (*Id.*)

Generally a contract entered into under a mutual mistake of fact is voidable and subject to rescission; the mutual mistake must exist at the time the contract is entered into and must be substantial (*Matter of Gould v. Board of Ed. of Sewanhaka Cent. High School District*, 81 N.Y.2d 446, 453, 616 N.E.2d 142, 599 N.Y.S.2d 787 (1993); *Rodriguez v. Mower*, 56 A.D.3d 857, 866 N.Y.S.2d 815 (3d Dept., 2008); *County of Orange v. Grier*, 30 A.D.3d 556, 817 N.Y.S.2d 146 [2d Dept., 2006]). The theory is that the agreement as expressed, does not represent a "meeting of the minds" of the parties (*Matter of Gould v. Board of Ed. of Sewanhaka Cent. High School District, supra*; *County of Orange v. Grier, supra*; *Sunlight Funding Corp. v. Singer*, 146 A.D.2d 625, 536 N.Y.S.2d 533 [2d Dept., 1989]).

The listing by Sutton and Edwards, which described the size of the premises as 7800 square feet and the price as "\$7.25", together with the annual rental calculation set forth in the lease of \$56,500 based upon square footage of 7800 square feet, certainly presents evidence that both Keos and Helgen mistakenly believed that the size of the premises was approximately 7800 square feet. The loss of 700 square feet out of 7800 is clearly substantial. On this record, the Court finds that plaintiff has made out a *prima facie* case of mutual mistake.

Helgen's reliance upon the boilerplate merger clause in the lease to preclude all parol evidence does not suffice. The parol evidence rule does not apply to claims of mutual mistake as the theory in such cases is that the writing does not represent the agreement of the parties (*True v. True*, 63 A.D.3d 1145, 1147, (2d Dept., 2009); see generally *Chimart Associates v. Paul*, 66 N.Y.2d 570, 573-74, 489 N.E.2d 231, 498 N.Y.S.2d 344 [1986]). If there never was a meeting of the minds, then the lease, including the merger clause, would be void *ab initio* [*County of Orange v. Grier, supra*].

Helgen's insistence that it never represented the actual square footage or size of the leased premises misses the point. An agent is a party who acts on behalf of the principal with the latter's express, implied or apparent authority (*Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 606 N.Y.S.2d 243 [2d Dept., 1993]). A real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of its principal (*Dubbs v. Stribling & Associates*, 96 N.Y.2d 337, 340, 752 N.E.2d 850, 728 N.Y.S.2d 413 [2001]). While Helgen may never have made a specific representation regarding size, it is bound by the documentary representation of its admitted real estate broker/agent, Sutton and Edwards.

The disclaimer on the bottom of the listing page does not preclude parol evidence because it does not specifically address the issue in dispute, namely, the size of the demised space, (see generally *Joseph v. NRT Inc.*, 43 A.D.3d 312, 841 N.Y.S.2d 38 (1st Dept., 2007); *Culinary Connection Holdings v. Culinary Connection of Great Neck*, 1 A.D.3d 558, 559, 769 N.Y.S.2d 544 (2d Dept., 2003), lv app den 3 N.Y.3d 601, 816 N.E.2d 194, 782 N.Y.S.2d 404 (2004); *Hi Tor Indus. Park, Inc. v. Chemical Bank*, 114 A.D.2d 838, 494 N.Y.S.2d 751 [2d Dept., 1985]), and because no legal basis has been suggested for the disclaimer to be binding on Keos under the circumstances of this case.

Helgen's self-serving insistence that the mistake was not mutual, but unilateral, is completely unsupported in the record. The statement by Eugene DeSantis, president of Helgen, that he does "not know where" the rental calculation of \$7.25 per square foot "comes from" fails to raise an issue of fact, as he offers no explanation whatsoever for the lease's first year rental calculation of \$56,550.00. On this record, Helgen has failed to meet its burden of raising a triable issue of fact that there was no mutual mistake.

The Court notes that in its answer and in the DeSantis testimony, Helgen alleges a claim for \$9,000 of work performed according to Lease par. 47. However, Helgen fails to document or even identify the work at issue. Such a conclusory and unsupported claim fails to raise a triable issue of fact as to damages.

Helgen's request for "an opportunity to complete discovery" is disingenuous, given that more than two years have passed since the answer with counterclaims and third-party

complaint were served. Summary judgment may not be defeated on the grounds that discovery is needed, where the party advancing this argument has failed to ascertain the facts due to its own inaction (*Meath v. Mishrick*, 68 N.Y.2d 992, 994, 503 N.E.2d 115, 510 N.Y.S.2d 560 (1986); *Household Bank (SB), N.A. v. Mitchell*, 12 A.D.3d 568, 569, 785 N.Y.S.2d 116 (2d Dept., 2004); *Dennis v. City of New York*, 304 A.D.2d 611, 612-13, 758 N.Y.S.2d 661 [2d Dept., 2003]).

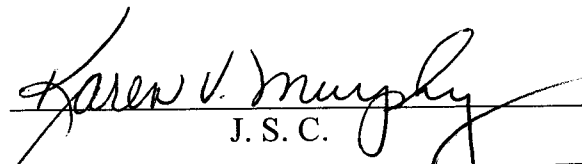
Based on the foregoing, Keos' motion for summary judgment on its cause of action for rescission of the lease based upon mutual mistake is granted, and Helgen's cross-motion for dismissal of the complaint is denied. Judgment is awarded in the amount of \$32,962.50, plus statutory interest of 9% [CPLR §5004]. Helgen's unaddressed affirmative defenses, as well as its counterclaims for unpaid rent and attorneys' fees, must be dismissed.

Under the general rule, attorneys' fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by an agreement, statute, or court rule (*Hooper Associates Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903, 549 N.Y.S.2d 365 [1989]). Here, Keos claims that it may be awarded attorneys' fees pursuant to its cause of action against Helgen for violation of General Business Law §349. However, the threshold test for liability pursuant to this statute is that the acts complained of are consumer-oriented generally, and not unique to the parties (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 [1995]). Keos fails to meet that threshold test here, where the subject commercial lease is a private contract and does not involve consumers at large (*Ramseur v. Hudsonview Co.*, 59 A.D.3d 308, 874 N.Y.S.2d 51 (1st Dept., 2009); *Revlon Consumer Products Corp. v. Arnov*, 238 A.D.2d 223, 657 N.Y.S.2d 9 [1st Dept., 1997]). For this reason plaintiff's claim for attorneys' fees must be denied, and this cause of action dismissed.

As Keos is entitled to rescission of the lease, Helgen has no cause of action against David and Wendy Williams for guaranty of the rescinded lease. The Williams' request for judgment dismissing the third-party complaint is also granted.

Submit judgment on notice.

Dated: September 28, 2009
Mineola, N.Y.


J. S. C.

ENTERED

OCT 05 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**