

Pludeman v Northern Leasing Sys., Inc.

2010 NY Slip Op 30750(U)

April 1, 2010

Supreme Court, New York County

Docket Number: 101059/04

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 101059/2004

PLUDEMAN, KEVIN

INDEX NO. 101059/04

vs

NORTHERN LEASING SYSTEMS

MOTION DATE _____

Sequence Number : ~~013~~ 014

MOTION SEQ. NO. 014

PARTIAL SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits 1-7

PAPERS NUMBERED

Answering Affidavits — Exhibits A-C

1
2
3

Replying Affidavits - Exhibits

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
APR 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 1 2010

MARTIN SHULMAN
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: IAS PART 1

-----X
KEVIN PLUDEMANN, et al.,

Plaintiffs,

Index No.: 101059/04

-against-

DECISION/ORDER

NORTHERN LEASING SYSTEMS, INC., et al.,

Defendants.

-----X
Martin Shulman, J.

FILED
APR 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this class action lawsuit, plaintiffs move by order to show cause ("OSC") to compel defendants to comply with their discovery demands or be precluded from presenting evidence at trial and/or striking their answer. The OSC also requests an order directing defendants to pay costs on appeal as previously awarded by the Court of Appeals and attorneys' fees and expenses incurred in plaintiffs' efforts to obtain payment of such costs.¹ Defendants oppose the OSC.

Motion to Compel

By prior decision and order dated October 3, 2007 in *Pludemann v. Northern Leasing Systems, Inc.*, 2007 WL 3050481 (Sup. Ct. NY Cty.), this court found that "[d]iscovery should . . . be reopened to the extent of permitting the parties to conduct disclosure regarding the individual plaintiffs' breach of contract claims." As to the class, this court permitted "limited disclosure relevant to the reinstated breach of contract

¹ The portion of the OSC seeking to lift the stay of discovery during the pendency of plaintiffs' motion for partial summary judgment has been rendered moot as a result of this court's decision and order dated March 25, 2010 which granted plaintiffs partial summary judgment as to liability on the breach of contract cause of action asserted against defendant Northern Leasing Systems, Inc. ("NLS").

claim [footnote omitted] as it relates to the class, solely to the extent that plaintiffs seek information which would permit plaintiffs 'to determine whether the prerequisites to class certification listed in CPLR 901 are present, and to assess the feasibility considerations listed in CPLR 902 . . .' [citation omitted]."²

This court's subsequent decision granting partial summary judgment as to liability on the breach of contract cause of action renders discovery on this issue moot. However, the breach of contract cause of action herein includes a punitive damages component, liability for which was not addressed in this court's decision granting partial summary judgment. As such, the court's analysis on this motion focuses on whether plaintiffs' demands are tailored to determine whether or not a basis exists to impose punitive damages against NLS on the breach of contract claim (i.e., whether NLS knowingly breached the leases in question by overcharging lessees).

In evaluating plaintiffs' May 2007 demands and defendants' responses,³ it is important to bear in mind that the breach of contract cause of action is interposed only against NLS and not the individual defendants. Further, requests for financial information are inappropriate until a jury determines that punitive damages should be imposed. See *Rupert v. Sellers*, 48 A.D.2d 265, 272 (4th Dept. 1975)(it is unnecessary

² This court ultimately granted plaintiffs' motion for class certification on the breach of contract claim. See *Pludeman v. Northern Leasing Systems, Inc.*, 24 Misc.3d 1206(A), 890 N.Y.S.2d 370 (Sup. Ct. NY Cty. 2009).

³ This court's October 3, 2007 decision and order involved the same demands at issue on this motion, to wit, Plaintiffs' Discovery Request, Fourth Series dated May 17, 2007 (OSC at Exh. 1) and Plaintiffs' Discovery Request, Fifth Series dated May 29, 2007 (OSC at Exh. 2) (collectively the "May 2007 demands"). Defendants' responses served in accordance with the October 3, 2007 decision and order are now at issue in this round of motion practice.

for plaintiff to know defendant's wealth until he obtains a special verdict that he is entitled to punitive damages); *Suozzi v. Parente*, 161 A.D.2d 232 (1st Dept. 1990); *Sterling Nat'l Bank v. Ernst & Young LLP*, 62 A.D.3d 584 (1st Dept. 2009).

Based upon the foregoing, the court sustains defendants' objections to the following: Fourth Series Document Demands #1 ("employment contracts, documents concerning salaries, bonuses and/or other compensation, W-2's"),⁴ #2 (all defendants' state and federal income tax returns), and #3 (all defendants' financial statements or statements of net worth); Fifth Series Interrogatory #2 (provide full details of financial relationships between affiliates); and Fifth Series Document Demands #3 (employment contracts) and #4 (payments between NLS and related entities).

The following demands are overbroad as written and/or duplicative: Fourth Series Document Demand #4 and Fifth Series Document Demand #1 (all documents concerning interrogatory responses); and Fifth Series Interrogatory #4. And, finally, the court simply cannot discern how the following demands might lead to information regarding NLS's breach of contract and potential liability for punitive damages as a result thereof: Fifth Series Interrogatories #5, #6, #7, #8 and #9 (tax liabilities), #10, #14 (personal guaranties), #18 (phone conversation recordings), #19 (monthly lease payment caps), #20 and #21 (verification of leases), #22 and #23 (quality control phone conversations), #24 and #25 (responses to lessees' phone calls), #26 and #27 (dunning phone calls) and #28 (chargebacks); Fifth Series Document Demands #5, #6 and #7 (employment documents for three specified non-party individuals), #8 and #9

⁴ Defendants shall respond to the Fourth Series Document Request 1 solely to the extent that it requests copies of job descriptions and performance reviews.

(documents regarding tax liabilities), #12 (leases between NLS and specified business lessees), #13 (exchange of information between lease financing companies), #14 (maximum monthly lease payments), #15 (claims for loss or damage to leased equipment), #16 and #17 (recordings of phone calls), #18 (chargeback policies), #19 (lease verifications), #20 (quality control), #21 (phone responses to lessees), #22 (dunning calls), #23 (correspondence from the Better Business Bureaus and/or other authorities concerning leases) and #24 (documents from Missouri Attorney General's lawsuit against NLS).

On or before May 5, 2010, defendants shall respond to the following demands, which are arguably tailored to lead to the production of material relevant to NLS's, its officers' and/or employees' knowledge regarding and responsibility for any alleged overcharges: Fourth Series Interrogatories #1 (describe job responsibilities of individual defendants), #2 (identify persons who drafted, reviewed, revised or otherwise participated in preparing the lease and guaranty), and #3 (identify all NLS affiliates and subsidiaries); Fourth Series Document Request #1 (as limited by footnote 4, *supra*); Fifth Series Interrogatories #1 (identify NLS affiliates and persons having controlling, equity or ownership interest in NLS), #3 (relationship between NLS and MBF Leasing, LLC and Golden Eagle Leasing, LLC), #11 (industry standards for LDW charges), #12 (amount of LDW charge), #13 (lease disclosure of LDW charges), #15 (amount of LDW charges collected by NLS), #16 (policies regarding LDW charges), #17 (costs incurred resolving LDW disputes); and Fifth Series Document Demands #2 (documents indicating corporate structure, with the exception of financing agreements), #10

[* 6]
(documents pertaining to LDW industry standards) and #11 (financial documents pertaining to LDW's).

Payment of Costs on Appeal

As a final matter, the court turns, with annoyance, to the portion of plaintiffs' OSC requesting an order directing defendants to pay plaintiffs costs on appeal totaling \$500⁵ as per the Court of Appeals' May 6, 2008 decision.⁶ Contending that defendants' continued refusal to pay costs as ordered is frivolous, plaintiffs further seek an award of attorneys' fees and expenses they incurred in attempting to collect this nominal sum. In opposition, defendants argue that costs are to be taxed by the Clerk at the end of the case.

Counsel for both parties waste court resources in belaboring this trivial issue.⁷ The court is compelled to cite Justice McGuire's apt assessment of the parties' prior

⁵ See CPLR §8204.

⁶ See *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 494 (2008).

⁷ As the following saga indicates, this is not the first time the parties and/or their counsel have demonstrated animosity to each other over peripheral issues. Apparently, on the joint appeal and cross-appeal before the Appellate Division, First Department, both esteemed attorneys failed to follow that court's applicable rule (22 NYCRR 600.11[d]) with respect to the preparation and submission of a joint record on appeal - defendants' counsel failed to consult with plaintiffs' counsel in preparing the record and plaintiffs' counsel refused to pay his half of what he deemed an exorbitant price. The Appellate Division entertained no less than two motions, resulting in that court's December 23, 2008 decision (*Lillienstein Aff. in Opp. at Exh. B*) directing plaintiffs to pay \$1,940.13 as their share of costs for the joint record. Upon plaintiffs' failure to pay this amount and defendants' refusal to permit plaintiffs to deduct the \$500 costs at issue here from the awarded record costs, defendants brought a second motion before the First Department for contempt and sanctions, which culminated in a July 21, 2009 decision finding plaintiffs and their counsel engaged in frivolous conduct and *inter alia* awarding defendants their costs and attorneys' fees in connection with that motion. *Id.* at Exh. C.

* 7]
motion practice before the First Department, as detailed in footnote 7, *supra*: "That the parties are incurring the costs of litigating this motion is remarkable."⁸

CPLR §8107 pertains to costs upon appeal and provides in relevant part:

The party in whose favor an appeal is decided in whole or in part is entitled to costs upon the appeal, whether or not he is entitled to costs in the action, unless otherwise provided by statute, rule or order of the appellate court. . . .

Absolutely nothing in this statute requires plaintiffs to await entry of final judgment to recover their costs on an interlocutory appeal. However, plaintiffs have not taken the requisite step of submitting a bill of costs to the New York County Clerk's Judgments Department.

Accordingly, the branch of plaintiffs' OSC for an order directing defendants to pay plaintiffs costs imposed by the Court of Appeals is denied, as is the request for sanctions. While the court cannot help but suspect that defendants' conduct is motivated in part by mean-spiritedness, plaintiffs' simple inquiry with the Judgments Department of the New York County Clerk's office would have obviated this portion of plaintiffs' OSC.

Counsel for both parties are cautioned to cease their gamesmanship, focus upon moving this action to trial expeditiously and conduct themselves in a professional manner. This is not a "suggestion".

The court has considered the parties' remaining arguments and finds them lacking in merit. For all of the above reasons, it is hereby

⁸ *Id.* at Exh. B, p. 4.

ORDERED that the portion of plaintiffs' OSC seeking to compel disclosure is granted to the extent that defendants are directed to respond to the document demands and interrogatories delineated herein, and is denied with respect to the balance of plaintiffs' document demands and interrogatories; and it is further

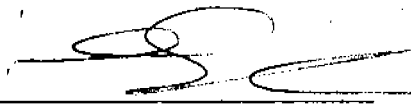
ORDERED that, in the event that defendants fail to timely comply with the discovery directives set forth herein, plaintiffs' counsel shall submit an affirmation detailing the default and shall submit an order on notice striking defendants' answer in its entirety; and it is further

ORDERED that the portion of plaintiffs' motion seeking to compel payment of costs on appeal and for sanctions is denied.

The parties are directed to appear for a status conference on May 11, 2010 at 9:30 a.m. at **60 Centre Street, Room 325**, New York, New York.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
April 1, 2010



Hon. Martin Shulman, J.S.C.

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