

Key Equip. Fin. Inc. v Rainbow Adv. Sales Corp.

2011 NY Slip Op 30446(U)

February 9, 2011

Sup Ct, Nassau County

Docket Number: 010703-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
KEY EQUIPMENT FINANCE INC.,

Plaintiff,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

-against-

**Index No: 010703-10
Motion Seq. Nos: 1 & 2
Submission Date: 12/20/10**

**RAINBOW ADVERTISING SALES CORP., d/b/a
RAINBOW ADVERTISING SALES CORPORATION,**

Defendant.
-----X

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affidavits in Opposition/Support (2)**
- and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Affidavit in Opposition.....X**
- Affidavit in Further Support.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff on October 7, 2010, and 2) the cross motion filed by Defendant on November 19, 2010, both of which were submitted on December 20, 2010. For the reasons set forth below, the Court denies the motion and cross motion.

BACKGROUND

A. Relief Sought

Plaintiff Key Equipment Finance Inc. ("Key" or "Plaintiff") moves for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment against the Defendant for the relief

demanded in the Verified Complaint and dismissing the Defendant's Answer. Defendant Rainbow Advertising Sales Corp., d/b/a Rainbow Advertising Sales Corporation ("Defendant") opposes Plaintiff's motion.

Defendant moves for an Order, pursuant to CPLR § 3212, entering summary judgment in favor of Defendant and against Plaintiff on all causes of action in the Verified Complaint.

Plaintiff opposes Defendant's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Jaslow Aff. in Supp.) alleges as follows:

Plaintiff is a national banking association and Defendant is a foreign business corporation with its principal place of business in Bethpage, New York. The Complaint contains five (5) causes of action which are as follows:

First Cause of Action: Breach of First Lease Agreement

On or about October 11, 2005, Defendant executed a Lease Agreement ("First Agreement") with the Plaintiff. Pursuant to the terms of the First Agreement, Defendant leased equipment from the Plaintiff and was required to make certain payments. Defendant is in default for failing to make required payments, despite demand by Plaintiff. As a result of that default, Defendant owes Plaintiff the sum of \$49,100.69, with interest from September 1, 2006, the date of default. In addition, Plaintiff seeks reasonable collection and legal costs incurred in pursuing this action, pursuant to applicable provisions in the First Agreement.

Second Cause of Action: Statement of Account

Plaintiff reasserts the allegations in support of the First Cause of Action and alleges, further, that Plaintiff rendered statements of account to Defendant on a monthly basis, and Defendant accepted and retained those statements of account without dispute. As a result, Plaintiff has stated an account with Defendant in the sum of \$49,100.69 which Defendant has not paid, despite due demand.

Third Cause of Action: Breach of Second Lease Agreement

On or about February 1, 2005, Defendant executed a Lease Agreement ("Second Agreement") with the Plaintiff. Pursuant to the terms of the Second Agreement, Defendant leased certain equipment from the Plaintiff and was required to make certain payments.

Defendant is in default for failing to make those payments, despite demand by Plaintiff. As a result of that default, Defendant owes Plaintiff the sum of \$117,724.50, with interest from September 1, 2006, the date of default. In addition, Plaintiff seeks reasonable collection and legal costs incurred in pursuing this action, pursuant to applicable provisions in the Second Agreement.

Fourth Cause of Action: Statement of Account

Plaintiff reasserts the allegations in support of the Third Cause of Action and alleges, further, that Plaintiff rendered statements of account to Defendant on a monthly basis, and Defendant accepted and retained those statements of account without dispute. As a result, Plaintiff has stated an account with Defendant in the sum of \$117,724.50 which Defendant has not paid, despite due demand.

Fifth Cause of Action: Unjust Enrichment

Plaintiff reasserts the allegations in support of the First through Fourth Causes of Action. Plaintiff further alleges that Plaintiff has demanded that Defendant relinquish and deliver immediate possession of the equipment ("Equipment") that is the subject matter of the First and Second Agreements. Despite that demand, Defendant has refused to deliver the Equipment to Plaintiff, or permit Plaintiff to remove that Equipment from Defendant's possession. By that refusal, Defendant has violated Plaintiff's rights in the Equipment and been unjustly enriched.

Plaintiff seeks monetary judgments on the First through Fourth Causes of Action. With respect to the Fifth Cause of Action, Plaintiff seeks an Order of Replevin.

In its Verified Answer with Affirmative Defenses ("Answer") (Ex. B to Jaslow Aff. in Supp.), Defendant, *inter alia*, 1) denies many of the allegations in the Complaint; and 2) asserts that it is not responding to certain allegations on the grounds that they state a conclusion of law to which no response is required.

In its Answer, Defendant also asserts thirteen (13) affirmative defenses: 1) the Complaint fails to state a cause of action on which relief may be granted; 2) the Complaint is barred because of Plaintiff's material breaches of agreements entered into between Plaintiff and Defendant, or other non-parties, and because of Plaintiff's other negligent or wrongful conduct; 3) Defendants have made all required payments under the Lease Agreements; 4) the causes of action for account

stated are insufficient because Plaintiff has not provided Defendant with copies of the invoices in question, and Defendant objected to any purported statements of account; 5) upon information and belief, the Equipment is no longer in Defendant's possession and, if it is in Defendant's possession, Plaintiff does not have the right to remove the Equipment from Defendant's possession; 6) the Complaint is barred, in whole or in part, by Plaintiff's failure to mitigate damages; 7) to the extent that Defendant owes money to Plaintiff, Plaintiff has misstated those amounts; 8) Plaintiff lacks standing to assert its causes of action; 9) Plaintiff's claims are barred based on the doctrine of accord and satisfaction; 10) any damages suffered by Plaintiff were not caused by Defendant; 11) the Complaint is barred by the doctrines of laches, estoppel, unclean hands and/or waiver, 12) the Complaint should be dismissed because Plaintiff is seeking to be unjustly enriched; and 13) Plaintiff's claims are barred, in whole or in part, by the doctrine of set-off.

In her Affidavit in Support, Erica Ellis ("Ellis") affirms as follows:

Ellis is the Senior Outsourcing Analyst for Plaintiff and has personal knowledge of the relevant facts and circumstances by virtue of her review of the books and records of Plaintiff, kept in the regular and ordinary course of its business.

On or about October 11, 2005, Defendant, by its President David Kline, executed the First Agreement with Plaintiff's assignor for Equipment consisting of one (1) Toshiba estudio 4511 and accessories. Pursuant to the terms of the First Agreement, Defendant was required to remit thirty-nine (39) consecutive monthly installments of \$1,044.10, plus applicable taxes.

Defendant, by its Facilities Manager Eileen Trinidad, executed the Second Agreement with Plaintiff for Equipment consisting of one (1) Toshiba eStudio 311c Digital Color Copier and accessories. Pursuant to the terms of the Second Agreement, Defendant was required to remit sixth-three (63) consecutive monthly installments of \$2,307.20, plus applicable taxes. Copies of the Agreements are annexed as Exhibit C to the Ellis Affidavit.

Ellis outlines relevant language in the First and Second Agreements including 1) language in the First Agreement regarding the Lessor making no representations or warranties regarding any equipment, including the implied warranties of merchantability and fitness for particular purpose, 2) language in the Second Agreement that Lessee leases the Equipment on an "as is" basis, and has no duties, responsibilities or liabilities relating to the Equipment, and 3) language

in the First and Second Agreements outlining the circumstances under which Defendant would be in default, which include failure to make payments due under the Agreements.

Defendant defaulted under the terms of the Lease Agreements by failing to make payment when due on or about September 1, 2006 ("Default Date") and thereafter. Moreover, Defendant never revoked, denied or disputed the existence of the Agreements prior to its Default. In addition, Plaintiff has fully performed its obligations under the Agreements in a commercially reasonable manner. Finally, Defendant has failed to raise any valid triable issues of fact within its Answer. Accordingly, Ellis submits, Plaintiff is entitled to collect from the Defendant the full amount due under the Lease Agreements.

In his Affidavit in Opposition/Support, David Kline ("Kline") affirms as follows:

Kline is the President of Defendant and is familiar with the facts and circumstances of this matter based on his review of documents maintained in the ordinary course of Defendant's business. Kline affirms that the Equipment that is the subject of the Agreements was supplied to Defendant by U.S. Business Technology ("USBT"). Kline submits that Defendant does not owe any money to Plaintiff under the Agreements.

With respect to the First Agreement, Plaintiff, or its affiliates, American Movie Classic Company and Rainbow Media Holdings LLC, made payments to Plaintiff until at least June of 2007. In support, Kline provides 1) copies of checks from Plaintiff to Defendant, and 2) electronic wire records (collectively annexed as Ex. B to Kline Aff.). Those documents consist of five (5) checks issued by Defendant to Plaintiff between September 27, 2006 and June 25, 2007.

With respect to the Second Agreement, Plaintiff made payments to Plaintiff until at least May of 2007. In support, Kline provides 1) copies of checks from Plaintiff to Defendant, and 2) electronic wire records (collectively annexed as Ex. D to Kline Aff.). Those documents include checks issued by Defendant to Plaintiff between July 28, 2005 and May 11, 2007.

Kline affirms that the First and Second Agreements were superseded by new leases ("Current Leases") in or around May of 2007. Plaintiff, with knowledge of the payments made by Defendant under the First and Second Agreements, accepted a complete buyout of those Agreements in consideration for Defendant agreeing to enter into the Current Leases. Plaintiff deemed satisfied all amounts owing on the original Agreements upon the parties entering into the Current Leases.

USBT confirmed, at or around the time the Agreements were superseded by the Current

Leases, that the Agreements were deemed satisfied. In or around May of 2007, USBT provided Defendant with an Executive Summary (Ex. E to Kline Aff.) that detailed the terms of a proposed new lease, intended to supersede the First Agreement. That Summary 1) describes the product as a “Toshiba E-Studio 5500 Digital Color Copier;” 2) provides monthly lease payments for a 39 month or, alternatively, 48 month lease term; and 3) includes the language “Buy-Out Existing Lease” and dollar amounts next to that language.

At or about the same time, USBT provided Defendant with another Executive Summary (Ex. F to Kline Aff.) intended to supersede the Second Agreement. That Executive Summary provides payment terms and contains the language “Includes the Buyout of lease number: CW01123377.” In addition, USBT confirmed in email correspondence from October of 2009 (Ex. G to Kline Aff.) that its records reflect that the Agreements were the subject of a “trade up.”

Kline affirms, further, that Plaintiff has acknowledged that the Agreements were satisfied. In support, Kline refers to 1) an email dated June 13, 2008 from a Key employee stating that the Agreements are “showing paid” (Ex. G at p. 3), and 2) an email dated June 13, 2008 from Jennifer Totten (“Totten”), Office Products Vendor Service Representative of Key, in which she states that the Second Agreement was “paid off in 07” (Ex. G at p. 2).

Thereafter, Defendant paid Key under the Current Leases and Kline notes that Plaintiff has not alleged that Defendant failed to make payments under the Current Leases. Kline notes further that, despite its claim that Defendant defaulted in 2006, Plaintiff did not demand payment until the fall of 2009. Counsel for Defendant notified counsel for Plaintiff that no monies were due and owing, and on December 31, 2009 and January 12, 2010, Defendant provided representatives of Key with documentation demonstrating Defendant’s payments to Plaintiff, and the superseding of the Agreements by the Current Leases.

In her Affidavit in Opposition to Defendant’s cross motion, Ellis affirms as follows:

When Defendant executed the Current Leases in May of 2007, Defendant obtained additional equipment. The records of Plaintiff reflect that Defendant still owes payments in connection with the First and Second Agreements. Ellis submits that Defendant has failed to provide sufficient evidence in support of its claim that the Agreements were paid in full.

Ellis submits that the Current Leases are “completely independent of” (Ellis Aff. in Opp. at ¶ 8), and do not supplement or supersede, the Agreements. With respect to Kline’s affirmation that USBT, the supplier (“Supplier”), represented to Defendant that the Current Leases would include a buy-out of the Agreements, Ellis affirms that Plaintiff did not participate in those

discussions, and USBT was not an agent of Plaintiff. The Agreement and the Current Leases reflect that the 1) Supplier is not an agent of Plaintiff, and is not authorized to bind Lessor, or make representations on Lessor's behalf; and 2) the Current Lease is fully integrated and supersedes any other verbal or written statement regarding its subject matter. Ellis submits that, as the Current Leases make no mention of a buy-out, they represent separate and distinct obligations of the Defendant.

Ellis affirms further that the emails provided by Kline reflecting a pay-off are inaccurate and that the Agreements were, in fact, never paid off. Ellis avers that Key's records reflect that Key advised Defendant on numerous occasions that the email was incorrect, and that payment was still owed. Ellis submits that Defendant "is attempting to benefit from this erroneous email despite having actual knowledge that it was sent in error."

C. The Parties Positions

Plaintiff submits that it has demonstrated its right to summary judgment by establishing that 1) the Agreements are clear and unambiguous contracts; 2) Defendant has defaulted in making payments pursuant to the Agreements; 3) the Agreements in question are statutory finance leases within the definition of the Uniform Commercial Code ("UCC") which became irrevocable and independent upon Defendant's acceptance of the Equipment; and 4) Defendant's affirmative defenses are without merit and fail to raise triable issue of facts.

Defendant opposes Plaintiff's motion, and submits that it has demonstrated its right to summary judgment, in light of the following: 1) Plaintiff has failed to produce any evidence establishing Defendant's default; 2) Defendant has provided evidence, including Exhibits E through G to the Kline Affirmation in Support, demonstrating that the Agreements were superseded by the Current Leases; 3) Defendant has provided proof, including checks and wire records, demonstrating that it made required payments under the Agreements; 4) Plaintiff has acknowledged that the Agreements were satisfied, as demonstrated by the emails provided; and 5) Ellis' conclusory assertion that Defendant failed to make required payments is insufficient to establish Plaintiff's right to summary judgment, in light of the conflicting documentation provided by Defendant.

In reply, Plaintiff submits, *inter alia*, that 1) Plaintiff is not bound by the agreement between Defendant and the Supplier agreed that the Agreements would be superseded; 2) Plaintiff was not involved in preparing the Executive Summaries on which Defendant relies in support of its claim that the Agreements were the subject of a buy-out; 3) the Court should not

consider any alleged agreements between the parties not specifically included in the Current Leases in light of the language in the Current Leases (Ex. C to Jaslow Reply Aff.) reflecting that a supplier cannot bind Plaintiff with respect to the Leases; 4) Defendant has failed to provide any evidence that the Agreements were paid off; 5) the emails provided by Defendant are insufficient to create an issue of fact, or prove, that the Agreements were paid off; 6) Defendant has failed to provide copies of the Current Leases, or quote language in the Current Leases supporting its assertion that the Current Leases superseded the Agreements; 7) the Current Leases make no reference to the Agreements, and contain no language reflecting that the Current Leases included buy-outs of the Agreements; and 8) because the Agreements are ambiguous, Defendant should be precluded from submitting evidence that contradicts or add terms to the Agreements.

In response, Defendant submits, *inter alia*, that 1) in light of Key's failure to submit an affidavit from the employees who sent the emails acknowledging the buy-out, and the conclusory nature of Ellis assertions, Plaintiff has failed to defeat Defendant's entitlement to summary judgment; 2) Plaintiff has incorrectly asserted that Defendant has not produced evidence to show that the Agreements were paid off; in fact, Defendant has produced documentation including emails from Key employees; and 3) Plaintiff's argument that Defendant should be precluded from submitting evidence that contradicts or adds to the Current Leases is misguided because the issue is not the interpretation of the Current Leases, but rather whether the Agreements were superseded, regarding which Defendant may submit extrinsic evidence.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according

to its terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

The parol evidence rule does not bar the introduction of extrinsic evidence to show a subsequent waiver or modification of a written contract. *Expocorp v. Hyatt Management Corp.*, 134 A.D.2d 234 (2d Dept. 1987), citing *Allied Chem. Corp. v. Alpha Portland Indus.*, 58 A.D.2d 975 (4th Dept. 1977); 9 Wigmore, Evidence § 2441. *See also Global Crossing Bandwidth, Inc. v. Locus Telecommunication, Inc.*, 632 F. Supp. 2d 224 (W.D.N.Y. 2009) (cites New York authority in support of principle that modifications of written contracts may be proved circumstantially by the conduct of the parties subsequent to the agreement).

C. Application of these Principles to the Instant Action

In light of the disputed issues, including whether the Current Leases superseded the Agreements, and the Court's conclusion that extrinsic evidence is admissible to demonstrate the parties' intent with respect to that issue, the Court denies Plaintiff's motion and Defendant's cross motion.

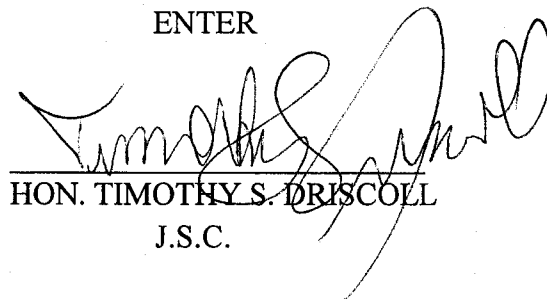
The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on March 15, 2011 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
February 9, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE