

Pludeman v Northern Leasing Sys., Inc.

2012 NY Slip Op 33208(U)

February 16, 2012

Sup Ct, 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: Shulman
Justice

PART 1

Pludeman, Kevin

INDEX NO. 101059/04

MOTION DATE _____

MOTION SEQ. NO. 023

MOTION CAL. NO. _____

- v -

Northern Leasing Systems

The following papers, numbered 1 to 4 were read on this motion to/for Renew Motion

~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ... A-G

PAPERS NUMBERED

Answering Affidavits — ~~Exhibits~~

12

Replying Affidavits _____

3

4

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

FEB 21 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: Feb. 16, 2012

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK; PART 1

KEVIN PLUDEMAN, CHRIS HANZSEK d/b/a
 HANZSEK AUDIO, SARA JANE HUSH, OZARK
 MOUNTAIN GRANITE & TILE CO. and DENNIS E.
 LAUCHMAN, on behalf of themselves and all others
 similarly situated,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN,
 STEVEN BERNARDONE, RICH HAHN and
 SARA KRIEGER,

Defendants.

Index No: 101059/04

Decision & Order

FILED

FEB 21 2012

Hon. Martin Shulman, J.S.C.:

NEW YORK
 COUNTY CLERK'S OFFICE

By decision and order dated March 25, 2010 (the "SJ decision"), this court

granted plaintiffs' motion for partial summary judgment against defendant Northern Leasing Systems, Inc. ("NLS") with respect to liability on plaintiffs' breach of contract/overcharge claim (*Pludeman v Northern Leasing Systems, Inc.*, 27 Misc3d 1203A [Sup Ct NY Co 2010] ["SJ decision"]), thereby construing the form leases at issue in this class action lawsuit to be one page contracts as a matter of law.

Thereafter plaintiffs, relying upon the SJ decision, moved *inter alia* for a judgment declaring that the form leases between class members and NLS are comprised of only the first page and all remaining pages are unenforceable against class members, together with related injunctive relief.¹

By decision, order and judgment dated June 17, 2011 (the "6/17 order"), this court granted those portions of plaintiffs' foregoing motion seeking declaratory and injunctive relief solely as to those plaintiff class members whose leases: 1) contain all

¹ As more fully discussed *infra*, plaintiffs also moved to compel disclosure.

material terms on the first page above the merger clause and signature line; 2) lack any provision for or reference to the LDW clause on the first page thereof; and 3) do not specifically incorporate or refer to the terms and conditions contained on the remaining pages. The 6/17 order *inter alia* went on to declare that such leases were comprised of only the first page and all remaining pages were unenforceable and to enjoin defendants from enforcing the lease terms contained in pages 2 through 4 of such leases.²

Defendants now move for renewal of the 6/17 order based upon the September 15, 2011 decision in *Pludeman v Northern Leasing Systems, Inc.*, 87 AD3d 881 (1st Dept 2011) (the "AD SJ decision"), which reversed the SJ decision. In opposition, plaintiffs request that this court deny this motion without prejudice to renew upon determination of plaintiffs' motion for leave to appeal the AD SJ decision to the Court of Appeals. The Appellate Division subsequently denied that motion by decision dated December 20, 2011.

Plaintiffs have not opposed this motion on the merits and upon denial of their motion for leave to appeal, they exhausted their appellate remedies and the AD SJ decision became the law of this case. There can be no serious dispute that the reversal of the SJ decision's finding that the subject form leases were one page contracts as a matter of law renders the 6/17 order a nullity. Accordingly, defendants'

² With respect to the portion of plaintiffs' motion seeking to compel disclosure, the 6/17 order granted such relief and ordered defendants to produce to plaintiffs NLS's entire electronic lease database in a readable and searchable format on or before June 30, 2011.

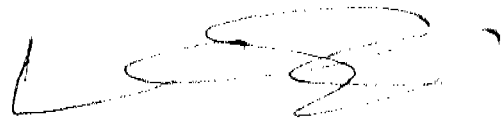
motion for renewal must be granted, and upon granting renewal, the 6/17 order must be vacated to the extent that it granted plaintiffs declaratory and injunctive relief.

As a final matter, plaintiffs' opposition correctly notes that defendants' motion to renew fails to proffer any reason why the portion of the 6/17 order directing disclosure of NLS's lease database should be vacated. In reply, defendants argue that "considerations of judicial economy" warrant this court holding the discovery issue in abeyance until this court decides defendants' simultaneously pending motion to decertify the class, which is also predicated upon the AD SJ decision. However, it is well settled that it is improper for the court to consider arguments raised for the first time on reply. *Wal-Mart Stores, Inc. v U.S. Fid. & Guar. Co.*, 11 AD3d 300, 301 (1st Dept 2004) (motion court properly declined to reach argument improperly raised for the first time in reply). Accordingly, upon granting renewal, this court adheres to the portion of the 6/17 order directing disclosure. Accordingly, it is hereby

ORDERED that defendants' motion for renewal is granted and upon granting renewal, the portion of this court's June 17, 2011 decision, order and judgment granting plaintiffs declaratory and injunctive relief is vacated.

The foregoing constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
February 16, 2012



HON. MARTIN SHULMAN, J.S.C.

FILED

FEB 21 2012