

**Pludeman v Northern Leasing Sys., Inc.**

2013 NY Slip Op 32281(U)

September 23, 2013

Sup Ct, NY 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

JOHN PUDOMM

- v -

NORTHMAN LEASING SYSTEMS INC

INDEX NO. 181059/04  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 28  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to not include

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>A-I</u>	<u>1</u>
Notice of Cross-Motion + Answering Affidavits — Exhibits <u>1-19</u>	<u>2</u>
Replying Affidavits — Exhibits <u>A-K</u>	<u>3</u>
Replying Affidavit (Cross-motion)	<u>4</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

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

**FILED**

SEP 26 2013

COUNTY CLERK'S OFFICE  
NEW YORK

HON. MARTIN SHULMAN, J.S.C. J.S.C.

Dated: Sept. 23, 2013

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

**FILED**

SEP 26 2013

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1-----X  
KEVIN PLUDEMAN, et al.,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., et al.,

Defendants.  
-----XCOUNTY CLERK'S OFFICE  
NEW YORK

Index No.: 101059/04

**DECISION/ORDER**

Motion Seq. 028

**Martin Shulman, J.**

Defendants move by order to show cause ("OSC") and plaintiffs cross-move to preclude each other from offering evidence at trial based upon mutual alleged discovery defaults and for sanctions pursuant to 22 NYCRR § 130-1.1. This court encouraged counsel for the parties to confer in good faith and work out their differences. To that end, counsel are to be commended for ultimately submitting to the court a stipulation and order dated August 23, 2013 (the "stipulation") resolving all but a few of the disputed discovery issues. The stipulation delineates the following issues as unresolved, thus narrowing this court's determination of the OSC and cross-motion to:

1) whether defendants are entitled to responses to Defendants' Interrogatories numbered 1-15, 24-27 and 31 on behalf of class members other than the four (4) individual named plaintiffs; and 2) whether plaintiffs must respond to defendants' demands for copies of form contracts plaintiffs use in their own businesses and equipment leases plaintiffs entered into with companies other than defendant Northern Leasing Systems, Inc. ("NLS").

## Relevant Procedural Background

The primary remaining causes of action herein allege: 1) fraud against all defendants on behalf of the named plaintiffs; and 2) breach of contract against defendant Northern Leasing Systems, Inc. (“NLS”) on behalf of the certified class based upon NLS’s alleged unauthorized collection of monthly loss and damage waiver fees (“LDW”).<sup>1</sup> In affirming class certification of the breach of contract cause of action, the Appellate Division, First Department articulated the issue common to the class as being “whether it is possible to construe the first page of the lease as a complete contract”, and further stated that “[r]esolution of this issue does not require individualized proof, and is capable of being determined solely upon examination of the first page of the lease.” *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 424 (1<sup>st</sup> Dept 2010).

By subsequent decision dated May 23, 2013, the Appellate Division, First Department modified this court’s prior decision dated July 13, 2012 to the extent of denying defendants’ motion to decertify the class, and otherwise affirmed. *Pludeman v Northern Leasing Sys., Inc.*, 2012 WL 3058628, 2012 NY Slip Op 31899 (Sup Ct, NY County 2012), *affd as mod in part* 106 AD3d 612 (1<sup>st</sup> Dept 2013). Additionally, the First Department’s May 23, 2013 decision remanded this matter “for a hearing at which evidence will be presented to the factfinder to determine whether a reasonable person would have believed that page 3 of the lease contained the additional (LDW) charges and whether the fees were reasonable.” 106 AD3d at 615-616. This hearing was initially scheduled for September 10, 2013 but had to be rescheduled due to the

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<sup>1</sup> Additional causes of action for unjust enrichment and money had and received also remain.

outstanding discovery at issue in this OSC and cross-motion. The stipulation provides for an adjourned hearing date of January 6, 2014.<sup>2</sup>

### Interrogatories

Defendants served their first set of interrogatories on plaintiffs on November 1, 2011. OSC at Exh. B. Plaintiffs responded by submitting an unverified response dated June 20, 2013. *Id.* at Exh. F. As set forth in defendants' OSC, defendants objected to plaintiffs' responses to interrogatories 1-15 and 23-31. Plaintiffs have now stipulated to provide sworn responses to these interrogatories on behalf of the individual named plaintiffs, but not on behalf of unnamed class members. The stipulation narrows the specific interrogatories for which defendants seek a response from absent class members to interrogatories 1-15, 24-27 and 31.

*Murray v Allied-Signal, Inc.*, 177 AD2d 984 (4<sup>th</sup> Dept 1991), is the only New York case this court uncovered on the subject of obtaining discovery from absent class members. As plaintiffs note, case law on the subject is derived primarily from the federal courts. The court in *Murray* recognizes federal case law's prevailing principle that discovery of unnamed class members should be limited but "is permitted where it is

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<sup>2</sup> The papers submitted in this round of motion practice, as well as subsequent correspondence from counsel, indicate that the parties dispute the scope of the scheduled hearing. Defendants' counsel contends that the January 6, 2014 hearing is limited to those issues the Appellate Division identified in its May 23, 2013 decision pertaining to the class claim against NLS for breach of contract. Plaintiffs' counsel characterizes it as a "plenary trial" rather than "a 'hearing' on some discrete issue." Chittur Reply Aff. at ¶ 25. The scope of the preliminary hearing to be held on January 6, 2014 shall be limited to the issues the Appellate Division identified. However, for the purposes of this decision and order, the demands at issue will be analyzed in terms of their relevance to the entire action, and not merely the class claim for breach of contract.

necessary and helpful to the correct determination of the principal suit.”<sup>3</sup> As succinctly stated in *McPhail v First Command Fin. Planning*, 251 FRD 514, 517 (SD Cal 2008):

Discovery from absent class members is ordinarily not permitted. *On the House Syndication, Inc. v. Federal Express Corp.*, 203 F.R.D. 452, 453 (S.D.Cal.2001). “[A]n absent class-action plaintiff is not required to do anything.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). “It is not intended that members of the class should be treated as if they were parties plaintiff, subject to the normal discovery procedures, because if that were permitted, then the reason [behind Rule 23(a)(1) of the Federal Rules of Civil Procedure] would fail.” *Fischer v. Wolfenbarger*, 55 F.R.D. 129, 132 (W.D.Ky.1971). “Whether prior to class certification or after, discovery, except in the rarest of cases, should be conducted on a class wide level.... [¶] If joinder of all parties is impracticable, propounding discovery like interrogatories, depositions, and requests to produce on an individual basis is even more impracticable.” *Adkins v. Mid-America Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill.1992). Importantly, a defendant who propounds discovery upon absent class members requires those members to take some affirmative action to remain in the class, “effectively creating an ‘opt in’ requirement which is inconsistent with the ‘opt out’ provisions of Rule 23.” *On the House*, 203 F.R.D. at 456. “Thus, allowing defendants to subject absent class members to discovery may defeat the purpose of certifying the class in the first place.” *Id.*

Turning to defendants’ specific demands, this court first addresses interrogatories 8 through 15, which ask each named plaintiff if they signed the lease marked at their deposition and to identify all persons who were present when such leases were signed. As these demands are directed to the named plaintiffs concerning the specific circumstances of their lease executions, they are inapplicable to other class members and no purpose would be served by compelling a class-wide response. To

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<sup>3</sup> In *Murray*, the issue of individual damages had been severed for a separate trial to follow the trial on issues common to the class. The Fourth Department modified the lower court’s order directing unnamed class members to respond to a demand for a bill of particulars, instead requiring the named plaintiff to respond on behalf of himself and all class members.

the extent that it appears defendants seek to obtain the same information from absent class members, no demand to that effect has been interposed and, had such a demand been interposed, it would be impracticable and unrealistic to demand such information from an estimated 600,000 class members. See *McPhail, supra*, at 518. Accordingly, the portion of defendants' OSC seeking to compel class members to respond to interrogatories 8 through 15 is denied.

Interrogatories 1 through 3 ask plaintiffs to identify all persons having knowledge or information relevant to every allegation in the amended complaint (1), to detail such persons' knowledge or information (2) and identify each person to be called as a trial witness (3). At the outset, interrogatory 3 has been resolved via the stipulation, wherein the parties have agreed to identify all witnesses in advance of the hearing date. Thus, in the event any unnamed class members intend to testify, defendants will receive advance written notice to that effect. With respect to interrogatories 1 and 2, it is too burdensome to seek such a broad range of information from 600,000 class members. See *McPhail, supra*, at 517-518. To require responses from all class members would also defeat the purpose of certifying the breach of contract cause of action as a class action. *Id.* Accordingly, defendants' OSC is denied with respect to interrogatories 1 through 3 as directed to class members.

Similarly, interrogatories 4 and 5 ask plaintiffs to identify all persons having knowledge or information as to whether each plaintiff only received the first page or all four pages of the lease and to detail each person's knowledge or information. Interrogatories 6 and 7 ask plaintiffs to identify all persons having "knowledge or information as to whether, if a particular Plaintiff received all four pages of the form

lease, that Plaintiff reasonably believed that all terms were contained on page 1” and to detail each person’s knowledge or information.

As with interrogatories 1 and 2, it would be impracticable and unrealistic to demand the information sought in interrogatories 4 through 7 from hundreds of thousands of class members, and as such, defendants’ OSC is denied with respect to interrogatories 4 through 7 as directed to class members. However, in the event plaintiffs’ counsel intends to call any unnamed class members as witnesses, the demanded information, which is more narrowly tailored than the information sought in interrogatories 1 and 2, shall be provided for such testifying class members simultaneously with plaintiffs’ service of their witness list.

Interrogatories 23 and 24 ask plaintiffs to identify persons with knowledge of the meaning of the term “price in effect” as used in the insurance clause of all but plaintiff Hanzsek’s lease (23) and to detail each person’s knowledge or information (24).<sup>4</sup> Defendants contend that these demands are relevant to the issue of whether the LDW fee charged was reasonable, an issue the First Department remanded for hearing. Plaintiffs respond that defendants are the only persons having such knowledge and further object that the demand is improper “since it involves conclusions of fact or law and argumentative matter (citation omitted).”

As with interrogatories 4 through 7, it would be impracticable and unrealistic to demand the information sought in interrogatories 23 and 24 from hundreds of

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<sup>4</sup> The stipulation does not include interrogatory 23 as one of the unresolved items for this court’s determination. This is presumably an oversight because interrogatory 24 cannot be answered without first answering interrogatory 23.

thousands of class members, and as such, defendants' OSC is denied with respect to interrogatories 23 and 24 as directed to class members. However, in the event plaintiffs' counsel intends to call any unnamed class members as witnesses, the demanded information, which is more narrowly tailored than the information sought in interrogatories 1 and 2, shall be provided for such testifying class members simultaneously with plaintiffs' service of their witness list.

Interrogatories 25 through 27 ask for the identity of each plaintiff class member who claims their lease was presented at execution: 1) on a clipboard (25); 2) hurriedly (26); or 3) in such a way that they reasonably believed it was only one page (27).

These demands are not properly directed towards unnamed class members, as determination of the common class issue "does not require individualized proof" of the circumstances of each class member's lease execution. See *Pludeman v Northern Leasing Sys., Inc.*, *supra*, 74 AD3d at 424. While relevant to the issue of fraud, that cause of action was not certified as a class claim. Accordingly, defendants' OSC is denied with respect to interrogatories 25 through 27 as directed to class members.

Finally, interrogatory 31 requests facts supporting plaintiffs' claim for punitive damages. For the same reasons stated above, requiring such information from class members is impracticable. However, in the event plaintiffs' counsel intends to call any unnamed class members as witnesses, the demanded information, which is more narrowly tailored than the information sought in interrogatories 1 and 2, shall be provided for such testifying class members simultaneously with plaintiffs' service of their witness list.

## Document Demands 1 and 2

Turning to defendants' two (2) outstanding document demands for form contracts used in the named plaintiffs' businesses (demand 1) and equipment leases plaintiffs (including class members) entered into with other companies (demand 2). Plaintiffs object to these demands "as irrelevant, oppressive, vague, burdensome, not calculated to lead to the discovery of admissible evidence, and meant to harass and abuse Plaintiffs." OSC at Exh. G. Defendants' OSC argues that plaintiffs waived their right to object by not responding to the demands for over 18 months.

In opposition to defendants' OSC, plaintiffs further contend that both demands are palpably improper because they are duplicative of defendants' prior demands served in 2005 which were the subject of motion practice before Justice Heitler and ultimately resolved by stipulation.<sup>5</sup> Thus, plaintiffs contend defendants are attempting to relitigate discovery issues that have already been resolved. Defendants' reply does not address plaintiffs' foregoing claim, contending only that demands 1 and 2 "are relevant to the question of whether [plaintiff Hush] understood the lease terms to be contained on the first page of the lease."<sup>6</sup>

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<sup>5</sup> This court is unable to confirm this claim since plaintiffs only include a copy of their discovery responses as an exhibit to their notice of cross-motion and opposition to defendants' OSC. No copy of defendants' demands or any court order and/or stipulation has been provided and as such, it is impossible to determine whether or not defendants (by prior counsel) made the same demands in 2005. See Class Counsel's Aff. in (a) Supp. of Class Plaintiffs' Notice of Cross-Motion and in (b) Opp. to Defendants' OSC at Exh. 15.

<sup>6</sup> With respect to the first demand for form contracts, defendants justify this demand based upon plaintiff Sara Hush's deposition testimony that she used form contracts in her business.

The CPLR permits broad disclosure “of all matter material and necessary in the prosecution or defense of an action . . .” CPLR § 3101(a). This court agrees that defendants’ document demands 1 and 2 are arguably relevant to the named plaintiffs’ fraud cause of action, particularly to whether the named plaintiffs reasonably believed all of the terms of their leases with NLS were contained on the first page of that form contract. Their level of familiarity, if any, with form contracts generally and equipment lease forms is a factor to be considered in assessing whether they establish the element of reasonable reliance. Accordingly, this portion of defendants’ motion is granted as to the named plaintiffs but denied as to the class members for the same reasons discussed above with respect to defendants’ interrogatories.<sup>7</sup>

For all of the above reasons, it is hereby

ORDERED that the remaining relief requested in defendants’ OSC and not resolved by the stipulation and order dated August 23, 2013 is granted in part and denied in part as set forth herein; and it is further

ORDERED that plaintiffs shall respond to defendants’ document demands 1 and 2 within 30 days of the date of this decision; and it is further

ORDERED that all requests for sanctions are denied.

The preliminary hearing in this action directed by the Appellate Division, First Department shall proceed on January 6, 2014 at 9:30 a.m. at 60 Centre Street, Room

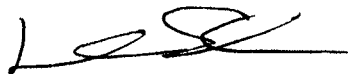
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<sup>7</sup> Addressing plaintiffs’ claims that document demands 1 and 2 are duplicative of demands previously addressed by the court (Heitler, J.) prior to class certification, and without the benefit of having any actual rulings thereon as part of this record, this court will allow the demands at this post-certification stage of the litigation.

325, New York, New York. Counsel for the parties are directed to appear for a pre-trial conference on October 15, 2013 at 9:30 a.m.

The foregoing is this court's decision and order. Copies of this decision and order have been provided to counsel for the parties via e-mail.

Dated: New York, New York  
September 23, 2013



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Hon. Martin Shulman, J.S.C.

**FILED**

SEP 26 2013

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NEW YORK



C. Plaintiffs' Interrogatories To Defendants: Defendants agree to provide sworn responses to Plaintiffs' Interrogatory number 2 (Discovery Request, Fourth Series) so as to be received on or before September 12, 2013.

D. Defendants' document requests to Plaintiffs: Plaintiffs agree to provide responsive documents to Defendants' document requests as follows:

- i. Requests #3-6: documents reflecting Plaintiffs' damages: Plaintiffs agree to provide responsive, non-privileged documents, on behalf of the individual plaintiffs and the class, to these requests within thirty (30) days of the deposition of defendant Steve Bernardone.
- ii. Request #8: documents reflecting the meaning of the term "price in effect" as that term is used in the Insurance clause of the plaintiffs' leases: Plaintiffs aver that they have no documents responsive to this Request.

E. Plaintiffs' document requests to Defendants:

(i) Request # 4 (Discovery Request, First Series): ("Correspondence, instruction booklets, "How to" bulletins, memos, notes, drafts, discussion papers, communication with sales personnel and/or agents and all other documents concerning leases, including without limitation, completion, drafting, preparation and execution thereof"). Defendants will search for and produce by September 12, 2013, to the extent not already produced, all instruction booklets, "How to" bulletins, and guidelines to sales/ISO personnel, including drafts, and communication concerning such drafts.

(ii) ESI (such as emails and memos) from/to any of the Defendants (Individual and Corporate) : The parties agree to limit the scope of this Request. Plaintiffs agree that on or before Monday, August 19, 2013, they will provide to Defendants' counsel a list of

electronic search terms to limit the scope of this Request. Upon receipt, the parties will in good faith negotiate and agree to a list of search terms and custodians for whom the search terms will apply. Defendants will then conduct a search for responsive electronic documents. The parties will negotiate in good faith if any or all of the search terms need to be edited to effectuate the purpose of the search term list. Defendants will produce any responsive, non-privileged documents resulting from the search but need not produce any documents previously produced in the *Serin* litigation. Defendants will make a reasonable effort to comply within forty-five (45) days, and will produce documents on a rolling basis. All such documents shall be produced on or before October 31, 2013.

(iii) Request #10, (Discovery Request, Fifth Series): Documents (including ESI concerning the LDW charges): The parties agree to limit the scope of this Request. Plaintiffs agree that on or before Monday, August 19, 2013, they will provide to Defendants' counsel a list of electronic search terms to limit the scope of this Request. Upon receipt, the parties will in good faith negotiate and agree to a list of search terms and custodians for whom the search terms will apply. Defendants will then conduct a search for responsive electronic documents. The parties will negotiate in good faith if any or all of the search terms need to be edited to effectuate the purpose of the search term list. Defendants will produce any responsive, non-privileged documents resulting from the search but need not produce any documents previously produced in the *Serin* litigation. Defendants will make a reasonable effort to comply within forty-five (45) days, and will produce documents on a rolling basis. All such documents shall be produced on or before October 31, 2013.

(iv) Plaintiffs' Discovery Request, Eighth Series: Defendants agree to serve responses and objections so as to be received on or before two days after Plaintiffs' counsel's

execution of this Stipulation and Order. Defendants will produce non-privileged, responsive documents within two weeks of Plaintiffs' counsel's execution of this Stipulation.

F. Depositions of Plaintiffs: Plaintiffs agree to produce the four (4) class representatives for video-taped depositions, in the county of residence of each named Plaintiff, limited to the new topic of the reasonableness of the LDW charge, which topic was identified by the Appellate Division – First Department in its Opinion, dated May 23, 2013, and limited to four (4) hours of testimony per deponent. The parties further agree to permit Defendants to establish a reasonable foundation for the permitted limited inquiry into the reasonableness of the LDW charge, but such foundation shall not be duplicative of topics already covered at plaintiffs' prior depositions. Such depositions shall be held on mutually convenient dates on or before October 31, 2013.

G. Depositions of the Defendants: Defendants agree to produce witnesses in accordance with the following:

- i. Witness(es) on behalf of corporate defendant: Defendants shall produce for deposition(s) the witnesses on behalf of Northern Leasing Systems, Inc. at the offices of defendants' counsel, for a maximum of two (2) days (fourteen hours) in the aggregate. Such deposition(s) shall be held on mutually convenient dates on or before October 31, 2013.
- ii. Individual Defendants: Defendants shall produce for depositions the individual defendants, at the offices of defendants' counsel, for a maximum of one (1) day each. Such depositions shall be held on mutually convenient dates on or before October 31, 2013.

H. Deposition of Rose Marie Richards (Lauchman's wife): Although Plaintiffs' counsel does not represent Rose Marie Richards, Plaintiffs' counsel will use best efforts to schedule the deposition of Dennis Lauchman to take place on the same day as the deposition of Ms. Richards, and at the same location within the County of their residence.

I. Depositions of additional fact witnesses: All parties reserve the right to notice depositions of additional fact witnesses on or before September 27, 2013, and take such depositions by October 31, 2013.

J. Pretrial procedures: All parties agree to serve a list of trial witnesses so as to be received within 30 days of Defendants' document production herein. The parties continue to discuss the need, propriety, and contents of a pre-trial order.

K. Timing of Trial: All parties expect this case to be ready for a bench trial by, January 6, 2013 which shall be considered a mandatory trial date, subject to the approval of the Court.

**ISSUES NOT RESOLVED BY THIS STIPULATION**

A. Defendants' Interrogatories to Plaintiffs: Plaintiffs and Defendants cannot agree on whether Plaintiffs are required to provide sworn responses to Defendants' Interrogatories numbered 1-15 and 24-27 and 31 with respect to class members other than the individual named plaintiffs. The parties have fully briefed this issue, and request that the Court rule on this issue.

B. Defendants' document requests to Plaintiffs:


- i. Request #1: form contracts that Plaintiffs use in their business, including the form contracts that Sara Hush testified that she used in her business. The parties have fully briefed this issue, and request that the Court rule on this issue.

- ii. Request #2: equipment leases entered into by Plaintiffs with companies other than Northern. The parties have fully briefed this issue and request that the Court rule on this issue.

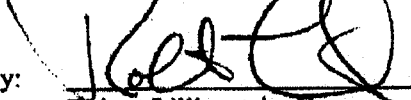
This stipulation may be executed in counterparts and by facsimile, all of which are deemed to be originals.

Dated: New York, New York  
August 23, 2013

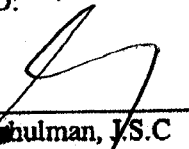
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SO-ORDERED: AUG 29 2013

  
Hon. Martin Schulman, J.S.C

HON. MARTIN SHULMAN, J S C

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