

U.S. Legal Serv., Inc. v Eldad Prime, LLC

2013 NY Slip Op 32995(U)

November 8, 2013

Sup Ct, NY County

Docket Number: 650089/2011

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MON. CLERK OF COURT
Justice

PART 35

Index Number : 650089/2011
U.S. LEGAL SERVICES, INC.
vs.
ELDAD PRIME LLC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/10/2013
MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion to amend the caption is granted and the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
U.S. LEGAL SUPPORT, INC.,

Index No.: 650089/2011

Plaintiff,

-against-

ELDAD PRIME, LLC,

Defendant.
-----x

and it is further

Page 1 of 2

Dated: _____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

ORDERED and **ADJUDGED** that the branch of plaintiff U.S. Legal Support, Inc.'s motion for summary judgment pursuant to CPLR 3212 on the first cause of action for breach of contract is granted and plaintiff U.S. Legal Services, Inc. shall have a judgment against defendant Eldad Prime, LLC for **\$630,909.46**; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion for leave to amend the complaint to add a claim for an account stated and for judgment on such claim is denied; and it is further

ORDERED that the defendant Eldad Prime, LLC's cross-motion is granted solely as to defendant's *third* counterclaim for unpaid rent for April and May 2012, with interest from April 2012, and the issue of damages as to the amounts owed is referred to the Special Referee to hear and determine. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 20 days of entry to arrange a date for the reference to J.H.O. Ira Gammerman; and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support Office (Room 158) shall **amend the caption** accordingly.

This constitutes the decision and order of the court.

Page 2 of 2

DATED: 11/8/2013


HON. CAROL EDMEAD J.S.C.

1. CHECK ONE : CASE DISPOSED NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS: GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE : SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 35

-----X
 U.S. LEGAL SERVICES, INC.,

Plaintiff,

Index No.: 650089/2011

-against-

DECISION AND ORDER

Motion Seq. 004

ELDAD PRIME, LLC,

Defendant.

-----X
 CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action for breach of a commercial lease, plaintiff U.S. Legal Services (“plaintiff”) moves (1) for summary judgment (CPLR 3212) on its first cause of action for breach of contract against Eldad Prime, LLC (“defendant”) and (2) for leave to amend the caption and to add an account stated claim. Defendant cross-moves for summary judgment on its first counterclaim for reformation, or in the alternative, for a determination on its sixth affirmative defense of unconscionability, for dismissal based on lack of standing, and for a money judgment on its claim for unpaid rent.

Background Facts

Plaintiff, a national provider of litigation support and legal recruitment services, is a tenant in the “Galleria” building located at 115 East 57th Street, New York, New York, which is owned by defendant.

On or about December 1, 1999, plaintiff’s predecessor-in-interest leased a 12th floor office space from defendant’s predecessor, pursuant to a lease, which was to expire on May 31, 2007 (the “Lease”). In 2001, defendant acquired the building and succeeded to the Lease. Prior to the expiration date of the Lease, the parties herein negotiated and executed a Lease Amendment,

renewing the Lease for another five years until May 31, 2012 (*see* the Lease Amendment dated May 29, 2007, exhibit 5). During the negotiation period, plaintiff's leasing broker Eric Beichler ("Beichler") and defendant's Vice President of commercial sales Daniel Gohari ("Gohari") exchanged various drafts for the proposed Amendment (*see e.g.*, Gohari transcript pp. 19-27).

After the renewal of the Lease, plaintiff performed certain improvement work in the rented space and thereafter demanded reimbursement from defendant in the amount of \$630,909.46, pursuant to the contract provision, which is at the heart of the parties' dispute. Section 3 (a) in the prior drafts of the Lease Amendment (exhibit 9) purportedly limited the landlord's reimbursement obligation to no more than \$34,000 (the "cap" provision). However, this provision was later deleted by plaintiff's broker Beichler and does not appear in the executed version of the Lease Amendment (exhibit 5), such that the remaining language requires defendant to reimburse plaintiff for "actual cost" of the work.¹ The final version of the four-page Lease Amendment was executed by defendant's principal Joseph Moinian ("Moinian"), who did not read the document prior to its signing.

Plaintiff demanded that defendant reimburse it for the work performed (*see* plaintiff's CFO, Charles Durrett's demand letter dated May 6, 2010, exhibit 9). However, defendant refused, claiming it did not know or agree to Beichler's changes to the contract. As a result, plaintiff brought this action for *breach of contract* and *unjust enrichment*.

Defendant filed an Answer asserting affirmative defenses, *inter alia*, for *unconscionability* and *lack of standing*; and counterclaims for *reformation* on the grounds of

¹ Beichler also deleted a clause in Section 3 (b), which originally provided that plaintiff will not be reimbursed for painting and carpeting work (exhibit 19), but that provision is not at issue on this motion.

fraud and “mutual” mistake; and for *two months of unpaid rent* for April and May of 2012, plus interest from April 2012 in the net amount of \$64,569.60.

Plaintiff now moves for summary judgment on its claim for breach of contract and for leave to amend its caption and the Summons (and Complaint) to change its name from “U.S. Legal Services, Inc.” to “U.S. Legal Support, Inc.” on the ground that in July 2011, plaintiff was merged into U.S. Legal Support, Inc., a Texas corporation authorized to do business in New York. Plaintiff also seeks to amend the Complaint to add a cause of action for an account stated and summary judgment on that claim, even if unpleaded.

In support of its breach of contract claim, plaintiff contends that it performed the renovation work pursuant to the pertinent provision in the Lease Amendment entitled “Initial Tenant Work.” The work included demolition of existing interior walls and construction of new glass and dry wall offices; installation of a new ceiling system, light fixtures; re-carpeting; and relocation of sprinkler and fire alarm systems, and was approved by defendant’s managing agent Cushman & Wakefield in December 2007 as a condition of obtaining a building permit from the New York City Department of Buildings (exhibit 15).

Further, defendant failed to reimburse plaintiff in accordance with the clear and unambiguous reimbursement provision in the Lease Amendment. Beichler testified at deposition that, during the negotiation period, plaintiff rejected the “cap” proposed by defendant (Beichler 97-100), and that Beichler spoke to defendant’s counsel about the changes he sought to make to the Lease Amendment, and secured his consent to do so prior to the execution (Beichler 97- 98). And, since defendant signed the Lease Amendment, it is bound by its terms and cannot now argue that it did not read it.

Next, plaintiff argues that the court should permit plaintiff to assert an *account stated* claim based on the pertinent facts already alleged in the original complaint and defendant did not object or respond to plaintiff's May 6, 2010 demand for at least five months, when defendant's general counsel Harry Dreizen ("Dreizen") told Beichler in a telephone conversation that he could not authorize the \$630,000 reimbursement because it appeared to him that the landlord was only going to paint and carpet plaintiff's space (Dreizen transcript, p. 11). And in any event, an oral objection is insufficient to defeat an account stated claim.

Plaintiff further argues that defendant's counterclaims should be dismissed.²

The *first* counterclaim for reformation, which alleges that defendant was deceived by fraud into signing "plaintiff's" version of the Amendment, should be dismissed because plaintiff made no misrepresentations to defendant and defendant cannot establish justifiable reliance, an essential element of fraud in the execution. Defendant's belief that document was different from the one he thought he was signing resulted from defendant's own failure to read the document. Defendant's counsel Jason Kahane ("Kahane") testified that he "assumed" the draft was the same as the one he previously forwarded to plaintiff for execution (the "Kahane draft"), and signed it without reading it first (Kahane transcript, pp. 16-25). Likewise, defendant's vice president of commercial sales Gohari testified at deposition that Moinian did not read the document. Furthermore, reformation based on fraud in the execution, as claimed here, does not void a contract.

The *second* counterclaim for reformation on the ground of mutual mistake should also be

² The court notes that, while in its Notice of Motion, plaintiff does not seek the dismissal of defendant's counterclaims, it asserts arguments for such relief in its memorandum of law.

dismissed as defendant cannot invoke a mutual mistake defense to avoid consequences of its own negligence, *i.e.*, failure to read the four-page document. The counterclaims are also barred by the doctrine of ratification as defendant accepted benefits of the Lease Amendment in the form of plaintiff's rent payments. And in any event, reformation as an equitable remedy is not available to defendant who "sat on its rights" and delayed in discovering the alleged mistake.

Defendant opposes plaintiff's motion and cross-moves for summary judgment on its first counterclaim for reformation of the Lease Amendment and for a money judgment against plaintiff for unpaid rent in the amount of \$64,569.60 for April and May of 2012, plus interest from April 2012. Defendant also seeks a determination on its sixth affirmative defense that paragraph 3(a) of the Lease Amendment is unconscionable, and a summary judgment on its first and second affirmative defense that plaintiff has no standing to bring this suit due to violations of New York Business Corporation Law ("BCL") §§1301 and 1312.

Defendant argues that it was fraudulently induced by plaintiff to sign the Lease Amendment, believing that the contract it executed was identical to the Kahane draft. The court should deny plaintiff summary judgment on his breach of contract claim since, at minimum, a question of fact exists as to misrepresentation and reliance. And, the court should reform paragraph 3 (a) in the Lease Amendment to restore it to the original terms actually agreed upon and the reformed version should read as follows:

"3. Landlord's Contribution. (a) Landlord shall reimburse Tenant for the cost of Initial Tenant Work in an amount (the "Work Allowance") equal to the lesser of (i) \$34,333.00 and (ii) the actual cost of Initial Tenant Work."

Defendant contends it never agreed to reimburse plaintiff for more than painting and carpeting [within the "cap" provision]. Plaintiff had a duty but failed to notify Kahane and

Gohari of the deletion of the material term,³ leading them to believe the Kahane draft remained unchanged.

Further, defendant justifiably relied on plaintiff's presentation of the contract because as stated in Kahane's and Gohari's affidavits, they never discussed with plaintiff any changes to the "cap" provision and the parties' prior practice was that all changes to the Lease Amendment were discussed in emails and/or highlighted in blue, as for example, the requirement that landlord carpet the "entire" premises "no later than sixty (60) days from the Lease Amendment commencement" (Gohari's Affidavit, ¶¶35-36; exhibit 8). Likewise, Beichler requested by email that the name "U.S. Legal Support, Inc." be changed to "U.S. Legal Services, Inc." (Kahane Affidavit, ¶¶28; Exhibit 5, p. 3). Based on this, Kahane and Gohari trusted plaintiff and did not read the document when Beichler returned it to defendant for signature (*see* Gohari Affidavit; Kahane Affidavit). Moinian did not read the document before signing it because he relied on Kahane reading it. And in any event, the fact that Moinian is a "sophisticated" real estate investor does not preclude him from asserting fraud on behalf of defendant, even though he did not read the document before signing it. Also, defendant could not ratify the deletion of the "cap" provision without the knowledge that said provision was deleted.

Next, plaintiff's alleged damages based on the Initial Tenant's Work performed are unsupported by an affidavit from anyone with personal knowledge; plaintiff's attorney's affirmation is insufficient to support its summary judgment motion; the person who signed the Complaint was not employed by plaintiff at the time that the work was allegedly done; and, the

³ Defendant expressly notes that it is not seeking to reform that part of the Amendment which excluded "paint" and "carpeting" from paragraph 3(b).

bills from contractors are inadmissible as they are not plaintiff's business records.

Defendant further contends that the court should deny plaintiff's motion for leave to amend the complaint to add the cause of action for an account stated because plaintiff failed to comply with the condition precedent to reimbursement under the contract (Lease Amendment, §3 (a)). Plaintiff's one-page "schedule" of its alleged payments to contractors, attached to the May 6, 2010 demand letter, does not satisfy the submission requirements for reimbursement, as it does not contain any actual bills from the contractors; does not show how the alleged payments relate to reimbursable items; there is no bill from JRM Construction which makes up the majority of the claim, and general releases alone are insufficient.

Furthermore, there is a dispute as to the "account," since defendant never agreed to the work performed by plaintiff, which was broader in scope than the one approved by landlord, or to the reimbursement of the amount sought by defendant (*see Dreizen Affidavit*, ¶12). During a phone conversation with plaintiff in September 2010, defendant's counsel Dreizen stated that he was unfamiliar with any alleged obligation for reimbursement and would "look into the matter" (*see email between Beichler and Dreizen*, exhibit 23). Likewise, in response to the second demand letter with enclosures, sent by plaintiff's counsel Eric Boden in November 2010 (exhibit 14), Dreizen "categorically rejected [plaintiff's] claims" (*see Dreizen Affirmation*, ¶19). Defendant's oral objections are sufficient to rebut any inference of implied agreement. And, permitting plaintiff to assert this cause of action at this time would be prejudicial to defendant as it had no opportunity to conduct discovery with respect to said claim. In the alternative, Section 3 (a) of the Lease Amendment, as it reads now, is unconscionable as the deletion of the "cap" provision exposed defendant to an unlimited monetary obligation, as the amount sought by

plaintiff is equal to a one-year rent under the Lease.

Next, defendant argues that plaintiff may not maintain this action because it is not qualified to do business in this State as required by BCL §1312,⁴ and it commenced this action under a wrong name of "U.S. Legal Services, Inc.," instead of its legal name "U.S. Legal Support Inc.," or its fictitious name "USLS," in violation of BCL §1301 (d) (*see* exhibits 2; 26).

And lastly, defendant seeks summary judgment on its third counterclaim for a money judgment against plaintiff for unpaid rent in the amount of \$64,659.60, for April and May of 2012, plus interest from April 2012 (exhibits 17; 18).

In reply, plaintiff argues that since defendant failed to read the document, it cannot claim *fraud* or *mistake*. Plaintiff had no duty to disclose the changes, which were apparent on the face of the document. Moreover, defendant's reliance is not justified as it had the means and ability to know what was apparent on the first page of the contract.

As to an *account stated*, plaintiff's demand for reimbursement is properly supported by the required documentation, *i.e.*, copies of actual invoices from contractors and architect, and lien waivers (exhibit 14; Durret Affidavit, ¶7). These documents are admissible as business records as they were required to be submitted to the landlord pursuant to §3 (a) (B) of the Lease. Defendant will not be prejudiced by the amendment as the pertinent facts have been alleged in the complaint and defendant has taken five depositions and did not explain what discovery it would seek (*see* CPLR 3212 [f]).

As to the *unconscionability* defense, defendant cannot show that the contract was

⁴ BCL section 1312 (a) states that a foreign corporation may not maintain any action or special proceeding in this State unless and until such corporation has been authorized to do business in this state.

procedurally or substantively unconscionable *when made*. Thus, defendant cannot be permitted to escape its contractual obligation simply because it made a bad deal.

Finally, the court should strike defendant's first affirmative defense as moot. First, BCL §1312 does not bar plaintiff's suit. The documentary evidence shows that in August 2011, defendant merged with U.S. Legal Support, Inc., a Texas corporation with the fictitious name U.S. Support Northeast (exhibit 23), which is authorized to do business in New York. Second, BCL §1301 (d) is inapplicable as plaintiff did not apply for authority to conduct business solely under the fictitious name pursuant to BCL §1304. And in any event, the failure to use a fictitious name is not an affirmative defense to an action for breach of contract. Furthermore, BCL §1314 permits a foreign corporation to sue another foreign corporation in New York where the claim relates to the property situated in this state at the time of the making of the contract and the subject matter is situated within this state.

As to the third counterclaim, while plaintiff withheld the rent for the last two months, defendant failed to account for the interest that has accrued on the security deposit, as required by the Lease.

Discussion

A. Summary Judgment on the Breach of Contract Claim

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). The motion must be supported

“by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]) and set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

To establish a breach of contract claim, plaintiff is required to show the existence of a valid contract, performance by the plaintiff, breach of the contract by defendant and resulting damages (*see Flomenbaum v New York Univ.*, 71 AD3d 80, 890 NYS2d 493 [1st Dept 2009]; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court, New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

The court finds that plaintiff established, through the copy of the Lease Amendment executed by both parties and other evidence, its entitlement to summary judgment as a matter of law. The Lease Amendment provides in pertinent part:

“Landlord’s Contribution. (a) Landlord shall reimburse Tenant for the cost of Initial Tenant Work in an amount (the “Work Allowance”) equal to the (i) the actual cost of Initial Tenant Work, upon the following terms and conditions:

(A) Reimbursement shall be made to Tenant after all Initial Tenant Work has been completed;

(B) Tenant shall have supplied to Landlord: (1) a certificate signed by Tenant’s architect and an officer of Tenant certifying that all Initial Tenant Work has been satisfactorily completed in accordance with the plans and specifications therefor approved by Landlord, (2) paid invoices evidencing the cost of all Initial Tenant Work, (3) a general release from all contractors, subcontractors and materialmen performing Initial Tenant Work and (4) all Building Department sign-offs and inspection certificates and any permits required to be issued by the

Building Department or any other governmental entities having jurisdiction thereover; and
 (C) Tenant is not then in default under this Lease.

* * *

(b) "Initial Tenant Work" means the installation of fixtures, improvements and appurtenances attached to or built into the Premises, and shall not include movable partitions, business and trade fixtures, machinery, equipment, furniture, furnishings, and other articles of personal property."

(Lease Amendment §3, exhibit 5).

The language of these provisions is clear and unambiguous. Plaintiff demonstrated that it complied with its contractual obligations as it completed the work and submitted the required documentation to the landlord; there is no indication that plaintiff was "then in default under the Lease"⁵; and, it is undisputed that defendant did not reimburse plaintiff for the work in accordance with the "Work Allowance" provision. Thus, based on the Lease Amendment (exhibit 5), defendant is in breach.

Defendant's opposition fails to raise a triable issue of fact as to its liability under the Lease Amendment.

Fraud

Defendant argues, in effect, that the parties to the contract should be bound to the terms of an earlier draft of the Lease Amendment (the Kahane draft) because defendant was fraudulently induced to accept the final version. This argument is unsupported by law or the facts.

A party alleging *fraudulent inducement* in the execution of an instrument must allege misrepresentation or a material omission of fact known to be false by the inducing party,

⁵ The court notes that under the Lease, Tenant's non-payment of rent constitutes a default (*see* Lease, §11.1 (a), defendant's exhibit 1). However, while the record shows that plaintiff owes defendant for two months rent for April and May of 2012, there is no indication that *at the time when plaintiff sought reimbursement from defendant* in May (and November) of 2010, plaintiff was in default under the Lease.

justifiable reliance of the other party on the misrepresentation or material omission, and injury (*NMIQ LLC v OmniSky Corp.*, 31 AD3d 315, 317 [1st Dept 2006], quoting *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]).

Here, even if plaintiff engaged in improper, duplicitous conduct by secretly deleting the “cap” provision in the Amendment and remaining silent about the deletion, Kahane’s and Moinian’s negligent *failure to read* the final version of the Lease Amendment forecloses a claim of fraud (see *Sorenson v Bridge Capital Corp.*, 52 AD3d 265 [1st Dept 2008], *leave to appeal dismissed*, 12 NY3d 748, 876 NYS2d 699, 904 NE2d 836 [2009]; *Movado Group, Inc. v Mozaffarian*, 92 AD3d 431 [1st Dept 2012]; *Vulcan Power Co. v Munson*, 89 AD3d 494 [1st Dept 2011]; *Nanjing standard International, Ltd. v Kwok*, 2013 WL 1127728 [Sup Ct, New York County 2013]; *Mayer v Abri Properties, LLC*, 2012 WL 6923670 [Sup Ct, New York county 2012][Trial Order][defendants' admission that they failed to read the mortgage, guarantees and other loan documents reveals a lack of merit in their claims of fraudulent inducement]).

It is a well established general rule that “[a] party who signs a document without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms” (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 861 NYS2d 280; see also *Pimpinello v Swift & Co.*, 253 NY 159, 162–163, 170 NE 530 [1930]). Specifically, such failure to read the document prevents defendant from establishing *justifiable reliance*, an essential element of fraud in the execution (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265). In *Sorenson*, where the vendor had deleted the language to which the purchaser had objected in his presence and then reinserted it without any notice, the First Department held that, while such allegedly duplicitous conduct in the course

of negotiations was improper, plaintiff had a fair opportunity to read the final agreements, including the disputed language, before executing them, but reread only those sections he was told contained additional changes. Thus, the purchaser's negligent *failure to read* agreements prevented him from establishing justifiable reliance.

Likewise, here, defendant had a fair opportunity to read the final contract, but failed to do so. That Kahane “assumed” the draft was the same as the one he had sent to plaintiff (Kahane transcript, pp. 16-25), and that Moinian, in turn, “relied on Kahane” to have read it, only highlights defendant’s negligence in failing to read the final document before signing it (*see Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 537 NYS2d 787 1988]; *Cogut v 1220 Park Ave. Corp.*, 2012 WL 3449444 [Supreme Court, New York 2012](Trial Order) [plaintiffs received the alteration agreement prior to their signing it and were afforded an opportunity to read and review it, and so are “conclusively presumed to have known, understood and assented to its terms”], *citing Imero Fiorentino Associates, Inc. v Green*, 85 AD2d 419, 447 NYS2d 942 [1st Dept 1982]).

Furthermore, the arm's length nature of this transaction negates any alleged duty to disclose (*see e.g., Republic of Croatia v Trustee of Marquess of Northampton 1987 Settlement*, 203 AD2d 167, 168, 610 NYS2d 263 [1st Dept 1994], *lv denied* 84 NY2d 805, 618 NYS2d 6 [1994]). Under New York law, a duty to disclose material facts arises when there is a fiduciary relationship between the parties, or when one party possesses superior knowledge, not readily available to the other, and knows that the other party is acting under the mistaken belief with respect to a material fact (*see Swersky v Dreyer and Traub*, 219 AD2d 321, 643 NYS2d 33 [1st Dept 1996]), *citing Beneficial Commercial Corp. v Murray Glick Datsun, Inc.*, 601 FSupp 770

[SDNY 1985]). In this regard, defendant was required to satisfy a two-prong test by showing that: the material fact was information “peculiarly within the knowledge” of plaintiff, and that the information was not such that could not have been discovered by defendant through the “exercise of ordinary intelligence” (*Black v Chittenden*, 69 NY2d 665, 669, 511 NYS2d 833, 503 NE2d 1370 [1986], quoting *Schumaker v Mather*, 133 NY 590, 596, 30 NE 755 [1892]). Under the circumstances, having executed the document without reading, defendant cannot show that it could not have discovered the deletion of the “cap” provision through the “exercise of ordinary intelligence.”

And even if *arguendo* plaintiff was under a duty to disclose the deletion based on the parties’ prior practice of tracking or communicating any changes, but remained silent before returning the final version, it cannot be said that plaintiff “concealed” the change in paragraph 3 (a), which appeared on the very first page of the document. Moreover, parties to a contract, particularly sophisticated parties, as here, have an obligation to exercise ordinary diligence in ascertaining the terms of the contracts they sign (*Sander v J.P. Morgan Chase Home Mortg.*, 56 AD3d 301, 302, 867 NYS2d 87 [1st Dept.2008]).

Here, Moinian is a sophisticated businessman and the Lease Amendment was drafted by defendant’s counsel Kahane. Under the circumstances, ordinary diligence would have included reading the agreement Moinian was signing on behalf of his company. Therefore, it is *not* reasonable to infer that Moinian’s failure to read the final Amendment was justifiable. As such, these facts are insufficient to overcome the strong presumption that defendant knew, understood and assented to the contract’s terms (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304 [2001])["a party who signs a document is

conclusively bound by its terms absent a valid excuse for having failed to read it").

Defendant failed to submit, and the court's research uncovered no controlling New York cases in support of the proposition that parties' prior conduct or practice in the process of contract negotiation can justify a party's failure to read a contract before signing it, so as to support a fraudulent concealment claim.

Since defendant's failure to read the document it signed cannot negate defendant's duty to perform under the contract, defendant failed to defeat summary judgment on the ground of fraud.

Condition Precedent

Neither does defendant raise a triable issue of fact with respect to plaintiff's alleged failure to satisfy a *condition precedent*⁶ to reimbursement under the contract (*see* Lease Amendment §3 (a) (B), *supra*, exhibit 5). The record shows that plaintiff's demand for reimbursement is properly supported by the copies of the architect's certification, invoices from contractors and the architect, paid checks and lien waivers (exhibit 14; Durret Affidavit, ¶7). Furthermore, these documents are admissible as business records, even though they were issued by third parties. "A business record will be admissible if that record "was made in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (*One Step Up, Ltd. v Webster Business Credit Corp.*, 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518[a]).

Contrary to defendant's contention, the requirement that business records be

⁶ The court notes that defendant's arguments with respect to condition precedent are set forth in the context of defendant's opposition to plaintiff's proposed claim for an account stated. However, the court deems these arguments also pertinent to plaintiff's breach of contract claim.

authenticated by the person who actually entered the data has been rendered obsolete by modern business practices (*K & K Enterprises Inc. v Stemcor USA Inc.*, 100 AD3d 415, 954 NYS2d 512 [1st Dept 2012])[holding that the third-party's bills of lading created as a result of the third-party's performance of contractual duties to defendant sufficiently reliable to be admissible]). Thus, a document may be authenticated as a business record by a witness with personal knowledge of the business' relevant practices and procedures (*see Vermont Commissioner of Banking and Insurance v Welbilt Corp.*, 133 AD2d 396 [2d Dept 1987]).

Here, the subject documents are properly authenticated as they are accompanied by an Affidavit from plaintiff's then Chief Financial Officer "Durrett," who assembled the subject documents pursuant to paragraph 3 (B) of the Lease Amendment, *i.e.*, in the ordinary course of business (*see Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d 727, 728, 498 NYS2d 453 [1986])[where plaintiff used information on delivery tickets to prepare its invoices, delivery tickets were properly admitted as business records although nonparty contract truckers supplied the information on them]; *K & K Enterprises Inc. v Stemcor USA Inc.* [the third-party's bills of lading created as a result of the third-party's performance of contractual duties to defendant sufficiently reliable to be admissible]). And in any event, the affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form", *e.g.*, documents, transcripts (*Furlender v Sichenzia Ross Friedman FERENCE LLP*, 79 AD3d 470, 912 NYS2d 204 [1st Dept 2010]).

Unconscionability

Defendant's sixth affirmative defense of unconscionability likewise fails to raise a triable

issue of fact.

Unconscionability requires some showing of “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party” (*Matter of State of New York v Avco Financial Service of New York Inc.*, 50 NY2d 383, 389, 429 NYS2d 181 [1980]).

Here, defendant has failed to set forth facts sufficient to support its claim of unconscionability. Even assuming the terms of the Lease Amendment executed by plaintiff were unreasonably favorable to plaintiff, defendant’s failure to read even the first page of the Lease Amendment, as noted, precludes it from arguing that it was deprived of a “meaningful choice” (*Gillman v Chase Manhattan Bank, N.A.*, 135 AD2d 488; *Matter of State of New York*, *supra*).

Moreover, the doctrine of unconscionability has little applicability in the commercial setting, as herein, because it is presumed that businessmen, as herein, deal at arm's length, with relatively equal bargaining power (*Gillman v Chase Manhattan Bank*, 135 AD2d 488, 521 NYS2d 729 [2d Dept 1987], *aff'd* 73 NY2d 1, 534 NE2d 824 [1988], *citing Equitable Lbr. Corp. v IPA Land Development Corp.*, 38 NY2d 516, 523, 381 NYS2d 459 [1976]).

Thus, the court cannot conclude that the Lease is unconscionable as a matter of law.

In light of this, the portion of the cross-motion for summary judgment on its sixth affirmative defense that paragraph 3 (a) of the Lease Amendment is unconscionable, is denied.

Lack of Standing

BCL §1312 provides that “[a] foreign corporation doing business in this state without authority may not maintain any action or special proceeding in this state unless and until such

corporation has been authorized to do business in this state” (BCL §1312 [a]).⁷

Here, the documentary evidence demonstrates that at the time of commencement of the action on January 11, 2011, plaintiff was authorized to do business in New York. The evidence also demonstrates that in August 2011, plaintiff [U.S. Legal Services, Inc.] merged with the Texas corporation “U.S. Legal Support, Inc.,” having the fictitious name U.S. Support Northeast, which is also authorized to do business in New York (*see* the Certificate of Merger filed with the Texas Secretary of State on July 18, 2011, exhibit 22). Thus, BCL §1312 does not bar plaintiff’s suit.

Next, defendant failed to submit any legal support for the proposition that failure of an entity to use its fictitious name, in addition to its legal name, violates BCL §1301 (d).

BCL §1301 (d) provides that:

A foreign corporation whose corporate name is not acceptable for authorization pursuant to sections 301 and 302 of this chapter, may submit in its application for authority pursuant to section 1304 of this chapter, a fictitious name under which it shall do business in this state. [. . .] A foreign corporation authorized to do business in this state under a fictitious name pursuant to this section, shall use such fictitious name in all of its dealings with the secretary of state and in the conduct of its business in this state.

Defendant failed to show, and there is no indication in the record, that plaintiff’s corporation’s name at the time of the commencement of the action “was not acceptable for authorization” pursuant to the relevant sections, *supra*, so as to require it to use the fictitious

⁷ In addition, the court notes that BCL §1312 [b] provides that “[t]he failure of a foreign corporation to obtain authority to do business in this state *shall not impair the validity of any contract or act of the foreign corporation* or the right of any other party to the contract to maintain any action or special proceeding thereon, and Footnote 6, cont’d.

shall not prevent the foreign corporation from defending any action or special proceeding in this state.”

name “U.S. Support North East” (see exhibit 23).⁸ In light of this, the portion of defendant’s cross-motion for summary judgment on the *first* and *second affirmative defenses* on the ground of lack of standing is denied.

Defendant’s Counterclaim for Reformation

Defendant’s counterclaim for reformation based on fraud fails to raise any triable issues of fact.

It is well settled that a party seeking reformation must establish, by clear and convincing evidence that mutual mistake or unilateral mistake combined with fraud exists, and *what exactly was agreed upon between the parties* (*New York First Avenue CVS, Inc. v Wellington*, 299 AD2d 205, 750 NYS2d 586 [1st Dept 2002], *citing Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986][emphasis added]; *George Backer Management Corp. v Acme Quilting Co., Inc.*, 46 NY2d 211, 219, 385 NE2d 1062, 1066 [1978]).

Here, defendant failed to make such a showing. As noted above, defendant failed to raise an issue of fact as to fraudulent concealment. And, in order to avoid performance of a contract based on a theory of *unilateral mistake*, a party to the agreement must demonstrate that the other fraudulently misled him or her and that the contract does not express the intended agreement (*Greater NY Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]). Here, as the court noted above, defendant’s alleged mistaken belief resulted from defendant’s own failure to read the document, which precludes it from asserting mistake (737 *Park Ave. Acquisition LLC v Shalov*, 106 AD3d 513, 964 NYS2d 533 [1st Dept 2013][defendant

⁸ It is also noted, as argued by plaintiff, that BCL §1314 permits a foreign corporation to sue another foreign corporation in New York where the claim relates to the property situated in this State at the time of the making of the contract and the subject matter is situated within this State.

who failed to read the instrument precluded from claiming mistake], citing *Hutchinson Burger, Inc. v Hutch Rest. Assoc., L.P.*, 100 AD3d 531 [1st Dept 2012]). Thus, the *first* counterclaim for reformation based on fraud is dismissed. Consequently, the corresponding portion of defendant's cross-motion for summary judgment on its *first* counterclaim is denied.

For the reasons discussed above, plaintiff's request for dismissal of defendant's *second* counterclaim for reformation based on *mutual mistake* is warranted. Plaintiff established that it made no mistake in preparing the final version or operated under any mistaken belief. Plaintiff further established that defendant failed to read the Lease Amendment, which precludes a claim of mutual mistake. Defendant failed to raise an issue of fact showing that the mistake was "mutual," and failed to demonstrate *what exactly both parties agreed upon* with respect to reimbursement for plaintiff's renovation work (*George Backer, supra*). Thus, the *second* counterclaim based on mutual mistake is likewise dismissed.

Therefore, since defendant failed to raise a triable issue of fact, plaintiff's summary judgment on the first cause of action for breach of contract is granted.

B. Leave to Amend

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011], citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 AD3d 507, 868 NYS2d 612 [2008]). "[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted" (*Megarix Furs, Inc. v Gimble Bros., Inc.*, 172 AD2d 209 [1st Dept 1991]). "[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion

for summary judgement” (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]).

The party “opposing a motion to amend a pleading must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Based on the Certificate of Merger, as noted (*see* p. 18), leave to amend the caption to substitute the name “U.S. Legal Support, Inc.” for “U.S. Legal Services, Inc.” is granted.⁹

However, the leave to add a claim for an *account stated* is denied.

An account stated is an *agreement* to which parties have come “regarding the amount due on past transactions” (*Lapidus & Associates, LLP v Elizabeth Street, Inc.*, 25 Misc 3d 1226(A), Slip Copy, 2009 WL 3823246 [Supreme Court, New York County 2009], citing *Rodkinson v Haecker*, 248 NY 480, 485 [1928]). The elements of the claim are defendant’s receipt and retention of the subject statement of account without proper objection within a reasonable time (*see Loheac v Children’s Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626 [1st Dept 1990], *appeal denied* 77

⁹ It should also be noted that in light of the court’s grant of the leave to amend caption, defendant’s argument that plaintiff commenced this action under the wrong name is moot at this juncture.

NY2d 802 [1991] [account stated where there was agreement to pay and failure to object within reasonable period of time]).

In light of the dispute as to defendant's obligation to pay and the amount sought by plaintiff, plaintiff fails to show an *agreement* to which parties have come "regarding the amount due on past transactions," so as to create an account stated. At most, the record indicates that defendant's general counsel Dreizen expressed his uncertainty with respect to plaintiff's alleged demand for reimbursement and promised to "to look into the matter" (*see* email between Beichler and Dreizen, exhibit 23). Thus, in the absence of such showing, the portion of plaintiff's motion to add a cause of action for an account stated is denied.

Defendant's Counterclaim for Unpaid Rent

Defendant is entitled to summary judgment on its *third* counterclaim for unpaid rent. It is undisputed that plaintiff withheld rent payments for April and May 2012 (exhibits 17 and 18). And, plaintiff's argument as to the landlord's failure to account for the interest accrued on the security deposit that was made when the original Lease was signed in December 1999, is insufficient to defeat the claim for non-payment of the rent, and only is relevant to the amount of damages. Thus, summary judgment on this counterclaim is granted on the issue of liability, and the issue of damages as to the amounts of the rent owed is referred to the Special Referee.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion to amend the caption is granted and the caption is amended to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

-----x
U.S. LEGAL SUPPORT, INC.,

Index No.: 650089/2011

Plaintiff,

-against-

ELDAD PRIME, LLC,

Defendant.
-----x

and it is further

ORDERED and ADJUDGED that the branch of plaintiff U.S. Legal Support, Inc.'s motion for summary judgment pursuant to CPLR 3212 on the first cause of action for breach of contract is granted and plaintiff U.S. Legal Services, Inc. shall have a judgment against defendant Eldad Prime, LLC for **\$630,909.46**; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion for leave to amend the complaint to add a claim for an account stated and for judgment on such claim is denied; and it is further

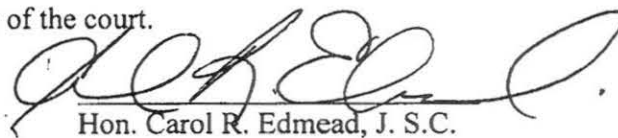
ORDERED that the defendant Eldad Prime, LLC's cross-motion is granted solely as to defendant's *third* counterclaim for unpaid rent for April and May 2012, with interest from April 2012, and the issue of damages as to the amounts owed is referred to the Special Referee to hear and determine. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 20 days of entry to arrange a date for the reference to J.H.O. Ira Gammerman; and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support Office (Room 158) shall **amend the caption** accordingly.

This constitutes the decision and order of the court.

Dated: November 8, 2013


Hon. Carol R. Edmead, J. S.C.

HON. CAROL EDMEAD