

**Hellenic Imperial Airways S.A. v Gulf Air Co.**

2016 NY Slip Op 30083(U)

January 13, 2016

Supreme Court, New York County

Docket Number: 654234/2012

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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HELLENIC IMPERIAL AIRWAYS S.A.,

Plaintiff,

**DECISION/ORDER**

-against-

Index No. 654234/2012  
Motion Seq. No. 003

GULF AIR COMPANY, G.S.C.,

Defendant.

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**HON. SALIANN SCARPULLA, J.:**

In this action arising from an alleged breach of a sublease agreement, defendant Gulf Air Company, G.S.C. (“Gulf”) moves to dismiss plaintiff Hellenic Imperial Airways S.A.’s (“Hellenic”) amended complaint pursuant to CPLR §§ 3211(a)(1) and (7).

Hellenic is an airline based in Athens, Greece, and Gulf is a company that subleases commercial aircraft. On May 2, 2011, Hellenic and Gulf signed a letter of intent to execute a sublease agreement by June 9, 2011, under which Hellenic would sublease two Airbus aircraft from Gulf. In the letter of intent, the parties agreed that the aircraft would be delivered by June 13, 2011, or another mutually agreeable date, and that Hellenic would make two security deposits (\$375,000 within seven days of signing the letter of intent and \$375,000 upon signing the sublease).

Hellenic paid both security deposits to Gulf totaling \$750,000. The parties, however, did not sign a sublease on or before June 9, 2011. Hellenic claims that despite Gulf’s repeated assurances that it would deliver the aircraft on time for the summer travel

season, Gulf failed to deliver the aircraft because the technical documents necessary for placing the aircraft on the Greek aviation registry were incomplete. On July 4, Hellenic sent a termination letter to Gulf that demanded a return of the \$750,000 security deposit.

Hellenic alleges that Gulf refused to return the security deposit and instead offered a reduced monthly rent rate for the aircraft to Hellenic. The parties eventually negotiated a sublease agreement (“sublease”) for one aircraft at a reduced monthly rent rate, which they executed on September 9, 2011.

The sublease contains several provisions that gave rise to this dispute. First, the sublease required Hellenic to pay an additional \$270,000 security deposit on or before the earlier of the Delivery Date and October 1, 2011.<sup>1</sup> Second, the sublease stated that “if the Delivery Date occurs before 1 October 2011 (i) the first Rent Payment Date shall be the Delivery Date,” but if the “Delivery Date occurs on or after 1 October 2011 (i) the first Rent Payment Date shall be 1 October 2011.” Importantly, the sublease did not contain a specific delivery date by which Gulf was required to deliver the aircraft.

After signing the sublease, the parties continued to discuss technical details concerning delivery of the aircraft and the documents necessary to register the aircraft in Greece. By October 1, Gulf had not yet delivered the aircraft, and Hellenic had not yet paid the additional \$270,000 security deposit or the first month’s rent. Hellenic alleges that, on October 4, Gulf “admitted to Hellenic that it was still not ready to perform” and

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<sup>1</sup> The term “Delivery Date” is defined by the sublease as “the date of Sub Lease Supplement No. 1, which date shall be the date the Aircraft is delivered by Sub Lessor [Gulf] and accepted by Sub Lessee [Hellenic], pursuant to the provisions of Section 2 hereof.”

“requested that Hellenic ‘bear’ with Gulf and the continued delay.” However, two days later, on October 6, Gulf sent a termination letter to Hellenic, stating that Gulf was exercising its right to terminate the sublease based on Hellenic’s failure to pay the additional security deposit and first month’s rent by October 1.

In the amended complaint, Hellenic seeks to recover the \$750,000 security deposit and additional damages arising from Gulf’s failure to deliver the aircraft. Hellenic asserts six causes of action for breach of the implied covenant of good faith and fair dealing; breach of contract; reformation based on mutual mistake; rescission based on mutual mistake; rescission based on unilateral mistake; and attorney’s fees.

Specifically, Hellenic alleges that Gulf breached the implied covenant of good faith and fair dealing by terminating the sublease when it was unable to deliver the aircraft, and that Gulf breached the sublease by failing to deliver the aircraft and return the security deposit to Hellenic. In addition, Hellenic asserts that the sublease contains two mutual or unilateral mistakes: (1) a mistaken omission of any “date by which Gulf was obligated to deliver the Leased Aircraft to Hellenic”; and (2) a mistaken provision that requires Hellenic “to pay rent for an Aircraft that Gulf Air had no obligation to deliver, at any time.”

In the current motion, Gulf argues that the complaint should be dismissed based on Hellenic’s failure to state a claim and a defense founded on documentary evidence. Gulf also contends that Hellenic’s claim for reformation or rescission of the sublease fails because the sublease contains no mutual or unilateral mistake.

## **Discussion**

### **I. Breach of Contract and Reformation**

In the complaint, Hellenic alleges that Gulf breached the sublease by failing to deliver the aircraft and return the \$750,000 security deposit. Gulf argues that this claim should be dismissed because Hellenic does not adequately plead its own performance, a breach of the sublease by Gulf, or any additional damages.

#### **a. Hellenic's contractual obligation to pay the \$270,000 security deposit**

Section 2 of the sublease required Hellenic to pay an additional \$270,000 security deposit by October 1. Hellenic does not dispute that it failed to pay this deposit, but instead contends that its failure is excused because Gulf anticipatorily repudiated the contract by refusing to deliver the aircraft.

Under the doctrine of anticipatory repudiation, when a party repudiates a contractual duty before performance is due, the non-repudiating party is entitled to claim damages for breach of the contract. *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 462-63 (1998). The doctrine of anticipatory repudiation “relieves the nonrepudiating party of its obligation of future performance and entitles that party to recover the present value of its damages from the repudiating party’s breach of the total contract.” *Am. List Corp. v. U.S. News & World Report, Inc.*, 75 N.Y.2d 38, 44 (1989); *Kaplan v. Madison Park Grp. Owners, LLC*, 94 A.D.3d 616, 619 (1st Dep’t 2012).

To support a claim for anticipatory repudiation, the claimant must show that the repudiating party made an unqualified and clear refusal to perform with respect to the

entire contract. *Highbridge Dev. BR LLC v. Diamond Dev., LLC*, 67 A.D.3d 1112, 1115 (3d Dep't 2009). "A repudiation can be either 'a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach' or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.'" *Norcon Power Partners, L.P.*, 92 N.Y.2d at 463 (quoting Restatement [Second] of Contracts § 250); *Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 301 A.D.2d 70, 77 (1st Dep't 2002).

Hellenic contends that Gulf unequivocally repudiated the sublease by communicating that it was unable to deliver the aircraft. Hellenic's chairman, Talal Abureyal, states in an affidavit that, on October 4, Gulf asked Hellenic to continue bearing with Gulf's delays in delivering the aircraft. Abureyal further states that Hellenic did not pay the additional security deposit or the first month's rent on October 1 because Gulf had acknowledged that it was unable to deliver the aircraft as required by the sublease. These allegations are sufficient to state a claim for anticipatory repudiation, which if proven, would excuse Hellenic's obligation to pay the additional security deposit and permit Hellenic to claim damages for Gulf's breach of the sublease. *Highbridge Dev. BR LLC v. Diamond Dev., LLC*, 67 A.D.3d 1112, 1115 (3d Dep't 2009); 28 N.Y. Prac. Contract Law §14:7 (noting that "[o]nce it becomes clear that the party will not perform, the aggrieved party is excused from futile acts such as satisfying conditions precedent").

**b. Hellenic's contractual obligation to pay rent by October 1**

The sublease further required Hellenic to make the first rent payment on the Delivery Date, if that date occurred before October 1. Otherwise, if the Delivery Date occurred after October 1, the first rent payment would be due on October 1.

Hellenic admits that it did not make the first rent payment on October 1, but instead argues that the sublease should be reformed because the parties mistakenly included a provision that requires Hellenic to pay rent on October 1, regardless of whether the aircraft was delivered. In the alternative, Hellenic contends that its obligation to pay rent is excused based on Gulf's anticipatory repudiation of the sublease.

I first address Hellenic's claim that the sublease should be reformed based on mutual mistake. To obtain reformation of a contract "it must be shown that 'the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake on one side and fraud on the other, omitted some provision agreed upon, or inserted one not agreed upon.'" *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 29 (1st Dep't 1992) (quoting *Curtis v. Albee*, 167 N.Y. 360, 364 (1901)).

To assert a claim for mutual mistake, the plaintiff must allege that the parties have reached an agreement "and, unknown to either, the signed writing does not express that agreement." *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 574 (1986); *Greater New York Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 (1st Dep't 2007). "The purpose of reformation is not to 'alleviat[e] a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties.'" *Warberg Opportunistic*

*Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 85 (1st Dep't 2013) (quoting *George Backer Management Corp. v. Acme Quilting Co., Inc.*, 46 N.Y.2d 211, 219 (1978)).

In the amended complaint, Hellenic alleges that two mutual mistakes appear in the contract: a mistaken omission of any date by which Gulf was obligated to deliver the aircraft; and a mistaken provision that requires Hellenic to pay rent on October 1, even if the aircraft had not been delivered. In his affidavit, Hellenic's chairman Talal Abureyal states that Hellenic was responsible for registering the aircraft in Greece using documents provided by Gulf, and that the parties intended that Hellenic's obligation to pay rent on October 1 would only if the aircraft had been delivered by Gulf, even if it was not yet registered by Hellenic.

To further show the parties' agreement that Hellenic's first rent payment would coincide with delivery, Abureyal submits an email from Gulf's in-house attorney Vaughan Crossley dated July 13, 2011, in which Crossley proposes that Hellenic's "[p]ayment of the security deposit and the rentals [are] to start on delivery of the aircraft." Based on the allegations in the amended complaint and Abureyal's affidavit, Hellenic states a claim for reformation based on mutual mistake.

The sublease terms also show that the parties may have failed to memorialize an agreement that Hellenic's first rent payment would be due only upon delivery of the aircraft. Sections 3 and 4 of the sublease state that "[t]he Term for the Aircraft shall commence on the Delivery Date," and that Hellenic shall pay "Basic Rent for the Aircraft on each Rent Payment Date throughout the Term." Further, in Section 2, the sublease

states that “[t]he Aircraft . . . shall be delivered to SubLessee at Athens International Airport Greece, or . . . at such other location mutually agreed,” and that “Sub Lessee shall be permitted a reasonable two (2)-day inspection of the Aircraft not less than five (5) days prior to the delivery date therefor.” Together, these contractual provisions may indicate that the parties intended that Hellenic would only be obligated to pay rent throughout the Term, which would not commence until Gulf delivered the aircraft, and that the parties would be in continuous communication regarding the delivery date of the aircraft to ensure that Hellenic would have time to inspect the aircraft and make the first rent payment by the delivery date.

As an alternative to reformation, Hellenic argues that it is excused from paying rent based on the doctrine of anticipatory repudiation. For the reasons stated above, Hellenic sufficiently states a claim for anticipatory repudiation by alleging that Gulf repudiated the sublease when it acknowledged that it could not deliver the aircraft. If Hellenic demonstrates that Gulf anticipatorily repudiated the sublease, Hellenic’s obligation to pay the first month’s rent would be excused, and Hellenic may proceed with its breach of contract claim against Gulf.

**c. Hellenic’s damages**

Lastly, Gulf argues that Hellenic failed to allege any damages because Gulf was not required to return the \$750,000 security deposit. However, the sublease states that “upon the failure by Sub Lessor [Gulf] to deliver the Aircraft to Sub Lessee [Hellenic] in accordance with the terms and provisions of this Sub Lease, Sub Lessor shall return the

Security Deposit to Sub Lessee.” At the early stage of this action, Gulf fails to demonstrate that it is entitled to retain the \$750,000 security deposit paid by Hellenic.

Gulf further contends that Hellenic failed to adequately plead additional damages. In the amended complaint, Hellenic claims that it suffered damages resulting from Gulf’s failure to deliver the aircraft, including costs of using replacement aircraft, lost profits and lost business opportunities. These allegations are sufficient to put Gulf on notice of the additional damages that Hellenic intends to prove, and I therefore deny Gulf’s motion to dismiss the claim for additional damages.

For the reasons stated above, Gulf’s motion to dismiss Hellenic’s causes of action for breach of contract and reformation is denied.

## II. Rescission

A contract may be subject to rescission “based on a mutual mistake by the parties.” *Simkin v. Blank*, 19 N.Y.3d 46, 52 (2012). “Mutual mistake occurs when the parties have reached an oral agreement and, unknown to either, the subsequent writing does not express that agreement.” *Loyalty Life Ins. Co. v. Fredenberg*, 214 A.D.2d 297, 299 (3d Dep’t 1995). The “mutual mistake must exist at the time the contract is entered into and must be substantial.” *Gould v. Bd. of Educ. Of Sewanhaka Cent. High. Sch. Dist.*, 81 N.Y.2d 446, 453 (1993).

A plaintiff may also seek rescission based on a unilateral mistake. *Almap Holdings, Inc. v. Bank Leumi Trust Co. of New York*, 196 A.D.2d 518, 519 (2d Dep’t 1993). However, a claim of “a unilateral mistake alone is an insufficient basis for relief.” *Kotick v. Shvachko*, 130 A.D.3d 472, 473 (1st Dep’t 2015). A unilateral mistake may be

the basis for rescission if it is induced by fraud, or if enforcement of the contract would be unconscionable or “result in unjust enrichment of one party at the expense of the other.” *Cox v. Lehman Bros.*, 15 A.D.3d 239, 239 (1st Dep’t 2005); *Gould*, 81 N.Y.2d at 453 (noting that “plaintiff may be entitled to have a court of equity *rescind* a contract even where the mistake is unilateral . . . if failing to do so would result in unjust enrichment of defendant”); *Gessin Elec. Contractors, Inc. v. 95 Wall Assoc., LLC*, 74 A.D.3d 516, 520 (1st Dep’t 2010); *Kotick*, 130 A.D.3d at 473; *Desiderato v. N & A Taxi, Inc.*, 190 A.D.2d 250, 256 (1st Dep’t 1993).

Hellenic asserts that the sublease contains two mutual or unilateral mistakes, and that enforcement of the sublease as written would result in unjust enrichment to Gulf. Specifically, Hellenic claims that the sublease failed to include a delivery date for the aircraft, and mistakenly requires Hellenic to pay monthly rent regardless of whether the aircraft was ever delivered. Hellenic further alleges that it has no adequate remedy at law, and that the parties can be restored to the status quo ex ante without prejudice by Gulf’s return of the security deposit to Hellenic.

Based on the allegations in the amended complaint, Hellenic states a claim for rescission. The mistakes alleged serve as a sufficient basis for a rescission claim because they are so substantial and material that they go “to the foundation of the agreement.” *Da Silva v. Musso*, 53 N.Y.2d 543, 552 (1981) (quoting *Belknap v. Sealey*, 14 N.Y. 143, 155 (1856)). Accordingly, Gulf’s motion to dismiss the rescission claim is denied.

### **III. Breach of Implied Covenant of Good Faith and Fair Dealing**

“Implicit in all contracts is an implied covenant of fair dealing and good faith.” *Components Direct, Inc. v. European Am. Bank & Trust Co.*, 175 A.D.2d 227, 229 (2d Dep’t 1991). “The implied covenant of good faith and fair dealing ‘embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 228 (2011).

In the complaint, Hellenic alleges that Gulf breached the implied covenant of good faith and fair dealing by terminating the contract, even though it could not perform its contractual obligations. However, Hellenic may not assert a claim for breach of the implied covenant of good faith and fair dealing based on Gulf’s exercise of a contractual right to terminate the contract. I therefore grant Gulf’s motion to dismiss the first cause of action for breach of the implied covenant of good faith and fair dealing.

### **IV. Attorney’s Fees**

Section 19.05 of the sublease provides that “[i]n any litigated action, proceeding, controversy or dispute of any kind whatever in connection with the enforcement of rights under this Sub Lease, the prevailing party shall be entitled to recover its expenses, including reasonable attorneys’ fees, from the other party.”

Gulf contends that Hellenic’s claim for attorney’s fees should be dismissed because Hellenic is not a prevailing party in this action. Gulf’s motion to dismiss the claim for attorney’s fees is premature because several causes of action remain against Gulf.

In accordance with the foregoing, it is

ORDERED that defendant Gulf Air Company, G.S.C.'s motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (7) is granted only to the extent that the first cause of action for breach of the implied covenant of good faith and fair dealing is dismissed, and otherwise denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208, on February 24, 2016 at 2:15pm.

This constitutes the decision and order of this Court.

DATE:

1/13/16

  
SALIANN SCARPULLA, JSC