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| <b>General Elec. Capital Corp. v Camelot Consulting, Inc.</b>                                                                                                                                                                                            |
| 2017 NY Slip Op 31485(U)                                                                                                                                                                                                                                 |
| July 13, 2017                                                                                                                                                                                                                                            |
| Supreme Court, New York County                                                                                                                                                                                                                           |
| Docket Number: 651746/2015                                                                                                                                                                                                                               |
| Judge: Nancy M. Bannon                                                                                                                                                                                                                                   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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GENERAL ELECTRIC CAPITAL CORPORATION

Plaintiff

Index No. 651746/2015

v

DECISION AND ORDER

CAMELOT CONSULTING, INC.

Defendant.

MOT SEQ 001

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover for breach of two equipment leases, the plaintiff moves pursuant to CPLR 1018 for leave to substitute its assignee as the party plaintiff, pursuant to CPLR 3212 for summary judgment on the complaint, and pursuant to CPLR 3211(b) to strike the defendants' affirmative defenses. The defendant opposes the motion. The motion is granted.

II. BACKGROUND

On January 16, 2013, the defendant entered into a written agreement to lease certain office equipment from Konica Minolta Business Solutions, U.S.A., Inc., doing business as Konica Minolta (hereinafter Konica), for a period of 60 months at \$4,312.29 per month, for a total of \$258,737.40. Between March 17, 2013, and January 2, 2015, the defendant paid the total of

\$98,745.24, leaving a total balance of \$159,992.16 on that lease. On October 14, 2014, the defendant entered into a separate written lease with Konica for additional office equipment, with a term of 63 months at \$1,727.08 per month, beginning with the fourth month of the lease term. The defendant has not paid anything in connection with the second lease, thus leaving a total balance of \$103,624.80. The defendant was notified on May 1, 2015, that it was in default.

Both of the subject leases provide that "this agreement cannot be canceled or terminated." They both contain a liquidated damages clause that permits Konica, upon the defendant's default in payment, to collect all past due monthly charges and to accelerate payment of the present value of all remaining monthly charges, discounted at the rate of 4% per annum, plus interest at the rate of 8% per annum on any unpaid balance. In addition, upon such a default, Konica is further entitled to repossess the equipment and recover the present value of the amount of any purchase option referable to the equipment or, if none, the residual value of the equipment at the end of the term, discounted by 4% per annum, plus interest at the rate of 8% on any unpaid balance, along with the expenses incurred in repossessing the equipment. The leases also include a provision that permits Konica to recover attorney's fees if it is required to commence an action to recover for the defendant's default.

In two separate undated assignments, Konica assigned its rights under the leases to the plaintiff, General Electric Capital Corporation (GECC). GECC commenced this action on May 19, 2015. In a written assignment dated October 1, 2015, GECC assigned its rights under the leases and the affiliated accounts receivable to GE Information Technology Solutions, LLC (GEITS), a California limited liability company. On March 1, 2016, GEITS filed an amendment to its articles of organization, changing its name to Wells Fargo Vendor Financial Services, LLC (Wells Fargo).

### III. DISCUSSION

#### A. SUBSTITUTION OF ASSIGNEE AS PLAINTIFF

CPLR 1018 provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Hence, GECC may either continue this action in its own name, or seek to substitute its assignee, Wells Fargo, as the party plaintiff. See B & H Fla. Notes, LLC v Ashkenazi, 149 AD3d 401 (1<sup>st</sup> Dept. 2017). Therefore, that branch of GECC's motion which is to substitute Wells Fargo in its place and stead as a party plaintiff is granted.

B. SUMMARY JUDGMENT ON THE COMPLAINT

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1<sup>st</sup> Dept. 2009). GECC established its prima facie entitlement to judgment as a matter of law on the complaint by submitting the pleadings, an attorney's affirmation, and the affidavit of GECC's--and now Wells Fargo's--in-house litigation specialist Anthony Janney, who authenticates the leases, assignments, and account of payments that are also submitted with the motion. Janney avers on personal knowledge that Konica delivered the leased equipment to the defendant, and that the defendant only made monthly payments in connection with the first lease, but ceased doing so in January 2015.

Janney calculates the present value of all remaining monthly charges, discounted at the rate of 4% per annum, to be \$151,333.84 as to the first lease (discounted from \$159,992.16) and \$95,000.87 as to the second (discounted from \$103,624.80), for a total of \$246,334.71. He also sets forth a calculation of the residual value of the leased equipment at the end of the prescribed lease terms, concluding that the residual value of the equipment covered by the first lease was \$11,584.56 and that covered by the second lease was \$4,626.71, for a total of

\$16,211.27. Janney further includes a calculation of late fees referable to the unpaid balances as of May 1, 2015, when GECC informed the defendant that it was in default, concluding that the lease permitted GECC to recover \$643.83 in late fees on the first lease and \$345.40 on the second lease, for a total of \$989.23. Janney further asserts that GECC expended \$1,125 in repossession the subject equipment from the defendant. The plaintiff's attorney asserts that he performed 26 hours of legal services, and bills at the rate of \$275, thus entitling the plaintiff to an award of attorneys' fees in the sum of \$7,150.

In opposition, the defendant submits the affidavit of its president, Robert Cook. Cook makes only vague, unsubstantiated, and conclusory assertions that he disputes the calculation of the aggregate rental value of the leases and the residual value of the equipment, but sets forth no facts to substantiate that putative dispute. Although both Cook and GECC agree that the defendant made partial payments on the first lease, Cook incorrectly contends that GECC is claiming that he made no payments whatsoever.

The remainder of Cook's affidavit raises only legal arguments, including that the complaint fails to state a cause of action, the defendant is not in privity with GECC, the defendant's return of the equipment constitutes a defense to the claim for the residual value of the equipment. He further argues

that GECC has an obligation to mitigate damages by re-letting the equipment, the defendant received no consideration under the leases, and that GECC may not recover absent a complete accounting of its actual damages. Since Cook provides no factual basis to support any of his defenses, he fails to raise a triable issue of fact in opposition to GECC's showing, and summary judgment must be awarded to GECC.

C. DISMISSAL OF AFFIRMATIVE DEFENSES

Contrary to Cook's assertions, the defendant's affirmative defenses also fail as a matter of law.

When assessing the adequacy of a complaint in the context of CPLR 3211(a)(7), the court's role is "to determine whether plaintiffs' pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a complaint adequately states a cause of action, the court must "liberally construe the complaint," accept the facts alleged in it as true, and accord the plaintiff "the benefit of every possible favorable inference." Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty

Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, 84 NY2d 83 (1994); Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Here, the complaint clearly states a cause of action to recover for breach of contract.

There is no merit to the defendant's contention that it is not in privity with GECC, as Konica's assignee. See General Elec. Capital Corp. v Pacheco & Lugo, PLLC, 300 AD2d 185 (1<sup>st</sup> Dept. 2002).

The defendant's return of the leased equipment does not constitute a defense to the action, since the leases unequivocally permitted Konica, or its assignees, to simultaneously repossess the equipment and collect several categories of liquidated damages in the event of a default in payment.

The defense of lack of consideration is unavailing, inasmuch as the defendant essentially concedes the equipment was delivered and, hence, that Konica performed under the leases until the defendant defaulted in payment. See 600 Lexington Owner LLC v Kaplowitz, 149 AD3d 590 (1st Dept. 2017).

Nor were Konica or its assignees obligated to mitigate damages, since "[m]itigation of damages is not relevant when there is a valid liquidated damages clause." Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636, 639 (2<sup>nd</sup> Dept. 2000); see American Capital Access Serv. Corp. v Muessel, 28 AD3d

395 (1<sup>st</sup> Dept. 2006); Crown IT Services, Inc. v Koval-Olsen, 11 AD3d 263 (1<sup>st</sup> Dept. 2004); see also UCC § 2A-527. Since there is no basis upon which the court to conclude that the liquidated damages clause in leases are void as unenforceable penalties, GECC may recover those damages, and is not limited to seeking actual damages. See 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assoc., Inc., 24 NY3d 528 (2014).

#### IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion to substitute Wells Fargo Vendor Financial Services, LLC, as the party plaintiff, for summary judgment on the complaint, and to dismiss all of the defendant's affirmative defenses is granted, and it is further,

ORDERED that the caption is amended to read:

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Wells Fargo Vendor Financial  
Services, LLC,

v

Camelot Consulting, Inc.

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and it is further,

ORDERED that the Clerk of the court shall revise his records accordingly; and it is further,

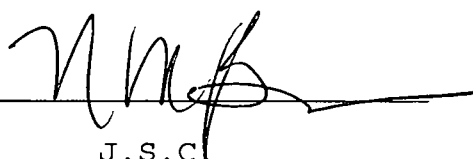
ORDERED the Clerk of the court shall enter judgment in favor

of the plaintiff, Wells Fargo Vendor Financial Services, LLC, and against the defendant, Camelot Consulting, Inc., in the sums of (a) \$262,545.98, plus interest at the rate of 8% per annum from May 1, 2015, as an for an award of the discounted balances of the subject leases and the residual value of the subject equipment, (b) \$2,114.23, as and for an award for late fees and expenses of repossession of the subject equipment, and (c) \$7,150.00 as and for an award of an attorney's fee.

This constitutes the Decision and Order of the Court.

Dated: 7-13-17

ENTER: \_\_\_\_\_

  
J.S.C.

**HON. NANCY M. BANNON**