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

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

Plaintiffs,

-against-

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

Defendants.

Index No: 101059/04

Decision & Order

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

Motion sequences 24 and 25 are consolidated for disposition. The two (2) remaining causes of action in this class action law suit allege fraud against defendants Northern Leasing Systems, Inc. ("NLS"), Jay Cohen, Steve Bernardone, Rich Hahn and Sara Krieger (collectively, "defendants"), and breach of contract solely as to NLS.

By decision and order dated April 24, 2009, this court *inter alia* granted plaintiffs' prior motion granting class certification solely with respect to plaintiffs' breach of contract claim against NLS.[1] Central to this court's determination to certify the class here was the finding that individual inquiries were unnecessary. *Pludeman v Northern Leasing Sys., Inc.*, 2009 WL 1812532, at *7. And in affirming the class certification, the Appellate Division, First Department similarly rejected NLS's claim that individual issues predominated because plaintiffs must establish a valid excuse for not reading the lease or perceiving that it was four pages rather than one, which excuse would purportedly be

[1] *Pludeman v Northern Leasing Sys., Inc.*, 24 Misc3d 1206(A), 2009 WL 1812532 (Sup Ct, NY Co, 2009). The Appellate Division, First Department modified the class certification decision to the extent of expanding the class, and otherwise affirmed. *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420 (1st Dept 2010).

unique to each class member. *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d at 424.

Thereafter, this court granted the class plaintiffs partial summary judgment as to liability on the breach of contract claim (the "SJ decision").[2] By decision dated September 15, 2011, the Appellate Division, First Department reversed the SJ decision ("SJ AD decision").[3]

In motion sequence 24, defendants move to decertify the class based upon the SJ AD decision. Plaintiffs oppose the motion and simultaneously cross-move for summary judgment, for the second time, on their breach of contract cause of action, albeit on different grounds. In motion sequence 25, defendants move by order to show cause ("OSC") for an order denying plaintiffs' cross-motion on the grounds that plaintiffs present no new evidence or other sufficient cause to justify a second summary judgment motion.[4]

In the SJ decision, this court construed plaintiffs' form leases to be one-page contracts as a matter of law and granted plaintiffs partial summary judgment on the issue of liability as to the breach of contract cause of action based upon NLS's unauthorized collection of loss damage waiver ("LDW") charges.[5] In reversing, the SJ

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[2] *Pludeman v Northern Leasing Sys., Inc.*, 27 Misc3d 1203(A), 910 NYS2d 408 (Sup Ct, NY Co, 2010).

[3] *Pludeman v Northern Leasing Sys., Inc.*, 87 AD3d 881 (1st Dept 2011).

[4] In essence, defendants seek to strike the cross-motion as improper in order to avoid opposing it on the merits.

[5] The form leases in question contain an LDW provision requiring lessees to insure leased equipment against all risk of loss or damage and provide NLS with proof of insurance. Absent such proof, lessees were deemed to have participated in the LDW program for a fee that NLS could change from time to time.

AD decision found that questions of fact preclude summary judgment on plaintiffs' breach of contract claims because:

> a factfinder must determine (1) whether plaintiffs received only the first page of the form lease or all four pages, and (2) whether, if plaintiffs received all four pages, they could reasonably have believed that all terms were contained on page 1. The latter question cannot be answered as a matter of law in plaintiffs' favor, given that page 1 of the form lease . . . states that it is 'Page 1 of 4' and contains a reference, above the lessee's signature, to paragraph 11, which appears on page 3 of the form. Moreover, the record contains evidence that the form lease each plaintiff signed was printed on one sheet of paper, 11 inches wide by 17 inches long, folded in half to create a four-page booklet . . .

Pludeman v Northern Leasing Sys., Inc., 87 AD3d at 882.

DEFENDANTS' MOTION TO DECERTIFY THE CLASS

Based upon the foregoing finding, defendants argue that:

- at least two of CPLR §901(a)'s prerequisites for class certification,[6] *viz.*, commonality and typicality (CPLR §901[a][2] and [3]), are now lacking and the class should be decertified because: "(1) liability in this case does not turn on any one common issue; and (2) individual issues - e.g. the circumstances surrounding the execution of each lease - will have to be addressed with respect to each of the hundreds of thousands of class members";[7]

- issues as to what pages each class member received and what each reasonably believed necessarily require inquiry into each lessee's interactions with independent vendors and thus cannot be determined on a class-wide basis; and
- deposition testimony and documentary evidence allegedly contradict the named plaintiffs' claims that they did not understand that their leases included the LDW charge found on page 3 thereof. Defendants thus argue that decertification is warranted because their defenses to the

[6] CPLR §901(a)'s prerequisites for class certification are: (1) the class must be so numerous that joinder of all members is impracticable; (2) common questions of law or fact must predominate; (3) the claims of the representative plaintiff must be typical of all members of the class; (4) the representative party must fairly and adequately protect the interests of the class; and (5) a class action must be the most fair and efficient means of resolving the controversy.

[7] Defendants' Memorandum of Law in Support at p. 13.

named plaintiffs' claims are not typical of the defenses applicable to the class.[8] See CPLR §901(a)(3).

In opposition, plaintiffs argue that:

- the motion to decertify the class is moot for the reasons set forth in support of their cross-motion for summary judgment (discussed *infra*); specifically, "[e]ven if the Lease is considered to be a four page document, the LDW charges were unauthorized, and class consideration is proper";[9]

- individual issues do not predominate and plaintiffs' interactions with non-party vendors at the time they signed their leases are irrelevant because the issue to be determined is "what a reasonable person in the position of the parties would have thought [was] meant (citations omitted and emphasis in original)";[10]

- defendants misinterpret the SJ AD decision as holding that the form leases cannot be construed as one page contracts as a matter of law; by contrast, plaintiffs contend that the SJ AD decision merely held that this issue "had to be resolved as a matter of fact; it could not be resolved as a matter of law" and thus, individualized inquiries still remain irrelevant;[11]

- certification is proper because this litigation involves the interpretation of an essentially uniform contractual provision; and

- the form leases' merger clause bars extrinsic evidence regarding plaintiffs' interactions with independent non-party vendors.

In reply, defendants argue, in relevant part, that:

- issues of fact exist as to what constitutes each plaintiff's lease (i.e., whether it is one page or four pages) and the only way for a factfinder to

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[8] For example, NLS argues that certain named plaintiffs authorized the LDW charges. Specifically, plaintiff Lauchman signed a Delivery & Acceptance Certificate confirming his obligation to pay taxes and insurance in addition to the basic monthly lease payments and plaintiff Hush was orally advised of the LDW charge before NLS accepted her lease.

[9] Plaintiffs' Memorandum of Law in Support of Cross-Motion and in Opposition to Motion for Decertification, at p. 22.

[10] *Id.* at p. 23.

[11] *Id.* at p. 3.

determine if each plaintiff received all lease pages is to examine the facts surrounding each lease signing;

- the Appellate Division rejected plaintiffs' merger clause argument and the SJ AD decision's holding necessarily requires examination of evidence other than the leases themselves; and

- plaintiffs improperly attempt to frame the court's inquiry as being a reasonable person standard, yet this approach presupposes that there is agreement as to what terms are part of each plaintiff's lease.

Discussion

Highlighting this court's threshold determination that as to plaintiffs' breach of contract claim,[12] there was at least one issue common/typical to the class that predominates over any individualized issues, the First Department reasoned that liability in this case "**could** turn on a single issue", to wit, "whether it is possible to construe the first page of the lease as a complete contract because of the merger clause, signature lines, and the space for the detailing of fees." *Id.* (emphasis added). In affirming certification of the class, the Appellate Division went on to state that individualized proof is not needed because resolution of the foregoing issue "is capable of being determined solely upon examination of the first page of the lease." *Id.*

Taking its cue from the Appellate Division which framed the predominant issue common to and/or typical of the class, this court's SJ decision rejected any need for extrinsic evidence after examining the first page of the lease and concluded that the form leases in question were comprised of only the first page. However, the SJ AD decision rejected this finding.

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[12] Parenthetically, the Appellate Division had resuscitated plaintiffs' breach of contract claims previously dismissed because a prior Supreme Court Justice viewed same as factually/legally insufficient as pleaded. See *Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 368 (1st Dept 2007), *aff'd* 10 NY3d 485 (2008).

In holding that a factfinder must now determine how many lease pages each plaintiff received and whether those plaintiffs who received all four pages reasonably could have believed that all its terms were contained on the first page, the First Department has jettisoned the predominant issue and expanded the scope of the factfinder's inquiry to now require individualized proof in determining plaintiffs' breach of contract cause of action. The result of the SJ AD decision is that determining liability on this cause of action is no longer merely a matter of contractual interpretation.

It will now be necessary to determine what each plaintiff's lease is comprised of and whether it was reasonable for any plaintiff to believe the document consisted of only one page. Again, this necessarily entails individual inquiries into the circumstances of each plaintiff's lease execution. Clearly, this fact specific inquiry cannot be determined from a review of the lease's language. And as a result of the SJ AD decision, individual issues now predominate over common questions of fact or law. As such, the motion to decertify the class must be granted (CPLR §901[a][1] and [2]).

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs cross-move for summary judgment on their breach of contract cause of action on the following grounds which allegedly came to light for the first time during discovery: 1) the coverage NLS's purported LDW program offered was illusory; 2) defendants never revealed the terms of the LDW program to lessees or guarantors and as such they were unable to make claims for coverage they did not know existed; 3) defendants charged a uniform $4.95 per month without regard to the equipment leased or the age of the lease; 4) only lease guarantors could make claims; 5) guarantors had to pay a $200 fee to make a claim; 6) defendants have very few documents regarding

the LDW program; 7) the only basis for the $4.95 monthly charge is defendants' unsubstantiated "belief" as to what competitors charge; 8) the LDW lease provision requires NLS to request that lessees submit evidence of insurance coverage prior to imposing the LDW fee, which NLS never did; and 9) failure to disclose the LDW fee breached the implied covenant of good faith and fair dealing. As a result of the foregoing, plaintiffs contend that the LDW charges were unconscionable and/or unreasonable as a matter of law in that the program was "nothing more than a ruse to collect money" which "provided no benefit whatsoever to lessees."[13] In addition to moving for summary judgment, plaintiffs further claim that these allegations present a common issue for the class which render defendants' decertification motion moot.

Defendants' OSC argues that the cross-motion for summary judgment is an improper second summary judgment motion based on facts and legal theories that were available at the time of plaintiffs' first motion. See *National Enters. Corp. v Dechert Price & Rhoads*, 246 AD2d 481, 482 (1st Dept 1998)(multiple summary judgment motions are impermissible in the absence of newly discovered evidence or other sufficient cause). Specifically, defendants note that plaintiffs' claim of unconscionability was asserted in the First Amended Complaint (the "complaint") filed in 2004 and conclude that plaintiffs made a strategic decision not to raise these arguments at the time they first moved for summary judgment on the breach of contract cause of action. Defendants urge this court to deny the cross-motion outright without reaching its merits.

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[13] Plaintiffs' Memorandum of Law in Support of Cross-Motion and in Opposition to Motion for Decertification, at p. 2.

Plaintiffs dispute that the facts and theories relied upon in their second summary judgment [cross] motion were available at the time of their first motion. Rather, plaintiffs contend that their cross-motion is proper since it is based upon evidence uncovered during discovery and subsequent to their summary judgment motion filed in May 2009 and this court's March 25, 2010 SJ decision. Specifically, plaintiffs rely upon defendants' responses to plaintiffs' interrogatories and document demands dated June 4, 2010 and documents defendants produced on May 5, 2010 which are Bates stamped as D000008-D000015 and D000076-D000081. Cross-motion at Exhs. 1-3.

Plaintiffs further argue that sufficient cause exists to consider their cross-motion because: 1) the supporting facts cannot be disputed as they are based upon defendants' own discovery responses, thus defendants' liability "can be disposed of summarily without the expenditure of the court's and the parties' time and resources at trial . . ." (citing *Elie v City of New York*, 33 Misc3d 958, 935 NYS2d 252 (Sup Ct, Queens Co, 2011); 2) the SJ AD decision was an intervening change in the law;[14] and 3) this court has broad powers under CPLR 907 to control the course of proceedings and protect the class' interests by preventing undue repetition and streamlining the case.

Discussion

Defendants' OSC is based upon their claim that plaintiffs could have raised the foregoing arguments at the time they brought their prior summary judgment motion.

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[14] Plaintiffs' opposition to the OSC does not explain the basis of this argument. It appears that plaintiffs rely upon dicta in the First Department's SJ AD decision stating "if the LDW fee provision is found to be part of the agreement, NLS is entitled to set the fee, provided the fee is reasonable."

Although defendants cite paragraph 156 of the complaint for its allegation that defendants' conduct was unconscionable, that claim is made in connection with plaintiffs' fraud cause of action rather than the breach of contract cause of action and the complaint contains none of the factual allegations plaintiffs now raise regarding the alleged illusory nature of NLS's LDW program. Given the timing of the parties' discovery exchange this court cannot conclude that plaintiffs were in a position to include their new claims at the time they brought their first summary judgment motion. Accordingly, the OSC must be denied.

However, although unopposed, plaintiffs' cross-motion for summary judgment must also be denied. As stated in *Weinstock v Handler*, 254 AD2d 165, 166 (1st Dept 1999) "the general rule is that a party may not obtain summary judgment on an unpleaded cause of action (citation omitted) . . ." Summary judgment may only be awarded on an unpleaded cause of action where "the proof supports such cause and if the opposing party has not been misled to its prejudice (citation omitted)." *Id.*

Here, plaintiffs' breach of contract cause of action as alleged in the complaint contends that NLS breached plaintiffs' leases by collecting an unauthorized $4.95 LDW charge not expressly reflected on their perceived one-page contracts. In support thereof, the complaint further alleges that: the lease terms were concealed from plaintiffs; only the first page of the lease is enforceable; and defendants improperly charged and collected sums in excess of those listed on the first page.

With their present allegations, plaintiffs attempt to present an entirely new theory for what is essentially a second, unpleaded breach of contract cause of action. Central to this new claim is the assumption that plaintiffs' leases include an LDW provision,

though plaintiffs make clear that they do not concede this point. Such an assumption is at complete odds with the breach of contract cause of action as presently pleaded. At this time, there is no basis for this court to consider summary judgment on the unpleaded breach of contract claim. *See, e.g., Kramer v Danalis*, 49 AD3d 263, 264 (1st Dept 2008) (reversing award of summary judgment on an unpleaded cause of action to enforce an agreement where the complaint made no reference thereto and the complaint sought contradictory relief, *viz.*, to have all agreements declared void).

In addition to seeking to plead a contradictory theory for recovery, issue has not been joined on this claim and defendants have had no opportunity to interpose a defense. Indeed, it does not appear that defendants have had any notice that plaintiffs intended to pursue a breach of contract cause of action predicated upon NLS's LDW program, as opposed to the LDW charges, being a "scam". As in *Primestone, LLC v Lichtenstein*, 2011 WL 1258164, 2011 NY Slip Op 30743(U) (Sup Ct, NY Co.), "the claim that [plaintiffs are] seeking summary judgment on is new and, until [plaintiffs] brought this motion, never an issue in this case." The discovery plaintiffs obtained from defendants and which forms the basis for their new claim has been in plaintiffs' counsel's possession since June 2010, approximately a year and a half before plaintiffs made this cross-motion. This court cannot help but conclude that this claim is "coming from out of nowhere" in an attempt to prevent class decertification. The more appropriate course of action is for plaintiffs to move to amend the complaint, if they so choose.

In any event, even if it were appropriate for this court to consider plaintiffs' unpleaded claim, plaintiffs do not establish a right to summary judgment thereon. The

discovery plaintiffs rely on does not conclusively prove that the LDW program is illusory. Rather, plaintiffs inferentially conclude from the paucity of documentation produced that the LDW program is a sham.

Finally, plaintiffs' unpleaded claim cannot serve as a basis to deny defendants' motion for class decertification. As set forth above, the class as certified cannot be saved in light of the SJ AD decision. Accordingly, for all of the foregoing reasons, it is hereby

ORDERED that defendants' motion to decertify the class (motion sequence 24) is granted; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment (motion sequence 24) is denied; and it is further

ORDERED that defendants' OSC (motion sequence 25) is denied.

Counsel for the parties are directed to appear for a status conference on July 31, 2012, at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York.

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

Dated: New York, New York
July 13, 2012

HON. MARTIN SHULMAN, J.S.C.