49 Misc.3d 1219(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Civil Court, City of New York,
New York County.

LEASE FINANCE GROUP LLC, Plaintiff,
v.
Traian INDRIES, Defendant.

No. CV–002826–14/NY. | Dec. 9, 2015.

Attorneys and Law Firms

Eliyahu Babad, Esq., Joseph I Sussman, P.C., Cedarhurst, NY, Attorneys for Plaintiff.

William Fowlkes, Esq., M. Cabrera & Associates, PC, Nanuet, NY, Attorneys for Defendant.

Opinion

PAUL A. GOETZ, J.

***1** Plaintiff, Lease Finance Group, LLC[1] ("Plaintiff" or "Lease Finance Group"), brought this action against Defendant, Traian Indries ("Defendant"), seeking to recover two thousand two hundred fifty-four dollars ($2,254.00) under a personal guarantee of obligations pertaining to an equipment finance lease agreement ("lease agreement") for a credit card processing machine. Plaintiff also seeks five hundred sixty-three dollars and fifty cents ($563.50) for legal fees incurred to enforce the agreement. The lease agreement was entered into in California by Plaintiff's purported predecessor-in-interest, Global Leasing Company ("Global Leasing"), which has a business address in Los Angeles California, and non-party, Express Tailoring, a Redlands, California business. The case is in New York County Civil Court of the City of New York pursuant to a forum selection provision in the lease agreement requiring that any disputes between the parties be heard in the State and County of New York. Defendant now moves to amend his answer pursuant to CPLR § 3025, for summary judgment pursuant to CPLR § 3212 and for dismissal on the grounds that New York is an improper forum.

Defendant's Motion for Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' " (*Jacobson v. New York City Health and Hospitals Corp.,* 22 N.Y.3d 824, 833 [2014] [*quoting Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986)]. "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.' " (*Id.* [*quoting William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh,* 22 N.Y.3d 470, 475, 982 N.Y.S.2d 813 (2013)]. "If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action." (*Id.* [*quoting Vega v. Restani Constr. Corp.,* 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 (2012)]).

Defendant moves for summary judgment on two grounds: Defendant timely cancelled the lease under Uniform Commercial Code ("U.C.C.") section 2A–407 prior to accepting the equipment and the alleged contract is void as a contract of adhesion and is unconscionable.

Cancellation of the Lease Under the U.C.C.

Defendant attests in his affidavit in support of his motion that "[o]n January 12, 2011, five days after entering into this [lease] agreement, I sent a Cancellation Letter to Payment Systems, prior to receiving the credit card processing unit. In March of 2011, I returned the leased credit card processing unit to Manager Payment Equipment & Supply, who was servicing the lease agreement at that time."

Plaintiff argues Defendant waived the affirmative defense that he cancelled the lease because it was not raised in his answer. However, the Court determines that although Defendant waived this affirmative defense, Defendant's waiver was retracted by the assertion of this unpleaded defense in his motion for summary judgment and consideration of the defense on summary judgment is warranted since Plaintiff fully opposed the issue in its responsive papers. (*Green Harbor Homeowners Assoc., Inc. v. Ermiger,* 128 A.D.3d 1142 (3rd Dept 2015).

***2** Turning to the merits of Defendant's cancellation claim, Plaintiff contends that on June 8, 2011, an employee with Plaintiff's Originations Department spoke with Defendant and he confirmed, among other things,

that the equipment was installed and operating.

Article 2–A of the U.C.C. governs finance leases that are not consumer leases such as the one entered into by the parties. Article 2–A of the U.C.C. does not have a cancellation provision; under Article 2–A a lessee may either *reject* nonconforming equipment or *revoke* acceptance of non-conforming equipment that the lessee later discovers is nonconforming. Pursuant to U.C.C. section 2–A–509 a lessee may rightfully *reject* goods that fail to conform to the lease agreement but the rejection is ineffective unless it is made within a reasonable time after tender or delivery of the equipment. U.C.C. section 2–A–517 permits a lessee to *revoke* acceptance of equipment that is nonconforming within a reasonable time after discovering the equipment is nonconforming, however, revocation of acceptance is not effective until the lessee notifies the lessor.[2]

Defendant fails to make a prima facie showing to entitlement to summary judgment on the grounds that he either effectively rejected the credit card processing machine or revoked his acceptance. Defendant does not allege, much less establish that the credit card processing machine did not conform to the lease agreement. (U.C.C. § 2–A–509). Likewise, Defendant fails to allege much less establish that he rejected the equipment or revoked his initial acceptance of it within a reasonable period of time. (U.C.C. § 2A–517).

Although Plaintiff did not cross-move for summary judgment, pursuant to CPLR § 3212(b) the Court considers whether Plaintiff is entitled to summary judgment and determines that Plaintiff fails to establish its entitlement to summary judgment on the issue of whether Defendant rejected the equipment or revoked his acceptance. Although Plaintiff asserts that Defendant admitted that the credit card processing machine was installed and operating, Plaintiff does not allege much less establish that Defendant admitted it was installed and operating properly, i.e., that it was conforming to the lease.

Therefore, a question of fact remains as to whether Defendant effectively rejected the machine, under UCC section 2–A–509 or revoked his acceptance of it, under UCC section 2–A–517 because the machine was non-conforming.

Accordingly, that branch of Defendant's motion seeking summary judgment on the grounds that he "timely cancelled the lease" is DENIED.

Unconscionability

Defendant states in his affidavit in support of his motion that he immigrated to the United States from Romania in 1996, English is not his first language and his level of education level is equivalent to the eighth grade in the United States. Defendant attests that he felt pressured to sign the lease agreement when he was approached by the sales representative and that he did not fully understand the terms and the legal consequences. Defendant further attests that he executed the lease agreement at his business in California, he lives and works in California and "traveling to New York to further defend [himself] in this action would create an extreme hardship and financial burden [on him]."

***3** Defendant's counsel argues that the lease agreement is unconscionable because when Defendant signed it, he was in "a position of greatly reduced bargaining power" and the terms unreasonably favor Plaintiff.

Plaintiff counters that the doctrine of unconscionability has little application in the commercial setting because it is primarily a doctrine created to protect the "commercially illiterate consumer." Plaintiff further argues that the lease agreement includes a provision wherein Defendant waived all of his defenses and that such a waiver provision is enforceable under UCC section 9–403.

While it is correct that the doctrine of unconscionability rarely applies in a commercial setting because the parties are presumed to have equal bargaining power (*Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.,*. 87 A.D.3d 850, 856, 929 N.Y.S.2d 206 [1st Dept 2011]) stating that both parties are businesses does not end the analysis. The equal bargaining power of the parties is merely a presumption that may be overcome. (*See Advanta Business Services Corp. v. Colon,* 4 Misc.3d 117, 782 N.Y.S.2d 502 [App T 2nd Dept 2004] [holding there is a question of fact "as to the propriety of the (finance lease agreement) negotiation process, particularly in light of defendant's alleged lack of competence in English and the complexities of the contract which included the absence of remedies in the event the consideration therefor failed and the waiver of defenses in the event of a breach."] [citations omitted]). Defendant has sufficiently rebutted the presumption that the parties had equal bargaining power with his unrebutted sworn affidavit attesting that English is not his first language, he has the equivalent of an eighth grade education and in light of the complexity of the lease agreement. (*See Id.*). Therefore, an unconscionability analysis is warranted.

"The doctrine of unconscionability contains both

substantive and procedural aspects, and whether a contract or clause is unconscionable is to be decided by the court against the background of the contract's commercial setting, purpose and effect." (*Sablosky v. Edward S. Gordon Co., Inc.,* 73 N.Y.2d 133, 138, [1989]). "The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction ..., whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." (*Gillman v. Chase Manhattan Bank, N.A.,* 73 N.Y.2d 1, 10–11 [1988] [citations omitted]). The substantive aspect of unconscionability requires the court to "consider whether one or more key terms are unreasonably favorable to one party." (*Sablosky,* 73 N.Y.2d at 138, 538 N.Y.S.2d 513, 535 N.E.2d 643). There is no general test for measuring the reasonableness of a transaction ... [but generally] "an unconscionable contract is one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible according to its literal terms." (*Id.* [citations and internal quotes omitted]).

***4** "Generally, before a determination of unconscionability can be made, a full trial of the issues is required." (*Lawrence v. Miller,* 48 A.D.3d 1, 8, 853 N.Y.S.2d 1 [1st Dept 2007]). "While determinations of unconscionability are ordinarily based on the court's conclusion that both the procedural and substantive components are present [after a trial], there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." (*Gillman,* 73 N.Y.2d at 12, 537 N.Y.S.2d 787, 534 N.E.2d 824 [internal citation omitted]). Such is the case here regarding the forum selection clause.

Normally, "[f]orum selection clauses which are prima facie valid ... are enforced because they provide certainty and predictability in the resolution of disputes." *Sterling Nat. Bank v. Eastern Shipping Worldwide, Inc.,* 35 A.D.3d 222, 826 N.Y.S.2d 235 [1st Dept 2006] *quoting Brooke Grp. Ltd. v. JCH Syndicate 488,* 87 N.Y.2d 530, 534 [1996] [internal citations omitted] "The very point of forum selection clauses, which render the designated forum convenient as a matter of law, is to avoid litigation over personal jurisdiction as well as disputes arising over the application of the long-arm statute." (*Sterling Nat. Bank,* 35 A.D.3d at 222, 826 N.Y.S.2d 235 *quoting Nat. Union Fire Ins. Co. of Pitt., Pa. v. Williams,* 223 A.D.2d 395, 397–98, 637 N.Y.S.2d 36 [1st Dept 1996]) Therefore, "it is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation." (*Id.*[citations omitted] *see also Brax Capital Group, LLC v. WinWin Gaming, Inc.,* 83 A.D.3d 591, 922 N.Y.S.2d 43 [1st Dept 2011] [finding jurisdiction over defendant guarantor pursuant to CPLR § 302(a)(1) and because he was subject to the forum selection clause and the finding of personal jurisdiction "did not violate defendant's right to due process, since his conduct and connection with this State were such that he should reasonably have anticipated being brought into court."]; *Sydney Attractions Grp. Pty., Ltd. v. Schulman,* 74 A.D.3d 476, 902 N.Y.S.2d 82 [1st Dept 2010] [finding no reason to depart from the well-settled policy of the courts of this State to enforce forum selection clauses.]).

> However, a contractual forum selection clause, ... may be set aside if it is shown by the resisting party to be unreasonable or unjust, or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.

(*Northern Leasing Systems, Inc. v. French,* 48 Misc.3d 43, 44–45 [App T 1st Dept 2015]; *citing Sterling Natl. Bank,* 35 A.D.3d at 222, 826 N.Y.S.2d 235).

Generally, in cases where forum selection clauses have been enforced, the parties have been sophisticated businesses or business people as the movant seeking non-enforcement of the clause. For example, in *Sterling National Bank* the Court observed that "*defendant corporation, a sophisticated business entity,* agreed when it originally entered into the lease agreement that venue would be placed in *New Jersey* ..." (35 AD3d at 223 [emphasis provided]). In *National Union Fire Insurance Company,* the Court noted "Plaintiff ... provided a bond to Franklin Cimarron Pointe Associates, a failed real estate limited partnership, guarantying the payment of promissory notes given to its lender by *defendant investors* ... The promissory notes contemporaneously executed contain choice of law and selection of forum clauses that exclusively designate *Pennsylvania* as the forum for litigation of disputes." (223 A.D.2d at 395 [emphasis provided]). Another common thread in *Sterling National Bank* and *National Union Fire*

Insurance Company is that both cases involved forum selection clauses designating litigation in states sharing boarders with New York, New Jersey in *Sterling National Bank* and Pennsylvania in *National Union Fire Insurance Company.*

***5** In *Brax Capital Group,* the defendant was a corporate executive with intertwining corporate and personal roles involved in procuring investors for a corporation that he chaired. (83 AD3d at 591). The defendant in *Brax* "sent others to New York who acted on his behalf in dealing with investment bankers involved in obtaining financing for the corporation." (*Id.*) It is also worth noting that the Court in *Brax* based its finding of personal jurisdiction over the defendant not just on the forum selection provision but also pursuant to New York's long arm statute (CPLR § 302).

The defendant in *Sydney Attractions Group* was not a business but an individual with a dispute with a Australian company, the plaintiff, over a deed. (74 AD3d at 476). The *Sydney Attractions* Court noted that the forum selection clause requiring that disputes be resolved in the Courts of the State of New South Wales and of the Commonwealth of Australia could not be unilaterally waived by the plaintiff because it was not only for the plaintiff's benefit but also for the other Australian company that was a party to the contract. (*Id.*).

This case is distinguishable from the above cited authorities. Here, the Defendant is neither a sophisticated business entity (*Sterling National Bank*), nor an investor (*National Union Fire Insurance*), nor a party seeking investors in a corporation (*Brax*), but rather an immigrant whose first language is not English and whose education level is equivalent to the eighth grade in the United States. Here, Plaintiff seeks to enforce the forum selection clause, unlike *Sydney Attractions Group* where Plaintiff sought to unilaterally waive forum selection.

Turning to the provisions of the parties' lease agreement, in addition to the forum selection clause requiring that disputes between the parties be heard in a court located in the County and State of New York, the lease agreement provides for a term of forty-eight (48) months with a monthly lease payment of forty-nine dollars ($49.00), plus applicable taxes[3] and four dollars and ninety-five cents ($4.95) charge per month if Defendant fails to procure insurance for the machine. Assuming Defendant made no payments and he failed to obtain insurance for the credit card processing machine, he would owe Plaintiff, under the terms of the lease agreement, two thousand five hundred eighty-nine dollars and sixty cents ($2,589.60). Requiring Defendant to travel two thousand seven hundred (2,700) miles from California to New York City to defend himself in a case seeking roughly $2,600.00 lands the forum selection clause in this lease agreement between these parties squarely within the exceptional circumstance where a determination of procedural unconscionability is unnecessary because the forum selection provision here is "so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." (*Gillman,* 73 N.Y.2d at 12, 537 N.Y.S.2d 787, 534 N.E.2d 824). Indeed a question might be raised if the purpose of the forum selection clause in this case is not to "provide certainty and predictability in the resolution of [the dispute]" (*Sterling Nat. Bank,* 35 A.D.3d at 222, 826 N.Y.S.2d 235) but rather to increase the likelihood of obtaining a default judgment against Defendant because of the distance he would have to travel and the expense he would incur to travel to and stay in New York City as compared to the small amount of money sought.

***6** Moreover, even if the forum selection clause were not unconscionable, it would still be unenforceable because it would be unreasonable and unjust to enforce it. This case is more on point with *Northern Leasing Sys. Inc. v. French* than with the other cited authorities discussed above.

In *French,* the Court found that the parties' dispute had no substantial nexus with New York because the lease agreement was signed in California where the defendant's business and the equipment were located and where Defendant is a resident with no ties to New York. (48 Misc.3d at 45). Quoting from *Silver v. Great American Insurance Company* (29 N.Y.2d 356, 361 [1972]), the Court in *French* observed that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." (*Id.*). After noting the defendant's advanced age and that the amount in dispute was minor, the Court held that it would be unreasonable to enforce the forum selection provision and granted the defendant's motion to dismiss on forum non conveniens grounds. (*Id.*).

Here too there is no substantial nexus with New York because the lease agreement was signed by Defendant in California with the original lessor, a California corporation. Moreover, Defendant resides in California where his business and the equipment are located and the amount in dispute is relatively minor ($2,254.00). (*French,* 48 Misc.3d at 45). Therefore, substantial justice would dictate that this case be heard in a California court. (CPLR § 327).

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Plaintiff's reliance on U.C.C. section 9–403 for the proposition that as an assignee of the lease agreement for value, in good faith and without notice of defenses to enforce waivers of defenses is not supported by the record. U.C.C. section 9–403 applies to secured transactions and "whether a transaction creates a lease or security interest is determined by the facts of each case." (U.C.C. § 1–201[37][a]).The submissions of the parties do not establish that the transaction between the parties—the lease finance agreement—created a security interest as that term is defined in U.C.C. section 1–201(37). Therefore, the applicability of U.C.C. section 9–403 is not supported by the record and Plaintiff's reliance on it is without merit.[4]

Likewise based upon this record, Plaintiff's reliance on its assertion that it is a holder in due course and citation to U.C.C. section 3–305(a) is without merit. Plaintiff bears the burden of establishing that it is holder in due course by showing it took the lease agreement for value, in good faith and without notice that it is subject to any defenses or claims. (U.C.C. § 3–302; *Advanta Business Services Corp. v. Five C's Hardware & Paint Store, Inc.,* 256 A.D.2d 369, 681 N.Y.S.2d 569 [2nd Dept 1988]). "In determining good faith, all the circumstance of the case must be considered. The relationship between the vendor, the financial company [assignor/original lessor], and the assignee, should be looked at to determine whether the assignee is so directly interested and involved in the transaction that there is an identity of interest between the assignee, the lending institution [assignor/original lessor] and the vendor." (*Id.*). Plaintiff has failed to offer any evidence of its relationship with the original lessor, Global Leasing, and the vendor, Payment Systems, so that a determination can be made whether or not there is an identity of interest between either Plaintiff and Global Leasing or Plaintiff and Payment Systems. Consequently, Plaintiff's reliance on U.C.C. section 3–305(a) is without merit on this record.

***7** Accordingly, Defendant's summary judgment motion is GRANTED solely to the extent that the Court holds that the forum selection clause in this lease agreement between these partes is illegal and unenforceable on substantive unconscionability grounds.

As to the remainder of Defendant's summary judgment motion based on unconcsionabilty grounds the motion is DENIED. The determination on the remainder of Defendant's unconscionability defense will have to be made at a full trial in the appropriate California forum. (*See Lawrence,* 48 A.D.3d at 8, 853 N.Y.S.2d 1).

Consequently, the case is DISMISSED and Defendant's motion to amend his answer is DENIED as moot.

Accordingly, it is hereby

ORDERED Defendant's summary judgment motion is GRANTED solely to the extent that the forum selection clause is illegal and unenforceable; and it is further

ORDERED Defendant's summary judgment motion is DENIED in all other respects; and it is further

ORDERED Defendant's motion to amend his answer is DENIED as moot; and it is further

ORDERED the case is DISMISSED without prejudice to an action being brought in the appropriate California forum.

This Constitutes the Decision and Order of the Court.

All Citations

Slip Copy, 49 Misc.3d 1219(A), 2015 WL 8544338 (Table), 2015 N.Y. Slip Op. 51810(U)

Footnotes

1 Plaintiff submitted the affidavit of Lina Kravic, the Director of the Originations Department at Northern Leasing Systems, Inc. Ms. Kravic states that Northern Leasing is a New York corporation. Ms. Kravic further states that Northern Leasing and Lease Finance Group have an "internal agreement" whereby Lease Finance Group's "front-end business operations" are provided by Northern Leasing. Ms. Kravic does not state whether Lease Finance Group is a New York corporation and Plaintiff does not submit any other affidavit in support of its motion. The complaint alleges Plaintiff is a Delaware corporation with its "principal offices" in the County and State of New York. Moreover, while Ms. Kravic states that Lease Finance Group purchased the lease agreement from Global Leasing, no proof of the purchase was annexed to Plaintiff's papers.

2 UCC section 2–A–407, cited by Defendant's counsel provides in pertinent part that "[i]n the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods."

3 The lease agreement does not explain or define “applicable taxes”.

4 A security interest is created “if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and ... (iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.” (U.C.C. § 1–201[37][a]). “A transaction does not create a security interest merely because it provides that: ... (iii) the lessee has the option to renew the lease or to become the owner of the goods.” (*Id.* [37][b]). Here, the lease finance agreement is not subject to termination and Defendant has right to purchase the credit card processing machine at the expiration of the term but not for “no additional consideration or nominal additional consideration” but for its “Replacement Value”. The parties’ submissions do not establish that the “Replacement Value” is “nominal” consideration.

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