H

Court of Appeals of New York.
Bruce **OVITZ**, on Behalf of Himself and All Others Similarly Situated, Appellant,
v.
BLOOMBERG L.P. et al., Respondents.

March 27, 2012.

Background: Lessee of financial information services and equipment brought action against lessor following automatic renewal of parties' subscription agreement. The Supreme Court, New York County, Judith J. Gische, J., denied lessor's motion to dismiss, and it appealed. The Supreme Court, Appellate Division, 77 A.D.3d 515, 909 N.Y.S.2d 710, reversed, and leave to appeal was granted.

Holdings: The Court of Appeals, Jones, J., held that:
(1) even assuming that General Obligations Law's lease renewal provisions supported implied private right of action, lessee did not suffer harm, so as to support claim based on lease renewal;
(2) lessee failed to state claim against lessor under the deceptive trade practices statute; and
(3) action did not present justiciable controversy upon which a declaratory judgment could be rendered or irreparable harm necessary for injunctive relief.

Affirmed.

Pigott, J., filed opinion dissenting in part.

West Headnotes

[1] Bailment 50 22

50 Bailment
50k22 k. Termination, rescission, and option to purchase property. Most Cited Cases

Even assuming that General Obligations Law's lease renewal provisions supported implied private right of action, lessee of financial information services and equipment did not suffer harm as result of lessor's automatic renewal of lease following expiration of its two-year term, so as to support claim based on such renewal, where lessee did not pay any service termination fees and did not pay for services he did not receive. McKinney's General Obligations Law §§ 5–901, 5–903.

[2] Antitrust and Trade Regulation 29T 134

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk134 k. In general. Most Cited Cases

A prima facie showing under the deceptive trade practices statute requires allegations that a defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof. McKinney's General Business Law § 349(a).

[3] Antitrust and Trade Regulation 29T 179

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(B) Particular Practices
29Tk179 k. Other particular practices. Most Cited Cases

Lessee of financial information services and equipment failed to state claim against lessor under the deceptive trade practices statute based on lessor's automatic renewal of the lease, absent allegation that he suffered injury as a result. McKinney's General Business Law § 349.

[4] Declaratory Judgment 118A 143.1

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(G) Written Instruments and Contracts
118AII(G)1 In General
118Ak143 Particular Contracts
118Ak143.1 k. In general. Most Cited Cases

Action brought against lessor by lessee of financial information services and equipment based on

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automatic renewal of his lease did not present justiciable controversy upon which a declaratory judgment could be rendered or irreparable harm necessary for injunctive relief, where lessee did not suffer actual injury, and lessor waived its claims for early termination and collection fees.

*****726** Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York City (Vincent J. Syracuse and Matthew J. Sinkman of counsel), and Sperling & Slater, P.C., Chicago Illinois (Bruce S. Sperling, Mitchell H. Macknin and Greg Shinall of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York City (Thomas H. Golden and Sameer Advani of counsel), for respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York City (Jeffrey A. Mishkin, Anthony J. Dreyer and Jamie Stockton of counsel), for Sirius XM Radio Inc., amicus curiae.

***756 OPINION OF THE COURT**

JONES, J.

****1171** In June 2000, plaintiff Bruce Ovitz, an Illinois resident, entered into a two-year subscription agreement with defendant Bloomberg L.P. (Bloomberg) to lease a desktop terminal, software and other equipment to access real-time financial information services offered by the company. The contract provided that it "shall be automatically renewed for successive two-year periods" unless either the lessee (plaintiff) or lessor (Bloomberg) decided to terminate prior to renewal "by giving not less than 60 days' prior written notice to the other."

After the term of the original agreement expired in June 2002, plaintiff continued to use the equipment and financial services, without complaint, until September 15, 2008 when he contacted a Bloomberg sales representative to apprise the company that he "no longer wished to subscribe to [Bloomberg's] services, and wanted to terminate as of the end of the month." According to plaintiffs complaint, he was informed by the Bloomberg representative that the agreement had automatically renewed until June 15, 2010 and plaintiff would be obligated to remit periodic payments****1172 ***727** through the termination date, or pay an early ***757** termination fee equivalent to a year's worth of service ($18,720). Plaintiff also alleges that Bloomberg declared that it was their "standard policy not to give its subscribers any advance notice of the automatic renewal provision or deadline."

Plaintiff sent written notice to Bloomberg on October 7, 2008, reiterating his desire to terminate the agreement. Bloomberg, in turn, did not terminate the subscription service or remove the equipment, but instead, reaffirmed its view that the agreement had automatically renewed and sent an invoice on October 23, 2008 requesting payment for the next three months of service.

In an ensuing exchange of e-mails, Bloomberg sent plaintiff an invoice for past due payments in the sum of $5,699.70. Plaintiff replied "as [I] have said repeatedly since [S]ept 08, [I] no longer want to subscribe[ ] please disconnect my software and pick up your keyboard." Bloomberg transmitted a subsequent e-mail demanding immediate payment for past due amounts, including an additional $16,470 charge for termination of the contract. Due to plaintiff's nonpayment, Bloomberg claimed that he had breached the terms of the contract and sent a notice of termination, advising that the nonpayment violated paragraph 3(a) of the agreement and as such, "unless Bloomberg L.P. Accounting receives payment in full of all past due invoices by no later than 5:00 PM on 12/15/2008 the Agreement will be terminated and your Bloomberg equipment will be removed and returned."

On December 16, 2008, plaintiff commenced the instant putative class action, alleging a violation of General Obligations Law §§ 5–901 and 5–903; breach of contract; unjust enrichment; negligent misrepresentation; violation of General Business Law § 349; and seeking declaratory and injunctive relief. Two weeks after plaintiff filed suit, Bloomberg "as an accommodation[,] ... waive[d] the early termination buy-out" and "waiv[ed] collection of fees."

Supreme Court granted, in part, Bloomberg's pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), dismissing plaintiff's breach of contract, unjust enrichment and negligent misrepresentation claims (2009 N.Y. Slip Op. 32397[U], 2009 WL 3443330 [2009]). The court, however, found an implied private right of action under General Obligations Law §§ 5–901 and 5–903 that "support[ed] a

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claim that the agreement was not properly renewed beyond the expiration date of the initial term, even if plaintiff ***758** accepted Bloomberg services" (*id.* at *11). Moreover, although acknowledging plaintiff's out-of-state residence, the court permitted his General Business Law § 349 cause of action to survive on the ground that the complaint contained sufficient factual allegations to support a claim of deceptive business acts by Bloomberg within the State of New York. Finally, the court concluded that plaintiff's claims for declaratory judgment and a permanent injunction, enjoining Bloomberg from engaging in the alleged conduct, were supported by the existence of a justiciable controversy and irreparable harm, respectively.

The Appellate Division unanimously reversed, granting Bloomberg's motion in its entirety and dismissing plaintiffs complaint (77 A.D.3d 515, 909 N.Y.S.2d 710 [1st Dept.2010]). The court remarked that Bloomberg's failure to comply with the mandates of sections 5–901 and 5–903 rendered its automatic renewal provision inoperative and unenforceable, but observed that this alone did not warrant the maintenance of plaintiff's complaint as he failed to allege "that he paid for services he did ****1173 ***728** not receive" (*id.* at 516, 909 N.Y.S.2d 710). Plaintiff's General Business Law § 349 claim was deemed meritless because he was not deceived in New York State and failed to plead actual injury suffered as a result of the alleged deceptive practices. Finally, as Bloomberg did not commence enforcement proceedings against plaintiff and waived its collection of payments and fees, there was no justiciable controversy or irreparable harm supporting equitable relief.

This Court granted plaintiff leave to appeal (16 N.Y.3d 705, 919 N.Y.S.2d 120, 944 N.E.2d 658 [2011]), and we now affirm.

[1] In the context of a CPLR 3211 motion to dismiss, even affording plaintiff every favorable inference, as we must, when reviewing the pleadings and factual allegations of his complaint (*see Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011]; *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 [1980]), plaintiff's failure to identify a cognizable injury proves fatal to his action against Bloomberg.

[1] Assuming, without deciding, that an implied private right of action lies pursuant to General Obligations Law §§ 5–901 and 5–903,[FN1] plaintiff's claim was rightly dismissed because he has not suffered any harm as a result of Bloomberg's alleged practices. Plaintiff did not pay any service termination fees and, as ***759** the Appellate Division noted, he did not pay for services he did not receive; thus, no monetary damages were incurred (*see Ludl Elecs. Prods. v. Wells Fargo Fin. Leasing*, 6 A.D.3d 397, 775 N.Y.S.2d 59 [2d Dept.2004]; *Concourse Nursing Home v. Axiom Funding Group*, 279 A.D.2d 271, 719 N.Y.S.2d 19 [1st Dept.2001]). Plaintiff contends that he suffered damages because he sought to cancel his agreement as of September 15, 2008, but had prepaid for services through September 30, 2008. However, his complaint belies this argument as it pleads that plaintiff had notified Bloomberg that he "wanted to terminate [services] as of the end of the month." Further, despite the complaint's allegation that plaintiff's credit rating was impaired, Bloomberg's concession that the automatic renewal provision clause was rendered unenforceable and waiver of its claims to ****1174 ***729** termination fees ceased any threat of injury.

FN1. General Obligations Law § 5–901 provides, in relevant part:

> "No provision of a lease of any personal property which states that the term thereof shall be deemed renewed for a specified additional period unless the lessee gives notice to the lessor of his intention to release the property at the expiration of such term, shall be operative unless the lessor, at least fifteen days and not more than thirty days previous to the time specified for the furnishing of such notice to him, shall give to the lessee written notice, served personally or by mail, calling the attention of the lessee to the existence of such provision in the lease."

General Obligations Law § 5–903(2) similarly provides:

> "No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the

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> term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract."

[2][3] Plaintiff's General Business Law § 349 [FN2] claim must be similarly dismissed for lack of injury. It is well settled that a prima facie showing requires allegations that a "defendant is engaging in an act or practice that is deceptive or misleading in a material way and that *plaintiff has been injured by reason thereof*" *(Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 [1995] [emphasis added]; *see also* ***760***City of New York v. Smokes–Spirits.Com, Inc.*, 12 N.Y.3d 616, 623, 883 N.Y.S.2d 772, 911 N.E.2d 834 [2009]; *Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958, 961, 598 N.Y.S.2d 761, 615 N.E.2d 218 [1993]).

> FN2. General Business Law § 349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

[4] Finally, the Appellate Division properly dismissed plaintiff's claims for equitable relief. In light of the absence of actual injury and Bloomberg's waiver of its claims, there is neither a justiciable controversy upon which a declaratory judgment can be rendered, nor the irreparable harm necessary for injunctive relief (*see American Ins. Assn. v. Chu*, 64 N.Y.2d 379, 383, 487 N.Y.S.2d 311, 476 N.E.2d 637 [1985]; *Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354, 525 N.Y.S.2d 828, 520 N.E.2d 546 [1988]; CPLR 6301; *Kane v. Walsh*, 295 N.Y. 198, 205–206, 66 N.E.2d 53 [1946]; *Parry v. Murphy*, 79 A.D.3d 713, 715–716, 913 N.Y.S.2d 285 [2d Dept.2010]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

PIGOTT, J. (dissenting in part).

Because, in my view, plaintiff has alleged sufficient facts to sustain his declaratory judgment action, I dissent from that part of the majority opinion affirming the Appellate Division's dismissal of that cause of action. Since this case is before us on a motion to dismiss, the facts are drawn without contradiction from plaintiff's complaint.

On June 15, 2000, plaintiff entered into an agreement with Bloomberg L.P. and Bloomberg Finance L.P. (collectively, Bloomberg) to (1) lease certain equipment (a Bloomberg terminal) and services; and (2) subscribe to additional services (news and financial information). Paragraph 2(b) of the Agreement contains an "automatic renewal provision" that states that said Agreement will be automatically renewed for successive two-year periods unless Bloomberg or plaintiff elected not to renew by giving not less than 60 days notice to the other. The provision states as follows:

"2. Term.

"(a) This agreement shall be effective from the date it is accepted by Lessor [Bloomberg] and shall remain in full force and effect thereafter until the date that is two years after the date that the Services are first provided (the 'Term'), unless earlier terminated during the Term or any renewal thereof, as follows: (i) Lessee [Plaintiff] shall have the right to terminate this Agreement at any time upon not less than 60 days' prior written notice to Lessor and ***761** upon payment of the charges set forth in paragraph 3 of this Agreement; and (ii) Lessor shall [*sic*] the right to terminate this Agreement at any time immediately upon written notice to Lessee in the event of a breach by Lessee of any of the provisions of this Agreement.

*****730 **1175** "(b) The Term shall be automatically renewed for successive two-year periods unless Lessee or Lessor elects not to renew by giving not less than 60 days' prior written notice to the

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other. If this Agreement is so renewed for any additional period beyond the initial Term, the charges payable pursuant to paragraph 3(a) hereof for such renewal period shall be calculated at the prevailing rates then offered by Lessor, and the Schedule shall be considered to be amended accordingly."

Although the Agreement expired on June 15, 2002, Bloomberg never sent a notice to plaintiff giving him advance notice of the automatic renewal as required by statute (*see* General Obligations Law §§ 5–901, 5–903), nor did plaintiff expressly renew the Agreement. Plaintiff thereafter continued making payments, and Bloomberg continued providing the equipment and services.

In September 2008, plaintiff contacted a Bloomberg representative and advised him that he no longer wished to subscribe to Bloomberg's services, and that he wished to terminate the Agreement as of the end of September 2008. The representative directed plaintiff to the automatic renewal provision and told him that the Agreement was "operative and enforceable" and that he was obligated to fulfill its terms until June 15, 2010, admitting that it was Bloomberg's "standard policy" *not* to give advance notice of the automatic renewal deadline, a policy having been in effect for the previous 10 1/2 years. The representative also stated that Bloomberg would terminate the Agreement in exchange for nearly $20,000, approximately one year's worth of payments under the Agreement.

In October 2008, plaintiff sent Bloomberg written notice stating that he wanted his subscription cancelled as of October 1, 2008. Notwithstanding this, on October 23, Bloomberg sent plaintiff a notice stating that his payment for the last quarter of 2008 was due, prompting plaintiff to e-mail Bloomberg that he had cancelled his subscription. Upon receiving a similar notice in November 2008, plaintiff demanded in writing that Bloomberg retrieve its equipment.

***762** On December 9, 2008, Bloomberg sent plaintiff a letter that included all outstanding invoices on plaintiff's account, including $5,400 on an outstanding invoice for charges subsequent to plaintiffs termination of the Agreement. The letter stated that plaintiff was in breach of the Agreement and that, per the Agreement, Bloomberg would repossess the Bloomberg equipment and that plaintiff would be liable for a 50% termination charge covering the balance of the Agreement.

Plaintiff commenced this action seeking declaratory and injunctive relief on the ground that the Agreement is unenforceable. The action also alleged an as-of-yet uncertified "class action" against Bloomberg asserting, as relevant here, causes of action premised on alleged violations of General Obligations Law §§ 5–901 and 5–903 (the "automatic renewal" statutes) and General Business Law § 349 ("unfair and deceptive acts and practices" statute). Bloomberg moved to dismiss the complaint for failure to state a cause of action.

Supreme Court denied Bloomberg's motion to dismiss the General Obligations Law §§ 5–901 and 5–903 and General Business Law § 349 causes of action, concluding that, as to the claim for a permanent injunction, the threat to plaintiff's creditworthiness was sufficient to establish irreparable injury, and that as to the declaratory judgment claim, there was a "justiciable controversy" (2009 N.Y. Slip Op. 32397[U], *13 [2009]).

*****731 **1176** The Appellate Division, in dismissing the complaint, concluded that the automatic renewal provision in the Agreement was " inoperative" and "unenforceable" because Bloomberg failed to give the requisite notice, but nevertheless found that dismissal was warranted because plaintiff failed to allege that he paid for services that he did not receive and, to the extent that plaintiff sought damages for the alleged breach of the "automatic renewal" statutes, a private right of action was not expressly created by their language, nor could it be fairly implied (77 A.D.3d 515, 515, 909 N.Y.S.2d 710 [2010]).

In my view, the Appellate Division's dismissal went well beyond its function at this stage of the proceeding. This is a declaratory judgment action and, as such, the court's duty was to determine, upon an assumption that the allegations were true, whether Bloomberg violated the automatic renewal statutes—and it is clear that it did. The court's further finding—that there is no private right of action for the violation of ***763** such statutes—goes beyond the purpose of a declaratory judgment action. Instead, it concluded that "declaratory and injunctive relief is unwarranted ... since no justiciable controversy remains to support

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the claim for declaratory relief" (*id.* at 516, 909 N.Y.S.2d 710).

Plaintiffs cause of action for declaratory and injunctive relief states that there is an "actual and justiciable controversy" between plaintiff and Bloomberg relative to their rights and obligations under the Agreement, and that Bloomberg has "engaged in and continue[s] to engage in conduct that has a great probability of causing substantial and irreparable harm." It is alleged that Bloomberg's failure to provide plaintiff and the proposed class with notices of automatic renewal of the Agreement rendered the successive Agreements inoperative and unenforceable. As a result, according to plaintiff, he and members of the putative class are entitled to declaratory relief that the Agreements are unenforceable, and that its members are entitled to injunctive relief necessary to ensure that Bloomberg's "illegal, unfair and deceptive conduct will not continue into the future."

CPLR 3001 allows a court to render a declaratory judgment as to the rights of the parties when there is a justiciable controversy (i.e., one involving a present, rather than hypothetical, contingent or remote prejudice to the plaintiff) (*see American Ins. Assn. v. Chu*, 64 N.Y.2d 379, 383, 487 N.Y.S.2d 311, 476 N.E.2d 637 [1985]). Plaintiff has alleged that notwithstanding the statutory protection given to consumers by these statutes, Bloomberg's standard practice is to automatically renew its subscribers' contracts without giving any advance notice of the automatic renewal provisions therein or the deadlines for terminating them. In other words, Bloomberg's standard practice is to violate the automatic renewal statutes.

Plaintiff further alleges that despite the fact that Bloomberg's renewals are both "inoperative" and "unenforceable" due to its failure to provide the statutorily-required notice, Bloomberg treats all of its subscriber contracts as having been automatically renewed. It sends bills and collects fees under the service contracts. When subscribers, like plaintiff, attempt to terminate the services, Bloomberg, in the words of plaintiff, "brazenly tells them that they cannot do so because their contracts were automatically renewed." Bloomberg then falsely informs its subscribers that their only choices are to continue the service and pay for the remainder of the term, or discontinue the service and pay a termination fee equal to 50% of the charges for ***764** the remainder of the two-year "renewed" term. Moreover, plaintiff ****1177 ***732** claims, if a subscriber refuses to pay fees under a " renewed" contract, Bloomberg "unleashes its bill collectors" from its New York headquarters, and bombards subscribers with dunning letters, e-mails, collection notices, and threats, misrepresenting that the subscribers are in breach of the contract; and if they do not pay, Bloomberg threatens to report them to the credit bureaus and refer them to collection agencies. This does not appear to me to warrant the "no harm, no foul" approach the courts have taken to this case.

Whether the case merits class action status is another matter and, in my view, should be left to the sound discretion of the trial court. But this seems to me like an appropriate use of our declaratory judgment jurisprudence, and I would reinstate that cause of action.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ and SMITH concur with Judge JONES; Judge PIGOTT dissents in part in a separate opinion.

Order affirmed, with costs.

N.Y.,2012.
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