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June 11, 2010

VIA ECF

The Honorable Roslynn R. Mauskopf
United States District Court, E.D.N.Y.
225 Cadman Plaza East
Courtroom 6F
Brooklyn, New York 11201

Re: Salon Management USA, LLC, et al. v. TFG - New York, L.P.
Civil Action No. 10-CV-2496 (RMM) (RLM)

Dear Judge Mauskopf:

This Firm represents Plaintiffs Salon Management USA, LLC, Beach Bum SI, LLC, Lex23 Beach Spa, LLC, Beach Bum Tanning LLC, John Haaland, Julia Haaland, James F. Oliver, and Margaret Oliver (collectively, "Plaintiffs") in the above-referenced matter. We write the Court in response to defendant TFG – New York, L.P.'s ("Defendant") letter of June 8, 2010, requesting a pre-motion conference for leave to file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3) (improper venue), or in the alternative, a motion to transfer venue pursuant to 28 U.S.C. § 1404. Although we welcome the opportunity to appear before the Court for a pre-motion conference, we respectfully submit that the proposed motion will be futile.

This dispute arises out of a "Master Lease Agreement" ("Lease") pursuant to which Defendant leased to Plaintiffs certain tanning salon equipment and for which Plaintiffs made payments to Defendant totaling over $550,000. Plaintiffs commenced the instant action in the Supreme Court of the State of New York, County of Queens, to, among other things, obtain a declaration that: (1) Defendant assigned its rights under the Lease to a third-party and Defendant no longer has any rights whatsoever under the Lease, including the right to collect any further sums from Plaintiffs; (2) Defendant cannot renew the Lease because Defendant has violated Section 5-901 of the New York General Obligations Law; and (3) the renewal provision in the Lease is unconscionable and void as against public policy because it creates a perpetual obligation on the part of Plaintiffs to renew the Lease.

Prior to answering the Complaint, Defendant removed the case to this Court. Defendant now seeks to divest this Court of jurisdiction and presumably move the case to Utah based upon the pretext of a forum selection clause in the Lease. However, since Defendant assigned the contract to a third party, Defendant does not have standing to invoke the forum selection clause. *See* Plaintiffs' Complaint, ¶ 9.

Moreover, even if Defendant has standing, this Court should not enforce an unreasonable forum selection clause such as the one in the Lease. A forum selection clause is "unreasonable": "(1) if its incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party 'will for all practical purposes be deprived of his day in court,' due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state." *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993).

Here, the forum selection is overreaching as it prevents Plaintiffs, who operate their business in New York, received equipment from Defendant in New York, and were solicited by Defendants in New York, from pursuing a lawsuit in New York arising out of the Lease in a New York forum. Consequently, the choice of forum clause impermissibly "allo[ws] defendant to solicit and sell its services in New York State while at the same time chilling and extinguishing meritorious claims by forcing injured consumers to bring suit in a distant and economically inaccessible forum." *Bongo-Astier v. Carefree Lifestyles, Inc.*, 2010 WL 1509339 at 2 (N.Y. Civ. Ct. 2010).

In *Andin International Inc. v. Matrix Funding Corp.*, 194 Misc. 2d 719, 756 N.Y.S.2d 724 (Sup. Ct., N.Y. Co. 2003) (Cahn, J.S.C.), the New York State Court ruled against Matrix Funding Corporation, a predecessor entity to Defendant, finding that the renewal and choice of Utah law provisions of an essentially identical Lease violated New York public policy. In finding the choice of Utah law cause to violate New York public policy, Justice Cahn stated that "General Obligations Law §5-901 was enacted specifically to protect New Yorkers from this type of lease provision." *Id* at *723.

Moreover, Justice Cahn found that the protections of General Obligations Law §5-901 trumped the choice of Utah law provision, because the purpose of General Obligations Law §5-901 is "to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals." *Id.* at 723 (quoting 1953 NY Legis Ann., at 61-62). (A copy of the *Andin* Decision is annexed hereto.)

As a result, Defendant seeks to invoke the choice of Utah law provision in an attempt to avoid what it knows to be unforgiving New York law and precedent and to gain what it hopes is a more favorable Utah court. However, since Defendant has no standing to enforce the terms of

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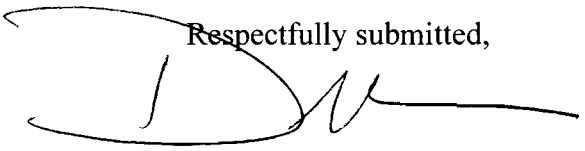
the Lease, the choice of forum clause in the Lease is the product of overreaching, and the Lease is otherwise void as against New York public policy, Defendant's proposed motion will fail and this Court should retain jurisdiction over the case.

We thank the Court for its attention to these matters.

Respectfully submitted,



Daniel A. Schnapp

cc: Nolan E. Shanahan, Esq.

LEXSEE

Cited
As of: Jun 10, 2010

Andin International Inc., Plaintiff, v. Matrix Funding Corporation, Defendant.

Index No. 600918/02

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

194 Misc. 2d 719; 756 N.Y.S.2d 724; 2003 N.Y. Misc. LEXIS 98

February 10, 2003, Decided

SUBSEQUENT HISTORY: [***1] Counsel Amended March 4, 2003.

DISPOSITION: Defendant's motion to dismiss denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant computer lessor moved to dismiss for failure to state a claim a declaratory judgment action in which plaintiff lessee challenged the lease as violative of N.Y. Gen. Oblig. Law § 5-901.

OVERVIEW: When the lessee sought to give notice of its intention to terminate a computer lease, the lessor notified the lessee that it had not given timely notice of its intention to terminate. When the lease was examined, it turned out that there was actually no way that a lessee could terminate the lease. Although the lease contained a Utah choice of forum clause, the court determined to apply New York law, since even the lessor had few ties with Utah, the lessee and the equipment were in New York, and the lease provision violated the public policy of New York as expressed in N.Y. Gen. Oblig. Law § 5-901, which absolutely forbade lease provisions that precluded termination. Although it applied New York law, the court pointed out that the same result, the denial of the lessor's motion to dismiss, might well have been reached under Utah law, under principles of unconscionability.

OUTCOME: The court denied the motion to dismiss.

CORE TERMS: lease, lessee's, renewal, lessor, cause of action, unconscionability, notice, automatic, terminate, computer equipment, public policy, unconscionable, expiration, monthly, choice of law, substantive unconscionability, automatically, manufacturer, contractual, businessmen, terminated, disparity, inasmuch, consumers, renewed, notify, rental, renew, lease term, lease provisions

LexisNexis(R) Headnotes

Civil Procedure > Federal & State Interrelationships > General Overview
Contracts Law > Types of Contracts > Lease Agreements > General Overview
[HN1]N.Y. Gen. Oblig. Law § 5-901 provides that where a lease is deemed renewed, unless the lessee provides notice of its intention not to renew, the lessor must give the lessee notice of the lessee's obligation to provide such notice prior to the time such notice is due, or the automatic renewal provision is ineffective.

Civil Procedure > Federal & State Interrelationships > General Overview
Commercial Law (UCC) > General Provisions (Article 1) > Application & Construction > Choice of Law > General Overview
Contracts Law > Defenses > Public Policy Violations
[HN2]As a general rule, New York courts will enforce contractual provisions for choice of law provided that: (a) the law of the state selected has a reasonable relation-

ship to the agreement; and (b) the law chosen does not violate a fundamental public policy of New York.

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > Unconscionable Agreements
Contracts Law > Defenses > Unconscionability > General Overview
[HN3]Utah law recognizes the doctrine of unconscionability with regard to contracts, and examines contracts in terms of two forms of unconscionability: (1) substantive unconscionability, which examines the relative fairness of the obligations assumed; and (2) procedural unconscionability, which focuses on the manner in which the contract was negotiated. Under Utah law, substantive unconscionability is indicated by: contract terms so one-sided as to oppress or unfairly surprise an innocent party; an overall imbalance in the obligations and rights imposed by the bargain; excessive price; or significant cost disparity. A gross disparity in contractual terms, even absent evidence of procedural unconscionability, can support a finding of unconscionability. Under Utah law, where it appears to the court that the contract, or any clause thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. Utah. Code Ann. § 70A-1-302(2).

HEADNOTES

Consumer Protection - Rental-Purchase Agreements - Automatic Renewal

General Obligations Law § 5-901, which provides that leases of personal property are not subject to automatic renewal unless the lessor notifies the lessee of the existence of the automatic renewal provision in time to avoid the automatic renewal, is applicable to a lease of computer equipment for use in New York by a New York corporation, notwithstanding that the lease states that it shall be governed by Utah law. The lessor was a Utah corporation, and payments under the lease were made to the corporation in Oregon. Accordingly, inasmuch as the purpose of the statute was to protect consumers from being subjected to unwanted lease renewals, it is applicable to this lease, whose renewal provisions make it almost impossible for a lessee to terminate its relationship with the lessor. Moreover, the renewal provisions are so one-sided that they could support a finding of unconscionability under Utah law.

COUNSEL: *Piper Rudnick LLP,* New York City (*Douglas A. Rappaport* and *Robin C. Tarr* of counsel), for defendant.

Anderson Kill & Olick, P.C., New York City (*Jeffrey E. Glen* of counsel), for plaintiff.

JUDGES: HERMAN CAHN, J.

OPINION BY: HERMAN CAHN

OPINION

[**725] [*719] Herman Cahn, J.

Defendant moves to dismiss for failure to state a cause of action (CPLR 3211[a] [7]).

[*720] This is an action for declaratory judgment, arising out of an agreement to lease computers. This court denies the motion, finding that portions of the agreement are against the public policy of New York State.

Plaintiff Andin International Inc. (Andin) is a jewelry manufacturer, headquartered in New York. Defendant Matrix Funding Corporation (Matrix) is a Utah corporation which is in the business of leasing computer equipment for office use.

On April 2, 1998, the parties entered into a "Master Lease Agreement" pursuant to which Matrix leased certain IBM computer software, hardware and accessories (the equipment) to Andin, for use at its New York facilities. In the complaint, Andin alleges that the lease term was for 36 months at a monthly [***2] rental of $ 27,816.81. The equipment was delivered on April 1, 1998, and the required monthly payments were duly made.

On February 15, 2001, approximately two months prior to the end of the lease term, Andin attempted to contact Matrix to arrange for return of the property at the termination of the lease. Andin alleges that when one of its employees called Matrix, he was told, by one Mr. Pistorius, that Matrix had closed its office, and that its employees now worked for another company, Applied Financials, at the same location and telephone number. The Andin employee informed Pistorius that Andin was not interested in renewing the lease, to which, Pistorius replied that Andin was "past the cancel date." Sometime thereafter, Andin decommissioned the property and placed it in storage.

A review of the lease provisions indicates that, although paragraph 3 of the lease states that Andin may terminate it after the initial 36-month term, paragraph 18 (m) places significant limitations on that right. The relevant provisions provide as follows:

"3. TERM OF LEASE:

"The term of any Lease, as to all Property designated on the applicable Schedule, shall commence on the Acceptance Date for [***3] such Property, and shall continue for an 'Initial Period' ending that number of months from the Commencement Date as specified in the Schedule. Thereafter, Lessee shall have options to purchase or return the Property or to extend the Lease, all as provided in Section 18(m) of this Agreement."

Paragraph 18 (m) provides, in part, that:

[*721] "18. GENERAL

"(m) *Lessee's Options at end of Initial Period.* At the end of the Initial Period of any Lease, or upon any expiration of any renewal or extension thereof as provided for in option (2) herein or otherwise, Lessee shall, provided at least one hundred eighty (180) days prior written notice is received by Lessor from Lessee via certified mail, do one of the following: (1) purchase the Property for a mutually agreeable price, (2) extend the Lease for twelve (12) additional months at the rate specified on the respective Schedule, or (3) return the Property to Lessor at Lessee's expense to a destination with the continental United States specified by Lessor and terminate the [**726] Schedule; provided, however, that for option (3) to apply ... Lessee must enter into a new Schedule with Lessor to lease Property which replaces the Property listed [***4] on the old Schedule. With respect to options (1) and (3), each party shall have the right in its absolute and sole discretion to accept or reject any terms of purchase or of any new Schedule, as applicable. In the event Lessor and Lessee have not agreed to either option (1) or (3) by the end of the Initial Period or any renewal or extension period then in effect, or if Lessee fails to give written notice of its option via certified mail at least one hundred eighty (180) days prior to the termination of the Initial Period or any renewal or extension period then in effect, then option (2) shall apply at the end of the Initial Period or any renewal or extension period then in effect."

Matrix's position is that the above lease provisions provide Andin with three options concerning the disposition of the equipment at the end of the initial period. Specifically, under paragraph 18 (m) of the lease, Andin may: (1) purchase the equipment from Matrix at a mutually agreeable price; (2) extend the lease for an additional 12-month period; or (3) return the equipment in exchange for new equipment pursuant to a new lease. The option must be exercised at least 180 days prior to the lease's expiration [***5] date. Matrix further asserts that under the terms of the lease, if Andin fails to exercise any of these three options, option 2 applies, thus automatically extending the lease for one additional year. A careful reading of the paragraph shows that it is almost impossible for a lessee to terminate its relationship with the lessor.

[*722] On February 12, 2002, Andin received a letter from Matrix, alleging that Andin was in default in paying $ 238,598.76, and that the "accelerated balance" due was $ 395,485.49. Matrix also demanded return of the property.

Andin then commenced the within action for a judgment declaring that: (1) pursuant to General Obligations Law § 5-901, upon Matrix's failure to notify Andin that the lease would be renewed, it ended, and Andin is not indebted to Matrix (first cause of action); (2) paragraph 18 (m) of the lease, which allows Matrix to reject any terms of purchase, and which automatically renews the lease, year after year, is unconscionable, and that inasmuch as Andin has paid the reasonable value of the property as determined by the monthly lease rate, the lease has terminated (second cause of action); (3) Matrix has abandoned [***6] the equipment which is the subject of the lease and said equipment may be disposed of by Andin (third cause of action); and (4) Andin's obligations under the lease terminated upon the expiration of the lease's original term (fourth cause of action).

Andin's first cause of action is based on [HN1]General Obligations Law § 5-901 which provides that where a lease is deemed renewed, unless the lessee provides notice of its intention not to renew, the lessor must give the lessee notice of the lessee's obligation to provide such notice prior to the time such notice is due, or the automatic renewal provision is ineffective. However, paragraph 17 (b) of the lease contains a choice of law provision, providing that the lease will be governed under the laws of the State of Utah, Matrix's home state. Utah does not have a statute which corresponds to General Obligations Law § 5-901.

[HN2]As a general rule, New York courts will enforce contractual provisions for choice of law provided

that (a) the law of the state selected has a reasonable relationship to the agreement, and (b) the law chosen does not violate a fundamental public [**727] policy of New York (*see* Finucane v Interior Constr. Corp., 264 A.D.2d 618, 620, 695 N.Y.S.2d 322 [***7] [1st Dept 1999]; Marine Midland Bank, N.A. v United Missouri Bank, N.A., 223 A.D.2d 119, 643 N.Y.S.2d 528 [1st Dept], *lv dismissed* 88 NY2d 1017 [1996]; Micro Balanced Prods. Corp. v Hlavin Indus. Ltd., 238 A.D.2d 284, 667 N.Y.S.2d 1 [1st Dept 1997]). Here, Andin is a New York based corporation and the lease was for computer equipment to be delivered to and used in New York. The equipment was delivered from the manufacturers directly to Andin in New York. It apparently never saw Utah. Although Matrix is a Utah corporation, payments were made to Matrix in Portland, Oregon.

[*723] General Obligations Law § 5-901 was enacted specifically to protect New Yorkers from this type of lease provision. Originally enacted in 1953 as General Business Law § 399, the legislative sponsor of the bill explained its rationale as follows:

> "This bill seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals ... Undoubtedly, many unsuspecting small businessmen are taken in by such evil practices which--taken collectively [***8] --are costing those who cannot afford it many thousands of dollars yearly." (Peerless Towel Supply Co., Inc. v Triton Press, Inc., 3 A.D.2d 249, 251, 160 N.Y.S.2d 163 [1st Dept 1957], quoting 1953 NY Legis Ann, at 61-62.)

In view of the public policy purpose behind the section, General Obligations Law § 5-901 is applicable to the within transaction.

Therefore, the motion to dismiss is denied.

Even if this court were to apply Utah law, paragraph 18 (m) might, in all likelihood, be unenforceable. [HN3]Utah recognizes the doctrine of unconscionability with regard to contracts, and examines contracts in terms of two forms of unconscionability: "substantive unconscionability," which examines the relative fairness of the obligations assumed, and "procedural unconscionability," which focuses on the manner in which the contract was negotiated (Resource Management Co. v Western Ranch and Livestock Co. Inc., 706 P.2d 1028 [Utah 1985]; *see also* Equitable Life & Casualty Ins. Co. v Ross II, 849 P.2d 1187 [Utah Ct App 1993]). Under Utah law, "substantive unconscionability is indicated by 'contract terms so one-sided as [***9] to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain,' excessive price or significant cost disparity" (Resource Management Co. v Western Ranch and Livestock Co. Inc., supra, 706 P.2d at 1041 [citations omitted]). A gross disparity in contractual terms, even absent evidence of procedural unconscionability, can support a finding of unconscionability (id. at 1043).

Here, under the terms of the lease, unless Andin is willing to meet the price unilaterally set for the purchase of the equipment, Andin will be bound for a successive 12-month period to renting the equipment. This clause, which, in essence, creates a perpetual obligation, is sufficiently one-sided and imbalanced so that it might be found to be unconscionable. Under Utah law, where it appears to the court that the contract, or any [*724] clause thereof, may be unconscionable, "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination" ([***10] Utah Code Ann § 70A-2-302 [2] [1953]).

[**728] Accordingly, it is ordered that defendant Matrix Funding Corporation's motion to dismiss is denied.