

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Plodeman

INDEX NO. 101059/04

MOTION DATE _____

MOTION SEQ. NO. 016

MOTION CAL. NO. _____

NORTHERN LEASING SYSTEMS

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6/20/11
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The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits <u>1-5</u>	<u>1</u>
Answering Affidavits - Exhibits _____	<u>2, 3</u>
Replying Affidavits <u>Exhibits 1-7</u>	<u>4</u>
<u>Sum-Reply Aff. in Further Opp.</u>	<u>5</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision, order and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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JUN 20 2011
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NYS SUPREME COURT - CIVIL

FILED
JUN 22 2011
COUNTY CLERK'S OFFICE
NEW YORK

MOA

Dated: JUNE 17, 2011

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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
and Judgment**

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

Plaintiff class members move by order to show cause ("OSC") to: 1) enter a judgment for declaratory relief against defendants; 2) enjoin defendants from enforcing certain lease provisions against the class members; and 3) compel discovery.

Defendants oppose the OSC.

The relevant underlying facts can be gleaned from this court's prior decisions and orders, including: the March 25, 2010 Decision and Order granting plaintiffs' motion for partial summary judgment against defendant NLS with respect to liability on plaintiffs' breach of contract/overcharge claim (*Pludeman v Northern Leasing Systems, Inc.*, 27 Misc3d 1203A [Sup Ct NY Co 2010] ["SJ Decision"]); the April 19, 2009 Decision and Order granting Plaintiffs' renewal motion for class certification (*Pludeman v Northern Leasing Systems, Inc.*, 24 Misc3d 1206A [Sup Ct NY Co 2009] ["Class Cert Decision"], *aff'd as mod* 74 AD3d 420 [1st Dept 2010] ["AD Class Cert Decision"]); *Pludeman v Northern Leasing Systems, Inc.*, 40 AD3d 366 (1st Dept. 2007) ("Pludeman AD Decision"); and *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486 (2008)

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NYS SUPREME COURT - CIVIL

014

("Pludeman CtApp Decision"). The defined terms used in the foregoing decisions and orders are incorporated herein.

Declaratory Relief

Plaintiffs specifically seek a judgment declaring that the form leases between class members and NLS are comprised of only the first page and all remaining pages are unenforceable against class members.¹ Plaintiffs base their request upon this court's SJ Decision, which "construe[d] Plaintiffs' form leases to be one-page contracts as a matter of law, and grant[ed] Plaintiffs' motion for partial summary judgment on the issue of liability as to Plaintiffs' cause of action for breach of contract for overcharges." Plaintiffs contend that the requested declaration (and related injunctive relief, *infra*) will merely formalize the court's SJ Decision.

In opposition, defendants contend that this court's SJ Decision addressed only the form lease NLS used between January 1, 1999 and January 22, 2004. Noting that the AD Class Cert Decision subsequently expanded the class to include *inter alia* lessees and/or guarantors who entered into leases with NLS, either directly or as an assignee, from January 1, 1999 through the resolution of this class action, defendants

¹ This court's Class Certification Order originally defined the class, in pertinent part, as "All persons and entities who signed as lessees and/guarantors in equipment lease finance agreements with [NLS]... between January 1, 1999 and January 22, 2004, without prejudice, and who made monthly loss and damage waiver ("Loss & Damage Waiver") payments via electronic debiting or other appropriate means to [NLS]", with certain specific exclusions. Thereafter, the AD Class Cert Decision expanded the class "to include (1) lessees/guarantors whose leases were assigned to [NLS]; (2) lessees/guarantors who executed leases with [NLS], irrespective of whether they made loss damage waiver payments; and (3) lessees/guarantors who executed leases with NLS from January 1, 1999 through the date of this action's resolution. . ." *Pludeman v Northern Leasing Systems, Inc.*, 74 AD3d at 420-421.

argue that lease forms used after January 2004 materially differed from the lease form analyzed in this court's SJ Decision. Defendant Sara Krieger submits an exhaustive affidavit detailing approximately 232 different lease forms NLS has used since 2004, some of which include LDW charges on the first page (expressly excluded from the class) and some of which contain the lessees' signature and/or initials on every page (a scenario not addressed in the SJ Decision). Thus, defendants argue that those class members who fall into the expanded class (as opposed to those in the original class as constituted at the time of the SJ Decision) as defined in the AD Class Cert Decision are not entitled to the broad declaratory and injunctive relief plaintiffs seek.

In reply, plaintiffs claim the form leases defendant Krieger proffers were not previously produced in discovery and should not be considered. Defendants respond by sur-reply denying any discovery default and noting that as early as 2007 NLS had identified 157 different lease forms. Lillienstein Sur-Reply Aff. at ¶14.

NLS does not deny that the requested declaratory relief is warranted for some class members. However, this court agrees with defendants that such relief is not warranted in favor of class members who signed lease forms materially different from the form discussed in the SJ Decision. That decision did not address the merits of the breach of contract/overcharge claim in those instances in which class members signed and/or initialed every page of the lease. Further, this court's Class Cert Decision specifically excludes as class members "such lessees and guarantors under such agreements in which the term 'LDW' or 'Loss & Damage Waiver' was expressly written above the merger clause on the signature page thereof". The AD Class Cert Order did not disturb this exclusion from the class. Thus, plaintiffs are not entitled to the

sweeping declaration they request unless their lease is substantially similar to those leases which were the subject of the SJ Decision.

As to the parameters and scope of the declaration to be granted, the court cannot simply restrict the declaration's applicability to all pre-January 2004 leases, as defendants suggest. For example, plaintiffs submit examples of form leases executed after 2004 which mirror those considered in the SJ Decision. See Exh. 1 to Chittur Reply Aff. Defendant Krieger also notes that certain lease forms used by NLS's affiliates prior to January 2004 and subsequently assigned to NLS contain LDW provisions on the first page. Thus, every lease executed after January 2004 is not materially different from the lease form discussed in the SJ Decision and the terms of each class member's lease dictate the relief they are entitled to.

For the foregoing reasons, the portion of the OSC requesting a declaration predicated upon this court's holding in the SJ Decision is granted solely to the extent that those plaintiffs whose leases contain all material terms on the first page above the merger clause and signature line which contain no provision for or reference to the LDW clause on the first page and which do not specifically incorporate or refer to the terms and conditions contained on remaining pages are entitled to a declaration that their leases are comprised of only one page and any remaining pages are unenforceable.

Injunctive Relief

Plaintiffs also seek an injunction restraining defendants from directly or indirectly enforcing any terms contained in pages 2 through 4 of the form leases against class members. Of paramount concern to the class is NLS's continued collection of fees it

allegedly is not entitled to and its undisputed pursuit of litigation against class members wherein defendants rely upon and seek court enforcement of lease terms not contained on the first page of the form lease. Again relying on the SJ Decision, plaintiffs contend defendants should be enjoined from enforcing not only the LDW provisions which form the basis of their breach of contract cause of action, but also other lease clauses not contained on the first page such as those pertaining to methods of serving process, forum selection, attorney's fees, etc. Plaintiffs detail actual cases pending before other justices of this court, the Civil Court of the City of New York and the Appellate Term, First Department, arguing that defendants' pursuit of these cases is an attempt to circumvent the SJ Decision, resulting in harm to class members and the judicial system in the form of duplicative litigation.

In opposition, defendants counter that an injunction prohibiting NLS from making arguments before other courts is an improper prior restraint. According to defendants, plaintiffs are improperly asking this court to intervene in other cases and overrule courts of coordinate jurisdiction.

This court agrees that those class members who were found to be entitled to declaratory relief (see discussion, *supra*) are also entitled to related permanent injunctive relief, as requested in the amended complaint's breach of contract cause of action, to effectuate this court's holding in the SJ Decision. To the extent plaintiff class members may be parties to litigation with NLS before other courts, they are free to raise the defense of res judicata in the context of such proceedings and have the issue adjudicated in those forums. Accordingly, the portion of the OSC seeking injunctive relief is granted to the extent set forth above.

Severance of Claims for Damages, Punitive Damages and Fraud

Plaintiffs allege that defendants have argued before other courts that the SJ Decision lacks preclusive effect because no judgment has been entered. As the court has granted plaintiffs' requests for declaratory and injunctive relief to the extent set forth above and defendants' opposition does not address this portion of the OSC, Plaintiffs' request for entry of the judgment sought and severance of their claims for fraud, damages and punitive damages is granted.

Motion to Compel

Plaintiffs' OSC also requests an order compelling defendants to produce their electronic lease database containing all leases and lease-related information for class members in a readable and searchable format. Plaintiffs' counsel contends that defendants agreed to produce the requested database at a June 15, 2010 conference. Such information is needed to ensure that all class members, and particularly the expanded class members, are identified and notified.

Defendants deny any such agreement, claiming they agreed to provide an electronic list of class members together with the amount of LDW fees each paid. Defendants provided such information to plaintiffs' counsel by CD's delivered on July 9, 2010 and September 3, 2010² and subsequently provided a list of names and

² With respect to each class member, these CD's contained: "(i) Lease #; (ii) Lessee Name; (iii) Guarantor Name; (iv) Collected LDW (amount of LDW collected); (v) Total Receivable (total of all lease payments, LDW and taxes that were payable according to the terms of the lease); (vi) Total Collected (total paid on the lease plus value of equipment it is was returned); (vii) Remaining Receivable (Total Receivable minus Total Collected); (viii) Net LDW Collected (Amount of LDW collected in excess of Remaining Receivable)." See Lillienstein Aff. in Opp. at ¶22.

addresses for potential class members. Further, defendants' counsel contends the requested database was provided to plaintiffs earlier in this litigation and plaintiffs failed to take advantage of it. To this, plaintiffs respond that the database was produced previously for the limited purpose of class certification.

Determination of this OSC was held in abeyance while counsel for the parties attempted to resolve this issue among themselves. Defendants subsequently produced at least a portion of NLS's database pertaining to class members, but not the entire database of all lessees and guarantors. This court finds that the entire database is material and relevant and should be produced forthwith. Accordingly, the portion of plaintiffs' OSC seeking an order compelling the production of NLS's entire lease database is granted.

For all of the foregoing reasons, it is hereby

ORDERED that the portions of plaintiffs' OSC seeking declaratory and injunctive relief are granted as to those plaintiff class members whose leases: 1) contain all material terms on the first page above the merger clause and signature line; 2) lack any provision for or reference to the LDW clause on the first page thereof; and 3) do not specifically incorporate or refer to the terms and conditions contained on remaining pages (hereinafter the "subclass members"), and is otherwise denied; and it is further

ORDERED, ADJUDGED and DECLARED that the plaintiff subclass members' leases are comprised of only the first page and all remaining pages are unenforceable; and it is further

ORDERED that judgment be entered in favor of the plaintiff subclass members and against defendants on the portion of the breach of contract cause of action seeking

permanent injunctive relief to the extent that defendants are hereby enjoined and restrained from enforcing the lease terms contained in pages 2 through 4 of the form leases against plaintiff subclass members; and it is further

ORDERED that the plaintiff subclass members' claims for damages, punitive damages and fraud are severed and continued; and it is further

ORDERED that the portion of the OSC to compel defendants to comply with plaintiffs' discovery demands is granted; and it is further

ORDERED that on or before June 30, 2011 defendants shall produce to plaintiffs NLS's entire electronic lease database in a readable and searchable format

The Clerk is directed to enter judgment in favor of the plaintiff subclass members as set forth herein above.

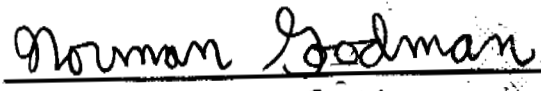
Counsel for the parties are directed to appear for a status conference in Room 325, 60 Centre Street, on July 12, 2011 at 9:30 a.m.

The foregoing constitutes this court's decision, order and judgment. Courtesy copies of this decision, order and judgment have been provided to counsel for the parties.

Dated: New York, New York
June 17, 2011

FILED
JUN 22 2011
COUNTY CLERK'S OFFICE
NEW YORK


HON. MARTIN SHULMAN, J.S.C.


CLERK

Index No. 101059/04

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PLUDEMANN ET AL

Plaintiff,

-against-

NORTHERN LEASING SYSTEMS ET AL.

Defendants.

ORDER & JUDGMENT

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1:00 P
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