

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,

Index No: 101059/04

Plaintiffs,

-against-

Decision and Order

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

Defendants.

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

In this continuing litigation odyssey, Plaintiffs, ("Pludeman"), Chris Hanzsek d/b/a Hanzsek Audio ("Hanzsek"), Sara Jane Hush ("Hush"), Ozark Mountain Granite & Tile Co. ("Ozark") and Dennis E. Lauchman ("Lauchman")(collectively, "Plaintiffs") now move for partial summary judgment finding defendant, Northern Leasing Systems, Inc. ("NLS" or "Corp. Defendant") liable with respect to their breach of contract/overcharge claim. NLS opposes this motion.¹

Relevant Backdrop²

In its brief explanation of the business transactions the parties engaged in that

¹ This motion became *sub judice* in the Summer, 2009, however the parties had requested the court to forebear from determining this motion due to their ongoing settlement discussions. The parties have recently informed the court that these discussions proved ultimately unsuccessful and now request a determination.

² For purposes of this motion, the relevant underlying facts can be gleaned from this court's 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], ["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)("Pludeman CtApp Decision").

are the subject of this now class action lawsuit, the Court of Appeals described NLS as a New York-based company "in the business of micro-ticket leasing" which finances credit card point-of-sale (POS) terminals and other business equipment. Specifically, NLS, as lessor, enters into finance lease agreements with small businesses (lessees) for certain equipment. Under the terms of these leases, NLS purchases the equipment from third-party vendors solely for the purpose of leasing it." (See Pludeman CtApp Decision, 10 NY3d at 489, fn 1).

When this court determined that Plaintiffs met the predominance requirement of CPLR 901(a)(2) entitling Plaintiffs to be granted class certification solely on their breach of contract/overcharge claims, its focus was on certain pleaded allegations about the executed finance lease agreements (the "form leases") (Exhibit 3 to Motion) that also appear to be central to Plaintiffs' partial summary judgment motion (Class Cert. Decision, 24 Misc3d 1206A [*10-12]):

[T]he nature of Plaintiffs' breach of contract claim [see Count XIII, ¶¶ 165-167 as Exhibit 1 to Motion] involves the first page of a typical equipment form lease NLS utilized . . . [which] facially depicts the whole contract including monthly payment terms for the leased equipment, bank information for the electronic deduction of fees, the guaranty and a merger clause . . . [I]n the "Schedule of Payments Section" on the first page of Plaintiffs' form leases, there is absolutely no insertion of the \$4.95 LDW fee or any printed legend of any type size about the "Loss & Destruction Waiver fee (see section 13). . ."³
. . . [T]he first page of the typical NLS form lease Plaintiffs . . . executed contained all the material terms of the contract without an insertion of any LDW fee or printed legend referable thereto and a clearly worded merger clause above the signature lines which states, in relevant part:

³ The gravamen of this lawsuit addresses whether NLS had a contractual right to either require a lessee to insure the leased/financed credit card equipment against risk of loss or damage or otherwise be subject to a potentially variable LDW fee or charge.

THE TERMS OF THIS LEASE REPRESENT THE FINAL EXPRESSION OF THE AGREEMENT BETWEEN LESSOR AND LESSEE AND MAY NOT BE WAIVED ALTERED MODIFIED REVOKED OR RESCINDED AND ALL PRIOR AND/OR CONTEMPORANEOUS ORAL AND WRITTEN REPRESENTATIONS ARE MERGED HEREIN. ANY AGREEMENTS TO MODIFY THIS LEASE MUST BE BY A SIGNED WRITING EXECUTED BY LESSOR AND LESSEE AND NO ATTEMPT AT ORAL MODIFICATION OR RECISION OF THIS LEASE OR ANY TERM HEREOF WILL BE BINDING . . . (footnote omitted and bracketed matter added).

Plaintiffs' Motion

Plaintiffs contend that their form leases as completed and executed did not authorize NLS to impose/deduct any LDW charges, therefore, Corp. Defendant should be liable for contract breaches of overcharge as a matter of law. Plaintiffs' uniform claim rests on perceived, undisputed facts: (1) the first page of their form leases was presented only as a one page contract with all its essential terms pre-printed and handwritten above the signature line⁴; (2) that first page neither contained a provision for LDW charges, nor referred to any other page or provision in the form leases for such charges; (3) the merger clause contained on the first page of these form leases precludes the applicability and enforcement of any other provision contained in its remaining three pages; (4) even if these form leases are deemed to be four page documents, still, there were no specific provisions setting forth any amount of the LDW

⁴ Each of the four Plaintiffs submitted virtually identical affidavits wherein he/she adopts and incorporates the factual allegations in the Amended Verified Complaint and particularly attests to signing a "1-page lease" with NLS (see ¶ 3 of the Pludeman, Hanzsek, Hush and Lauchman Affs. in Support of Motion).

charge and the frequency of its imposition (i.e., weekly charge, monthly charge, etc.)⁵; and (5) the Appellate Division's ultimate construction of these form leases to reinstate Plaintiffs' breach of contract claim for overcharges (see Pludeman AD Decision, *supra*, 40 AD3d at 368) is law of the case rendering NLS liable for overcharges as a matter of law.⁶

NLS's Opposition

In the preamble to its memorandum of law in opposition to Plaintiffs' motion for partial summary judgment on their breach of contract claim, NLS cries foul when noting that Plaintiff chose to start this round of motion practice immediately after the issuance of the Class Cert. Decision which effectively stayed Corp. Defendant's right to complete discovery—discovery that would arguably support its defenses and allegedly prove Plaintiffs' claims false.⁷ NLS further raises the following points which it claims demonstrate the existence of material issues of fact and foreclose the possibility of the court potentially committing reversible error were it to grant Plaintiffs' motion:

⁵ Unlike Pludeman's, Hush's and Lauchman's form leases, Hanzsek's form lease is apparently an older version which does not contain a licensing provision for software (see Exhibits A-C to NLS Document Binder at ¶¶ 2). Another key difference is the fact that Hanzsek's form lease does specify a pre-printed monthly LDW charge of \$2.95 (see Exhibit D to NLS Document Binder at ¶ 8), whereas the remaining Plaintiffs' leases set no amount for this fee.

⁶ In earlier motion practice, Corp. Defendant sought to dismiss Plaintiffs' amended complaint *inter alia* pursuant to CPLR 3211(a)(1) contending that its form lease (as a four page booklet) completely refuted each pleaded cause of action and established its defense as a matter of law. As a result of the Appellate Division's reinstatement of Plaintiffs' cause of action for breach of contract for overcharges, Plaintiffs now argue that Court was necessarily holding that such LDW charges were unauthorized by these form leases as executed.

⁷ Plaintiffs do not oppose Corp. Defendant's right to continued discovery, however, as will be noted, *infra*, the former argues that such discovery would not have produced any new evidence to undermine the merits of their motion.

- Plaintiffs' prior deposition testimony contradicts their claim of only signing a one page form lease (e.g., Lauchman testified that he was aware there were "several other pages to the lease [Exhibit U to NLS Document Binder at p.158, line 5 to p. 159, lines 1-4]);
- A physical examination of each form lease will disclose it to be a bi-folded four page document with printing on both sides of an 11" x 17" sheet with its pagination located in the bottom left portion of each folded side in small legible print (e.g., "page 1 of 4", etc.) (see Exhibits A-E to NLS Document Binder)⁸;
- Plaintiffs err in treating the Appellate Division's ruling reinstating the breach of contract cause of action as a contract construction finding of fact which is binding on this court and the Pludeman AD Decision does not mandate granting Plaintiffs' motion, without more;
- The legal "standard on a certification motion is thus far different– far more lenient, favoring Plaintiffs– than the standard for deciding a summary judgment motion . . ." (NLS Memorandum of Law p. 23), thus, this court's Class Cert. Decision does not mandate granting Plaintiff's motion as well;
- Plaintiffs "disingenuously proffer only a portion of that [merger] clause. The merger clause paragraph is located above each Plaintiff's signature and expressly refers to obligations under paragraph 11 of the lease, which is not on page 1 but on page 3, together with the insurance/LDW provision. . ." ⁹ (NLS Memorandum of Law at p. 3);
- At the very least, the foregoing point raises a question of fact as to whether Plaintiffs reading the first page with a reference to paragraph 11 of the form lease should have realized it had a number of pages containing other provisions;
- Each Plaintiff signed the Personal Guaranty portion of the form lease with a signature line a little less than two inches from the clearly legible pagination at

⁸ To add gravitas to this point, Corp. Defendant quotes from the dissenting opinion of Court of Appeals Judge Robert S. Smith who stated that "[i]t would be hard to pick it up without realizing that it is a booklet, not a single page . . ." (footnote omitted)(Pludeman CtApp Decision, 10 NY3d at 497).

⁹ Given the reference to "paragraph 11" in the small-printed paragraph above the merger clause (the latter printed in bold type, uppercase letters), NLS argues more forcefully that it should be given "the benefit of all reasonable inferences that can be drawn from this evidence . . . [which creates] an issue of fact as to whether the merger clause refers only to the first page of the [form][l]ease, or whether it refers to the remaining pages as well." (bracketed matter)(NLS Memorandum of Law at p. 31).

the bottom of the first page of the form lease, a telling clue that there was more than meets the eye;

- Lauchman additionally signed a Delivery and Acceptance Receipt for the credit card equipment (Exhibit H to NLS Document Binder) and initialed his acknowledgment to not only pay the basic monthly lease payment but also the applicable taxes and insurance (i.e., LDW charge) and therefore he cannot deny his lease obligations;
- At least four corporate officers of vendors¹⁰ attested that their respective companies: promote business practices designed to enable small business merchants to make informed decisions about whether to purchase or lease credit card equipment; field-trained their respective sales staffs as to how to advise a potential lessee about the different options and properly conclude a transaction; utilized the NLS leasing program following strict guidelines to ensure a potential lessee was fully aware of all the terms and conditions of this four page form lease booklet; neither instructed nor actually observed its sales staffs to hide any portion of an NLS form lease with a clip board or in any other manner during the course of negotiating an equipment lease; required its sales staffs to fill in the essential terms after a full, unhurried discussion with potential lessees¹¹ *inter alia* about the basic monthly payments, applicable tax and potential LDW charge; arranged for copies of these signed form leases to either be made at the time of signing or mailed shortly afterwards; and after the equipment was received and installed, an NLS staff member would verbally verify the form lease terms with the lessees;
- At least ten New York County Civil Court decisions¹² granted varied relief to leasing companies such as NLS from defendant lessees such as Plaintiffs here relying on the very terms and conditions contained in the pages of the entire form lease (i.e., NLS's contractual right to collect various charges including the LDW charge, to collect attorney's fees, to choose the litigation forum and to accelerate

¹⁰ See opposition affidavits of Tom Johnson of Signtronix, Jim Raim of National Bankcard Corp, Robert Peisner of Worldwide Merchant Services and Randy Sagar of National Processing Corp.

¹¹ NLS illustratively points to another issue of fact resting on a contradiction or inconsistency when Plaintiff Lauchman attested that he "signed the first page in haste" (Exhibit Q to NLS Document Binder at ¶ 7), yet subsequently thereto, testified to spending about four hours with the vendor representative prior to signing the form lease (Lauchman EBT as Exhibit U to NLS Document Binder at p. 62, lines 4-5).

¹² NLS submitted an Appendix with its Memorandum of Law in opposition to Plaintiffs' motion for partial summary judgment containing copies of these New York County Civil Court decisions.

the amounts due under the equipment finance lease), thus, Plaintiffs' posture in this litigation runs contrary to those determinations;

- The courts have enforced contract terms following a signature page and even in documents outside the four corners of a contract, and the merger clause contained on the first page of the form leases does not require otherwise; and
- In any event, the objective evidence Corp. Defendant proffers (e.g., vendor affidavits, conformed copies of the form lease booklets [with its ambiguous reference to "paragraph 11" above the merger clause and its small print pagination on the first page thereof], Plaintiffs' own inconsistencies in sworn affidavits and depositions, verification forms, Delivery and Acceptance receipts, etc.) perforce raises material issues of fact and support the denial of Plaintiffs' motion.

In reply, Plaintiffs argue that: the merger clause bars the applicability and enforcement of any other provision contained in the remaining three pages of the form leases; the reference to "paragraph 11" in the black bordered *About Your Bank* section on the first page of the form leases, even if arguably ambiguous, is insufficient to have incorporated the remaining pages of terms and conditions including the insurance clause triggering the LDW charge; "[t]he First Department upheld the claim of 'overcharge', necessarily holding that the LDW charge was not authorized by the form lease." (emphasis in the original) (Plaintiffs' Reply Memorandum of Law at p. 7); and Corp. Defendant's lip service request for additional discovery will gain NLS no advantage as the court's construction of the form leases in issue involves a question of law.

DISCUSSION

At the nascent stage of this litigation, NLS sought dismissal *inter alia* of Plaintiffs' breach of contract claim pursuant to CPLR 3211(a)(1)(documentary evidence) and

CPLR 3211(a)(7).¹³ In asserting the former ground, NLS apparently believed its form lease booklet would “utterly refute the [P]laintiff[s]’ factual allegations, thereby conclusively establishing a defense as a matter of law . . .” (internal citations omitted) (*Farber v Breslin*, 47 AD3d 873, 876 (2nd Dept 2008). When the Appellate Division reviewed Justice Heitler’s Decision and Order addressing these two grounds for dismissal of this cause of action, the Appellate Division “must [have] accept[ed] all of the factual allegations in the [amended] complaint as true, and draw[n] all inferences favorably to the [P]laintiff[s] . . .” (bracketed matter added)(*Chan v Louis*, 303 AD2d 151, 152 (1st Dept 2003).

On that existing record and contrary to Plaintiffs’ viewpoint, the Appellate Division did not render any controlling finding of fact upon reinstating Plaintiffs’ breach of contract cause of action. When the Appellate Division modified the April 7, 2005 Decision and Order, the Pludeman AD Decision tersely concluded that “[t]he cause of action for breach of contract is sufficiently stated¹⁴ by the allegations of overcharges. . .” (40 AD3d at 368). Stated more strongly, “[t]he allegations in the amended complaint were sufficient ‘for pleading survival purposes’ to state [a] cause[] of action alleging

¹³ As noted in the Class Cert Decision (24 Misc3d 1205A [*3], fn 2), the Pludeman AD Decision resolved an appeal of an April 7, 2005 Decision and Order of the Hon. Sherry Klein-Heitler, JSC, who, relevant to this discussion, dismissed the breach of contract claims for factual/legal insufficiency as Plaintiffs failed to plead any facts as to how NLS breached their form leases (CPLR 3211[a][7]). Therefore, it was apparently unnecessary to address Corp. Defendant’s other CPLR 3211(a)(1) ground for dismissal.

¹⁴ In ¶ 166 of the Amended Complaint (see Exhibit 1 to Motion), Plaintiffs pleaded that “[b]y charging and collecting sums in excess of those specified in the first page of the Lease and Personal Guaranty, and by imposing undisclosed amounts towards alleged taxes and insurance coverage [i.e., LDW charge], Northern Leasing breached the contracts in issue . . .”

breach of [contract for overcharges] . . ." (bracketed matter added). *Farber, supra*, 47 AD3d at 876. Again, that Court merely determined the sufficiency of Plaintiffs' pleaded claim, nothing more and nothing less, and that ruling is clearly not law of the case as to the burden now imposed on this court to resolve Plaintiffs' motion for partial summary judgment on this very same claim.

This court also agrees with NLS that because a more liberal standard is applied when deciding whether to grant class certification, this court's Class Cert Decision, without more, should not control the outcome here as well.

The foregoing being said, "[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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

After searching this record, here are the undisputed critical facts. Above the signature line contained in the *Lease Acceptance* section on the first page of Plaintiffs' form leases, there is no hand-written insertion of a \$4.95 LDW charge in the Schedule of Payments section. This section does contain two essential handwritten terms for the

basic monthly payment and lease finance term (e.g., 48 months), albeit without any start or end date. Unlike the small, pre-printed bold typed words, "Plus Applicable Taxes," there is no pre-printed legend in that section or anywhere else on the first page referring to an applicable LDW charge. And unlike the reference to "paragraph 11" (which solely addresses the various remedies NLS could exercise upon a lessee's default) contained in the first paragraph of the *About Your Bank* section, there is no paragraph reference anywhere else on the form leases' first page referring to, or highlighting, the relevant insurance provision (on the third page of these form lease booklets) which would otherwise impose on the lessee an undisclosed "price in effect," variable or fixed LDW charge if the lessee opted not to insure the leased equipment as required. Plaintiffs have met their initial burden of making out a prima facie case for partial summary judgment making NLS liable for the imposition/collection of overcharges.

The burden now shifts to NLS, who proffers a heavily larded opposition to defeat a straightforward breach of contract/overcharge claim replete with affidavits and admissible evidence of Plaintiffs' sworn inconsistencies (as well as lower court decisional authority), all ostensibly packaged to raise genuine material issues of fact. After analyzing Corp. Defendant's proof (which could fairly have been meaningful if Plaintiffs had sought summary judgment *inter alia* on their fraud and negligent misrepresentation claims) and drawing all reasonable inferences in favor of this non-moving party, this court cannot discern *any* issue of fact which would defeat Plaintiffs' motion.

As stated, *supra*, these executed form leases contained “all the material terms of the contract without an insertion of any LDW fee or printed legend referable thereto and a clearly worded merger above the signature lines . . .” (24 Misc3d 1206A [*11]). Here, NLS has taken a position contrary to when it unsuccessfully sought to dismiss this action pursuant to CPLR 3211(a)(1) relying on the very form lease booklets in issue. Now realizing it cannot prove a negative, NLS hones in on the words “paragraph 11” and the small print pagination on the first page and suggest that these are ambiguous terms that implicitly incorporate by reference the contents of the remaining three pages of these form leases, creating a material issue of fact. This court is not persuaded.

First, “in cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language . . .” *Jacobson v Sassower*, 66 NY2d 991, 993 (1985); see also *William A. White/Tishman East, Inc. v Banko*, 171 AD2d 401, 402 (1st Dept)(“any ambiguit[y] in an agreement [is] to be interpreted ‘most strongly against the draftsman’ as long as the particular interpretation would not lead to an absurd result. . .”) (bracketed matter added), *app. den.* 78 NY2d 857 (1991).

The words “paragraph 11” refer to a lease default provision that has absolutely no bearing as to the material essential payment terms inserted above the signature line. Moreover, NLS’s self-perceived interpretation of “paragraph 11” as implicitly incorporating by reference the insurance clause on the third page for form leases thereby validating the LDW charge is not only an absurd construction, it is also contrary to law.

New York follows that common law rule by requiring that the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt. While a party's failure to read a duly incorporated document will not excuse the obligation to be bound by its terms, a party will not be bound to the terms of any document unless it is clearly identified in the agreement (internal quotations and citations omitted).

See PaineWebber Inc. v Bybyk, 81 F3d 1193, 1201 (2nd Cir 1996); *See also, Chiacchia v National Westminster Bank USA*, 124 AD2d 626 (2nd Dept 1986). By a parity of reasoning, for the terms and conditions contained in the remaining three pages of the form leases to be binding on lessees, that first page had to have contained clearly identified terms incorporating by reference the remaining terms and conditions of these form leases. The pagination and words, "paragraph 11," printed on the first page of these form leases simply do not cut it. While NLS correctly states the proposition that not all contract terms must be located above the signature line to be enforceable (e.g., terms and conditions printed on the reverse side of an executed contract), that presupposes that those terms and conditions were called to the attention of the party to be bound thereby. *See Roger's Fence, Inc. v Abele Tractor & Equip. Co., Inc.*, 26 AD3d 788, 789 (4th Dept 2006)(pre-printed in capital letters directly above the signature line was a notice that the "conditions of sale and warranty terms were on the reverse side of the agreement. . ."). Here too, neither the pagination, nor the words, "paragraph 11," are adequate to call Plaintiffs' attention to an obligation to be bound by any other term or condition contained in the remaining three pages of their form leases, especially the insurance provision.

On this record, this court construes these form leases, as executed, to be (24 Misc3d 1206A [*11]):

“complete, clear and unambiguous on . . . [their] face [and] must be enforced according to the plain meaning of . . . [their] terms . . .” *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). . . And with the existence of a clearly worded merger clause above the signature line, there would be no need to resort to extrinsic evidence¹⁵ (especially hearsay information) to construe the language of the form lease(s). See *also, Jarecki v. Shung Moo Louie*, 95 NY2d 665, 669 (2001)(merger clause bars parole evidence)(bracketed matter added).

What was a probability discussed in the Class Cert Decision is now a certainty.

Based on the foregoing, this court construes Plaintiffs' form leases to be one-page contracts as a matter of law, and grants Plaintiffs' motion for partial summary judgment on the issue of liability as to Plaintiffs' cause of action for breach of contract for overcharges.

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
March 25, 2010



HON. MARTIN SHULMAN, J.S.C.

¹⁵ As noted in Corp. Defendant's opposition, *supra*, an example of extrinsic evidence NLS would have liked to rely on are the vendor affidavits uniformly describing their sales representatives' alleged unhurried discussions with Plaintiffs about the basic monthly payments, applicable tax and potential LDW charge, all while perusing the form leases together.