[* 1]

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

PRESENT: MADDEN PART 11
Justice

MARGUERITE LEWITIN

INDEX NO. 112593/08

MOTION DATE

- v -

MOTION SEQ. NO. 6

MANHATTAN MINI-STORAGE

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

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

FILED

JUN 13 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: June 8, 2012

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 11

--X

MARGUERITE A.L. LEWITIN,
Petitioner,

-against-

MANHATTAN MINI STORAGE and "JOHN" or "JANE" DOE,
Respondents.

--X

Index No. 112593/09

DECISION AND ORDER

JOAN A. MADDEN, J.:

Petitioner, Marguerite A.L. Lewitin (Lewitin), moves by order to show cause pursuant to 22 NYCRR 202.21 (e), to vacate the note of issue filed on October 20, 2011. Respondent, Manhattan Mini Storage (MMS or the storage facility), cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the petition on the ground that the petitioner is in material breach of the parties' contract or, in the alternative, for partial summary judgment directing that petitioner's recovery, if any, be capped at $7,500. Lewitin cross-moves for sanctions.

Background

The facts of this case have been discussed at length in this court's previous decisions and will not be repeated here. By decision and order dated April 9, 2010, the court held that the sale of petitioner's goods had not been properly noticed under Lien Law § 187 and that the storage facility was liable to the Lewitin for damages resulting from the sale but "that any damages proven by Lewitin can be offset by . . . any amounts she still owes to the storage facility" (4/9/10 Decision, at 4). The court referred the issue of damages to a Special Referee, to hear and report; however, after more than a year of delays and adjournments, on May 17, 2011, the court withdrew the reference and directed the parties to set a new schedule for discovery which would include Lewitin's amended expert's report with supporting evidence. The court also granted the storage facility's request to take Lewitin's deposition and to file an amended expert's report if necessary.

Lewitin served a revised expert's report which determined that the total loss value was $148,200, as of the date of the sale. Thereafter, the parties appeared for a compliance conference which resulted in an order: 1) directing the storage facility to serve Lewitin's deposition transcript with post-deposition demands by August 18, 2011; 2) directing Lewitin to comply with the storage facility's demands by September 30, 2011, subject to a self-executing "otherwise precluded" provision; and 3) directing Lewitin to file the note of issue on or before October 17, 2011.

According to MMS, it complied with its obligations under the compliance conference order but Lewitin did not and, on October 21, 2011, MMS filed the note of issue certifying that this matter is ready for trial.

Lewitin now moves to vacate the note of issue filed by MMS. MMS opposes the motion and cross moves for summary judgment, arguing that the petition should be dismissed on the grounds that Lewitin materially breached the storage facility agreement (Agreement) by failing to pay the monthly charges as they became due and, if the expert's report is correct, by understating the value of the items being stored at the facility. In the alternative, MMS seeks partial summary judgment limiting its liability to $7,500 pursuant to Article 11 (b) of the Agreement.

In opposition to summary judgment, Lewitin contends that MMS is liable to her for conversion by selling her property without giving her prior notice. She also argues that the terms of the agreement only limit the storage facility's liability to $7,500 for its negligent acts, and that she is entitled to treble damages for the storage facility's violation of section 182 of the Lien Law.

<u>Discussion</u>

[* 4]

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also*, *Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994]["(i)t is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . ." [citations omitted]).

MMS's cross motion seeking summary judgment dismissing the petition is denied. Paragraph 10 of the Agreement states that where the occupant, in this case Lewitin, fails to pay the occupancy charges as they become due or fails to comply with any other term of the Agreement, the Owner, here MMS, may, after notice, terminate the agreement and "sell Occupant's personal property in accordance with Section 182 of the New York State Lien Law . . ." (Kaufman Aff., Ex. A).

Here, Lewitin failed to pay the occupancy charges for several months and, MMS did, in fact, conduct a sale of petitioner's property. However, according to Lien Law § 182 (7), MMS was, prior to such sale, required to provide Lewitin with notice of the sale at her last known address by personal delivery or by certified or registered mail, return receipt requested. In the April 9, 2010 decision, the court determined that MMS failed to provide such notice and, because the sale was conducted without proper notice, MMS is liable for damages (*see Matter of Anderson v Pods, Inc.*, 70 AD3d 820, 822 [2d Dept 2010]). MMS sought renewal, which motion was denied. That decision is "law of the case."

"The doctrine of law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding" (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]), and the law of the case doctrine will only be ignored in extraordinary circumstances, such as a change in law or a showing of new evidence (*id.; see also Foley v Roche*, 86 AD2d 887, 887 [2d Dept 1982]). MMS has not established that there has been a change in the law or new evidence which would require the court to re-examine the prior decision and, thus, the April 9, 2010 decision determining that Lewitin is entitled to damages remains law of the case.

On the other hand, MMS has established its entitlement to partial summary judgment limiting Lewitin's damages to $7,500. The Agreement required Lewitin to set forth the value of the personal property she was storing in the facility. Specifically, Article 4 of the Agreement states, in pertinent part:

> 4. VALUE OF THE OCCUPANT'S PROPERTY
>
> Occupant will not store personal property in the storage space having an aggregate value exceeding $7,500. Occupant acknowledges that this limitation is important to Owner . . .

(Kaufman Aff., Ex. A).

The $7,500 amount was handwritten into the Agreement and Lewitin initialed Article 4, acknowledging the that she would not store property having a value of more than $7,500 in the facility.

Article 11 (B) of the Agreement delineates MMS's liability for any loss or damage to Lewitin's personal property. That Article states:

> B. [MMS's] liability for damages relating to any loss or damage to [Lewitin's] personal property caused by [MMS] after [MMS] enforces Owner's lien as described in Article 10, is limited to $7,500. Such liability may, on written request of [Lewitin], at the time of signing this Agreement or within a reasonable time thereafter, and if such request is accepted in writing by the owner, be increased on part or on all of the property stored in the storage space . . . . If such request is made and accepted, the monthly occupancy charge set forth in Article 2, will be increased, commencing when [MMS] accepts in writing, the request of the Occupant by $1.00 for each $100.00 or part of $100.00 liability

(Kaufman Aff., Ex. A).

Once again, the $7,500 amount was handwritten into Article 11 (B) and Lewitin initialed that provision. It is undisputed that Lewitin did not request an increase in liability, in writing, or otherwise.

Moreover, in Article 7 of the Agreement, Lewitin agreed that she would maintain insurance on the contents of the storage space and, she did in fact, enter into an insurance contract which provides, in paragraph 2, that the insurance limit on the goods stored is $3,000 (Kaufman Aff., Ex. B).

It is well settled that a clear and unambiguous contract should be enforced according to its terms (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.,* 1 NY3d 470, 475 [2004]; *W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162 [1990]) and that the "construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument . . . "(*Beal Sav. Bank v Sommer,* 8 NY3d 318, 324 [2007]). "[T]he court should construe the agreements so as to give full meaning and effect to the material provisions" (*Excess Ins. Co. Ltd. v Factory Mut. Ins.*, 3 NY3d 577, 582 [2004]).

In Article 11 (B), Lewitin and MMS agreed that MMS's liability for any loss or damage to Lewitin's personal property, that was caused by MMS, would be limited to $7,500. Lewitin expressly acknowledged this limitation by initialing the provision in the Agreement. Indeed, in Article 4, she expressly agreed that she would not store property valued at more than $7,500 and her monthly occupancy fee of $802.00 was based on that valuation. Lewitin was given the opportunity to increase MMS's liability by paying an increased occupancy charge but she declined that opportunity. Under section182 of the New York Lien Law, self-storage lease clauses containing limitations of liability are enforceable (*see Goldberg v Manhattan Mini Stor. Corp.*, 225 AD2d 408, 408 [1st Dept 1996]; *see also Levy v Morgan Bros. Manhattan Stor. Co.*, 204 AD2d 695, 695 [2d Dept 1994][hold harmless agreement in monthly self-storage lease enforceable]).

In *WestCom Corp. v Greater N.Y. Mut. Ins. Co.* (41 AD3d 224, 229 [1st Dept 2007]), plaintiff brought suit against its insurer and MMS after the insurer denied its claim for loss of property from a storage unit owned by MMS. In that case, the First Department construed the limitation of liability clause in MMS's Agreement and found that WestCom's potential recovery from MMS was limited to $7,500 because, "[u]nder the Storage Agreement, WestCom agreed that it would not store more than $7,500 worth of property in its unit, and that MMS's 'liability for damages relating to any loss or damage to [WestCom's] personal property caused by [MMS] . . . is limited to $7,500'"

Lewitin's argument that the limitation of liability clause does not apply because MMS's conversion or gross negligence caused her loss is without merit. This court has determined that petitioner was not properly served with the notice of sale pursuant to Section 182 of the New York Lien Law and, since the sale had already occurred when she commenced the special proceeding, she is entitled to damages that resulted from the improper sale (*see also, Matter of Anderson v Pods, Inc.*, 70 AD3d at 822). The petition at issue here contains no allegations to support petitioner's contention that MMS acted intentionally to convert her property (Kaufman Aff., Ex. C); and the cases Lewitin cites, in support of conversion, involve different sections of the Lien Law that are not applicable here.[1] The clear language of the limitation of liability clause states that the limitation applies to loss or damage to Lewitin's personal property caused by MMS and the First Department has held that the limitation of liability language applies where MMS's negligence or gross negligence in the sale may have caused the loss at issue (*see WestCom Corp. v Greater N.Y. Mut. Ins. Co.*, 41 AD3d at 228-229; *Goldberg v Manhattan Mini Stor. Corp.*, 225 AD2d at 409). Accordingly, the limitation of liability language is applicable to the circumstances here.

As for Lewitin's motion to vacate the note of issue, it is denied, however, limited discovery is permitted on petitioner's First Set of Interrogatories and MMS is directed to respond to Interrogatories 8 through 11 and 13 in petitioner's First Set of Interrogatories attached to the order to show cause as Exhibit B within 30 days of the date of this decision and order.

---

[1] *Ingram v Machel & Jr. Auto Repair* (148 AD2d 324, 324-325 [1st Dept 1989]) discussed violations of sections 201 and 202 of the Lien Law which do not apply to the contractual relationship between Lewitin and MMS (*see Goldberg v Manhattan*, [225 AD2d at 408]). *Parker v P&N Recovery of N.Y.*, (182 Misc 2d 342 [Civ Ct NY County 1999]) dealt with Lien Law section 184 [garage keepers]).

Lewitin also seeks sanctions against MMS, arguing that MMS misled the court when it certified, in the note of issue it executed on October 20, 2011, that all discovery had been completed or waived, and stated that an agreement to extend the discovery deadline and file the note of issue was only in the preliminary discussion stage when the note of issue was filed.

However, the documentary evidence reveals that, on August 11, 2011, Lewitin entered into a compliance conference order agreeing to comply with MMS's discovery demands by September 30, 2011, subject to a self-executing "otherwise precluded" provision and that she was directed to file the note of issue by October 17, 2011. At that compliance conference, Lewitin did not demand that MMS respond to outstanding discovery requests and she did not demand additional discovery from MMS (Kaufman Aff., Ex. 2).

Thereafter, on September 8, 2011, Lewitin served a First Set of Interrogatories (Kaufman Aff., Ex. 4) and MMS requested additional time to respond to Lewitin's discovery demand. The parties drafted a stipulation which would have extended the discovery deadline date and the date to file the note of issue but, Lewitin declined to sign the stipulation on the ground that she wanted to check with the court to determine whether such extension would be permitted by the court (Kaufman Aff., Ex. 5). There is no evidence that, on or after October 1, 2011, Lewitin either followed up with the court or signed the stipulation extending the discovery and note of issue dates. Accordingly, the self-executing preclusion order and the October 17, 2011 date to file the note of issue remained the order of the court and MMS did not mislead the court by filing the note of issue and/or affirming that discovery was complete or had been waived, and therefore Lewitin's request for sanctions is denied.

Conclusion

In view of the above, it is

ORDERED that petitioner Marguerite A. Lewitin's motion to vacate the note of issue is denied, however, respondent Manhattan Mini Storage is directed to respond to questions 8 through 11 and 13 in petitioner's First Set of Interrogatories within 30 days of the date of this decision and order, a copy of which is being mailed by my chambers to counsel for the parties; and it is further

ORDERED that petitioner Marguerite A. Lewitin's request for sanctions is denied; and it is further

ORDERED that respondent Manhattan Mini Storage's cross motion seeking summary judgment or, in the alternative, partial summary judgment is granted to the extent that the branch of the motion seeking partial summary judgment is granted and, pursuant to the parties' agreement, petitioner Marguerite A. Lewitin's damages are limited to $7,500 and is otherwise denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 11, room 351, 60 Centre Street, New York, on June 28, 2012 at 9:45 a.m.

DATED: ~~May 2012~~ June 8, 2012

J.S.C.

FILED

JUN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE