Heins v Public Storage
2012 NY Slip Op 31852(U)
July 11, 2012
Supreme Court, Suffolk County
Docket Number: 09608/2008
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Robert Heins,

Plaintiff,

-against-

Public Storage, a Maryland Real Estate Investment Trust, as Successor of Public Storage, Inc. and PS Orangeco, Inc.,

Defendants.

Index No.: 09608/2008

Motion Sequence No.: 008; MOT.D
Motion Date: 3/28/12
Submitted: 4/19/12

Motion Sequence No.: 009; XMOT.D
Motion Date: 3/28/12
Submitted: 4/19/12

Attorney for Plaintiff:

Russ & Russ, P.C.
543 Broadway
Massapequa, NY 11758

Attorney for Defendants:

Cullen and Dykman LLP
100 Quentin Roosevelt Boulevard
Garden City, NY 11530

Clerk of the Court

Upon the following papers numbered 1 to 100 read upon this motion to compel disclosure and cross motion to dismiss cause of action: Notice of Motion and supporting papers, 1 - 46; Notice of Cross Motion and supporting papers, 47 - 76; Answering Affidavits and supporting papers, 77 - 98; Replying Affidavits and supporting papers, 99 - 100.

ORDERED that the motion by plaintiff, Robert Heins, is granted only to the extent that the attorneys for the parties shall appear for a preliminary conference on August 29, 2012 at 9:30 A.M. (*see* 22 NYCRR § 202.12) to schedule disclosure consistent with the determination herein, and such application is otherwise denied; and it is

ORDERED that the cross-motion by defendants, Public Storage, Inc., sued in this action as Public Storage, a Maryland Real Estate Investment Trust, as successor of Public Storage, Inc. and PS Orangeco, Inc., is granted to the extent it seeks an order pursuant to CPLR 3211(a)(7) dismissing plaintiff's claim under General Business Law §349 and such cross-motion is otherwise denied

In August 2004, plaintiff Robert Heins allegedly entered into an agreement with Public Storage, Inc. to lease space at a self-storage facility located on Sunrise Highway in Patchogue, New York. The leased space, measuring approximately 5' x 10' and identified as Enclosed/Parking Space D212, allegedly was used by plaintiff to store various personal items including a record collection, paintings, first edition books and family members' personal effects. The monthly rental charges for the leased space allegedly were paid electronically from a bank account maintained by plaintiff and nonparty Linda Cox. In March 2007, Public Storage allegedly served a notice advising plaintiff that his property was to be sold at public auction for nonpayment of rental fees. Upon receipt of such notice, Cox allegedly went to the storage facility with bank records showing the rental fee had, in fact, been paid electronically to Public Storage. On March 15, 2007, Public Storage allegedly notified plaintiff that the February rental payment had been credited to his account. Later that same month, it allegedly sent plaintiff a notice advising that the rate for leasing storage space at the facility was increasing in May 2007.

On March 31, 2007, the personal property stored by plaintiff in the space identified as Enclosed/Parking Space D212 allegedly was auctioned by Public Storage's agent, defendant PS Orangeco, Inc., for a nominal amount. On April 2, 2007, Cox allegedly returned to the facility with bank records showing the rent had been paid and was advised that the personal property had been sold. Plaintiff allegedly went to the facility the next day and saw that nearly all of the boxes of personal property stored in the leased space had been removed.

Subsequently, plaintiff commenced this action to recover damages for the alleged wrongful sale of his personal property. The first five causes of action set forth in the Third Amended Complaint seek to hold Public Storage liable under the theories of negligence, conversion, fraud, breach of contract and "wrongful sale" in violation of Lien Law §182. The sixth cause of action seeks to hold both Public Storage and PS Orangeco liable for violations of Lien Law §182 and General Business Law §349. In addition, as part of the fourth cause of action, plaintiff seeks a judgment declaring "the unenforceability or inapplicability of any claimed 'exculpatory' clauses or limitations of liability or disclaimer in any claimed rental agreement." Defendants' answer denies nearly all of the allegations in the complaint and interposes numerous affirmative defenses, including that the sixth cause of action does not make out a cognizable claim for deceptive business practices as it does not allege a deceptive act or practice directed at the public at large.

The branch of defendants' motion seeking dismissal of the claim against them for violation of General Business Law §349 is granted. On a motion to dismiss, "the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference", and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19

[2005]; ***Leon v Martinez***, 84 NY2d 83, 87-88 [1994]; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, [2d Dept 2010]).

General Business Law §349 (a) provides that it is unlawful to perform "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Enacted to protect consumers, the statute initially was enforceable only by the Attorney General. However, to expand its use as a means of halting consumer frauds, the statute later was amended to allow actions by private plaintiffs, who may recover compensatory damages, limited punitive damages, injunctive relief and attorneys' fees (*see* General Business Law §349 [h]; ***Karlin v IVF Am.***, 93 NY2d 282, 291 [1999]). To assert a claim under General Business Law §349 (h), a plaintiff must allege that the defendant engaged in consumer-oriented conduct that is materially misleading, and that plaintiff suffered injury as a result of such deceptive act or practice (***City of New York v Smokes-Spirits.Com, Inc.***, 12 NY3d 616, 621 [2009]; *see* ***Stutman v Chemical Bank***, 95 NY2d 24 [2000]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20 [1995]; ***Emigrant Mtge, Co., Inc, v Fitzpatrick***, 95 AD3d 1169 [2d Dept 2012]). A plaintiff suing for deceptive acts or practices "need not show that the defendant committed the complained-of acts repeatedly . . . but instead must demonstrate that the acts or practices have a broader impact on customers at large" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 25; *see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308 [1995]). A plaintiff also must establish that the defendant "intended to deceive its customers to the customers' detriment and was successful in doing so" (***Samiento v World Yacht Inc.***, 10 NY3d 70, 81 [2008]). Significantly, the statute is not intended to turn a breach of contract into a tort (***Teller v Billy Hayes, Ltd.***, 213 AD2d 141, 148, [2d Dept 1995]) and private contract disputes unique to the parties do not fall within its ambit (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 25).

Here, the amended complaint does not allege that defendants committed deceptive acts or practices that had a broad impact on consumers at large (*see* ***Promatech, Inc. v AFG Group, Inc.***, 95 AD3d 450 [1st Dept 2012]; ***Makuch v New York Cent. Mut. Fire Ins. Co.***, 12 AD3d 1110 [4th Dept 2004]). Significantly, the complaint does not allege that Public Storage engaged in deceptive conduct likely to mislead consumers leasing storage space at its facility and that such conduct caused plaintiff's injury (*see* ***Gale v International Bus. Machines Corp.***, 9 AD3d 446 [2d Dept 2004]; ***Andre Strishak & Assoc. v Hewlett Packard Co.***, 300 AD2d 608 [2d Dept 2002]). In fact, the complaint does not set forth the terms of the lease agreement allegedly entered into by plaintiff and Public Storage, nor does it allege that such agreement was a standard form regularly used for customers of Public Storage. Instead, the allegations set forth in the sixth cause of action are based on the alleged breach by Public Storage of its statutory obligations under section 182 of the Lien Law in allegedly enforcing its lien upon plaintiff's personal property. Moreover, the plaintiff's claim for recovery under General Business Law § 349 must be dismissed because it does not sufficiently allege conduct having an impact on consumers at large. In view of this determination, the branch of plaintiff's motion seeking an order resolving all issues in his favor on the claim under General Business Law § 349 must be denied.

As to the branches of plaintiff's and defendants' motions seeking an order compelling disclosure, parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material . . . in the prosecution or defense'" (*Id.* at 407, *quoting* CPLR 3101). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.***, 74 AD3d 1139 [2d Dept 2010]; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531 [2d Dept 2007]; ***Vyas v Campbell***, 4 AD3d 417 [2d Dept 2004]). Thus, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g.* ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998 [2d Dept 2011]; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531 [2d Dept 2007]; ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469 [2d Dept 2004]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420 [2d Dept 1989]).

Here, plaintiff's sweeping demands for "corporate compliance reports, internal audit reports, risk management reports . . . general or in-house counsel reports . . . supporting any of the answers to interrogatories," "[m]inutes of meetings of [Public Storage's] Board of Directors or Board committees or executives referring to problems with . . . accounting of customer payments . . . public sales in New York . . . auctions in New York," and documents "referring to or relating to" to Public Storage's "rules, policies and procedures with regard to alleged delinquent accounts" are palpably improper, as they seek internal business records containing privileged material and corporate documents that are confidential and not relevant to the instant litigation, especially in light of the dismissal of the claim for deceptive business practices (*see* ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469 [2d Dept 2004]; ***Community Dev. Assn. v Warren-Hoffman & Assoc.***, 4 AD3d 755 [4th Dept 2004]; ***Bettan v Geico Gen. Ins. Co.***, 296 AD2d 469 [2d Dept 2002], *lv dismissed* 99 NY2d 552 [2002]; ***Saratoga Harness Racing v Roemer***, 274 AD2d 887 [3d Dept 2000]; ***Wood v Sardi's Rest. Corp.***, 47 AD2d 870 [1st Dept 1975]; *see also* ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 408 [2d Dept 2009]; ***First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.***, 56 AD3d 1137 [4th Dept 2008]).

Contrary to the conclusory allegations by plaintiff's counsel, defendants' demand for access to the personal property stored in the leased space remaining in plaintiff's possession or control after the auction is not palpably improper, as such evidence clearly is relevant to their defense of this action. Further, defendants' demands for copies of the specific documents in plaintiff's possession that support the elements of his causes of action and claims for damages properly seek evidence "material and necessary" to the defense (CPLR 3101; *see generally* ***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403 [1968]). As to defendants' demand for an itemized list of the personal property stored in the leased space over which plaintiff currently retains possession and control, however,

items must be pre-existing and tangible to be subject to discovery and production and a party cannot be compelled to create new documents or items in response to a disclosure demand (***Rosado v Mercedes-Benz of N. Am.***, 103 AD2d 395, 398 [2d Dept 1984]; *see* ***Feretich v Parsons Hosp.***, 88 AD2d 903 [2d Dept 1982]; ***Slavenburg Corp. v North Shore Equities***, 76 AD2d 769 [1st Dept 1980]). Thus, a party may be required to produce only those items "which are in the possession, custody or control" of that party (*see* CPLR 3120 [1]; ***Gatz v Layburn***, 9 AD3d 348 [2d Dept 2004]; ***Castillo v Henry Schein, Inc.***, 259 AD2d 651 [2d Dept 1999]; ***Forestire v Inter-Stop, Inc.***, 211 AD2d 751 [2d Dept 1995]; ***Lear v New York Helicopter Corp.***, 190 AD2d 7 [2d Dept 1993]; ***Rosado v Mercedes-Benz of N. Am.***, 103 AD2d 395 [2d Dept 1984]).

Pursuant to CPLR 3133, if the party served with interrogatories is a corporation, the answers to such interrogatories shall be in writing, under oath, "by an officer, director, member, agent or employee having the information." Here, the responses to plaintiff's interrogatories served by Public Storage and PS Orangeco do not comply with CPLR 3133, as they were answered by their attorney acting "upon information and belief," rather than by an officer, agent or employee with the requisite knowledge. Likewise, plaintiff's answers to defendants' written interrogatories were improperly furnished by his attorney. It is noted that plaintiff's verification of the supplemental response to defendants' interrogatories did not cure such defect.

Dated: 7/11/2012

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**