SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, and FERN A. FISHER, DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR NEW YORK CITY COURTS AND ADMINISTRATIVE AUTHORITY OF THE CIVIL COURT OF THE CITY OF NEW YORK,

Petitioners

- against -

Index No. 450460/2016

DECISION AND ORDER

NORTHERN LEASING SYSTEMS, INC., LEASE FINANCE GROUP LLC, MBF LEASING LLC, LEASE SOURCE-LSI, LLC a/k/a LEASE SOURCE, INC., GOLDEN EAGLE LEASING LLC, PUSHPIN HOLDINGS LLC, JAY COHEN a/k/a ARI JAY COHEN, individually, as principal of NORTHERN LEASING SYSTEMS, INC., as a member of LEASE FINANCE GROUP LLC, and as an officer of PUSHPIN HOLDINGS LLC, NEIL HERTZMAN, individually and as an officer of NORTHERN LEASING SYSTEMS, INC., JOSEPH I. SUSSMAN, P.C., JOSEPH I. SUSSMAN, individually and as a principal of JOSEPH I. SUSSMAN, P.C., and ELIYAHU R. BABAD, individually and as a principal or associate of JOSEPH I. SUSSMAN, P.C.,

Respondents

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner Schneiderman, New York Attorney General, sues pursuant to New York Executive Law § 63(12) and General Business Law (GBL) § 349 for respondents' fraud and illegal conduct in leasing credit card equipment. The lessors are respondents Northern Leasing Systems, Inc., Lease Finance Group LLC, MBF

Leasing LLC, Lease Source-LSI, LLC, Golden Eagle Leasing LLC, and Pushpin Holdings (Northern Leasing respondents). Respondents Joseph I. Sussman, P.C., Sussman, and Babad (attorney respondents) enforced these leases through litigation. Respondents Cohen and Hertzman are officers of the Northern Leasing respondents. Petitioner Attorney General also seeks dissolution of Northern Leasing, Inc., based on its fraud and illegal conduct. N.Y. Bus. Corp. Law (BCL) § 1101(a)(2). Petitioner Judge Fisher seeks to vacate the default judgments respondents obtained. C.P.L.R. § 5015(c).

Respondents move to dismiss the petition based on documentary evidence, the applicable statutes of limitations, and the petition's failure to state a claim. C.P.L.R. § 3211(a)(1), (5), and (7). At oral argument, respondents withdrew their motions insofar as they as sought disclosure.

II. APPLICABLE STANDARDS

When evaluating respondents' motion to dismiss the petition under C.P.L.R. § 3211(a)(7), the court must accept petitioners' allegations as true, liberally construe them, and draw all reasonable inferences in their favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). Dismissal is warranted only if the petition fails to allege facts that fit within any cognizable

legal theory. ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014).

To dismiss the petition pursuant to C.P.L.R. § 3211(a)(1), the admissible documentary evidence must utterly refute or completely negate petitioners' allegations against respondents so as to eliminate all material disputes regarding those facts. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); Mill Financial, LLC v. Gillett, 122 A.D.3d at 103; Art & Fashion Group Corp. v. Cyclops Prod., Inc., 120 A.D.3d 436, 438 (1st Dep't 2014). The documentary evidence must plainly and flatly contradict the petition's claims. Maas v. Cornell Univ., 94 N.Y.2d 87, 91 (1999); Xi Mei Jia v. Intelli-Tec Sec. Servs., Inc., 114 A.D.3d 607, 608 (1st Dep't 2014); Cathy Daniels, Ltd. v. Weingast, 91 A.D.3d 431, 433 (1st Dep't 2012); KSW Mech. Servs., Inc. v. Willis of N.Y., Inc., 63 A.D.3d 411 (1st Dep't 2009). See Lopez v. Fenn, 90 A.D.3d 569, 572 (1st Dep't 2011).

III. STATUTES OF LIMITATIONS

Respondents contend that C.P.L.R. § 214(3) bars petitioners' claims for acts or omissions more than three years before the filing of the petition April 11, 2016. A limitations period of six years, however, applies to petitioners' claims under Executive Law § 63(12). C.P.L.R. § 213(1); State of New York v.

Cortelle Corp., 38 N.Y.2d 83, 86-87 (1975); People v. Credit Suisse Sec. (USA) LLC, 145 A.D.3d 533, 535 (1st Dep't 2016); People v. Trump Entrepreneur Initiative LLC, 137 A.D.3d 409, 418 (1st Dep't 2016). Petitioners' claim under BCL § 1101(a)(2), based on fraud and scienter, is similarly subject to a limitations period of six years. C.P.L.R. § 213(1); State of New York v. Cortelle Corp., 38 N.Y.2d at 88. Only petitioners' claims under GBL § 349 are subject to a limitations period of three years. C.P.L.R. § 214(2); Gaidon v. Guardian Life Ins. Co. of Am., 96 N.Y.2d 201, 209-10 (2001).

IV. CLAIMS UNDER GBL § 349

"Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." GBL § 349(a).

> Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices.

GBL § 349(b). This provision allows respondent Attorney General to commence an action on the people of New York's behalf to enjoin and obtain restitution for deceptive acts or practices affecting consumers. People v. Coventry First LLC, 13 N.Y.3d 108, 114 (2009). The acts or practices violating GBL § 349 must be consumer-oriented, relating to purchases or leases for personal, family, or household use. Medical Socy. of State of

N.Y. v. Oxford Health Plans, Inc., 15 A.D.3d 206, 207 (1st Dep't 2005); Sheth v. New York Life Ins. Co., 273 A.D.2d 72, 73 (1st Dep't 2000). See City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 621, 623 (2009); Stutman v. Chemical Bank, 95 N.Y.2d 24, 29 (2000).

The petition labels the lessees under the Northern Leasing respondents' leases for credit card equipment as consumers, but also describes the lessees as small businesses and small business owners. Sustainable claims under GBL § 349 are limited both to transactions for personal, family, or household and not business uses and to transactions in New York. Goshen Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 325; Egan v. Telomerase Activation Sciences, Inc., 127 A.D.3d 653, 653 (1st Dep't 2015); Ovitz v. Bloomberg L.P., 77 A.D.3d 515, 516 (1st Dep't 2010). Although in opposition to respondents' motions petitioners suggest that enforcement of the leases' guaranties against the individual guarantors may impact their personal, family, or household finances, the petition nowhere alleges that the guaranties are entered, implemented, or even enforced for personal, family, or household purposes. Because petitioners do not show that the lessees or guarantors are consumers under GBL § 349, petitioners fail to sustain their claim under that statute.

V. CLAIMS UNDER EXECUTIVE LAW § 63(12)

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order

> enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages . . . .

N.Y. Exec. Law § 63(12). This provision authorizes respondent Attorney General to commence an action to enjoin and seek restitution for fraudulent or illegal business activity. People v. Greenberg, 27 N.Y.3d 490, 497 (2016); People v. Sprint Nextel Corp., 26 N.Y.3d 98, 108 (2015); People v. Coventry First LLC, 13 N.Y.3d at 114.

Fraud under this provision is "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." N.Y. Exec. Law § 63(12). See People v. Credit Suisse Sec. (USA) LLC, 145 A.D.3d at 534. This provision also defines "repeated" conduct as conduct affecting more than one person and "persistent" conduct as continuing conduct. N.Y. Exec. Law § 63(12).

The test for fraud under Executive Law § 63(12) is whether the act tends to deceive or creates an atmosphere conducive to fraud. People v. General Elec. Co., 302 A.D.2d 314, 314 (1st Dep't 2003). A claim under § 63(12) does not require evidence of bad faith, scienter, People v. General Elec. Co., 302 A.D.2d at 315, or the elements of common law fraud. People v. Coventry First LLC, 52 A.D.3d 345, 346 (1st Dep't 2008), aff'd, 13 N.Y.3d 108.

In sum, to maintain a claim of fraud under Executive Law § 63(12), the petition must allege enough facts to allow a

reasonable inference of fraud. Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d 486, 492 (2008); DDJ Mgt., LLC v. Rhone Group L.L.C., 78 A.D.3d 442, 443 (1st Dep't 2010); Pramer S.C.A. v. Abaplus Intl. Corp., 76 A.D.3d 89, 98 (1st Dep't 2010). Through allegations that the Northern Leasing respondents' salespersons secure leases by misrepresenting the lease provisions, giving lessees incomplete or unexecuted copies of leases, materially altering leases after their signature, and enforcing leases with forged signatures, petitioners sufficiently plead fraud under the statute.

A. THE INDEPENDENT SALES ORGANIZATIONS' CONDUCT

The Northern Leasing respondents contend that the petition complains of acts by independent sales organizations (ISOs), for which the Northern Leasing respondents are not liable. The petition alleges that the ISOs are respondents' agents and that Northern Leasing's agents or Northern Leasing itself committed the deceptive and fraudulent conduct. See People v. Coventry First LLC, 52 A.D.3d at 346, aff'd, 13 N.Y.3d 108. Specifically, the petition alleges the Northern Leasing respondents' direction, supervision, and control of, support to, and direct involvement in the ISOs' misconduct, thus establishing that the Northern Leasing respondents knew and approved of the ISOs' misconduct. Id.

Since respondent Cohen's affidavit fails to authenticate or lay any foundation for the admissibility of the standard ISO agreements upon which respondents rely to establish that the ISOs

were not their agents or employees, respondents fail to establish any documentary defense based on the standard agreements' contents. AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc., 120 A.D.3d 431, 432-33 (1st Dep't 2014); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 637-38 (1st Dep't 2011); Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d 317, 318 (1st Dep't 2007). Even if the court accepts the agreements as admissible, they do not dispositively demonstrate that the ISOs are not respondents' agents because, by securing lessees for the Northern Leasing respondents, the ISOs obtain a benefit for these respondents. Most fundamentally, standard agreements that ISOs will not make representations on the Northern Leasing respondents' behalf, will deliver the equipment and a copy of the lease to lessees, will comply with law, and will abide by Northern Leasing respondents' policies do not negate the petition's allegations that these promises of future conduct were not kept.

The Northern Leasing respondents, after all, own the leased equipment and thus retain responsibility when the equipment is not delivered, does not function, is not repaired, or is not replaced as promised and when they allegedly respond to complaints of undelivered or non-functioning equipment by simply insisting on continued payments. In all these ways, the petition effectively pleads the Northern Leasing respondents' direct conduct or the ISOs' actual authority as the Northern Leasing

respondents' agents, which respondents do not refute. Whether the petition pleads the ISOs' apparent authority therefore is academic.

B. PETITIONERS' EVIDENCE

Although respondents may not support their motions to dismiss the petition with affidavits, Serao v. Bench-Serao, 149 A.D.3d 645, 646 (1st Dep't 2017); Lowenstern v. Sherman Sq. Realty Corp., 143 A.D.3d 562, 562 (1st Dep't 2016); GEM Holdco, LLC v. Changing World Tech., L.P., 127 A.D.3d 598, 599 (1st Dep't 2015); Flowers v. 73rd Townhouse LLC, 99 A.D.3d 431, 431 (1st Dep't 2012), petitioners may rely on admissible affidavits to supplement the petition. C.P.L.R. § 403(b); Nonnon v. City of New York, 9 N.Y.3d at 827; Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013); Thomas v. Thomas, 70 A.D.3d 588, 591 (1st Dep't 2010). The Northern Leasing respondents contend, however, that the affidavits petitioners present to support their petition are inadmissible. First, the Northern Leasing respondents urge that lessors or guarantors' affidavits are deficient because they were not sworn contemporaneously with their writing. No authority, however, invalidates an affidavit because the witness wrote it first to memorialize events and later swore to it for use in court.

Second, the Northern Leasing respondents insist that the affidavits include inadmissible hearsay where the lessees attest to statements by Northern Leasing respondents' employees. The

lessees' accounts of what those employees stated to the lessees, however, are not offered for the truth of those statements, but simply for what promises or misrepresentations the employees made. Hinlicky v. Dreyfuss, 6 N.Y.3d 636, 646-47 (2006); People v. Caban, 5 N.Y.3d 143, 149-50 (2005); People v. Davis, 58 N.Y.2d 1102, 1103 (1983); Giardino v. Beranbaum, 279 A.D.2d 282, 282 (1st Dep't 2001). See Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh, 87 A.D.3d 65, 68 n. (1st Dep't 2011).

The Northern Leasing respondents next contend that the affidavits sworn outside New York lack a certificate of conformity. C.P.L.R. § 2309(c). The Northern Leasing respondents waived this defect when they failed to reject the affidavits within 15 days after their service or to indicate any prejudice from the defect. C.P.L.R. § 2101(f); Pion v. New York City Hous. Auth., 125 A.D.3d 462, 462 (1st Dep't 2015). Moreover, since the affidavits were duly notarized outside New York, the omission of a certificate of conformity is not a fatal defect, but is a mere irregularity that petitioners may remedy nunc pro tunc. Indemnity Ins. Corp., Risk Retention Group v. A 1 Entertainment LLC, 107 A.D.3d 562, 563 (1st Dep't 2013); Hall v. Elrac, Inc., 79 A.D.3d 427, 427-28 (1st Dep't 2010); Matapos Tech. Ltd. v. Campania Andina de Comercio Ltda, 68 A.D.3d 672, 673 (1st Dep't 2009). In any event, several affidavits sworn in New York, which do not require any certificate of conformity, substantiate petitioners' claims. While the Northern Leasing respondents contend that respondent Attorney General presented

only a few affidavits of the hundreds of thousands of transactions on which petitioners' claims are based, the Attorney General need not establish a claim under Executive Law § 63(12) by any number or percentage of consumer complaints. State of New York v. Princess Prestige Co., 42 N.Y.2d 104, 107 (1977).

C. UNCONSCIONABILITY

1. The Need for a Hearing

The Northern Leasing respondents contend that the court must conduct a hearing pursuant to the Uniform Commercial Code to determine whether to sustain the petition's claim that the leases comprise "unconscionable contractual provisions." N.Y. Exec. Law § 63(12). Uniform Commercial Code (UCC) Article 2-A "applies to any transaction, regardless of form, that creates a lease." N.Y. U.C.C. § 2-A-102. Therefore UCC § 2-A-108(1) and (2), governing unconscionable lease provisions and conduct used to induce execution of leases or to collect lease payments, applies.

> Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

N.Y. U.C.C. § 2-A-108(3). At this juncture, however, the court is not making a finding of unconscionability, but is merely determining whether the petition sufficiently pleads unconscionability. See State of New York v. Avco Fin. Serv. of N.Y., 50 N.Y.2d 383, 390 (1980); Green v. 119 W. 138th St. LLC, 142 A.D.3d 805, 809 (1st Dep't 2016). No hearing is required before respondents answer the petition.

2. Procedural and Substantive Unconscionability

By alleging that lessees lacked a meaningful choice, the petition sets forth a claim of unconscionability. Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 10 (1988); State of New York v. Avco Fin. Serv. of N.Y., 50 N.Y.2d at 389; Dabriel v. First Paradise Theaters Corp., 99 A.D.3d 517, 520 (1st Dep't 2012). Procedural unconscionability relates to a contract's formation and encompasses the use of high pressured tactics or deception; the contract's legibility; the education, experience, and language ability of the party claiming unconscionability; and the disparity of bargaining power. Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 11; State v. Avco Fin. Serv. of N.Y., 50 N.Y.2d at 390; Green v. 119 W. 138th St. LLC, 142 A.D.3d at 809; Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d at 520. Substantive unconscionability relates to the contract's terms and analyzes whether they are unreasonably favorable to one party. Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 12; Green v. 119 W. 138th St. LLC, 142 A.D.3d at 809; Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d at 521. At oral argument the Northern Leasing respondents maintained that procedural unconscionability applied to the ISOs, while substantive unconscionability applied to respondents, as drafters of the leases.

The petition pleads claims of procedural unconscionability through allegations both of the lessees' circumstances and of respondents' conduct. Petitioners allege that lessees' education was limited and that lessees were immigrants with limited fluency

in English, elderly, disabled, and thus vulnerable to aggressive, high pressured, and deceptive tactics. The petition alleges that Northern Leasing respondents' salespersons made false promises to lessees, did not provide complete copies of the leases to lessees, and then enforced unsigned and forged leases.

Substantively, petitioners allege that the leases include unconscionable noncancellation, forum selection, and service by mail provisions. Similarly to the "standard" ISO agreements, the Northern Leasing respondents rely only on unauthenticated, inadmissible, allegedly typical leases to rebut the petition's allegations of substantive unconscionability. AQ Asset Mgt. LLC v. Levine, 128 A.D.3d at 621; Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc., 120 A.D.3d at 432-33; IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d at 637-38; Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d at 318. Even if the court considers these leases, their bold or enlarged print does not diminish their unconscionability for lessees who do not understand English or lack education. See Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 11; State of New York v. Avco Fin. Serv. of N.Y., 50 N.Y.2d at 390; Green v. 119 W. 138th St. LLC, 142 A.D.3d at 809; Dabriel v. First Paradise Theaters Corp., 99 A.D.3d at 520.

3. The Noncancellation Provision

Noncancellation provisions are ordinarily enforceable. "In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and

independent upon the lessee's acceptance of the goods." N.Y. U.C.C. § 2-A-407(1). This irrevocability does not apply, however, to the lessees who claim the credit card equipment was never delivered to them. The petition's allegations that lessees' signatures were forged and that lessees did not receive complete copies of their leases similarly negate the propositions that, as a matter of law, the lessees were bound by the terms of the leases they signed, and their failure to read the leases before signing them is no defense. Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 304 (2001), overruled on other grounds, Oakes v. Patel, 20 N.Y.3d 633, 645 (2013); Gillman Chase Manhattan Bank, 73 N.Y.2d at 11.

4. The Forum Selection Provision

Forum selection provisions also are enforceable, unless shown to be unreasonable. Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A., 26 A.D.3d 286, 288 (1st Dep't 2006). Forum selection provisions that violate public policy are unreasonable and unenforceable. See Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d 620, 621 (1st Dep't 2012). The parties do not dispute that a forum selection provision in the Northern Leasing respondents' leases designates New York County as the exclusive forum for litigating claims under the leases. The petition alleges that a majority of the lessees and guarantors reside outside New York State and that the cost of appearing in court or retaining a New York attorney is burdensome. The

petition further alleges that respondents obtained over 19,000 default judgments in respondents' actions against lessees or guarantors to collect payments under their leases between 2010 and 2015. The petition's allegations thus support an inference that the trials in New York County were so impracticable and inconvenient as to deprive the lessees of their "day in court" and compel the court to decline enforcement of the forum selection provision. Yoshida v. PC Tech U.S.A. & You-Ri, Inc., 22 A.D.3d 373, 373 (1st Dep't 2005). See Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621.

Respondents' collection actions are not lawsuits where plaintiffs, if they choose to sue, are limited to a particular forum. See British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg, 172 A.D.2d 234, 234 (1st Dep't 1991); Harry Casper, Inc. v. Pines Assoc., L.P, 53 A.D.3d 764, 765 (3d Dep't 2008); LSPA Enter., Inc. v. Jani-King of N.Y., Inc., 31 A.D.3d 394, 395 (2d Dep't 2006); Di Ruocco v. Flamingo Beach Hotel & Casino, 163 A.D.3d 270, 271-72 (2d Dep't 1990). In respondents' actions, defendants do not choose to engage in litigation. They are faced with the choice only between defending far from their home and business or forgoing a defense.

A forum selection provision is also unenforceable if it is part of an agreement permeated with fraud. DeSola Group v. Coors Brewing Co., 199 A.D.2d 141, 141-42 (1st Dep't 1993). See Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621. As set forth above, the petition alleges that leases were

not signed by the lessees, were materially altered, or contained forged signatures and that lessees received an incomplete or no copy of the lease. These allegations, combined with the petition's further allegations that the Northern Leasing respondents' salespersons falsely represented that the leased equipment was free, a cost saving benefit, and cancelable and that lessees would acquire ownership of the equipment at the end of the lease term, raise an inference that the leases' formation is permeated with fraud. DeSola Group v. Coors Brewing Co., 199 A.D.2d at 141.

5. The Alternative Service Provision

Contracting parties may agree to means of service alternative to the statutorily required means. The typical leases that the Northern Leasing respondents present, on which petitioners may rely to oppose dismissal, see Mitchell v. Calle, 90 A.D.3d 584, 585 (1st Dep't 2011); Ayala v. Douglas, 57 A.D.3d 266, 267 (1st Dep't 2008); Navedo v. Jaime, 32 A.D.3d 788, 789-90 (1st Dep't 2006); Thompson v. Abbasi, 15 A.D.3d 95, 97 (1st Dep't 2005), permit service of process commencing litigation of claims under the leases by mail to the mailing address in the lease or to the lessee's or guarantor's current or last known address when the litigation is commenced. Alternative means of service to which contracting parties freely agree are also enforceable. Knopf v. Sanford, 150 A.D.3d 608, 610 (1st Dep't 2017); Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L., 78 A.D.3d 137, 141 (1st Dep't 2010); Clovine Assoc. Ltd. v. Kindlund, 211 A.D.2d

572, 573 (1st Dep't 1995); Credit Card Leasing Corp. v. Elan Group Corp., 185 A.D.2d 109, 109 (1st Dep't 1992). Even agreed upon waivers of service are enforceable. Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L., 78 A.D.3d at 140.

The only "mailing address" in the lease, however, is for the lessee. The guarantor's address in the lease is a "Home Address." Aff. of Jay Cohen Ex. 1-1, at 2, Ex. 1-2, at 1, Ex. 1-3, at 1, Ex. 1-4, at 2, Ex. 1-5, at 2, Ex. 1-6, at 1, Ex. 1-7, at 1, Ex. 1-8, at 1, Ex. 1-9, at 1, Ex. 1-10, at 2, Ex. 1-11, at 2, Ex. 1-12, at 2, Ex. 1-13, at 1, Ex. 1-15, at 2. Thus, since the lease permits service at the guarantor's current or last known address or at the lessee's mailing address in the lease, respondents may serve the guarantor at the latter address. Moreover, even if respondents were to serve guarantors or lessees at their current or last known address, nothing in these leases notifies guarantors or lessees to update their addresses in the lease if their addresses change. Even if parties to a lease reasonably might do so while the lease is in effect, once it has expired, which is when respondents typically commence litigation under the lease, it is unreasonable to expect that parties would update their addresses for an entity with which they no longer conduct business. Even if leases do notify parties to update their address, such a notice is ineffective if, as the petition alleges, the lessors and guarantors do not receive a copy of that provision or, of course, if they have never signed the lease. For all these reasons, service by mail to the mailing address in

the lease and not necessarily to the lessee's or guarantor's residence or place of business may be unconscionable because the service is not reasonably calculated to provide notice to the lessee or guarantor. U.S. Const. amend. XIV; N.Y. Const. art. I, § 6; Matter of Orange County Commr. of Fin. (Helseth), 18 N.Y.3d 634, 639 (2012); Ruffin v. Lion Corp., 15 N.Y.3d 578, 582 (2010); Kennedy v. Mossafa, 100 N.Y.2d 1, 9-10 (2003). See California Suites, Inc. v. Russo Demolition Inc., 98 A.D.3d 144, 150 (1st Dep't 2012); Reinhard v. City of New York, 34 A.D.3d 376, 377 (1st Dep't 2006).

The petition alleges further that the leases include automatic renewal provisions, without agreement to renew the lease, and that respondents do not advise lessees of the end of their lease term, but continue deducting payments under the lease after the lease term has ended: effectively a never ending lease. These facts and their absurd result raise a plausible claim that no agreed upon alternative service provision extends after the life of the lease, when respondents typically commence litigation under the lease.

Respondents insist that the automatic renewal provisions were valid and that respondents owed no duty to inform lessees of the end of their lease term. Accepting these propositions of law, however, does not overcome the petition's further allegations that the Northern Leasing respondents obstructed lessees' cancellation of their leases, whether before or after the lease term or any renewal. According to petitioners, the

Northern Leasing respondents failed to make their salespersons or other representatives available to lessees to transact any further business after the leases' execution and failed to provide any address for lessees to return unwanted equipment.

In sum, the petition's allegations and lessees' supporting affidavits set forth the lease provisions claimed to be unconscionable and demonstrate deception, including withholding from lessees complete copies of their leases and forgery of their signatures, and other indicia that lessees did not knowingly and freely give their consent to the leases' terms. State of New York v. Avco Fin. Serv. of N.Y., 50 N.Y.2d at 390. Petitioners thus sustain their claims of various categories of "unconscionable contractual provisions." N.Y. Exec. Law § 63(12).

VI. CLAIM FOR DISSOLUTION UNDER BCL § 1101

Petitioner Attorney General seeks to dissolve Northern Leasing Systems, Inc., due to its fraudulent and illegal activity.

> The attorney-general may bring an action for the dissolution of a corporation upon one or more of the following grounds:
>
> . . . .
>
> (2) That the corporation has exceeded the authority conferred upon it by law, or has violated any provision of law whereby it has forfeited its charter, or carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.

N.Y. Bus. Corp. Law § 1101(a). See State of New York v. Cortelle Corp., 38 N.Y.2d at 87; People v. Oliver Schools, 206 A.D.2d 143,

145 (4th Dep't 1994). Business Corporation Law § 1101(a) thus grants petitioner Attorney General standing to vindicate the State's right to remedy a corporation's fraudulent acts and dissolve a corporation that has abused the State's grant of corporate status. State of New York v. Cortelle Corp., 38 N.Y.2d at 88; People v. Oliver Schools, 206 A.D.2d at 145-46.

The petition alleges that a Consent Order and Judgment dated February 28, 2013, in a prior action,

> permanently enjoined Respondents from engaging in any deceptive, fraudulent or illegal practices in violation of, inter alia, New York Executive Law § 63(12) and New York General Business Law ("GBL") § 349 in connection with "any collection or attempted collection of taxes and/or related administrative fees through any means from lessees or former lessees.

V. Pet. ¶ 15. As well as detailing, as discussed above, the persistent fraudulent and illegal transaction of business to which the Northern Leasing respondents subjected innumerable lessees over a span of years through drafting leases and securing the lessees, the petition alleges that the Northern Leasing respondents disobeyed this order. Together, these allegations plead a significant, serious, and continuing abuse of a public right justifying dissolution. People v. Oliver Schools, 206 A.D.2d 143, 147 (4th Dep't 1994).

VII. CLAIMS AGAINST RESPONDENT HERTZMAN

Even if the court denies the motion to dismiss the claims against the Northern Leasing respondents, they independently seek dismissal of the claims against respondent Hertzman. The petition alleges that Neil Hertzman is Northern Leasing's Vice

President of Customer Service and Collections. The Consent Order and Judgment designated Hertzman as the liaison for handling complaints and gave him authority to resolve them. The petition alleges that Hertzman participated in collection of lessees' debts under their leases and knew of Northern Leasing's fraudulent and deceptive acts, as required for liability under Executive Law § 63(12). Petitioners' allegations of Hertzman's involvement and participation in the day-to-day operations of Northern Leasing's collections adequately plead fraud by Hertzman, as a corporate officer. Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d at 492-93; DDJ Mgt., LLC v. Rhone Group L.L.C., 78 A.D.3d at 443. Hertzman's position also raises a reasonable inference that he acted on Northern Leasing's behalf. DDJ Mgt., LLC v. Rhone Group L.L.C., 78 A.D.3d at 444.

Although Hertzman's affidavit is not documentary evidence under C.P.L.R. § 3211(a)(1), Serao v. Bench-Serao, 149 A.D.3d at 646; Lowenstern v. Sherman Sq. Realty Corp., 143 A.D.3d at 562; City of New York v. VJHC Dev. Corp., 125 A.D.3d 425, 426 (1st Dep't 2015); Art & Fashion Group Corp. v. Cyclops Prod., Inc., 120 A.D.3d at 438, his affidavit nonetheless describes his position and how Northern Leasing handles lessees' complaints. His affidavit describes how Northern Leasing's records contradict lessees' claims, but does not negate any of the petition's allegations establishing his individual liability. Instead, by confirming his employment with the Northern Leasing respondents, Hertzman underscores his association with their operations,

rather than dissociating himself from them. DDJ Mgt., LLC v. Rhone Group L.L.C., 78 A.D.3d at 444.

VIII. CLAIMS AGAINST THE ATTORNEY RESPONDENTS

The attorney respondents move to dismiss the complaint against them on the ground that their representation of the Northern Leasing respondents in their actions under the leases was constitutionally protected activity. The Noerr-Pennington doctrine, derived from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and Mine Workers v. Pennington, 381 U.S. 657 (1965), protects the right under the First Amendment to the United States Constitution to petition the government for governmental action, including through litigation, Villanova Estates, Inc. v. Fieldston Prop. Owners Assn., Inc., 23 A.D.3d 160, 161 (1st Dep't 2005); I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d 206, 208 (1st Dep't 2005); Singh v. Sukhram, 56 A.D.3d 187, 191 (2d Dep't 2008), and any incidental activity. Nineteen Eighty-Nine, LLC v. Ichan Enters. L.P., 99 A.D.3d 546, 547 (1st Dep't 2012). See Posner v. Lewis, 18 N.Y.3d 566, 572 (2012). The attorney respondents bear the initial burden to demonstrate the doctrine's applicability so as to bar petitioners' claims. See Nineteen Eighty-Nine, LLC v. Ichan Enters. L.P., 99 A.D.3d at 547; Arts4All, Ltd. v. Hancock, 25 A.D.3d 453, 454 (1st Dep't 2006).

The sham exception to the Noerr-Pennington doctrine applies to abuse of a governmental process, rather than its outcome. Singh v. Sukhram, 56 A.D.3d at 192. To plead the sham exception

to the Noerr-Pennington doctrine, the petition must allege facts allowing an inference that respondents lacked a genuine interest in seeking governmental action, Villanova Estates, Inc. v. Fieldston Prop. Owners Assn., Inc., 23 A.D.3d at 161; Singh v. Sukhram, 56 A.D.3d at 192, and that their use of the litigation process in that quest was objectively baseless. I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d at 208; Singh v. Sukhram, 56 A.D.3d at 192.

Petitioners' allegations of respondent Sussman's testimony that 90% of defendants sued by respondents defaulted, yet they continue to serve defendants by mail as the leases allow, fail to demonstrate that the attorney respondents' actions were baseless. The allegations that the attorney respondents shared office space with the Northern Leasing respondents, shared access to their computer database, and knew of lessees' complaints of misrepresentation by salespersons and of forgery do not allow an inference that the attorney respondents knew their litigation to enforce the leases was objectively baseless, to establish the sham exception. I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d at 208. See Singh v. Sukhram, 56 A.D.3d at 192. Nor do the attorney respondents, as legal counsel retained by the Northern Leasing respondents, lack an interest in a favorable outcome of the actions under the leases. Singh v. Sukhram, 56 A.D.3d at 193. See Posner v. Lewis, 80 A.D.3d 308, 316 (1st Dep't 2010), aff'd, 18 N.Y.3d 566. Any lack of due diligence by the attorney respondents in investigating their claims falls

short of raising an inference that they knew the actions commenced on respondents' behalf were baseless. Petitioners thus fail to sustain their claims against respondents Joseph I. Sussman, P.C., Sussman, and Babad.

IX. JUDGE FISHER'S CLAIM SEEKING TO VACATE DEFAULT JUDGMENTS

Petitioner Judge Fisher seeks to vacate default judgments respondents obtained in their actions to recover damages for breach of the leases.

> An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such actions set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just.

C.P.L.R. § 5015(c). At oral argument, Judge Fisher clarified that she did not collaterally attack prior court orders by seeking to vacate default judgments sustained upon denial of a defendant's motion to vacate a default judgment. The petition's allegations that lessees' consent to jurisdiction in New York County and to service by mail, in leases that lessees have not executed or of which they have not received complete copies, is ineffective, for the reasons explained, plead claims that other default judgments were obtained by fraud, misrepresentation, unconscionability, or lack of due service. Id.

Respondents contend that Judge Fisher has failed to comply

with the statute's notice requirement, which, other than "appropriate notice to counsel for the respective parties, or to the parties themselves," is undefined. C.P.L.R. § 5015(c). If filing and serving the petition commencing this proceeding is not "appropriate notice," the Consent Order and Judgment provided respondents additional prior notice.

Respondents further contend that laches bar Judge Fisher's claims. Even if Judge Fisher delayed the institution of her claims, respondents fail to identify any change in their position during the lapse of time or other prejudice from it to support a defense of laches. EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d 45, 55 (1st Dep't 2004); Rosenthal v. City of New York, 283 A.D.2d 156, 161 (1st Dep't 2001); Cohen v. Krantz, 227 A.D.2d 581, 582-83 (2d Dep't 1996).

X. CONCLUSION

For the reasons explained above, the court grants the Northern Leasing respondents' motion to the extent of dismissing petitioners' claims under GBL § 349 and claims under Executive Law § 63(12) and C.P.L.R. § 5015(c) insofar as they are based on illegal conduct in violation of GBL § 349, but otherwise denies those respondents' motion. C.P.L.R. §§ 404(a), 3211(a)(1), (5), and (7). The court also grants the motion by respondents Joseph I. Sussman, P.C., Sussman, and Babad to dismiss the petition against these attorney respondents. C.P.L.R. §§ 404(a), 3211(a)(7).

The Northern Leasing respondents shall serve and file an

answer to the petition within five days after service of this order with notice of entry unless petitioners agree to a longer period. C.P.L.R. § 404(a). Petitioners or the Northern Leasing respondents may re-notice the proceeding consistent with C.P.L.R. § 404(a). This decision constitutes the court's order and judgment dismissing the petition's claims under GBL § 349, claims under Executive Law § 63(12) and C.P.L.R. § 5015(c) insofar as they are based on illegal conduct in violation of GBL § 349, and claims against the attorney respondents.

DATED: November 17, 2017

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.