

**MLS Funding Corp. v Comprehensive Cardiac Servs.
of N.Y., P.C.**

2018 NY Slip Op 30317(U)

January 25, 2018

Supreme Court, Suffolk County

Docket Number: 12-02081

Judge: Arthur G. Pitts

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COPYINDEX No. 12-02081CAL. No. 16-02129COSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY**PRESENT:**Hon. ARTHUR G. PITTS
Justice of the Supreme CourtMOTION DATE 4-13-17
ADJ. DATE 6-29-17
Mot. Seq. # 004 - MD-----X
MLS FUNDING CORP.,

Plaintiff,

- against -

COMPREHENSIVE CARDIAC SERVICES OF
NEW YORK, P.C., ZAHEED TAI, SUDHESH
SRIVASTAVA and HUL GUAN,Defendants.
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Upon the following papers numbered 1 to 25 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-23; Replying Affidavits and supporting papers 24-25; Other Defendants' Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Comprehensive Cardiac Services of New York, P.C. for summary judgment dismissing the complaint against it is denied.

Plaintiff MLS Funding Corp. (MLS") allegedly entered an agreement in December 2005 whereby it financed the lease of certain diagnostic medical equipment, including an ultrasound machine, on behalf of defendant Comprehensive Cardiac Services of New York, P.C. Comprehensive's members, defendants Zaheed Tai, Sudhesh Srivastava, and Hul Guan, were required to execute documents personally guaranteeing the lease ("herein collectively referred to as "Comprehensive"). Shortly after executing the lease finance agreement and personal guarantees, MLS allegedly assigned its rights under the agreement, including its right to receive the remaining monthly finance payments, to nonparty General Electric Capital Corporation ("GECC"). The alleged assignment was memorialized by a notice of assignment forwarded to Comprehensive, and an assignment contract executed by the parties. Sometime nearing the end of the lease term, in a letter dated December 7, 2010, GECC purportedly sold the ultrasound machine to Comprehensive.

Subsequently, MLS commenced this action for breach of contract, asserting that it remained the lessor of record at the end of the lease term, and that Comprehensive breached the lease agreement when it retained the ultrasound machine and ceased making lease payments in December 2010. Comprehensive joined issue, denying MLS's claims and asserting various affirmative defenses, including lack of standing. On December 10, 2013, MLS moved for summary judgment in its favor on the issue of liability. By order dated April 23, 2014, this court denied MLS' motion, finding, *inter alia*, that discovery was incomplete, and that preliminary documentary evidence provided by the parties provided conflicting evidence as to the ownership of the equipment in question. The parties subsequently filed the note of issue on December 12, 2016.

Comprehensive now moves for summary judgment dismissing the complaint against it on the grounds MLS lacks standing to bring the action, as it assigned all of its rights under the lease to GECC, and that Comprehensive, through its exercise of a purchase option offered by GECC at the end of the lease, purchased the ultrasound machine free and clear of any alleged residual interests retained by MLS under the lease agreement. MLS opposes the motion on the grounds triable issues exist as to whether it retained all its other interests under the lease when it assigned GECC the right to receive payments under the lease and, if so, whether GECC, having only been assigned the right to collect such payments, had the right to sell the ultrasound machine at the end of the lease. Additionally, MLS asserts that GECC's offer to sell the ultrasound machine to Comprehensive was invalid, as the lease expressly forbids oral modifications of the agreement such as the purchase option GECC allegedly offered to Comprehensive.

Paragraph 11 through 13 of the lease agreement between MLS and Comprehensive states in pertinent part, as follows:

The Equipment is, and shall remain, the property of Lessor, and Lessee shall have no right, title, or interest in the Equipment except as expressly set forth in this Lease. . . By this Lease, Lessee acquires no ownership right in the Equipment, and has no option to purchase the same. Upon the expiration, or earlier termination or cancellation of this Lease, or in the event of a default under Paragraph 20, hereof, Lessee, at its expense, shall return the Equipment in good repair, ordinary wear and tear resulting from proper use thereof alone excepted, by delivering it, packed and ready for shipment, to such place or carrier as Lessor may specify. . . At the expiration of the Lease, Lessee shall return the Equipment in accordance with Paragraph 12, hereof. At Lessor's option, this Lease may be continued on a month-to-month basis until 30 days after Lessee returns the Equipment to Lessor. In the event Lease is so continued, Lessee shall pay to Lessor rentals in the same periodic amounts indicated under "Amount of Each Payment" above.

Paragraph 24 through 25 of the lease agreement further states:

This instrument constitutes the entire agreement between Lessor and Lessee. No provision of this Lease shall be modified or rescinded unless in writing signed by a representative of Lessor. Waiver by Lessor of any provision hereof in one instance shall not constitute waiver as to any other instance. . . This Lease is intended to constitute a valid and enforceable legal instrument, and no provision of this Lease that may be deemed unenforceable shall in any way invalidate any other provision or provisions hereof, all of which shall remain in full force and effect.

The notice and acknowledgment of assignment form forwarded to Comprehensive states as follows:

Please be advised that, effective December 22, 2005, MLS has assigned to General Electric Capital Corporation ("GECC") all of MLS's right, title and interest in and to the above described agreement (the "Agreement") and the related equipment. You should send all future payments under the Agreement to GECC at the address set forth below. . . Please be advised that GECC is only being assigned the rights to payments under your agreement and is not undertaking any obligations MLS (if any). MLS and/or the manufacturer, as applicable, remain solely liable for all performance obligations as the renter under the Agreement . . . *Upon payment of all of Lessee's obligations pursuant to any such lease assigned GECC will promptly reassign to MLS Funding Corp. all rights of GECC under the Lease, including but not limited to the transfer of title to the subject leased equipment and any unexercised purchase options and/or agreements relating to the leased equipment*

The assignment contract executed by the parties further provides, in pertinent part, that:

1. For value received, Assignor hereby unconditionally and irrevocably assigns and transfers to Assignee, its successors and assigns all of Assignor's right, title and interest in and to the following:

(a) the Contracts . . . annexed hereto and made a part of this Assignment by reference . . .

(b) the payments due and to become due under each assigned contract ("Payments");

(c) Assignor's security interest in the equipment subject to such Assigned Contracts ("Equipment") . . .

3. Assignee and Assignor intend for the assignment of all payments and other contract rights under each Assigned Contract pursuant to this Assignment to be a true sale of such Payment and contract rights and not as a loan from Assignee to Assignor. . . Assignor grants Assignee a security interest in the Assigned Contracts, the Payments and all proceeds of each. Assignor hereby authorizes Assignee to file (a) all Uniform Commercial Code ("UCC") financing Statements with respect to any security interest granted by Customers to Assignor under the Assigned Contracts . . . (b) any and all UCC Financing Statements that Assignee deems appropriate in order to perfect the security interest granted by the Assignor to Assignee under this Assignment.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Uni. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

“[W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectation will be realized” (*John E. Andrus Memorial Home v De Buono*, 260 AD2d 635, 688, 688 NYS2d 687 [2d Dept 1999]; see *Herzfeld v Herzfeld*, 50 AD3d 851, 851, 857 NYS2d 170 [2d Dept 2008]; *McCabe v Witteveen*, 34 AD3d 652, 825 NYS2d 499 [2d Dept 2006]). While a determination of the intent of the parties to a contract can be made as a matter of law where their intent is discernable within the four corners of an unambiguously worded agreement (see *Nappy v Nappy*, 40 AD3d 825, 836 NYS2d 256 [2d Dept 2007]), where a contract clause is ambiguous, and the determination of the parties’ intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is a matter for trial (see *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]). The test for determining whether contract language is ambiguous is “whether the agreement on its face is reasonably susceptible of more than one interpretation” (*Chimart Assoc. v Paul*, 66 NY2d 570, 573, 498 NYS2d 344 [1986]; see *Sasson v TLG Acquisition LLC*, 127 AD3d 480, 9 NYS3d 2 [1st Dept 2015]).

“An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, or chattel, or other thing” (*Griffey v New York Cent. Ins. Co.*, 100 NY 417, 422, 3 NE 309 [1885]). “No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned” (*Matter of Stralem*, 303 AD2d 120, 122, 758 NYS2d 345 [2d Dept 2003], quoting *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). While an assignment at law requires that an assignor must be “divested of all control over the thing assigned” (*Coastal Commercial Corp. v Kosoff & Sons*, 10 AD2d 372, 376, 199 NYS2d 852 [4th Dept 1960]; see *Matter of Stralem*, *supra*), New York also recognizes the conditional assignment of a collateral security interest meant to secure an underlying debt or loan (see *Agristor Leasing v Barlow*, 180 AD2d 899, 901, 579 NYS2d 476 [3d Dept 1992]; *Southern Assoc. v United Brands Co.*, 67 AD2d 199, 204, 414 NYS2d 560 [1st Dept 1979]; *Fifty States Mgt. Corp. v Pioneer Auto Parks*, 44 AD2d 887, 888, 355 NYS2d 856 [4th Dept 1974]). When parties agree to a conditional assignment for security purposes only, the assignor is permitted to retain title in the collateral while giving a security interest to the assignee for future claims (see *Miller v Wells Fargo Bank International Corp.*, 540 F2d 548, 559 [2d Cir 1976]). As a result, the putative assignor under such an agreement will not be deprived of its standing to maintain an action in lieu of its rights to underlying collateral (see *N. Picco & Sons Contr. Co., Inc. v Board of Educ. of the Bronxville School*, 71 AD3d 851, 895 NYS2d 881 [2d Dept 2010]; *Agristor Leasing v Barlow*, *supra*; *Fifty States Mgt. Corp. v Pioneer Auto Parks*, *supra*).

Here, Comprehensive did not meet its prim facie burden on the motion, as it failed to eliminate triable issues relating to whether the purported assignment was a conditional lease made for security purposes only and, if so, whether MLS retained an interest in the title of the ultrasound machine sufficient to give it standing to commence the instant action (see *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Uni. Med. Ctr.*, *supra*; see also *N. Picco & Sons Contr. Co., Inc. v Board of Educ. of the Bronxville School*, *supra*; *Agristor Leasing v Barlow*, *supra*). And, as the lease agreement, notice of assignment, and assignment contract contain ambiguous language as to whether GECC was only assigned the right to receive payments due under the lease, and that MLS retain collateral rights to the ultrasound machine, including the right to insist that GECC re-assign it the machine at the end of the lease, an issue of fact is presented which may only be resolved at trial (see *Amusement Bus. Underwriters v American Intl. Group*, *supra*; *Sheriff Officers Assn., Inc. v County of Nassau*, 69 AD3d 921, 893 NYS2d 260 [2d Dept 2010]). Significantly, the lease agreement explicitly states that GECC is only assigned the

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right to collect lease payments due under the agreement. Furthermore, while the assignment contract purports to divest MLS of all its rights to the leased equipment, it also states that upon the exhaustion of all payments under the lease, "GECC will promptly reassign to MLS [. . .] all rights of GECC under the Lease, including but not limited to the transfer of title to the subject leased equipment and any unexercised purchase options and/or agreements relating to the leased equipment." Accordingly, the motion by Comprehensive Cardiac Services of New York, P.C. for summary judgment dismissing the complaint against it is denied.

Dated: Riverhead, New York
January 25, 2018



ARTHUR G. PITTS, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION