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 BARBARA D. UNDERWOOD, Acting Attorney General of the State of New York, and GEORGE J. SILVER, DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR NEW YORK CITY COURTS,

Petitioners

- against -

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 a 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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Index No. 450460/2016

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Respondents Northern Leasing Systems, Inc., Lease Finance Group LLC, MBF Leasing LLC, Lease Source-LSI, LLC, Golden Eagle Leasing LLC, Pushpin Holdings LLC, Cohen, and Hertzman move to stay this proceeding based on their pending appeal of the order entered November 29, 2017, in this court. C.P.L.R. §§ 2201, 5519(c). The order denied in part these respondents'

motion to dismiss the petition, but granted their motion in part, and also granted the motion by respondents Joseph I. Sussman, P.C., Sussman, and Babad, attorneys for the other, moving respondents, to dismiss the petition against the attorney respondents. C.P.L.R. § 3211(a)(7). For the reasons explained below, the court denies respondents' motion for a stay.

I. A STAY PENDING APPEAL

By mainly repeating respondents' contentions in support of their prior motion that the November 2017 order determined, respondents contend that their appeal of the determinations denying dismissal of claims demonstrates sufficient merit to warrant a stay here pending the appeal, Respondents focus particularly on the denial of dismissal based on the Noerr-Pennington doctrine and based on the statute of limitations applicable to the claim under C.P.L.R. § 5015(c), bases for dismissal that they claim the court overlooked, and based on petitioners' failure to plead unconscionability.

The determination whether to grant a stay pending appeal is discretionary. Nama Holdings, LLC v. Greenberg Traurig LLP, 76 A.D.3d 804, 804 (1st Dept 2010); CDR Créances S.A. v. Euro-American Lodging Corp., 40 A.D.3d 421, 423 (1st Dep't 2007); 64 B Venture v. American Realty Co., 179 A.D.2d 374, 375 (1st Dep't 1992); Grisi v. Shainswit, 119 A.D.2d 418, 421 (1st Dep't 1986). See Asher v. Abbott Labs., 307 A.D.2d 211, 211 (1st Dep't 2003). In determining whether to grant a stay, the court considers the merit of the appeal, Nama Holdings, LLC v. Greenberg Traurig LLP,

76 A.D.3d at 805; CDR Créances S.A. v. Euro-American Lodging Corp., 40 A.D.3d at 423; 64 B Venture v. American Realty Co., 179 A.D.2d at 375-76; whether a stay will avoid duplication of effort and waste of judicial resources; and the prejudice to the parties opposing the stay. OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co., 96 A.D.3d 541, 541 (1st Dep't 2012); Asher v. Abbott Labs., 307 A.D.2d at 212.

II. UNADDRESSED GROUNDS FOR DISMISSAL

Respondents contend that the court did not address the applicability of the Noerr-Pennington doctrine to the claims against the nonattorney respondents, in contrast to the attorney respondents, or the applicability of a limitations period of three years to petitioners' claims under New York Business Corporation Law (BCL) § 1101(a)(2) and C.P.L.R. § 5015(c). Insofar as the Appellate Division may determine that this court failed to address any of respondents' grounds for dismissal, the Appellate Division simply may remand the proceeding to this court to determine such overlooked defenses. See Mitchell v. Fidelity Borrowing LLC, 40 A.D.3d 557, 558 (1st Dep't 2007); 220-52 Assoc. v. Edelman, 18 A.D.3d 313, 315 (1st Dep't 2005); Daley v. Related Companies, Inc., 179 A.D.2d 55, 59 (1st Dep't 1992).

In any event, respondents' most efficient remedy is to answer the petition and immediately move for a summary determination of any claims that the court ought to have dismissed, whether overlooked or not, or now ought to dismiss based on respondents' admissible evidence that the court did not

consider under C.P.L.R. § 3211(a). C.P.L.R. § 409(b). See Gonzalez v. City of New York, 127 A.D.3d 632, 633 (1st Dep't 2015); 1091 Riv. Ave. LLC v. Platinum Capital Partners, Inc., 82 A.D.3d 404, 404 (1st Dep't 2011); Hotel 71 Mezz Lender, LLC v. Rosenblatt, 64 A.D.3d 431, 432 (1st Dep't 2009); Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008). There is no outcome that respondents may gain on appeal that they may not gain by proceeding in this court.

III. THE MERIT OF RESPONDENTS' APPEAL

A. The *Noerr-Pennington* Doctrine

The nonattorney respondents contend that the court overlooked their joinder in the attorney respondents' motion to dismiss the petition based on the Noerr-Pennington doctrine. Even if the court did overlook the moving respondents' adoption of this defense, it does not alter the ultimate outcome. Procedurally, as set forth above, the Appellate Division may remand the proceeding for a determination based on this defense, or respondents now may move for a summary determination on that basis. On the merits, moreover, the Noerr-Pennington doctrine is not equally applicable to the nonattorney respondents.

This 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 nonattorney respondents themselves qualified the applicability of this doctrine as protecting only legitimate pre-litigation and litigation activities. By maintaining that dismissal of the attorney respondents based on this defense entitled the nonattorney respondents to dismissal as well, these respondents imply that all their activity alleged in the petition is both legitimate and limited to pre-litigation and litigation activity.

Unlike the attorney respondents' conduct, the petition's allegations of the nonattorney respondents' conduct, fraudulently inducing merchants to enter overpriced equipment leases, with other terms also unduly favorable to respondents, and preventing the return of unrequested or defective equipment, plead the baselessness of these respondents' actions to enforce the leases. This pleading establishes the "sham" exception to the Noerr-Pennington doctrine, which is applicable to litigation undertaken without objective basis or reasonable expectation of success founded on the law and facts, but which the court found inapplicable to the attorney respondents. Singh v. Sukhram, 56 A.D.3d at 192; I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d at 208. In sum, the sham exception lifts the

Noerr-Pennington doctrine's bar as to petitioners' adequately pleaded, legitimate claims against respondents, see Villanova Estates, Inc. v. Fieldston Prop. Owners Assn., Inc., 23 A.D.3d at 161-62, whose alleged unlawful conduct started well before their litigation to enforce their leases.

Moreover, from the petition's allegations of unconscionable leases that lessees were fraudulently induced to sign or on which their signatures were forged, it is readily inferable that the nonattorney respondents knew of the lessees' valid defenses to the leases' enforcement. Respondents point to the petition's allegation that the attorney respondents' knowledge is coextensive with their clients' knowledge, but that allegation relates only to the attorney respondents' knowledge of defenses raised by lessees or guarantors who appear and answer respondents' collection actions. The gravamen of petitioners' claims are all the lessees and guarantors who do not appear and whose valid defenses are unknowable to the attorney respondents, while their clients well know how they fraudulently induced merchants to enter the leases or prevented the return of unrequested or defective equipment.

Respondents now contend that the Noerr-Pennington doctrine also protects them against the litigation activity for which petitioner Judge Silver seeks relief under C.P.L.R. § 5015(c). Since C.P.L.R. § 5015(c) provides for relief from default judgments, procured through litigation, all the conduct for which § 5015(c) provides relief is litigation activity. Thus

respondents effectively challenge the entire provision on constitutional grounds. Respondents did not raise this defense in their motion to dismiss the petition, however; therefore, insofar as the defense is a ground for their appeal, the defense would be raised impermissibly for the first time on appeal. NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 181 (2016); Ari v. Cohen, 107 A.D.3d 516, 517 (1st Dep't 2013); New York Community Bank v. Parade Place, LLC, 96 A.D.3d 542, 543 (1st Dep't 2012); 220-52 Assoc. v. Edelman, 18 A.D.3d at 315.

B. Respondents' Statute of Limitations Defense

Respondents also contend that the court failed to address the statute of limitations applicable to the claims under BCL § 1101(a)(2) and C.P.L.R. § 5015(c). The court addressed the statute of limitations applicable to the BCL § 1101(a)(2) claim, holding that it was based on fraud and scienter and thus 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 83, 88 (1975).

Respondents introduced their arguments regarding the applicable statute of limitations by listing the C.P.L.R. § 5015(c) claim with the claims under BCL § 1101(a)(2), New York Executive Law § 63(12), and New York General Business Law § 349, as subject to a limitations period of three years under C.P.L.R. § 214(2). Respondents did not, however, discuss its applicability to the C.P.L.R. § 5015(c) claim further as they did in separate sections for the other claims. Respondents

separately raised a laches defense that the court addressed and rejected.

Even now, respondents present no authority that a claim under C.P.L.R. § 5015(c), also based on fraud and scienter, is subject to a limitations period of three years. Instead, again for the first time, respondents seek to apply the one year time limit for a motion pursuant to C.P.L.R. § 5015(a)(1) and the reasonable time limits for motions pursuant to other paragraphs of § 5015(a), limits which expressly do not apply to § 5015(c).

Most importantly, respondents acknowledge that, even if a limitations period of three years applies to the C.P.L.R. § 5015(c) claim or any of petitioners' other claims, the statute of limitations is not grounds to dismiss any claim altogether. Instead, the statute of limitations defense only would bar relief from transactions more than three years before the proceeding was commenced.

C. Unconscionability

Respondents also point to their appeal of the court's findings of unconscionability. The court made no finding of unconscionability, only a determination that the petition alleged 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). Respondents insist that the court confused the allegations supporting substantive and procedural unconscionability, but, regardless of any such confusion, the court determined that the petition alleged both

forms.

Unconscionability entails a substantive element: here, that the equipment lease terms were unreasonably favorable to respondents. 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; Green v. 119 W. 138th St. LLC, 142 A.D.3d at 809-10; Dabriel v. First Paradise Theaters Corp., 99 A.D.3d 517, 520 (1st Dep't 2012). While a contract provision may be "so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone," respondents do not claim that any of the lease provisions regarding the equipment's price, no cancellation, automatic renewal, forum selection, or service by mail is not, at minimum, extremely favorable to respondents and of no benefit to lessees. Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 12. In combination, these provisions well may be unreasonably favorable to respondents.

Respondents merely claim that these provisions are enforceable when freely negotiated without fraud. Therefore, except when a contract provision meets the "so outrageous" test, unconscionability also entails a procedural element: the lack of meaningful choice in the formation of the lease terms, through deception, high pressured tactics, overreaching, and the lessees' lack of experience, education, and language fluency, resulting in a disparity of bargaining power. Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 10-11; State v. Avco Fin. Serv. of N.Y., 50 N.Y.2d at 389-90; 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. The petition satisfies this element by alleging, first, that lessees and lease guarantors were vulnerable to aggressive, high pressured, and deceptive tactics due to their immigrant status, inexperience with the leases, limited education, and limited fluency in English. State v. Avco Fin. Serv. of N.Y., 50 N.Y.2d at 389. See Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d at 520. The petition further alleges that respondents' salespersons took advantage of these vulnerabilities, by making false promises to lessees and guarantors and not providing complete copies of the leases and guaranties to lessees and guarantors, so they might learn what these contracts in fact promised. Green v. 119 W. 138th St. LLC, 142 A.D.3d at 809. See Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 11; Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d at 520; Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d 620, 621 (1st Dep't 2012). Further, respondents sought to enforce their unreasonably favorable lease terms against lessees and guarantors who had been defrauded, had not received complete copies of the leases and guaranties, had not signed them, had not received the supposedly leased equipment, and had been prevented from returning unrequested or defective equipment and from cancelling leases. Finally, due to the forum selection and mail service provisions, these lessees and guarantors failed to answer in court due to its distance from their homes and businesses or their nonreceipt of process. See Public Adm'r

Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621; Yoshida v. PC Tech U.S.A. & You-Ri, Inc., 22 A.D.3d 373, 373 (1st Dep't 2005).

IV. THE OTHER FACTORS BEARING ON WHETHER TO GRANT A STAY

Respondents seek a stay because, in their view, continuing the proceeding before resolution of the appeal may unfairly burden them, by requiring them to conduct unnecessary disclosure, if the Appellate Division finds that the applicable limitations period is three years instead of the six years that this court applied. Respondents claim that, under this court's ruling, they need disclosure covering six years before the proceeding was commenced, but, under respondents' interpretation of the applicable statute of limitations, they would need disclosure covering only three of those six years. The attorney respondents also claim that continuing disclosure in their absence would prejudice them and waste judicial resources if, upon petitioners' cross-appeal, the Appellate Division reverses the attorney respondents' dismissal, because then these respondents would need to conduct disclosure duplicating what the remaining parties already conducted.

Before conducting any disclosure, however, any respondent must obtain the court's permission. C.P.L.R. § 408; Hirsch v. Stewart, 63 A.D.3d 74, 81 (1st Dep't 2009); 952 Assoc., LLC v. Palmer, 52 A.D.3d 236, 236 (1st Dep't 2008); Roth v. Pakstis, 13 A.D.3d 194, 195 (1st Dep't 2004); Stapleton Studios v. City of New York, 7 A.D.3d 273, 274-75 (1st Dep't 2004). See Solangee Z.

v. Kahir E., 107 A.D.3d 428, 429 (1st Dep't 2013); Daveiga v. City of New York, 57 A.D.3d 451, 451-52 (1st Dep't 2008). Petitioners emphasize that respondents need no disclosure because all the information regarding lessees' complaints of respondents' conduct alleged in the petition is in their files: a point that respondents never answer.

Even if disclosure is necessary, if respondents believe they need disclosure covering only three years before the proceeding was commenced, respondents may so limit their motion for disclosure. Even if the Appellate Division applies a limitations period of three years, however, petitioners may rely on evidence from before that period to support their claims; the statute of limitations will limit only the retroactive relief. Kent v. Papert Cos., 309 A.D.2d 234, 241 (1st Dep't 2003); Chefalas v. Taylor Clark Architects, 283 A.D.2d 174, 175 (1st Dep't 2001); Gould v. Decolator, 131 A.D.3d 445, 447-48 (2d Dep't 2015). See 450-452 East 81st St., LLC v. New York State Div. of Hous & Community Renewal, 70 A.D.3d 489, 490 (1st Dep't 2010); H.O. Realty Corp. v. State of N.Y. Div. of Hous & Community Renewal, 46 A.D.3d 103, 108-109 (1st Dep't 2007). Therefore the statute of limitations is not determinative of the scope of disclosure.

Regarding the other parties' interests, in the event that disclosure is permitted, and the Appellate Division reinstates the petition against the attorney respondents, they may avail themselves of the disclosure already conducted and make necessary supplemental requests or inquiries as is routine when parties are

impleaded after the original parties' completion of disclosure. Petitioners, on the other hand, claim prejudice from delay of the proceeding, given the number of additional complaints about respondents' conduct that petitioners continue to receive and respondents' continued commencement of actions and procurement of default judgments in the New York City Civil Court. See OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co., 96 A.D.3d 541; Asher v. Abbott Labs., 307 A.D.2d at 212.

V. CONCLUSION

As set forth above, respondents have failed to demonstrate sufficient merit to their appeal or a duplication of effort or waste of judicial resources from allowing the proceeding to continue, to warrant a stay of the proceeding pending the appeal. Therefore the court denies respondents' motion for a stay. C.P.L.R. §§ 2201, 5519(c). This decision constitutes the court's order.

DATED: May 18, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.