

**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, PART 34**

**STERLING NATIONAL BANK as assignee of
NORVERGENCE, INC.,**

Index No: 54751/04
Motion Calendar Date: March 9, 2005
Motion Calendar No.:

Plaintiffs

DECISION/ORDER

-against-

Present: **HON. ELLEN GESMER**
Judge, Civil Court

**KENNETH H. CHANG P.S. and KENNETH H.
CHANG, INDIVIDUALLY,**

Defendants

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Answering Affidavits/Affirmations.....	1
Reply Affidavits/Affirmations.....	5
Memoranda of Law.....	2
Other.....	

Plaintiff Sterling National Bank (Sterling) brings this action, as the assignee of NorVergence, Inc., claiming that defendants are in default in making payments on an alleged equipment rental agreement. Defendants have answered¹ and asserted three affirmative defenses: that the Court lacks personal jurisdiction over him, that proper venue of this matter is in the state of Washington; and that plaintiff is barred from recovery because any contract was procured by fraud. Before this Court is plaintiff's motion for summary judgment, and for an order striking defendant's affirmative defenses. Defendant opposes the motion. For the reasons set forth below, the Court denies plaintiff's motion in all respects.

The Parties' Factual Claims

Plaintiff is basing all of its claims against defendants on an "Equipment Rental Contract" (Contract) allegedly executed by defendant with plaintiff's assignor on March 10, 2004, a "Delivery and Acceptance Certificate," allegedly executed by defendant on April 1, 2004; and a letter from plaintiff to defendant, dated April 19, 2004, advising defendant that the Contract had

¹Defendant Kenneth H. Chang filed an Answer and an Affidavit in Opposition to Defendant's Motion, and also appeared on this motion, on behalf of both himself and his corporation, Kenneth Chang P.S. At oral argument, defendant's counsel waived any objection, for the purpose of this motion, to the failure of the corporate defendant to appear by counsel. The Court however advised Mr. Chang that New York State law requires that the corporate defendant, Kenneth H. Chang P.S. appear by counsel. (CPLR 321[a]). In this opinion, the Court will use "defendant" to refer to both defendants

been assigned to it. Defendant acknowledged receipt of the letter. Plaintiff's papers are devoid of any description of the item being rented (except to refer to it as "one(1) Matrix 2003"), any discussion of the nature of the Contract, and the circumstances under which it was executed. Moreover, plaintiff does not submit an affidavit by anyone who had personal knowledge of the Contract or the circumstances of the underlying transaction.

On the other hand, defendant makes detailed allegations concerning the circumstances of the making of the Contract, none of which plaintiff disputes. Specifically, defendant claims that in February 2004, he was approached by a salesman employed by NorVergence who told him that NorVergence could provide him with telecommunications services, including high speed internet access, toll-free 800 service, unlimited cellular usage and unlimited long distance calling, at a savings of 20 to 60% over his current costs. He further alleges that another NorVergence salesman, John Keith, met with him on February 27, 2004 and repeated the offer to provide him with services at a tremendous discount if he "qualified" for their services. On March 10, 2004, Mr. Chang again met with Mr. Keith who provided him with a "Cost Savings Proposal," and told him that NorVergence would consider taking him on as a customer. On the same day, Mr. Keith asked defendant to sign a stack of documents, which he claimed were "non-binding and no-risk" and were essential to reserve the circuitry and hardware in order for NorVergence to provide service to defendant. Mr. Keith told Mr. Chang that the documents had to be signed quickly and gave him no time to review them. In reliance on Mr. Keith's statement that the documents were non-binding, Mr. Chang signed them. Mr. Keith took the signed documents with him and promised to send a copy to Mr. Chang, but Mr. Chang avers that he never received a copy. While defendant does not admit signing the Contract, the Court notes that the Contract is dated March 10, 2004.

Mr. Chang further claims that NorVergence advised him that he had been "approved," and on April 1, 2004, a "Matrix" box was installed at his office. However, the high speed internet line, the 800 number and the long distance lines were never installed or activated.

Mr. Chang further alleges that NorVergence went into bankruptcy in July 2004, and that in November 2004, the Federal Trade Commission issued a complaint against it. He further provides documentary evidence that the New York State Attorney General is investigating financial institutions to which NorVergence had assigned its contracts and that it has entered into settlement agreements with several of them, under which they agreed to forgive most of the charges due from customers as a result of their contracts with NorVergence. In particular, defendant alleges that the New York State Attorney General has an investigation pending against plaintiff.

Plaintiff's Motion for Summary Judgment

At the simplest level, the Court must deny plaintiff's motion because it has failed to set forth a prima facie case. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). CPLR § 3212(b) requires that a motion for summary judgment be supported by an affidavit of a person with requisite knowledge of the facts, together with a copy of the pleadings and by other available proof (*Spearman v Times Square Stores Corp.*, 96 AD2d 552, 553 [2d Dept 1981]). "It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is

clear that no material issues of fact have been presented . . . If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]).

In this case, plaintiff relies on the affirmation of its attorney, Beth Herbstman, and an affidavit of Benjamin S. Katz, who identifies himself as First Vice-President and Special Asset Manager of Sterling. The Court will disregard Ms. Herbstman's affidavit, since an attorney's affirmation is of no value on a motion for summary judgment. (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 31 [1st Dept. 1979]). That leaves only Mr. Katz's affidavit and the three exhibits to it. Mr. Katz does not claim to have any personal knowledge of the transaction between plaintiff's assignor and defendants, or of the alleged assignment between plaintiff's assignor and plaintiff. Nonetheless, he states that plaintiff's assignor entered into a contract with defendants. While he attaches a copy of the alleged contract, he does not authenticate defendant's signature, so the copy of the alleged contract is of no probative value. Mr. Katz also claims that plaintiff's assignor assigned the contract to plaintiff. However, he does not provide any documentation of the assignment. Since the best evidence of the assignment would be the document of assignment itself, his statement to that effect is of no probative value. The only document which Mr. Katz attaches which mentions the assignment is a letter from plaintiff to defendant advising him that the assignment occurred and that defendant acknowledges receiving notice of it. That is insufficient to establish that the assignment took place. Finally, Mr. Katz swears that defendant is in default under its alleged agreement with plaintiff and that plaintiff made "numerous attempts" to collect the alleged balance due. However, he does not attach any documents to support his statements. While he claims to have familiarity with the plaintiff's books and records, that statement is of no value in the absence of the books and records on which he allegedly relies.

Consequently, plaintiff has not made out its prima facie case as to its entitlement to summary judgment, and its motion must be denied.

Plaintiff's motion to strike the affirmative defenses

Plaintiff has also moved to strike defendant's affirmative defenses.

The Court will address first plaintiff's motion to strike defendant's third affirmative defense. Defendant's third affirmative defense asserts that plaintiff's assignor fraudulently induced him to sign the Contract and that plaintiff may not recover on a contract entered into by fraud. Plaintiff asserts that defendant cannot assert this defense because of the "hell or high water" provision in the Contract. The Court rejects this argument for three reasons.

First, since plaintiff has not established that the Contract was signed by defendant, it cannot assert the Contract as a basis for striking defendant's affirmative defense.

Second, even if plaintiff had established that defendant had signed the Contract, "hell or high water" clauses have been held insufficient to bar a claim of fraudulent inducement.² (*Rhythm*

²The Court need not reach the question of whether "hell or high water" clauses are generally valid, and therefore does not do so. The Court notes, however, that the cases cited by plaintiff for that proposition are distinguishable from the case at bar. For example, in both *Preferred Capital, Inc. v. PBK, Inc.*, (309 AD2d 1168 [4th Dept 2003]) and *Advanta Leasing Services v Rosewood Furniture of New York, Inc.*, (3 Misc.3d 139(A) [App Term, 2d Dept 2004]), the Courts did not quote the language of the leases at issue, so they are not probative of the validity of the lease clause at issue in this case.

& Hues, Inc. v Terminal Marketing Co., Inc., 2002 WL 1343759, at *7 [SD NY 2002]; *see also Manufacturers Hanover Trust Co. v Yanakas*, 7 F3d 310, 318 [2d Cir 1993]).

Third, plaintiff also argues that it takes free of defenses because it is a holder in due course. However, although plaintiff's counsel asserts that it is "uncontroverted" that plaintiff "received the assignment for value, in good faith, and without notice of any defenses against the lessor," in fact none of those facts have been established at all, since plaintiff submitted no affidavit by anyone with personal knowledge of the assignment between plaintiff and its assignor. Moreover, even if plaintiff had established that it is a holder in due course, defendant could still assert the defense of fraud against it (UCC § 3-305; *First Nat'l Bank v Fazzari*, 10 NY2d 394, 397 [1961]; *Pioneer Credit Corp. v Bon Bon Cleaners Corp.*, 38 AD2d 743 [2d Dept 1972]). Accordingly, plaintiff's motion to dismiss the third affirmative defense is denied.

The Court now turns to plaintiff's motion to strike defendant's first and second affirmative defenses. In his first affirmative defense, defendant objects to the jurisdiction of this Court over him because he is a resident of the State of Washington, and Kenneth H. Chang P.S. is a Washington State corporation, with its principal place of business in Washington state. On this motion, defendant further explains that he has never had any contacts with the State of New York; specifically, he states, "I have never been to New York, do not own property in New York, do not transact business in New York, and have no other ties to the State of New York." In his second affirmative defense, defendant objects to venue in New York State, on the grounds that the transaction had no connection with New York, and that venue in New York would be "so gravely difficult and inconvenient" that he would be deprived of his day in Court.

Plaintiff asserts that venue and jurisdiction are proper because a provision on the back of the Contract states, in tiny type,

This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option.

The page on which this paragraph appears is initialed on behalf of NorVergence but not on behalf of defendant.

The Court rejects plaintiff's argument for three reasons.

First, as stated above, plaintiff has failed to establish that defendant signed the Contract so it cannot rely on the Contract to strike defendant's affirmative defenses.

Second, even if plaintiff had established that defendant had signed the Contract, for the reasons set forth above, defendant has asserted a valid defense against the Contract based on fraudulent inducement. If defendant prevails on that argument, that would invalidate the entire Contract including the provisions relating to venue and jurisdiction.

Third, a forum selection clause may be set aside if the party shows "that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court."

(British West Indies Guaranty Trust Co. v Banque Internationale A Luxembourg, 172 AD2d 234 [1st Dept 1991]; see also Brower v Gateway 2000, 246 AD2d 246, 255 [1st Dept 1998] [choice of forum clause may be so oppressive that it is set aside as unconscionable.]). The Court finds that defendant has made a sufficient showing that enforcement of this clause would be unjust and that the contract was obtained by fraud to justify denying plaintiff's motion to strike defendant's affirmative defense. Moreover, the Court has questions as to whether a forum selection clause that does not identify a specific jurisdiction is enforceable. (See, e.g. *IFC Credit Corp v Eastcom, Inc.*, 2005 WL 43159, * 1 [ND Ill 2005]). The Court also notes that the Attorney General of the State of New York has entered into consent agreements predicated on its findings that similar provisions were unconscionable under Executive Law §63(12) and the Uniform Commercial Code (UCC) 2-302.

Accordingly, the Court is denying plaintiff's motion in full. Moreover, the Court is sending a copy of this decision to the Bureaus of Telecommunications and Energy and Consumer Frauds and Protection of the Attorney General of the State of New York State Department of Law in light of defendant's uncontroverted statement that those bureaus are conducting an investigation into plaintiff's actions as an assignee of Norvergence, Inc.

Dated: March 22, 2005



ELLEN GESMER
Judge, Civil Court