



Hellenic Imperial Airways S.A. v Gulf Air Co.

2016 NY Slip Op 30083(U) (2016) | Cited 0 times | New York Supreme Court | January 13, 2016

SUPREME COURT OF STATE OF YORK COUNTY OF YORK: PART

IMPERIAL AIRWAYS S.A.,

Plaintiff, ..

GULF COMPANY, G.S.C.;

SCARPULLA, Seq. 003

G.S.C.

S.A.'s ("Hellenic") CPLR

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-against-

AIR

Defendant. -----)(

HON. SALIANN J.: DECISION/ORDER

Index No. 654234/2012 Motion No.

In this action arising from an alleged breach of a sublease agreement, defendant

Gulf Air Company, moves to dismiss plaintiff Hellenic Imperial Airways

amended complaint pursuant to §§ 321 l(a)(l) and (7).

Hellenic is an airline based in Athens, Greece, and Gulf is a company that

subleases commercial aircraft. May 2, Hellenic and Gulf signed a letter of

intent to execute a sublease agreement by June 9, under which Hellenic would

sublease two Airbus aircraft from Gulf. In the letter of intent, the parties agreed that the

aircraft would be delivered by June 13, or another mutually agreeable date, and that

Hellenic would make two security deposits within seven days of signing the

letter of intent and \$37 upon signing the sublease).

Hellenic paid both security deposits to Gulf totaling The parties,

however, did not sign a sublease on or before June 9, Hellenic claims that despite

repeated assurances that it would deliver the aircraft on time for the summer travel

654234/2012 Motion No. Page 1 of 12 [* 1] On

\$750,000

("sublease")



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003 season, Gulf failed to deliver the aircraft because the technical documents necessary for placing the aircraft on the Greek aviation registry were incomplete. July 4, Hellenic sent a termination letter to Gulf that demanded a return of the security deposit.

Hellenic alleges that Gulf refused to return the security deposit and instead offered a reduced monthly rent rate for the aircraft to Hellenic. The parties eventually negotiated a sublease agreement for one aircraft at a reduced monthly rent rate, which they executed on 9,

The sublease contains several provisions that gave rise to this dispute. First, the sublease required Hellenic to pay an additional security deposit on or before the earlier of the Delivery Date and October 1, 1 the sublease stated that the Delivery Date occurs before 1 October (i) the first Rent Date shall be the Delivery but if the Date occurs on or after 1 October (i) the first



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Rent Date shall be 1 October. Importantly, the sublease did not contain a specific delivery date by which Gulf was required to deliver the aircraft.

After signing the sublease, the parties continued to discuss technical details concerning delivery of the aircraft and the documents necessary to register the aircraft in Greece. By October 1, Gulf had not yet delivered the aircraft, and Hellenic had not yet paid the additional security deposit or the first month's rent. Hellenic alleges that, on October 4, Gulf told Hellenic that it was still not ready to and

' The term is defined by the sublease as date of Lease No. 1, which date shall be the date the Aircraft is delivered by Lessor [Gulf] and accepted by Lessee [Hellenic], pursuant to the provisions of 2

654234/2012 Motion No. Page 2 of 12 [* 2] "requested 'bear' continued delay."

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654234/2012 003 that Hellenic with Gulf and the However, two days

later, on October 6, Gulf sent a termination letter to Hellenic, stating that Gulf was exercising its right to terminate the sublease based on Hellenic's failure to pay the additional security deposit and first month's rent by October 1.



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In the amended complaint, Hellenic seeks to recover the security deposit and additional damages arising from failure to deliver the aircraft. Hellenic asserts six causes of action for breach of the implied covenant of good faith and fair dealing; breach of reformation based on mutual rescission based on mutual mistake; rescission based on unilateral mistake; and attorney's fees. Specifically, Hellenic alleges that Gulf breached the implied covenant of good faith and fair dealing by terminating the sublease it was unable to deliver the aircraft, and that Gulf breached the sublease by failing to deliver the aircraft and return the security deposit to Hellenic. In addition, Hellenic asserts that the sublease contains two mutual or unilateral mistakes: (1) a mistaken omission of any by which Gulf was obligated to deliver the Leased Aircraft to and (2) a mistaken provision that requires Hellenic pay rent for an Aircraft that Gulf Air had no obligation to deliver, at any

In the current motion, Gulf argues that the complaint should be dismissed based on Hellenic's failure to state a claim and a defense founded_ on documentary evidence. Gulf also contends that Hellenic's claim for reformation or rescission of the sublease fails because the sublease contains no mutual or unilateral mistake.

Motion No. Page 3 of 12 [* 3] \$750,000

Section \$270,000

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65423412012 003 Discussion

I. Breach of Contract and Reformation

In the complaint, Hellenic alleges that Gulf breached the sublease by failing to deliver the aircraft and return the security deposit. Gulf argues that this claim should be dismissed because Hellenic does not adequately plead its own performance, a breach of the sublease by Gulf, or any additional damages.

a. Hellenic's contractual obligation to pay the \$270,000 security deposit

2 of the sublease required Hellenic to pay an additional security

deposit by 1. Hellenic does not dispute that it failed to pay this deposit, but

instead contends that its failure is excused because Gulf anticipatorily repudiated the contract by refusing to deliver the aircraft.

the doctrine of anticipatory repudiation, when a party repudiates a

contractual duty before performance is due, the non-repudiating party is entitled to claim

damages for breach of the contract. *Norcon Power Partners, L.P. v. Niagara Mohawk*

Power Corp., 92 N. .2d 458, 462-63 (1998). The doctrine of anticipatory repudiation

the nonrepudiating party of its obligation of future performance and entitles that

party to recover the present value of its damages from the repudiating party's breach of



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the total Am. List Corp. v. News & World Report, Inc., 75 38, 44

(1989); Kaplan v. Madison Park Grp. Owners, LLC, 94 A.D.3d 616, 619 (1st Dep't

To support a claim for anticipatory repudiation, the claimant must show that the

repudiating party made an unqualified and clear refusal to perform with respect to the

Motion No. Page 4 of 12 [* 4] 2009). "A

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Y [Second] 250);

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65423412012 003 entire contract. Highbridge Dev. BR LLC v. Diamond Dev., LLC, 67 A.D.3d 1112, 1115

(3d Dep't repudiation can be either 'a statement by the obligor to the obligee

indicating that the obligor will commit a breach that would of itself give the obligee a



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claim for damages for total breach' or 'a voluntary affirmative act which renders the obligor unable or apparently to perform without such a Norcon Power Partners, L.P., 92 N. 2d at 463 (quoting Restatement of Contracts § Computer Possibilities Unlimited, v. Mobil Corp., A.D.2d 77 (1st Dep't Hellenic contends that Gulf unequivocally repudiated the sublease by communicating that it was unable to deliver the aircraft. Hellenic's chairman, Talal Abureyal, states in an affidavit that, on 4, Gulf asked Hellenic to continue bearing with delays in delivering the aircraft. Abureyal further states that Hellenic did not pay the additional security deposit or the first rent on 1 because Gulf had acknowledged that it was unable to deliver the aircraft as required by the sublease. These allegations are sufficient to state a claim for anticipatory repudiation, which if proven, would excuse Hellenic's obligation pay the additional security deposit and permit Hellenic to claim damages for of the sublease. Highbridge Dev. BR LLC v. Diamond Dev., LLC, 67 A.D.3d 1112, 1115 (3d Dep't 28 Contract Law §14:7 (noting that it becomes clear that the party will not perform, the aggrieved party is excused from futile acts such as satisfying conditions Motion No. Page 5 of 12 [* 5] October October October the October



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003 b. Hellenic's contractual obligation to pay rent by October 1

The sublease further required Hellenic to make the first rent payment on the

Delivery Date, if that date occurred before 1. Otherwise, if the Delivery Date

occurred after 1, the first rent payment would be due on 1.

Hellenic admits that it did not make the first rent payment on 1, but

instead argues that sublease should be reformed because the parties mistakenly

included a provision that requires Hellenic to pay rent on 1, regardless of

whether the aircraft was delivered. In the alternative, Hellenic contends that its

obligation to pay rent is excused based on anticipatory repudiation of the sublease.

I first address Hellenic's claim that the sublease should be reformed based on

mutual mistake. To obtain reformation of a contract must be shown that 'the parties

came to an understanding, but in reducing it to writing, through mutual mistake, or



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through mistake on one side and fraud on the other, omitted some provision agreed upon,

or inserted one not agreed William P. Pahl Equipment Corp. v. Kassis, 182

A.D.2d 22, 29 (1st Dep't 1992) (quoting Curtis v. Albee, 167 364 (1901)).

To assert a claim for mutual mistake, the plaintiff must allege that the parties have

reached an agreement unknown to either, the signed writing does not express that

Chimart Assoc. v. Paul, 66 574 (1986); Greater New York Mut.

Ins. Co. v. States Underwriters Ins. Co., 36 A.D.3d 441, 443 (1st Dep't

purpose of reformation is not to 'alleviat[e] a hard or oppressive bargain, but rather

to restate the intended terms of an agreement when the writing that memorializes that

agreement is at variance with the intent of both Warberg Opportunistic

65423412012 Motion No. Page 6of12 [* 6] L.P. 2013)

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Date," "Basic

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003 Trading Fund, v. GeoResources, Inc., 112 A.D.3d 78, 85 (1st Dep't (quoting George Backer Management Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211, 219 (1978)).

In the amended complaint, Hellenic alleges that two mutual mistakes appear in the contract: a mistaken omission of any date by which Gulf was obligated to deliver the aircraft; and a mistaken provision that requires Hellenic to pay rent on 1, even if the aircraft had not been delivered. In his affidavit, Hellenic's chairman Talal Abureyal states that Hellenic was for registering the aircraft in Greece using documents provided by Gulf, and that the parties intended that Hellenic's obligation to pay rent on 1 would only if the aircraft had been delivered by Gulf, even if it was not yet registered by Hellenic.

To further show the parties' agreement first rent payment would coincide with delivery, Abureyal submits an email from in-house attorney Vaughan Crossley dated July 13, in which Crossley proposes that Hellenic's of the security deposit and the rentals [are] to start on delivery of the aircraft. Based on the allegations in the amended complaint and Abureyal's affidavit, Hellenic states a claim for reformation based on mutual mistake.

The sublease terms also that the parties have failed to memorialize an



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agreement that Hellenic' s first payment would be due only upon delivery of the

aircraft. 3 and 4 of the state that Term for the Aircraft shall

commence on the Delivery and that Hellenic shall pay Rent for the Aircraft

on each Rent Payment Date throughout the in 2, the sublease

654234/2012 Motion No. Page 7 of 12 [* 7] "[t]he SubLessee

agreed," "Sub

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65423412012 003 states that Aircraft ... shall be delivered to at Athens International

Airport Greece, or ... at such other location mutually and that Lessee shall

be permitted a reasonable two (2)-day inspection of the Aircraft not less than five (5)

days prior to the delivery date Together, these contractual provisions may

indicate that the parties intended that Hellenic would only be obligated to pay rent

throughout the Term, which would not commence until Gulf delivered the aircraft, and

that the parties would be in continuous communication regarding the delivery date of the

aircraft to ensure that Hellenic would have time to inspect the aircraft and make the first

rent payment by the delivery date.

As an alternative to reformation, Hellenic argues that it is excused from paying

rent based on the doctrine of anticipatory repudiation. For the reasons stated above,



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Hellenic sufficiently states a claim for anticipatory repudiation by alleging that Gulf repudiated the sublease when it acknowledged that it could not deliver the aircraft. If Hellenic demonstrates that Gulf anticipatorily repudiated the sublease, Hellenic's obligation to pay the first month's rent would be excused, and Hellenic may proceed with its breach of contract claim against Gulf.

c. Hellenic's damages

Lastly, Gulf argues that Hellenic failed to allege any damages because Gulf was not required to return the security deposit. However, the sublease states that the failure by Lessor [Gulf] to deliver the Aircraft to Lessee [Hellenic] in accordance with the terms and provisions of this Lease, Lessor shall return the Motion No. Page 8 of 12 [* 8] Security Sub Lessee."

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003 Deposit to At the early stage of this action Gulf fails to . ' demonstrate that it is entitled to retain the security deposit paid by Hellenic.

Gulf further contends that Hellenic failed plead additional damages.

In the amended complaint, Hellenic claims that it suffered damages resulting from failure to deliver the aircraft, including costs of using replacement aircraft, lost profits and lost business opportunities. These allegations are sufficient to put Gulf on notice of the additional damages that Hellenic intends to prove, and I therefore deny motion . . to dismiss the claim for additional damages.

For the reasons stated above, motion to dismiss Hellenic's causes of action for breach of contract and reformation is denied.

II. Rescission

A contract may be subject to rescission on a mutual mistake by the v. Blank, 19 N.Y.3d 46, 52 (2012). mistake occurs when the parties have reached an oral agreement and, to either, the subsequent writing does not express that Loyalty Ins. Co .. Fredenberg, 214 A.D.2d 297, 299 (3d Dep't 1995). The mistake must exist at the time the contract is entered into and must be Gould v. Bd. Educ. Sewanhaka Cent. High. Dist., 81N.Y.2d446, 453 (1993).

A plaintiff may also seek rescission based on a unilateral mistake. A/map



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Holdings, Inc. v. Bank Leumi Trust Co. 196 A.D.2d 518, 519 (2d Dep't

1993). However, a claim of mistake alone is an insufficient basis for

Kotick v. Shvachko, 130 A.D.3d 472, 473 (1st Dep't 2015). A unilateral mistake may be

654234/2012 Motion No. Page 9 of 12 [* 9] "result

other." 2005);

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654234/2012 003 10 of 12 the basis for rescission if it is induced by fraud, or if enforcement of the contract would

be unconscionable or in unjust enrichment of one party at the expense of the

Cox v. Lehman Bros., 15 A.D.3d 239, 239 (1st Dep't Gould, 81 N.Y.2d at

453 (noting that may be entitled to have a court of equity rescind a contract

even where the mistake is unilateral ... if failing to do so would result in unjust

enrichment of Gessin Elec. Contractors, Inc. v. 95 Wall Assoc., LLC, 74



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A.D.3d 516, (1st Dep't Kotick, A.D.3d at 473; Desiderato v. N & A Taxi, Inc., A.D.2d 256 (1st Dep't 1993).

Hellenic asserts the sublease contains two mutual or unilateral mistakes, and that enforcement of the sublease as written would result in unjust enrichment to Gulf. Specifically, Hellenic claims that the sublease failed to include a delivery date for the aircraft, and mistakenly requires Hellenic to pay monthly rent regardless of whether the aircraft was ever delivered. Hellenic further alleges that it has no adequate remedy at law, and that the parties can be restored to the status quo ex ante without prejudice by return of the security deposit to Hellenic.

Based on the allegations in the amended complaint, Hellenic states a claim for rescission. The mistakes alleged serve as a sufficient basis for a rescission claim they are so substantial and material that they go the foundation of the Da Silva v. Musso, 53 N.Y.2d 543, 552 (1981) (quoting Belknap v. Sealey, 14 N.Y. 143, 155 (1856)). Accordingly, motion to dismiss the rescission claim is denied.

Motion No. Page [* 10] Implied

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contract.'" AMRO V.

208, (2011).



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IV.

Section .05 "[i]n

Sub

party." ·

65423412012 003 III. Breach of Covenant of Good Faith Fair Dealing

in all contracts is an implied covenant of fair dealing and good

Components Direct, Inc. v. European Am. Bank & Co., 175 A.D.2d 227, 229 (2d

Dep 't 1991). implied covenant of good faith and fair dealing 'embraces a pledge

that neither party shall do anything which will have effect of destroying or injuring

the right of the other party to receive the fruits of the ABN Bank, N.

v. MBIA Inc., 17 N.Y.3d 228

In the complaint, Hellenic alleges that Gulf the implied covenant of good

faith and fair dealing by the contract, even though it could not perform its

contractual obligations. However, Hellenic may not assert a claim for breach of the

implied covenant of good faith and fair dealing based on Gulfs exercise of a contractual

right to terminate the contract. I therefore grant Gulfs motion to dismiss the first cause

of action for breach of the implied covenant of faith and fair dealing.

Attorney's Fees



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19 of the sublease provides that litigated action, proceeding, controversy or dispute of any kind whatever in connection the enforcement of rights under this Lease, the prevailing party shall be entitled to recover its expenses, including reasonable attorneys' from the other ..

Gulf contends that Hellenic's claim for attorney's fees should be dismissed because Hellenic is not a prevailing party in this action. Gulfs motion to dismiss the claim for attorney's fees is premature because several causes of action remain against Gulf.

Motion No. Page 11 of 12 [* 11] G.S.C.'s

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Street, 208, 2016

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003 In accordance with the foregoing, it is

ORDERED that defendant Gulf Air Company, motion to dismiss the complaint pursuant to CPLR §§ 321 l(a)(l) and (7) is granted only to the extent that the first cause of action for breach of the implied covenant of good faith and fair dealing is dismissed, and otherwise denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at Centre Room on February 24, at 2:15pm.

This constitutes the decision and order of this Court.

DATE:



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