SHORT FORM ORDER

ORIGINAL

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA — IAS PART 12
Justice

- x

GOLDEN STONE TRADING, INC.,

Plaintiff,

- against -

WAYNE ELECTRO SYSTEMS, INC., a New York Corporation, AFFILIATED CENTRAL, INC., a New York Corporation, BJK INDUSTRIAL CORP., a business entity of unknown form and state of incorporation, JINGLONG LIN, an individual, and DOES 1-10,

Defendants.

- x

Index No.: 7260/06

Motion Date: 4/2/08

Motion No.: 9

Motion Seq. No. 4

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The following papers numbered 1 to 10 on this motion:

	Papers Numbered
Affiliated Central, Inc.'s Notice of Motion-Affidavits-Service-Exhibits & Memorandum of Law	1-5
Plaintiff's Affirmation in Opposition-Exhibit(s)	6-9
Defendant's Affirmation in Further Support-Service	10

By notice of motion, defendant, Affiliated Central, Inc. (Affiliated), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of the complaint as against them.

Plaintiff files an affirmation in opposition.

On or about June 12, 2006, plaintiff entered into a contract with defendant, Wayne Electro Systems, Inc. (Wayne), to install, monitor and service an alarm system for premises located at 102-17 44th Avenue, Corona, N.Y. Said premises housed property belonging to plaintiff as part of their business.

Thereafter, according to paragraph nine of plaintiff's complaint, Affiliated Central, Inc. (Affiliated) was to provide monitoring services for the alarm system pursuant to a contract between "plaintiff and/or Wayne on the one hand and Central [Affiliated] on the other hand..." (See defendant's Exhibit A).

In this action, plaintiff's claim for damages against each of the defendants, Wayne and Affiliated, is based on theories of negligence, gross negligence, breach of contract and breach of warranty, as well as punitive damages.

Essentially, defendant Affiliated argues that pursuant to the exculpatory clause of the contract between the parties, plaintiff is precluded from seeking recovery from defendant based on claims of breach of contract or warranty. Moreover, defendant maintains that none of the facts alleged by plaintiff rise to the level necessary for gross negligence, including Affiliated's admittance that a clerical error caused them to fail to respond to the alarm. Affiliated claims further that the exculpatory clause of the contract limits their liability even for their own negligence.

In response, plaintiff first makes the claim that there was no contract between Affiliated and plaintiff. Said claim is belied by plaintiff's own averments in the complaint as noted above, as well as being contrary to the causes of action claiming "breach of contract" and "breach of warranty" as against defendant Affiliated.

Plaintiff also maintains that the exculpatory provisions of the contract upon which defendant relies are unconscionable. This is so, plaintiff maintains, because of plaintiff's principal, Guo Hua Lin's inability to read and understand English, and because the size of the type used to print the exculpatory clauses. In support of this argument, plaintiff attempts to rely on CPLR § 4544, which regulates the manner and size type print required to be used in contracts involving consumer transactions.

Plaintiff's unsupported reliance on CPLR § 4544 however, is readily apparent by plaintiff's repeated use of the phrase in the affirmation in opposition, to wit, "if this was a consumer transaction." It is not. The rules regarding the conspicuousness and size of the type in a contract contained in CPLR § 4544 are therefore inapplicable in this instance.

Plaintiff also maintains that the contract is unconscionable based on the principal Guo Hua Lin's lack of understanding of the

English language.

"Whether a contract or any clause of a contract is unconscionable is a matter for the court to decide against the background of the contract's commercial setting, purpose, and effect, and the existence of this [should] not therefore bar summary judgment." Wilson Trading Corp. v. David Ferguson, Ltd., 23 NY2d 398, 403, 404, 297 NYS2d 108 (1968) (citing § 2-302 of the Uniform Commercial Code). Contrary to plaintiff's contention, a factual hearing is only necessary where the Court accepts, under the circumstances presented, the possibility of unconscionability. Fleishman Distilling Corp. v. Distiller's Co. Ltd., 395 FSupp 221 (1975).

Exculpatory clauses involving burglar alarms and burglar alarm systems "...have been consistently and frequently enforced (see e.g. Florence v. Merchants Cent. Alarm Co., 51 NY2d 793, aff'g 73 AD2d 869; Dubovsky & Sons v. Honeywell, Inc., 89 AD2d 993, and cases cited therein), [and] [plaintiff's] allegation that the exculpatory clause in question is unconscionable is without merit. Where there is no doubt that a contract or clause thereof is free from unconscionability, there is no requirement for a hearing on his issue. (See, State of New York v. Wolowitz, 96 AD2d 47; Dubovsky & Sons v. Honeywell, supra; cf Matter of State of New York v. Avco Fin. Serv., 50 NY2d 383)." Advance Burglar Alarm Sys. v. D'Auria, 110 AD2d 860, 862, 488 NYS2d 416 (2d Dep't 1985).

In this instance, defendant has presented a prima facie showing that the exculpatory provisions of the contract between the parties precludes recovery by plaintiff for ordinary negligence, alleged breach of contract or alleged breach of warranty.

To recover against defendant therefore plaintiff must present evidence of gross negligence. "Gross negligence is 'conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing' (supra at 823-824). In Colnaghi, the Court of Appeals held that the security company's failure to wire a skylight, which allowed burglars to enter and rob the art gallery, may have been negligent but did not 'evince the recklessness necessary to abrogate [the subscriber's] agreement to absolve the [security service] from negligence claims' (supra at 824). Delayed or inadequate response to an alarm signal, without more, is not gross negligence." Hartford Ins. Co. v. Holmes Protection Group, 250 AD2d 526, 527, 528, 673 NYS2d 132 (1st Dep't 1998). (See also Midtown Distributors Corp. v. Mutual Central Alarm Servs., Inc.,

49 AD3d 346, 852 NYS2d 768 [1st Dep't 2008], where "...defendant burglar alarm company installed a different alarm system and a different number of censors than provided in the parties contract, and failed to determine that the alarm had been tripped by burglars rather than birds...," did not constitute gross negligence to avoid consequences of exculpatory clause. Id.).

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendant, Affiliated Central, Inc.'s motion for summary judgment is granted with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
May 16, 2008

JOSEPH P. DORSA
J.S.C.

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