

**FILED**

**SEP 26 2014**

**STATE OF NEW YORK  
COURT OF CLAIMS**

**STATE OF NEW YORK**

**COURT OF CLAIMS**

**SUNNY LUMBER & HARDWARE, INC.,**

**Claimant,**

**DECISION AND  
ORDER**

**-v-**

**THE STATE OF NEW YORK,**

**Claim No. 122535  
Motion Nos. M-84720  
CM-84842**

**Defendant.**

**BEFORE:**

**HON. THOMAS H. SCUCCIMARRA  
Judge of the Court of Claims**

**APPEARANCES:**

**For Claimant:  
SANCHEZ & POLOVETSKY, PLLC  
BY: JENNIFER POLOVETSKY, ESQ.  
and PHILIP A. SANCHEZ, ESQ.**

**For Defendant:  
HON. ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL OF THE STATE OF NEW YORK  
BY: CHARLES E. GARY  
ASSISTANT ATTORNEY GENERAL**

The following papers were read and considered on the pending motions:

- 1 - 3 Notice of Motion [M-84720]; Affirmation by Charles E. Gary, Assistant Attorney General, and attached exhibits; Memorandum of Law
- 4 - 6 Notice of Cross-Motion [CM-84842], Affirmation in Opposition to State Motion and in Support of Claimant's Cross-Motion by Jennifer Polovetsky, Sanchez & Polovetsky, PLLC, attorneys for claimant, and attached exhibits; Memorandum of Law; Affidavit of Yi Tuan Chen and attached exhibit
- 7 - 9 Reply Affirmation in Opposition to Claimant's Cross Motion and in Further Support of Defendant's Motion by Charles E. Gary, Assistant Attorney General, Affidavit by Leoncio Romero, Real Estate Specialist, and attached exhibits; Affidavit by Nicole L. Zaidi, Real Estate Specialist, and attached exhibit

10 - 12 Attorney Affirmation in Reply by Philip A. Sanchez, Sanchez & Polovetsky, PLLC, attorneys for claimant, and attached exhibits; Reply Affidavit of Yi Tuan Chen; Affidavit of Translator

13 Filed Paper: Claim

The claim herein is one for compensation for the appropriation of the trade fixtures of Sunny Lumber & Hardware, Inc., a commercial tenant in land taken at 513 Porter Avenue, Brooklyn, New York by the New York State Department of Transportation [NYSDOT] as part of a project reconstructing the Kosciuszko Bridge. The property was appropriated on March 22, 2010, and Notice of Acquisition was served upon claimant on March 10, 2010. [Affirmation by Charles E. Gary, Exhibit C]. The owner in fee, 513 Porter Avenue LLC, served and filed its own claim for compensation [Claim Number 118289], and also commenced a special proceeding [SP-148] with regard to the distribution of an advance payment deposited by the State of New York as required by Court of Claims Act §§22 and 23. Such distribution proceeding was determined by the Decision and Order of Judge Soto filed on September 19, 2012. [Affirmation in Opposition to State Motion and in Support of Claimant's Cross-Motion by Jennifer Polovetsky, Exhibit 3]. Among other things determined therein was that the value of the fee owner's award did not include any payment for fixtures. *[Id.]*. It was also noted that the fee owner had advised the State by letter dated May 12, 2010 that if the advance payment at issue included fixtures, the award should be reapportioned to remove the fixtures from the real estate payment. *[Id.]*. Additionally, the Assistant Attorney General appearing in the distribution proceeding represented that Sunny Lumber did not have an interest in the advance payment fund at issue. *[Ibid.]*, Exhibit 4].

The defendant now moves to dismiss Sunny Lumber's trade fixture claim pursuant to Civil Practice Law and Rules §3211(a)(5), asserting that claimant's President, Yi Tuan Chen, executed an assignment of claim and release [ACM on December 7, 2010 in favor of the property owner, relinquishing any interest in the presently claimed fixtures. The State alternatively seeks a further extension of time within which to exchange and file its appraisal report.

In addition to opposing the motion, claimant makes a cross-motion for sanctions against the State, and for an order directing defendant to exchange and file its appraisal reports and to immediately file a Note of Issue and Certificate of Readiness. Claimant avers that the ACR is invalid, in that Mr. Chen - a Chinese immigrant who speaks limited English and who does not read or write English - executed such instrument by mistake. It is alleged that the State fraudulently induced him to sign the ACR under false pretenses by falsely advising him that the only legal meaning of the ACR was claimant agreeing to get its security deposit back from its former landlord, 513 Porter Avenue, LLC. Mr. Chen states that he was visited a number of times by the State representative, and understood the purpose for such visits to have been to coordinate Sunny Lumber's move from the property and to ensure that it received its security deposit from the former landlord. At no time did he understand that by signing this instrument he was purportedly waiving his right to just compensation for the appropriated trade fixtures.

Additionally, it is asserted by counsel that a second ACR containing additional terms, namely, that Sunny Lumber would receive the sum of \$11,800.00 - equal to 2 months of Sunny Lumber's lease security deposit - was also signed the same day, further suggesting Mr. Chen's understanding of what the instrument was intended to accomplish. [Affirmation in Opposition to

State Motion and in Support of Claimant's Cross-Motion by Jennifer Polovetsky, ¶¶ 4, 5, Exhibit 1; Reply Affidavit of Yi Tuan Chen, ri[ 7, 9]. This second ACR does not contain the notary's stamp, although her signature is on the document.

Defendant submits affidavits by the real estate specialists involved in the negotiation with Sunny Lumber, which show that the State was aware of some language limitations - indeed, one real estate specialist kept notes showing that he spoke not directly to Mr. Chen, but to Yvette Jeng, Mr. Chen's assistant, who acted as a translator on at least one occasion [see Affidavit by Leoncio Romero, Exhibits A and 13] - yet defendant does not deny that there was no translator present when the ACR was signed, instead suggesting that claimant forged the second ACR. Additionally, the real estate specialist indicates in notes from November 30, 2009 that when he delivered the notice to tenants about relocation assistance, and about "the list of fixtures and improvements" Ms. Jeng "informed me that she and their attorney had reviewed the lease and concluded they would not claim any reimbursements for the fixtures and improvements made to the property within their leased area." [Affidavit by Leoncio Romero, Exhibit A] Defendant argues that it had always been the understanding that Sunny Lumber would not make a fixture claim, and has assigned any interest in its fixtures to 513 Porter Avenue LLC (although the fee owner had disclaimed any interest in fixtures months before the execution of the ACR, and there has been a judicial determination that the *fee* owner's advance payment did not include fixtures).

A motion to dismiss based upon a purported release "should be denied where fraud or duress in the procurement of the release is alleged . . . (*citations omitted*)."  
Farber v Breslin, 47 AD3d 873, 877 (2d Dept 2008); see Newin Corp. v Hartford Ace. & indem. Co., 37 NY2d 211 (1975). Here, supported by affidavits, "[t]he allegations are sufficient to support a possible

finding that the release signed by the plaintiff 'was obtained under circumstances which indicate unfairness, overreaching and unconscionability' . . . (*citations omitted*). " Gibli v Kadosh, 279 AD2d 35, 41 (1st Dept 2000); *see* Warmhold v Zagarino, 106 AD3d 994 (2d Dept 2013); Gordon v Boyd, 96 AD3d 719, 720 (2d Dept 2012).

Additionally, even if the circumstances surrounding the execution of such assignment and release were not questionable, there is doubt as to its efficacy given that it involves a third party, the fee owner, who - at the time of the execution - had already indicated that it had no interest in the trade fixtures. Newin Corp. v Hartford Ace. & Indem. Co., 37 NY2d at 217,' Indeed, the lease between the claimant and the fee owner provides that Sunny Lumber reserved to itself in the lease its constitutional right to file a separate trade fixture claim. [Affirmation in Opposition to State Motion and in Support of Claimant's Cross-Motion by Jennifer Polovetsky, Exhibit 2].

The release is also unclear on its face [*see* Levinson v State of New York, 207 Misc 81, 83 (Ct Cl 1954)<sup>2</sup> ], as it seems to only be waiving an interest in the fee owner's award, and assigning its interest to the fee owner (though at the time of the execution in December 2010 the fee owner had already disclaimed any interest in fixtures), but does not appear to directly waive Sunny Lumber's right to bring its claim for just compensation for trade fixtures against the condemning authority, the State of New York.

---

"As to the release, it is executed solely on behalf of the Trustee, for himself, his predecessors, successors and assigns, and for and on behalf of the bankrupt Estate.' It did not, and indeed could not, effectively surrender the independent claims that are the subject of this action and which did not belong to the bankrupt estate."

2 "Comparing the release with its described property to the map annexed to the claim, ambiguity is evident and the court cannot even hazard a guess as to the intentions of the parties or whether one or both or neither of them was suffering under a mistake. Evidence on a trial is necessary."

Based on the foregoing, the motion to dismiss based upon assignment and release under Civil Practice Law and Rules §3211(a)(5) is denied, as there are issues surrounding the execution and scope of the purported release, that cannot be resolved on conflicting affidavits, and are best reserved to the plenary trial of the matter.

Claimant's cross-motion for sanctions is denied.

Defendant's application for a further extension of the time within which to exchange and file its appraisal is granted to the extent that it is directed to exchange and file same in the form required by 22 NYCRR §206.21(c), within 60 days of the filing date of this decision and order.

No further extensions shall be granted.

**White Plains, New York  
August 13, 2014**

A handwritten signature in black ink, appearing to read 'THOMAS H. SCUCCIMARRA', written over a horizontal line.

**THOMAS H. SCUCCIMARRA  
Judge of the Court of Claims**