[*1] **Bruce Ovitz, Respondent, v Bloomberg L.P., et al., Appellants.**

2864, 603692/08

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2010 NY Slip Op 7484*; *77 A.D.3d 515*; *909 N.Y.S.2d 710*; *2010 N.Y. App. Div. LEXIS 7557

October 21, 2010, Decided
October 21, 2010, Entered

SUBSEQUENT HISTORY: Leave to appeal granted by *Ovitz v. Bloomberg L.P., 16 N.Y.3d 705, 2011 N.Y. LEXIS 190 (2011)*

PRIOR HISTORY: *Ovitz v. Bloomberg, L.P., 2009 N.Y. Misc. LEXIS 6239 (N.Y. Sup. Ct., Oct. 2, 2009)*

HEADNOTES

Consumer Protection--Deceptive Acts and Practices--Leases of Personal Property.--Complaint should have been dismissed--automatic renewal provision of agreement between plaintiff and defendants was both "inoperative" (*General Obligations Law § 5-901*) and "unenforceable" (*General Obligations Law § 5-903*), since defendants failed to provide requisite notice to plaintiff that two-year subscription term was to be automatically renewed--however, dismissal of claims based on *sections 5-901* and *5-903* was warranted since plaintiff made no allegations that he paid for services he did not receive--complaint failed to state cause of action under *General Business Law § 349*; plaintiff, resident of Illinois, was not deceived in New York State; nor did plaintiff allege actual injury resulting from alleged deceptive practices, since defendants did not commence enforcement proceedings against plaintiff and were not seeking to collect fees or payments from plaintiff in connection with cancellation of his subscription.

COUNSEL: Willkie Farr & Gallagher LLP, New York (Thomas H. Golden of counsel), for appellants.

Sperling & Slater, P.C., Chicago, IL (Greg Shinall, of the Illinois Bar, admitted pro hac vice, of counsel), for respondent.

JUDGES: Concur--Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

OPINION

[**515] [***711] Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 7, 2009, which, to the extent appealed from, denied so much of defendants' motion to dismiss the first, fifth and sixth causes of action, unanimously reversed, on the law, without costs, the motion granted in its entirety, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this putative class action, accepting as true the facts alleged in the complaint (*see Leon v Martinez, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]*), we hold the automatic renewal provision of the agreement between plaintiff and defendants was both "inoperative" [**516] (*General Obligations Law § 5-901*) and "unenforceable" (*§ 5-903*), since defendants failed to provide the requisite notice to plaintiff that the

two-year subscription term was to be automatically renewed (*see Guerrero v West 23rd St. Realty, LLC, 45 AD3d 403, 846 NYS2d 41 [2007], lv denied 10 NY3d 707, 888 NE2d 396, 858 NYS2d 654 [2008]*; *Protection Indus. Corp. v DDB Needham Worldwide, 306 AD2d 175, 763 NYS2d 546 [2003]*). As such, the agreement was never effectively renewed for a definite term and could have been canceled by plaintiff at any time (*see Concourse Nursing Home v Axiom Funding Group, 279 AD2d 271, 719 NYS2d 19 [2001]*).

However, dismissal of the claims based on *General Obligations Law §§ 5-901* and *5-903* is warranted since plaintiff makes no allegations that he paid for services he did not receive (*see Ludl Elecs. Prods. v Wells Fargo Fin. Leasing, 6 AD3d 397, 398, 775 NYS2d 59 [2004], lv denied 3 NY3d 603, 816 NE2d 569, 782 NYS2d 696 [2004]*; *Concourse Nursing Home v Axiom Funding Group, 279 AD2d 271, 719 NYS2d 19 [2001]* [although subject equipment leases were never renewed because lessor failed to comply with *General Obligations Law § 5-901*, lessee, who continued using the equipment after the leases terminated, was not entitled to recover rent for post-termination period]). To the extent plaintiff [***712] seeks damages for defendants' alleged breach of these statutes, a private right of action is not expressly created by the language of the statutes and a legislative intent to create such a right of action is not fairly implied in the statutory provisions and their legislative history (*see e.g. Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist., 76 NY2d 207, 211, 556 NE2d 1087, 557 NYS2d 280 [1990]*).

The complaint also fails to state a cause of action under *General Business Law § 349*. Plaintiff, a resident of Illinois, was not deceived in New York State (*see Goshen v Mutual Life* [*2] *Ins. Co. of N.Y., 98 NY2d 314, 325, 774 NE2d 1190, 746 NYS2d 858 [2002]*). Nor did plaintiff allege actual injury resulting from the alleged deceptive practices, since defendants did not commence enforcement proceedings against plaintiff and are not seeking to collect fees or payments from plaintiff in connection with the cancellation of his subscription (*see Han v Hertz Corp., 12 AD3d 195, 784 NYS2d 106 [2004]*).

Furthermore, declaratory and injunctive relief is unwarranted in this case, since no justiciable controversy remains to support the claim for declaratory relief (*see Spitzer v Schussel, 48 AD3d 233, 234, 850 NYS2d 431 [2008]*). Concur--Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ. **[Prior Case History: *2009 NY Slip Op 32397(U)*.]**