

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D24776
O/prt

_____AD3d_____

Argued - September 17, 2009

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
SHERI S. ROMAN, JJ.

2008-04353

DECISION & ORDER

Central Equities Credit Corp., plaintiff-appellant,
v B&N Properties, LLC, defendant-appellant,
Elmar Associates, LLC, respondent, et al.,
defendants (Action No. 1).

Elmar Associates, LLC, respondent,
v B&N Properties, LLC, et al. appellants,
et al., defendants (Action No. 2).
(and related actions)

(Index Nos. 43274/00, 42396/00)

Lebensfeld Borker Sussman & Sharon, LLP, New York, N.Y. (Alan M. Lebensfeld and Brett R. Schwartz of counsel), for appellant Central Equities Credit Corp.

Oved & Oved, LLP, New York, N.Y. (Darren Oved of counsel), for appellant B&N Properties, LLC (joining in the brief filed by the appellant Central Equities Credit Corp).

Certilman Balin Adler & Hyman, LLP, East Meadow, N.Y. (Patrick McCormick and Donna-Marie Korth of counsel), for respondent Elmar Associates, LLC, and defendants Martin B. Gross, Elliot S. Gross, and Gross & Gross, LLP, in Action No. 1.

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CENTRAL EQUITIES CREDIT CORP. v B&N PROPERTIES, LLC
ELMAR ASSOCIATES, LLC v B&N PROPERTIES, LLC

In related actions, inter alia, to recover damages for breach of contract and for a judgment declaring the rights of the parties to certain escrowed funds, Central Equities Credit Corp. and B&N Properties, LLC, appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Jackson, J.), dated March 27, 2008, as denied the motion of Central Equities Credit Corp. for partial summary judgment dismissing the counterclaim asserted against it by Elmar Associates, LLC, in Action No. 1, and granted the cross motion of Elmar Associates, LLC, for summary judgment against Central Equities Credit Corp. and B&N Properties, LLC, in Action No. 2.

ORDERED that the appeal of B&N Properties, LLC, from so much of the order as denied the motion of Central Equities Credit Corp. for partial summary judgment dismissing the counterclaim asserted against it by Elmar Associates, LLC, in Action No. 1, and granted the cross motion of Elmar Associates, LLC, for summary judgment against Central Equities Credit Corp. in Action No. 2, is dismissed, as B&N Properties, LLC, is not aggrieved by those portions of the order (*see* CPLR 5511); and it is further,

ORDERED that the appeal of Central Equities Credit Corp. from so much of the order as granted the cross motion of Elmar Associates, LLC, for summary judgment against B&N Properties, LLC, in Action No. 2 is dismissed, as Central Equities Credit Corp. is not aggrieved by that portion of the order (*see* CPLR 5511); and it is further,

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the cross motion of Elmar Associates, LLC, for summary judgment against Central Equities Credit Corp. and B&N Properties, LLC, in Action No. 2, and substituting therefor a provision denying the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

Although this was the second time that the defendant Central Equities Credit Corp. (hereinafter Central) moved for partial summary judgment, and there is a general rule against successive summary judgment motions (*see Selletti v Liotti*, 45 AD3d 669; *Williams v City of White Plains*, 6 AD3d 609), the Supreme Court properly addressed the merits of the motion as Central averred that the motion was supported by newly-discovered evidence (*see EDP Hosp. Comp. Sys., Inc. v Bronx-Lebanon Hosp. Ctr.*, 63 AD3d 665; *Oppenheim v Village of Great Neck Plaza*, 46 AD3d 527; *compare B&N Properties, LLC v Elmar Ass., LLC*, 51 AD3d 831).

The Supreme Court properly denied Central's motion for partial summary judgment but erred in granting the cross motion of the defendant Elmar Associates, LLC, for summary judgment against Central and B&N Properties, LLC, in Action No. 2, as there are triable issues of fact which preclude summary judgment (*see B&N Prop., LLC v Elmar Ass., LLC*, 51 AD3d 831; *see also Geiger v ENAP, Inc.*, 264 AD2d 755).

FISHER, J.P., COVELLO, ANGIOLILLO and ROMAN, JJ., concur.

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CENTRAL EQUITIES CREDIT CORP. v B&N PROPERTIES, LLC
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2008-04353

DECISION & ORDER ON MOTION

Central Equities Credit Corp., plaintiff-appellant,
v B&N Properties, LLC, defendant-appellant,
Elmar Associates, LLC, respondent, et al.,
defendants (Action No. 1).

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Motion by the respondent on an appeal from an order of the Supreme Court, Kings County, dated March 27, 2008, to dismiss the appeal of B&N Properties, LLC. By decision and order of this Court dated April 23, 2009, the motion was held in abeyance, and was referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is denied as academic in light of the determination of the appeal.

FISHER, J.P., COVELLO, ANGIOLILLO and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

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