[* 1]

SEQ 1

SUMMARY JUDGMENT

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... & cross-motion	1, 1a, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

FILED
SEP 30 2004
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/24/04

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

8902 CORPORATION and DENIS LEAHY,

Plaintiff(s), Index No.: 111256/2002

- against -

DECISION/ORDER

HELMSLEY-SPEAR, INC. and MANHATTAN EMBASSY COMPANY, L.P.,

Defendant(s).

In this property damage action, plaintiff 8902 Corporation ("8902") and its principal, co-plaintiff Denis Leahy, seek damages and the return of personal property allegedly converted by defendants Helmsley-Spear, Inc. and Manhattan Embassy Company, L.P. (collectively "Helmsley-Spear"), after 8902 was evicted on July 27, 1999 from defendants' commercial premises at 890 Second Avenue in Manhattan. Helmsley-Spear moves for summary judgment dismissing the complaint, and further moves for summary judgment on its counterclaim against plaintiff Leahy based on a lease guaranty. Plaintiffs cross-move for summary judgment as to liability against defendants on their conversion claim, and further move to compel additional discovery.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853

[1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman v City of New York, supra, at 562.)

It is undisputed that on November 13, 1997, 8902 executed a 15-year lease for the premises, and plaintiff Leahy signed a guaranty of 8902's obligations under the lease. On July 27, 1999, 8902 was evicted from the premises by a New York City Marshal pursuant to a judgment of possession and warrant of eviction. By order of this court (Weissberg, J.) dated November 10, 2000, Helmsley-Spear obtained judgment against 8902 for rent arrears in the amount of $39,140.00, with interest from May 1, 1999, plus $2,036.00 for legal fees. This judgment remains unsatisfied.

For the purposes of this motion, it is further undisputed that personalty owned by plaintiff Leahy remained at the premises after the eviction, although the parties dispute the value and number of items that remained. The record is silent as to the current whereabouts of the property.

Plaintiffs assert five causes of action against defendants: Conversion, breach of contract, negligence in connection with a bailment, tortious interference with contract, and punitive damages.

Conversion

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." (State of New York v Seventh Regiment Fund, 98 NY2d 249, 259 [2002] [internal quotations omitted]. See also Bradley v Roe, 282 NY 525 [1940].) As a required element of conversion, plaintiff must

establish "[s]ome affirmative act – asportation by the defendant or another person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant." (Seventh Regiment Fund, 98 NY2d at 260.) Moreover, "courts from an early date have protected unsuspecting defendants by requiring plaintiffs, under some circumstances, to show that they demanded the goods and were refused." (Id.)

In moving for summary judgment dismissing plaintiffs' conversion claim, Helmsley-Spear makes a prima facie showing that it offered plaintiff access to the premises to obtain his personalty. After plaintiffs' eviction, plaintiff Leahy requested access to the property and defendants responded by letter dated September 23, 1999, which provided that, "[w]hile we have no problem providing access to the premises * * *, the week of September 27, 1999 is not available. The agent who handles the building * * * is on vacation until October 4, 1999." (Defendants' Ex. J.) This letter thus shows that defendants did not deny plaintiffs access to the property, although they arguably created a slight delay during their agent's absence on vacation.

In opposition, plaintiffs fail to raise a triable issue of fact as to whether defendants denied access to the property. Plaintiffs rely on Mr. Leahy's deposition in which he testified that he could not arrange access after the September 23 letter (see P.'s Dep. at 69), and that he spoke with Milton Sherman, Helmsley-Spear's manager, who allegedly said to him that "no, the guys don't want to give it [the personalty] to you." (Id. at 70.) Mr. Leahy further submits an affidavit in which he attests that he contacted defendants on "numerous occasions," and that he "repeatedly asked for access." (Leahy Aff. In Opp. ¶¶ 20-21.)

These wholly conclusory statements, which are made without specifying details as to the manner by which Mr. Leahy contacted defendants or the dates on which he requested or was denied access, are insufficient to raise a triable issue of fact. (See Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 [1974].)

Moreover, to the extent that plaintiffs base their conversion claim on correspondence preceding the September 23 letter, they also fail to raise a triable issue of fact. By letter dated August 3, 1999, defendants' counsel advised that plaintiffs had removed all of their property from the premises. (See Macron Aff. In Opp., Ex. E.) By letter dated August 11, 1999, plaintiffs' counsel disputed that assertion and provided a list of allegedly remaining items of property. (See id.) A second letter from defendants' counsel, dated August 24, 1999, acknowledged that some personalty remained on the premises, and requested that plaintiffs' counsel "arrange for your client to remove these few items of personalty from the premises." (See id.)

These letters evidence a period of approximately one month in which plaintiffs were delayed from obtaining access to the property, while the parties' counsel apparently attempted to negotiate the extent of the remaining personalty and its return. However, plaintiffs do not claim any damages resulting from this alleged delay. Rather, plaintiffs seek damages solely for the alleged destruction of the property. Accordingly, the correspondence showing delay is insufficient to raise a triable issue of fact on the conversion claim.

Breach of Contract

8902 alleges that Helmsley-Spear breached the parties' lease by unreasonably withholding consent to 8902's request to sublet or assign the lease. In moving to dismiss

plaintiffs' claim, defendants submit Mr. Leahy's letter to them, dated February 8, 1999, which advised that he had a buyer for the restaurant, and asked defendants to "[k]indly remit whatever is necessary to make the transfer of the lease." (See Berman Aff. In Support, Ex. L.) Defendants also rely on a letter from Mr. Leahy, dated February 17, 1999, which demanded that defendants "[g]et this done!" (See id.) Neither letter contains information required under Article 62(b) of the lease – namely, the name and address of the proposed assignee, banking, financial or other credit information, and information as to the nature of the assignee's business. (See Lease [Ex. A to Defendants' Motion].) In opposition to the motion, plaintiffs merely rest on the insufficient letters described above. As these letters demonstrate that plaintiffs failed to fulfill a condition precedent to plaintiffs' assignment or sublet of the lease, defendants are entitled to summary judgment dismissing the breach of contract cause of action. (See 200 Eighth Ave. Rest. Corp. v Daytona Holding Corp., 293 AD2d 353 [1st Dept 2002].)

Tortious Interference

As to plaintiffs' tortious interference claim, plaintiffs allege that Helmsley-Spear's unreasonable refusal to consent to assignment or subletting of the lease interfered with 8902's agreement with a prospective purchaser of plaintiffs' business. Defendants make a prima facie showing that plaintiffs fail to establish a required element for a tortious interference claim – namely, an executed contract between plaintiff and the proposed purchaser. (See Kronos, Inc. v AVX Corp., 81 NY2d 90 [1993].)

Even if an agreement were fully executed, plaintiffs' tortious interference claim would require dismissal. The acts alleged by plaintiffs to constitute defendants' tortious interference – namely, refusal to interview potential buyers, respond to phone calls or letters, or review

potential buyers' applications (see Ps.' Bill of Particulars ¶¶ 153-158) – are not independent torts committed towards a third party, but are merely an incident of the alleged failure to consent to the lease assignment. (See Rodriguez-Nunci v Clinton Hous. & Dev. Co., 241 AD2d 339 [1st Dept 1997]; EDP Hosp. Computer Sys., Inc. v Bronx-Lebanon Hosp. Ctr., 212 AD2d 570 [2d Dept 1995].) Plaintiffs' claim for tortious interference with contract must accordingly be dismissed.

Bailment

In moving to dismiss plaintiffs' bailment claim, defendants make a prima facie showing that there was no agreement between the parties for defendants to maintain plaintiffs' personal property after the eviction. (See Funding Assistance Corp. v Mashreq Bank, PSC, 277 AD2d 127 [1st Dept 2000].) Plaintiffs fail in opposition to submit any evidence to raise a triable issue of fact as to whether defendants were a constructive bailee of plaintiffs' property. The bailment claim must therefore be dismissed.

Punitive Damages

It is well settled that there is no independent cause of action for punitive damages. (Rocanova v Equitable Life Assur. Socy., 83 NY2d 603 [1994].) As plaintiffs' substantive claims have been dismissed, plaintiffs' punitive damages claim must also be dismissed.

Helmsley-Spear's Counterclaim

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." (City of New York v Clarose Cinema Corp., 256 AD2d 69, 71 [1st Dept 1998].)

It is undisputed that plaintiff Leahy executed a guaranty to Helmsley-Spear for "all of its [8902's] rent obligations pursuant to the [l]ease * * * limited to the period that the [p]remises is not surrendered to the [o]wner" (see Baquet Aff. In Support, Ex. B), and that this guaranty covered rent and attorney's fees. (See id.; Lease ¶ 19.) It is also undisputed that 8902's unpaid rent during the time it occupied the premises totaled $29,355.00, plus attorney's fees of $2,036.00. In fact this Court's order, dated November 10, 2000, directed entry of judgment against 8902 for rent arrears exceeding this amount. The court's order included an amount for one month's rent after 8902's eviction that is not covered under Mr. Leahy's guaranty.

In opposing defendants' prima facie showing that Mr. Leahy is liable on the guaranty, plaintiffs rest solely on the argument that Helmsley-Spear obtained judgment for the arrears upon plaintiffs' default in an underlying action, and that Mr. Leahy was never served in that action. Plaintiffs fail to submit any authority that a default judgment is not sufficient proof of the underlying debt or that the guarantor must be named in the action on the debt. Moreover, plaintiffs make no showing on the instant motion that the debt was not due. Accordingly, plaintiffs fail to raise a triable issue of fact on defendants' counterclaim.

Plaintiff's Cross-Motion

As the complaint is dismissed, that branch of plaintiffs' cross-motion seeking additional discovery is moot.

It is accordingly hereby ORDERED as follows: Defendants' motion is granted to the extent that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Helmsley-Spear is granted judgment against plaintiff Denis

Leahy on its first counterclaim in the amount of $29,355.00, plus $2,036.00 for attorneys fees, plus interest at the statutory rate from May 1, 1999, plus costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
September 24, 2004

MARCY FRIEDMAN, J.S.C.