

Thirty-One Co. v Forino

2005 NY Slip Op 30363(U)

August 30, 2005

Supreme Court, New York County

Docket Number: 604355/2004

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

THIRTY-ONE CO.,

Plaintiff,

- v -

INDEX NO. 604355/2004

MOTION DATE 5/26/05

LUIGI FORINO and INFINITY CONSULTING GROUP, INC.,
a/k/a INFINITY CONSULTING GROUP OF NEW YORK, INC.,
a/k/a INFINITY CONSULTING GROUP LLC,

Defendant.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

This constitutes the decision and order of the court.

Dated: 8/24/05

W
WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FILED
SEP 02 2005
NEW YORK
COUNTY CLERKS OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
THIRTY-ONE CO.,

Plaintiff,

Index No. 604355/2004
Mtn Seq. 001

-against-

LUIGI FORINO and INFINITY CONSULTING
GROUP, INC., a/k/a INFINITY CONSULTING
GROUP OF NEW YORK, INC., a/k/a INFINITY
CONSULTING GROUP, LLC,

Defendants.
-----x

WALTER B. TOLUB, J.:

By this motion, Plaintiff, Thirty-One Co. ("Plaintiff"), a New York Partnership and landlord of the building located and known as 254 West 31st Street moves for summary judgment pursuant to CPLR 3212 against defendant Luigi Forino, guarantor of the lease ("Guarantor"), and separately against Infinity Consulting Group, Inc. ("Infinity"), a/k/a Infinity Consulting Group of New York, Inc. a/k/a Infinity Consulting Group, L.L.C. ("Infinity LLC"), New York business entities doing business in the State, County and City of New York.

Factual Background

On or about April 1, 2000 Infinity Consulting Group, Inc. entered into a written lease for the entire tenth floor (the "premises") of Plaintiff's building located on 254 West 31st Street in Manhattan. Pursuant to the lease, Infinity was to occupy the

premises from April 1, 2000 until March 31, 2010. In connection with the lease, on March 3, 2000, the guarantor, Luigi Forino executed a Guaranty Agreement, guarantying to plaintiff full performance and observance of all the agreements to be performed by its Principal, Infinity Consulting Group, Inc. under the Lease while Infinity was in possession of the premises. On October 31, 2004, Infinity vacated the premises prior to termination of their lease. To date, the space remains unoccupied. Plaintiff alleges that Infinity ceased paying rent as set forth in the terms of the lease. Additionally, while not expressly stated in the papers, plaintiff also infers that Infinity did not pay all the rent owed up to the date of Infinity's vacatur of the premises. Infinity does not dispute that some back rent was owed. The instant action followed.

Plaintiff's complaint is comprised of four causes of action. The first cause of action, alleged as against the guarantor, seeks past rent in the amount of \$14,621.41. Plaintiff asserts that this amount is owed by Infinity, Infinity having failed to remit this amount prior to vacating the premises on October 31, 2004. Plaintiff's second cause of action seeks judgement against Infinity in the amount of \$43,329.28 representing rent due and arising on the premises as it continues to accrue pursuant to the terms of the lease. Plaintiff's third cause of action, as alleged as against Forino is for accounts stated, and seeks \$14,621.41 in past due

rent. Plaintiff's fourth and final cause of action seeks attorney's fees, costs, and expenses.

Discussion

Summary Judgment

For a motion for summary judgment to succeed, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Silman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial, [James Publishing 2001-2003] §37: 91-92).

In order to defeat a motion for summary judgment where the moving party has demonstrated its entitlement, the opposing party bears the burden of producing admissible evidence sufficient to establish disputed issues of fact sufficient to require a trial. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). If the opposing party is able to prove any doubt that triable issues of fact exist, summary judgment will be denied.

Liability of Infinity Consulting, Inc.

As the guarantor's liability is conditioned upon the

lease, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease. Consistent with this rule and the lease's default provision, Infinity is liable for any past due rent that may have accrued prior to the date of vacatur, and summary judgment with respect to the issue of whether Infinity is responsible for past rent due accruing after the date of vacatur is appropriate. However, as the plaintiff has not offered sufficient support for this court to determine the correct amount of damages owed as a matter of law, the court directs an inquest as to the amount of damages on this issue.

The next issue this court must necessarily address is whether the remaining causes of action are barred by the lack of contractual privity between the plaintiffs and various defendants. Infinity alleges that the plaintiff's complaint erroneously treats Infinity Consulting Group, the signatory to the lease, and Infinity Consulting Group LLC, the entity which sent rent payments, as the same entity. According to Infinity, given the fact that Inc. and LLC are separate and distinct entities, summary judgment as to LLC should be denied.

The plaintiff alleges that all three are the same entity. Although the plaintiff refers to all the entities in the caption as the same entity, each of the defendants was served separately through the secretary of state. Since liability is premised on the lease, holding Infinity Consulting Group or New York, Inc. and

Infinity Consulting Group, LLC liable for Infinity Consulting Group, Inc.'s default under the lease would require piercing the corporate veil. Piercing the corporate veil will generally require a showing that: (1) the owners exercised complete domination over the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v. New York State Dept. of Taxation and Finance*, 82 NY2d 135 [1993]). As a result, the liability if any of, of both Infinity Consulting Group of New York, Inc. and Infinity Consulting Group, LLC are questions of fact to be proven at trial.

Liability of Guarantor, Luigi Forino

With respect to the Guarantor's liability under the Guaranty Clause, the plaintiff alleges that Forino, as Guarantor, was responsible for \$14,621.21, representing unpaid rent and additional rent due and owing for the period through October 31, 2004 during which time Infinity was in possession of the premises and in default under the lease. There is no dispute as to the guarantor's liability for tenant's default under the lease under the Guaranty clause while the tenant was in possession. However, the guarantor asserts that he is relieved from any liability as a result of the plaintiff's retention of Infinity's security deposit, which is argued adequately compensates it for any default under the lease.

Under the terms of the subject lease, the landlord was entitled to apply tenant's security deposit after tenant vacated the premises. Moreover, Forino's guaranty expressly provides, "Owner shall not be required to use any security under the Lease before proceeding against or collecting any sums from the Principal."

Furthermore, it is well established that a guaranty is independent and by its terms stands alone in imposing direct and primary obligations for payment on the guarantor (*City of New York v. Clarosc Cinema Corp.*, 254 AD2d 69 [1st Dept. 1998]). Under case law, the landlord has a right to retain a security deposit from a defaulting tenant (*Wiener v. Tae Han*, 291 AD2d 297 [1st Dept. 2002]). More significantly, 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; see also BNY Fin Corp. v. Clare*, 172 AD2d 203 [1st Dept. 1991]; *Chemical Bank v. Geronimo Auto Parts Corp.*, 225 AD2d 461 [1st Dept. 1996]).

In the present case, the plaintiff has established the *prima facie* elements necessary to enforce the guarantor's written guaranty. The plaintiff has submitted to the court the absolute and unconditional limited guaranty signed by defendant guarantor in which the guarantor irrevocably guarantees to plaintiff the payment

[*8]

of all rent and additional rent under the lease prior to the date that tenant vacates the premises. Plaintiff has established the underlying debt through the Bonet affidavit and a showing of the guarantor's failure to pay the plaintiff the said amount. However contrary to plaintiff's allegation, according to the Guaranty, the guarantor's liability is limited to tenant's default under the lease while occupying the premises, and therefore does not extend to such rent and additional rent as it continues to accrue pursuant to the terms of the lease. The Court therefore grants summary judgment as to the guarantor's liability under the Guaranty Clause for any rent owed prior to Infinity's vacatur on as of October 31, 2004. However, because it is unclear how the plaintiff arrived at the figure of \$14,621.41, this court orders an inquest as to the amount of damages owed.

In addition, the plaintiff moves for summary judgment as to the guarantor based on a theory of account stated. An "account stated" is "'(a)n account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance'" (*Interman Industrial Products, Ltd. v. R.S.M. Electron Power*, 37 NY2d 151 [1975] citing *Volken v. DeGraaf*, 81 NY 268, 270 [1880]). In Judge Cardozo's words, "'the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness, *In simul computassent*, so that an action to recover balance as upon an implied promise of payment may thenceforth be

maintained'." (*Interman* at 154 citing *New-Burger-Morris Co. v. Talcott*, 219 NY 505 [1916]). In the present case, however, the landlord failed to provide the guarantor with an account, but instead sent him a demand for payment. Case law establishes that there can be no account stated where no account was presented (*Abbott, Duncan & Wiener v. Ragusa*, 214 AD2d 412 [1st Dept. 1995]), and "the mere rendition of an account without an acceptance by the other party does not constitute an account stated ... And a contention that a transaction amounted to an account stated is without merit where no account was presented or any dispute about the account was shown to have existed" (*Waldman v. Englishtown Sportswear*, 92 AD2d 833, 836 [1983]). In the present case, although the guarantor received a demand for payment, the plaintiff failed to attach a detailed statement that explained how the plaintiff arrived at the amount of \$14,621.41. Since the plaintiff failed to present the guarantor with a detailed account, the Court may not imply his consent to the amount presented. As a result, the court denies summary judgment on plaintiff's third cause of action.

Lastly, the landlord demands summary judgment with respect to attorney's fees, costs and expenses incurred as a result of the failure to pay rent and additional rent due. Pursuant to paragraph 19 of the Lease and paragraph 4 of the Guaranty, the principal, Infinity Consulting Group, Inc. agreed to pay these fees. Contrary to Infinity's allegation, the guarantor is not liable for attorney's fees since the guaranty agreement only provides for the

principal's liability in this regard. As a result, the court orders summary judgment with respect to Infinity's liability for attorney's fees, costs and expenses incurred as a result of its failure to pay rent and additional rent due, and the court directs an inquest to determine damages/reasonable attorney's fees.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendant Infinity Consulting, Inc. is granted with respect to its liability under the lease, and directs an inquest as to the amount of damages; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Luigi Forino is granted with respect to his liability under the Guaranty agreement, and directs an inquest as to the amount of damages; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Luigi Forino is denied with respect to an account stated; and it is further

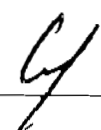
ORDERED that plaintiff's motion for summary judgment against Defendants for attorney's fees attorney's fees, costs and expenses incurred as a result of the failure to pay rent and additional rent

due is granted against Infinity Consulting, Inc. and denied against Luigi Forino, and directs an inquest as to the amount of damages.

Counsel for the parties are directed to appear for a Pre-Trial Conference on October 14, 2005 at 11:00 in I.A. Part 15, New York County Courthouse, 60 Centre Street, Room 335, New York New York at 11:00 a.m. at which time this matter will be set down for an inquest.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/13/05



HON. WALTER B. TOLUB, J.S.C.

FILED
SEPT 14 2005
NEW YORK
COUNTY CLERK'S OFFICE