

TM Park Ave. LLC v Shapiro, Shapses, Block, LLP
2006 NY Slip Op 30753(U)
January 10, 2006
Supreme Court, New York County
Docket Number: 103831/2005
Judge: Sherry Klein Heitler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

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TM PARK AVENUE LLC,

Plaintiff,

-against-

SHAPIRO, SHAPSES, BLOCK, LLP, A New York
Limited Liability Partnership, SHAPIRO & BLOCK,
LLP, MARC S. SHAPIRO, a/k/a MARK SHAPIRO
(Guarantor), PAUL M. SHAPSES, a/k/a PAUL
SHAPSES (Guarantor), JILL D. BLOCK, a/k/a JILL D.
BLOCK,

Defendants.

-----X
SHERRY KLEIN HEITLER, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition herein.

Plaintiff TM Park Avenue, LLP (Park) moves for an order directing defendants to pay, pendente lite, certain amounts as rent, additional rent and/or use and occupancy (seq. no. 001). Plaintiff also moves, pursuant to CPLR § 3212, for an order granting partial summary judgment, and upon granting said order, issuing, pursuant to CPLR § 5229, a restraining order that would have the same effect on defendants prior to the entry of judgment as a restraining notice served after judgment would have (seq. no. 002).

Plaintiff is the landlord of the subject premises which is the 19th floor of 315 Park Avenue South, New York, New York.

Defendant Shapiro, Shapses, Block, LLP ("SSB") is the tenant for the subject premises, under a lease dated February 1, 1998. Defendant Shapiro & Block, LLP ("SB") is the successor in interest to SSB. Defendants Marc Shapiro, Paul Shapses, and Jill Block ("the individual defendants") are guarantors of the lease.

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DECISION & ORDER

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NEW YORK
COUNTY CLERK'S OFFICE

When the tenant first took occupancy of the subject premises, it was engaged in the practice of law, and used the premises for said purposes. In August 2002, tenant ceased to use the premises as a law office and instead commenced to license the entire space to various licensees from which tenant collected license fees. Despite this change in circumstances, tenant kept paying its obligations under the lease to plaintiff.

However, in January 2005, tenant failed to pay the rent and additional rent due under the lease. On January 21, 2005, tenant tendered to plaintiff \$13,820.80 instead of the \$47,866.37 that was due for January. Plaintiff alleges that tenant has not made any payments to plaintiff since then.

Plaintiff commenced this action by service of a summons and complaint dated March 18, 2005. The complaint contains nine causes of action. The first cause of action seeks to recover the outstanding base rent for January, February, and March 2005. The second, third, fourth, fifth, sixth, and seventh causes of action seek to recover certain amounts which constitute additional rent for January, February, and March 2005. The eighth cause of action seeks to recover reasonable attorney's fees pursuant to the terms of the lease. The ninth cause of action seeks to recover all rent and additional rent that comes due during the pendency of this action.

By order to show cause dated April 28, 2005, plaintiff moved for an order directing defendants to pay, pendente lite, to plaintiff, \$100,000, representing the amount defendants have received from their licensees for the period from January 1, 2005 through April 30, 2005; \$25,000.00 per month for the period from May 1, 2005 to the determination of the instant order to show cause; and \$25,000.00 per month going forward.

Thereafter, by order to show cause dated June 25, 2005, plaintiff moved for an order granting it partial summary judgment, on the first through seventh causes of action for the rent and additional rent that accrued for the period from January 1, 2005 through March 31, 2005, and on the ninth cause of action for the rent and additional rent that accrued for the period from April 1, 2005 through the date of judgment.

In opposition, while defendants do dispute the amount of rent due, defendants did not submit any defense which would relieve tenant of the obligation to pay all or part of the outstanding rent. The only defense submitted by defendants is that the individual defendants have been discharged from their obligations under the guaranty and they are no longer liable for the outstanding rent.

The guaranty states in pertinent part:

"2. Continuing Guaranty. This is a continuing Guaranty and shall remain in effect until all the Tenant's Obligations have been paid, performed and satisfied in full and all of the Guarantor's obligations and liabilities hereunder shall have been paid, performed and satisfied in full; provided however this Guarantee shall be extinguished, terminated, null and void upon the satisfaction of paragraph 14 herein."

The parties agree that the reference to "paragraph 14" in the above paragraph is a typographical error and should read "13."

Paragraph 13 states in pertinent part,

"Termination. Notwithstanding any provision hereof to the contrary, if Tenant receives a valid notice of Tenant's default beyond any applicable grace periods in accordance with the terms of the Lease and Tenant vacates the entire Premises within 90 days of receipt of such notice, then Guarantor's obligations under the Guaranty are terminated and this guaranty shall be deemed null and void and of no further force and effect. Upon Tenant's surrender of the Premises Tenant will deliver a letter (a) that confirms the surrender of possession, and (b) waives any

claim of any sort that Tenant may in the future have against Landlord arising out of or related to this Lease or the tenancy created thereby.”

Defendants take the position that the summons and complaint in this case constitute a notice of tenant’s default under paragraph 13, and thus, the guaranty by the individual defendants has been terminated.

Plaintiff, on the other hand, takes the position that the summons and complaint do not constitute a notice of tenant’s default. Thus, since plaintiff never served a notice of tenant’s default, paragraph 13 is not germane.

This issue, however has been rendered moot.

Under paragraph 13, tenant had to surrender the premises within 90 days of the service of the notice of tenant’s default. Since the summons and complaint were allegedly received on or about March 29, 2005, tenant and all its licensees would have had to vacate the premises on or before June 27, 2005. According to the defendants, their licensees did not vacate the premises until July 12, 2005. Thus, even according to defendants’ interpretation of paragraph 13, the requirements of said paragraph were not met, and the guarantees are still in effect.

Defendant Mark Shapiro avers that he was advised on April 29, 2005 by Steven Mullins that the licensees could stay in the premises and that their failure to vacate the premises would not vitiate the conditional nature of the guaranty. Mr. Shapiro describes Mr. Mullins as a principal of plaintiff and defendants’ primary landlord contact in negotiating the lease and throughout the term.

This claim is of no moment. First, it should be noted that paragraph 5 (a) states, "This Guaranty may not be changed or terminated orally but only by an agreement in writing signed by the party against whom enforcement of such change termination is sought."

Moreover, the alleged statement by Steven Mullins is consistent with plaintiff's position. The licensees vacating the premises only becomes relevant if a notice of default is served. Since plaintiff claims that no notice of default was ever served, it follows that plaintiff's position is that the licensees' failure to vacate the premises would be of no effect.

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citations omitted]. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers [citation omitted]. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Alvarez v Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

In order to defeat the motion plaintiff must come forward and lay bare its proof that there is a bona fide issue for trial. Hanson v Ontario Milk Producers Cooperative, 58 Misc. 2d 138 (Sup. Ct. Oswego Cty. 1968).

Since plaintiff has made a prima facie showing of entitlement to judgment on the issue of liability as a matter of law and defendants have failed to show that any material issue of fact exists with respect to liability, plaintiff is entitled to summary judgment on the issue of liability. On the other hand, since defendants have raised a question as to the total amount owed, this issue must be resolved at an assessment hearing.

As the motion for summary judgment is granted, the motion for payments, pendente lite, is rendered moot.

Plaintiff's application for relief pursuant to CPLR § 5229 is denied.

CPLR § 5229 permits the post judgment enforcement remedy of examination and restraint prior to the entry of a final judgment. The only statutory requirement is that the application for said relief be made by the prevailing party.

It is in the trial court's discretion whether to grant the injunctive relief in light of the purpose of the statute: to prevent an adverse party from disposing of assets in order to avoid judgment. The court will only grant such relief where the trial court is led to believe that the danger exists that defendants may dispose or divert assets to avoid a potential judgment.

Gallegos v Elite Model Management Corporation, 1 Misc. 3d 200 (Sup. Ct. N.Y. Cty. 2003).

Here, plaintiff has made no such showing.

Accordingly, it is

ORDERED that the motion for partial summary is granted to the extent of granting judgment in favor of plaintiff TM Park Avenue, LLP and against defendants Shapiro, Shapes, Block, LLP, Shapiro & Block, LLP, Marc Shapiro, Paul Shapes, and Jill Block to the extent that they are liable for all outstanding amounts that have come due under the lease and all amounts that will come due under the lease until the entry of judgment; and it is further

ORDERED that an assessment of damages against the defendants is directed; and it is further

ORDERED that within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial

Support Office (Room 158), and shall pay the proper fee, if any, and said Clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that at the time of the assessment, the court will also conduct a trial on the eighth cause of action for reasonable attorney's fees; and it is further

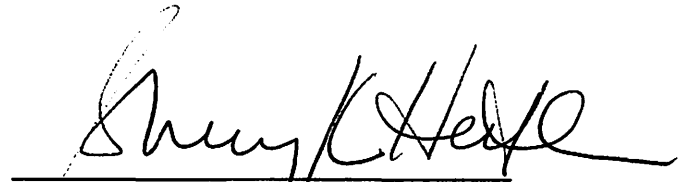
ORDERED that the motion for an order directing defendant to pay certain payments, pendente lite, is denied as moot; and it is further

ORDERED that the motion for a pre-judgment restraining order is denied; and it is further

ORDERED that counsel for the parties shall appear for a conference at 9:30 a.m. on February 1, 2006, at Room 438, 60 Centre Street, New York, New York 10007.

This shall constitute the decision and order of the court.

DATED: January 12, 2006


SHERRY KLEIN HEITLER
J.S.C.

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