

H.M.T. Realty Co. v JMJ Group Realty LLC

2007 NY Slip Op 31196(U)

May 10, 2007

Supreme Court, New York County

Docket Number: 0115851/2006

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

H. M. T. Realty

INDEX NO. 115851/2006

MOTION DATE 4/30/2007

- v -
JMJ GROUP REALTY LLC

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

PAPERS NUMBERED

1-3

4-6

7

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

*MB 6-11-07 P.C. at non set
at end of decision. IT to notify
all parties.*

FILED

MAY 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/07

[Signature]
DAVE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
H.M.T. REALTY CO.,

Plaintiff,

INDEX NO. 115851/06

-against-

JMJ GROUP REALTY LLC, MYRA COHEN,
JAMES SILVA and JOSEPH CHANES,

Defendants.

DECISION and ORDER

-----X
MYRA COHEN and JOSEPH CHANES,

Third Party Plaintiffs,

-against-

ESTATE OF JAMES SILVA, JOU MIN SILVA as
EXECUTRIX, JOU MIN SILVA individually,
and HEATHER SILVA

Third Party Defendants.

-----X
JANE S. SOLOMON, J.

FILED
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In this breach of contract action, plaintiff H.M.T. Realty Co. ("Plaintiff") moves for summary judgment on two of the causes of action alleged in the Complaint, and for an inquest as to damages. For the reasons described herein, the motion is granted as to liability, and the matter of damages is reserved for trial.

Plaintiff is a New York partnership with its office at 350 Third Ave, New York (the "Building"). Defendant MJM Group Realty LLC ("MJM") is a New York limited liability company that formerly was a tenant in the Building. The late James Silva

("Silva"), together with appearing defendants Myra Cohen ("Cohen") and Joseph Chanes ("Chanes") were business partners in JMJ, operating a number of Mailbox, Etc. stores, including one in a ground floor store at the Building (the "Premises").

The lease entered into between Plaintiff and JMJ for the Premises is dated November 1, 1997 (the "Lease"), and is for a 21 year term. It provides for a monthly base rent of \$5,500, and additional rent for real estate taxes and a fuel adjustment, together with late charges and legal fees, etc. The Lease also required JMJ to surrender the Premises in broom-swept condition upon termination. Silva, Cohen and Chanes (collectively, the "Guarantors") guaranteed JMJ's full performance under the Lease, including timely payment of rent, through a written guaranty dated November 1, 1997 (the "Guaranty"). Among other things, the Guaranty provides that the Guarantors' liability ends upon execution of a Surrender Declaration, the form of which is an exhibit.

On March 31, 2005, Chanes and Cohen allegedly sold their shares in JMJ to Silva under an agreement ("Agreement"), a copy of which has not been submitted. Chanes and Cohen claim the Agreement provides that Silva would continue to pay the Lease rent, and indemnify and hold Chanes and Cohen harmless for any amounts due.

Silva died on March 5, 2006, but Silva's widow, Jou Min Silva, continued to operate the Mailbox, Etc. store until she vacated the Premises on July 12, 2006, allegedly owing several months rent. By a Surrender Declaration in the form required, signed by Mrs. Silva and dated August 11, 2006, JMJ surrendered the Premises.

Plaintiff commenced this action in October 2006. Plaintiff alleges five causes of action; the first three are against JMJ only; the fourth is against the Guarantors and the fifth is for legal fees and is against all defendants. On this motion, Plaintiff seeks judgment against Chanes and Cohen on the fourth and fifth claims. In their Answer, Cohen and Chanes generally deny the Complaint and set forth unpersuasive affirmative defenses, including Plaintiff's failure to mitigate damages, and alleging that the Guarantors did not receive a copy of the Guaranty.

Under New York law, there is no duty to mitigate with respect to commercial leases. Holy Properties Ltd., L.P. v. Kenneth Cole Prods., 87 N.Y.2d 130 (1995). Moreover, the claim here only extends to pre-surrender arrears (when JMJ was still in possession of the Premises). With regard to Cohen and Chanes' argument that they did not receive an executed copy of the Guaranty, the Guaranty expressly provides that:

Each Guarantor hereby waives all presentments, demands, notices of nonperformance, protests, notices of acceptance of this Guaranty or Tenant's incurring of new or additional obligations or indebtedness, and any other formality that might otherwise be a condition to such Guarantor's absolute liability hereunder.

...

This Guaranty has been duly executed and delivered by each Guarantor and is a legal, valid and binding obligation of each Guarantor, enforceable against each Guarantor in accordance with its terms.

Cohen and Chanes argue that summary judgment is not appropriate because triable issues of fact exist, namely that: (i) they were never served with the Demand for Payment of Rents, as notices were sent to the wrong addresses; (ii) rents were paid for some of the months claimed as unpaid; (iii) there was no computation for the sums of additional rent (taxes, fuel, etc.); (iv) the Premises were surrendered in July and not August.

In its Reply, Plaintiff refers to the Guaranty to show that it was under no obligation to make a demand on the Guarantors; that their reliance on Silva to make payments only creates a dispute between the Guarantors; and if there is a dispute as to the amount owed, it can be determined through an inquest. Finally, they contend that under the Lease, the executed Surrender Declaration governs this dispute.

Plaintiff prevails on its claims for judgment as to liability. However, this does not mean that a trial is not

required at which it must prove the amount of damages to which it is entitled. Nor does it mean that defendants are not entitled to discovery regarding the calculation of the rent and the additional rent items Plaintiff seeks. This is particularly true when Chanes and Cohen were not directly involved in JMJ's business.

Accordingly, it hereby is

ORDERED that the motion for summary judgment on the Fourth and Fifth Causes of Action in the Complaint is granted with regard to liability as against defendants Cohen and Chanes; and it further is

ORDERED that a trial as to damages against the appearing defendants is directed, at which time an inquest will be had against the defaulting corporate defendant; and it further is

ORDERED that counsel shall appear for a preliminary conference on the remaining issues, including as to the third-party action, in Part 55 on June 11, 2007 at 12:00 noon, and be prepared to schedule all discovery to conclude by September 30, 2007.

Dated: May 10, 2007

FILED
MAY 14 2007
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ENTERED

J.S.C.

FILED