

Eighth Ave. Garage Corp. v H.K.L. Realty Corp.

2007 NY Slip Op 31203(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0604472/2005

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

-----X
EIGHTH AVENUE GARAGE CORP.,
Plaintiff,
-against-

Index No. 604472/05
Motion Date 03/21/07
Motion Seq. No. 001
Motion Cal. No.

H.K.L. REALTY CORP., FORTY-SIX PARKING
ASSOCIATES and LILA SCHEINER,
Defendants.
-----X

The following papers, numbered 1 to were read on this motion for Summary Jgmt.

NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

| PAPERS
| _____
| _____
| _____

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

This is an action to recover damages resulting from the defendant's refusal to release one Jacob I. Sopher from the personal guarantee of payment of a lease to a parking lot. The named defendants are HKL Realty Corp, Forty-six Parking Associates and Lila Scheiner. HKL Realty and Parking Associates were never served with process. Therefore, the only actual defendant is Lila Scheiner.

Defendant Scheiner moves for summary judgment dismissing the complaint while the plaintiff also moves for summary judgment and to compel discovery. Because the parties' submissions show that plaintiff failed to satisfy the lease requirements concerning Sopher's

right to release from his personal guarantee, the Court awards summary judgment to defendant Scheiner.

Plaintiff Eighth Avenue Garage Corp., entered into a lease with the named defendants allowing it to operate a parking lot owned by them. The lease contained a guarantee by Sopher, a principal of the plaintiff, which permitted his release if his interest was assigned, provided one or two individuals who were principals of the new operator companies and whose net worth was at least \$5,000,000, were substituted in his stead. The new guarantor or guarantors had to corroborate their new worth " ... by a financial statement prepared in accordance with generally accepted accounting principles and certified by an independent certified public accountant ..."

Two guarantors, an individual named Lopez, and a corporation were submitted and rejected by the defendant as not being in compliance with the lease's guarantee provisions. The plaintiff disagrees with some of the contentions and argues that the others are merely technical violations which should be ignored.

The Court finds that the violations are substantial and prevent the conclusion that the pertinent provisions of the guarantee were satisfied. First of all, Lopez was short of the \$5,000,000 minimum for net worth by \$90,000. Standing by itself, this might be construed as de minimus, but in conjunction with all of the other deviations, it justifies the Court's decision. The guarantee also calls for up to two individuals to be guarantors. While a

corporation is considered a person by operation of law, it is not an individual, which is defined as a human being. The word *individual* means “ ... of or relating to an individual, especially a single human.” American Heritage Dictionary, p. 893 [4th ed. 2000] This is buttressed by the rational argument by defendant that in real estate transactions, an individual is favored over a corporation because of the vagaries of corporate existence such as dissolution and merger which tends to make recovery against the guarantor more difficult. Moreover, the corporate *guarantor* did not have any assets at the time of the assignment, so it had no net worth, despite the prediction of what its net worth would be at its closing.

Getting back to the financial statements submitted by Lopez, there was no certification. The financial statement was signed by Becker and Company, an LLC consisting of CPAs. Since the statement is signed only as “Becker and Company, LLC,” which is not a CPA, it is not a certification. Becker and Company in its covering letter indicates that because ^{there} ~~that~~ is no estimate of current income taxes it was not prepared in accordance with generally accepted accounting principles, a serious departure from the guarantee. There was no audit of the assets of the guarantors, so their value is suspect. Finally, note 8 of the Lopez financial Statement shows a contingent liability of \$6,250,000. If taken into account, these would create a negative net worth. This is no mere technicality.

For all the foregoing reasons, it is

ORDERED and ADJUDGED the defendants' motion for summary judgment is granted and this action is dismissed; and it is further

ORDERED and ADJUDGED that the plaintiff's cross motion for summary judgment in favor of plaintiff is denied.

Dated: *May 1, 2007*

Enter:

[Signature]

Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

UNFILED JUDGMENT
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