

Roosevelt-Lee LP v Schoenberger

2007 NY Slip Op 31389(U)

May 16, 2007

Supreme Court, New York County

Docket Number: 0118563/2006

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART _____

Index Number : 118563/2006

ROOSEVELT-LEE LP

vs

SCHOENBERGER, ERIC

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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, it is ordered that this ~~motion~~ _____

motion (a) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
MAY 29 2007

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

Dated: 5/16/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

ROOSEVELT-LEE LP,

Plaintiff,

Decision/Order

-against-

Index No. 118563/06

ERIC SCHOENBERGER,

Defendant.

Mot. Seq. 001

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

FILED
MAY 29 2007
CLERK OF COURT
OFFICE

PAPERS	NUMBERED
Summons, Notice of Motion, BWS affirm., exhibits.....	1
Notice of Cross-Motion, PK affirm., ES affd., GJ affd., exhibits.....	2
SG affirm., exhibits.....	3
PK Reply affirm.....	4

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff has commenced this action seeking summary judgment in lieu of complaint. Defendant has cross-moved to dismiss the action based on improper service. For the reasons set forth below, both the motion and cross-motion are denied. The motion is hereby deemed and is converted into a complaint, which defendant is directed to answer within 20 days of the date of this decision.

Service of Process

The court first considers defendant's claim that he was not properly served with process. Unless the court has personal jurisdiction over defendant, it cannot reach the substantive merits of the parties claims. The process sever's affidavit of service indicates that service of process was made by serving the required papers on Gloria

Jurado at 34 West 32nd Street, New York, NY on January 3, 2007, as a person of suitable age and discretion. The papers were then mailed to defendant at 34 West 32nd Street and 225 East 57th Street both in Manhattan.

Both Gloria Jurado and defendant admit that the papers were left at defendants place of business. They claim, however, that Ms. Jurado was not authorized to accept service and did not physically take the papers.

Service under CPLR 308(2) permits service on a person of suitable age and discretion at defendants place of business. A person of suitable age and discretion need not be an authorized agent to accept service and an employee at a defendants place of business will generally qualify. Electric Ins. Co. V. Grajower, 256 AD2d 833 (3rd dept. 1998). In addition the fact that Ms. Jurado did not agree to take the papers and that they were left on a desk at the premises will not invalidate the service. Bossuk v. Steinberg, 58 NY2d 916 (1983). Defendants claim that Ms. Jurado was not resisting service is not true. She expressly told the process server that she was not authorized to accept service and did not take the papers from him. That is a sufficient predicate for the process server to leave the papers there.

Service pursuant to CPLR 308 (2) requires a follow up mailing at either defendants last known address or actual place of mailing. The affidavit of service provides that such a mailing was made to both locations. Defendants generalized statement that he did not receive a 'summons' in the mail is not sufficient to raise an issue of fact regarding service that would require a hearing. American Savings & Loan v. Twin Eagles Bruce, Inc., 208 Ad2d 446 (1st dept. 1994).

Summary Judgment in Lieu of Complaint

The underlying action concerns a claim on a guaranty of rent due under a commercial lease. Plaintiff is the successor in interest to the original landlord under the lease. It claims that the tenant is in default in paying rent and that the guaranty is an instrument for the payment of money only, entitling it to a money judgment against the guarantor for all of the unpaid rent. It is well established in general that a guaranty constitutes an instrument for the payment of money only. First Interstate Credit Alliance, Inc. V. Sokol, 179 AD2d 583 (1st dept. 1992). In the absence of express language to the contrary in the guaranty, however, a guarantor is entitled to assert any defenses or counterclaims that are/were available to the principal obligor. Durable Group, Inc. V. DeBenedetto, 85 AD2d 524 (1st dept. 1981). The guaranty at issue contains no such restriction.

Defendant claims that the tenant under the guaranteed lease was partially evicted from a portion of the leased premises as a result of serious flooding caused by plaintiff's failure to fix the roof. This may constitute a defense to payment of rent. Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY2d 77 (1970). While the court is mindful that such a defense requires an actual partial abandonment of the affected property, it is simply too premature for the court to make a summary determination rejecting the defense proffered at this time. Gallery at Fulton Street, LLC v. Wendnew, 30 AD3d 221 (2006).

Although the court finds that summary adjudication is not warranted at this time, it is converting this matter into an ordinary action. The motion and its supporting papers are deemed a complaint. The papers responsive to the motion are deemed an answer.

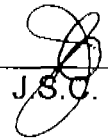
The parties are directed to appear for a preliminary conference before this court on June 7, 2007 at 9:30 am.

CONCLUSION

In accordance herewith the motion for summary judgment in lieu of complaint is denied and the cross-motion to dismiss is denied. Any requested relief not expressly granted herein is denied. The matter is converted into an ordinary action and the parties are directed to appear before this court for a preliminary conference on June 7, 2007 at 9:30 am. This constitutes the decision and order of the court.

Dated: New York, New York
May 16, 2007

SO ORDERED:



J.G. J.S.C.

FILED
MAY 29 2007
NEW YORK
COUNTY CLERK