

L. Charney 1410 Broadway, LLC v Tawil

2007 NY Slip Op 32062(U)

July 6, 2007

Supreme Court, New York County

Docket Number: 0104732/2006

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Index Number : 104732/2006
L.CHARNEY 1410 BROADWAY LLC.

INDEX NO. _____

vs
TAWIL, MARC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

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 ...

PAPERS NUMBERED

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 119)

Upon the foregoing papers, it is ordered that _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

SO ORDERED

Dated: 7/6/07

[Signature]

ROLANDO T. ACOSTA ^{J.S.C.}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION ^{J.S.C.}

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

L. Charney 1410 Broadway, LLC,

Plaintiff,

– against –

Mark Tawil, Jack Tawil, William Robinson,
MJT Imports Corp., Embee Accessories Inc.,
ABC Corporation and XYZ Corporation
Defendants.

DECISION/JUDGMENT

Index No. 104732/06

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

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11B)

The following documents were considered in reviewing plaintiff's motion for partial summary judgment on its first cause of action for breach of contract against all defendants or in the alternative striking defendants' answer pursuant to CPLR 3126, and defendants' motion for summary judgment dismissing the complaint or in the alternative, compelling plaintiff to provide defendants a verified bill of particulars, a response to defendants' supplemental document demand, and compelling plaintiff's principal to appear for deposition:

Papers	Numbered
Notice of Motion, Affidavit and Affirmation	1 (Exhibits A-H; A-R)
Notice of Cross-Motion, Affirmation, Affidavits & Memorandum of Law	2 (Exhibits A-Q)
Plaintiff's Affidavit & Affirmations in Opposition to Defendants' Cross-Motion	3

Background

Plaintiff is the landlord and owner of a commercial office building located at 1410 Broadway in New York County. On April 19, 2001, Embee Accessories Inc ("Embee") leased unit 1701 for a period of eight years from September 1, 2001 to August 31, 2009. It is undisputed that Embee vacated the premises on March 31, 2006 and that the lease provided

for accelerated rent in the event of a breach. See Paster Affirmation, Exhibit A, ¶ 70 of the lease. According to plaintiff, it has re-let the unit as of June 1, 2007, and the vacant period was from April 1, 2006 to June 1, 2007. Accordingly, plaintiff is seeking partial summary judgment on its first causes of action (breach of contract) in the amount of \$412,588.58, plus attorney's fees to be determined at a later date. Plaintiff's claims for attorney's fees is based on Article 18 of the lease.

Inasmuch as Embee is essentially bankrupt, the real issue in this case is whether the other named defendants are liable for Embee's breach. Defendants Marc Tawil and William Robinson executed limited personal guarantees on behalf of Embee. By the express language of the limited guarantees, their liability as guarantors existed only until Embee vacated the premises, see Defendants' Exhibit C, and there is no claim that Embee breached the lease prior to vacating the premises.

A more difficult situation is presented with defendants Marc Tawil, William Robinson, and Jack Tawil, not as personal guarantors but as principals responsible for Embee's debt, and MJT Imports Corp. ("MJT"). MJT is owned by defendants Marc Tawil and Jack Tawil, and Embee is owned by Marc Tawil and William Robinson. According to plaintiff, Jack Tawil has also represented himself as a controlling person of Embee. Both Embee and MJT shared the same address, phone number and number of employees. According to plaintiff, MJT and Embee operated as a single entity as part of a scheme to defraud plaintiff in an attempt to prevent MJT from being liable for Embee's obligations under the lease. In addition to submitting financial documents which according to plaintiff support its claim, it noted that Embee stated in an emergency contact sheet that MJT was the "d/b/a" of Embee. See Block Affidavit, Exhibit B.

Defendants dispute this claim, and argue that MJT was Embee's sub-tenant, and that plaintiff was aware of this from the inception of the lease. They also argue that Jack Tawil, Marc's 73-year-old father, is merely a silent partner with his son and had nothing to do with the signing of the lease.

In addition to asserting a breach of contract claim, plaintiff raised five additional causes of action: fraud in the inducement (second); a declaration that Embee and MJT are one corporate entity and that plaintiff be allowed to pierce the corporate veil (third); a judgment rescinding the lease and re-stating it with MJT as the tenant on the lease and a declaration that MJT is jointly and severally liable for the obligations of the tenant under the lease (fourth); anticipatory repudiation (fifth); and, fraudulent misrepresentation (sixth).

Although some paper discovery has taken place, there is still outstanding discovery request and no depositions have been taken.

Analysis

Plaintiff's motion for partial summary judgment on its first cause of action for breach of contract is granted against Embee only. Indeed, defendants do not dispute that Embee is liable for the breach. With respect to the other defendants, given that discovery is incomplete, CPLR 3212(f), there are simply too many issues of fact for this Court to grant summary relief at this juncture in the litigation.

Although Marc Tawil and William Robinson are not liable pursuant to the limited guarantees, see White Rose Food v Saleh, 99 NY2d 589 (2003)(a guaranty is interpreted in the strictest manner), they may nonetheless be liable in the event that plaintiff succeeds in piercing the corporate veil. I&G Lexington LLC v. Ayers Serota Association, 40 A.D.3d 278 (1st Dept. 2007); 29/35 Realty Associates v. 35th Street New York Yarn Center, 181 A.D.2d 540 (1st Dept. 1992); 888 7th Avenue Associates v. Allen Corp., 172 A.D.2d 445 (1st Dept. 1991).

Defendants' cross motion for summary judgment dismissing the complaint is granted solely to the extent of dismissing the second and sixth causes of action alleging fraudulent inducement and fraudulent misrepresentation, respectively. First Bank of America v. Motor car Funding, Inc., 257 A.D.287 (1st Dept. 1999)(A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (Gordon v. Dino De Laurentiis Corp., 141 A.D.2d 435, 436 [1st Dept. 1988])). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract (Non-Linear Trading Co. v. Braddis Assocs., Inc., 243 A.D.2d 107 [1st Dept. 1998])). Here, plaintiff's causes of action sounding in fraud is premised on its allegations that defendants were not sincere when they entered into the lease. As such, they must be dismissed.

That portion of plaintiff's motion which seeks relief pursuant to CPLR 3126 and defendants' request pursuant to CPLR 3124 are granted solely to the extent of ordering a Preliminary Conference. Accordingly, based on the foregoing, it is hereby

ADJUDGED that plaintiff's motion for partial summary judgment pursuant to its first cause of action (breach of contract) is granted against Embee Accessories, Inc, in the amount of \$412,588.58; and it is further

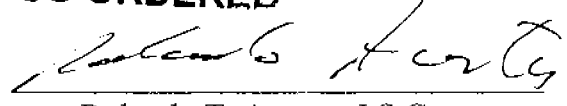
ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is granted solely to the extent of dismissing the second (fraudulent inducement) and sixth (fraudulent misrepresentation) causes of action; and it is further

~~ORDERED that a Preliminary Conference is scheduled for September 6, 2007, at 9:30 a.m. in Part 61, and it is further~~

ORDERED that the Court will conduct an attorneys fees hearing on the first cause of action after the trial on the remainder of the action has been completed.

This constitutes the Decision, Judgement and Order of the Court. A final judgment will be settled after trial.

SO ORDERED



ROLANDO T. ACOSTA, J.S.C.
J.S.C.

Dated: July 6, 2007

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