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

PRESENT: Hon Doris Ling-Cohan PART 36

Index Number : 600918/2006
VANDERBILT AVE., LLC
vs
VERAS, ELIEZER
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for dismiss & cross-motion to amend

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	
Replying Affidavits Reply Memo	5

Cross-Motion: ☑ Yes ☐ No 34

Upon the foregoing papers, it is ordered that this motion to dismiss & cross-motion to amend are decided in accordance with the attached memorandum decision.

FILED
JUL 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 7/9/07

J.S.C.

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

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: IAS PART 36

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VANDERBILT AVE., LLC

Index No. 600918/06

Plaintiffs,

Motion Seq. No.: 001

-against-

ELIEZER VERAS,

Defendants.

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DORIS LING-COHAN. J. :

Third-party defendants Ventura Payano ("Payano") and Soho Entertainment Group Owen (SEGO) move, pursuant to CPLR 3211 (a) (7) and (8), for an order dismissing the third-party complaint. Defendant/third-party plaintiff Eliezer Veras ("Veras") cross-moves, pursuant to CPLR 3025, for leave to serve an amended third-party complaint and for an order extending his time to serve the initial third-party complaint upon SEGO, pursuant to CPLR §306-b.

The original complaint alleges, inter alia, that: (1) plaintiff Vanderbilt Ave., LLC ("Vanderbilt"), as landlord, entered into a lease ("Lease") with 111 W. 17th St. Associates, Inc. ("Associates"), as tenant, for the ground floor retail space in the building located at 111 West 17th Street in Manhattan; (2) Veras executed a guarantee of Associates's obligations under the Lease; (3) the Lease was subsequently amended to, among other things, reflect the tenant's correct name, to wit, 111 W. 17th Street Corp. (Tenant); and (4) in December 2005, Tenant vacated the leased premises and returned the keys to Vanderbilt, having failed to pay rent in the amount of $72,450 and having damaged and stolen

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fixtures and personalty in the amount of $97,000. The complaint seeks to recover such damages, totaling $169,450.

The third-party complaint alleges, inter alia, that: (1) Payano is the owner of SEGO; (2) SEGO is a distinct corporation that was organized under the laws of Florida; (3) on April 11, 2005, Payano and SEGO (together, "Purchaser") entered into a written agreement ("Contract") to purchase Tenant from Veras for the sum of $425,000, to pay Veras $225,000 at the time of execution and the balance in six-month installments, the last payment to be made no later than October 16, 2005; (4) Purchaser has failed to pay $180,000 of the amount owed to Veras; and (5) at the time of the theft and damages alleged in the original complaint, Purchaser had sole control over Tenant's activities. The two causes of action in the third-party complaint allege, respectively, breach of contract and a right to indemnification. At the time that the Contract was entered into, Tenant had been operating a restaurant on the premises that it had leased.

As to the question of personal jurisdiction, third-party defendants' arguments alleging improper service, are unavailing. With respect to service on Payano, the affidavit of Veras' process server attests that he attached a copy of the third-party summons and complaint to the door of Payano's home, and that he mailed a copy of the papers to Payano at the same address. Payano acknowledges the papers were posted on the door of his home, but he

disputes the mailing in one entirely conclusory sentence. [1] However, "the ... mere denial of receipt by mail at [one's] home ... is insufficient to overcome the presumption of delivery which attaches to a properly mailed letter." Public Administrator of County of New York v Markowitz, 163 AD2d 100, 101 (1st Dept 1990). Thus, dismissal of the third-party complaint on the basis of improper service upon Payano is denied.

Veras concedes that SEGO has not yet been properly served, and moves for additional time to serve, pursuant to CPLR §306-b. Such portion of Veras' motion is deemed moot, since the Court, as detailed below, has granted Veras' motion to amend the complaint.

On a motion to dismiss for failure to state a claim, all factual allegations in the complaint are taken to be true. Leon v Martinez, 84 NY2d 83 (1994). Where, as here, the parties have submitted affidavits or other extrinsic evidence in support of their respective positions, the question to be decided is not whether the plaintiff has stated a claim, but whether he or she has one. Guggenheimer v Ginzburg, 43 NY2d 268 (1977); Biondi v Beekman Hill House Apartment Corp., 257 AD2d 76 (1st Dept 1999), affd 94 NY2d 659 (2000).

Aside from its argument as to service, SEGO has not moved to dismiss the first cause of action in the third-party complaint. Payano, who was the principal owner and the president of SEGO at all times relevant to this action, however, moves to dismiss the

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[1] Payano indicates: "A copy of the summons and third-party complaint in this action were never mailed to my home address". [¶16, Affidavit of Ventura Payano]

first cause of action (breach of contract) as against him, arguing that the contractual claim against him is barred since a corporate officer is not generally personally liable on contracts that he or she enters into on behalf of the corporation. Payano further argues that General Obligations Law § 5-701 (a) (2) and Uniform Commercial Code (UCC) § 2-201 (1) bar Veras' reliance upon Payano's alleged promise that he would personally pay the amounts that would be due to Veras under the Contract. As detailed below, such arguments by Payano fail.

General Obligations Law § 5-701 provides that an oral promise to "answer for the debt" of another is unenforceable. Uniform Commercial Code (UCC) § 2-201 (1) provides that, with exceptions that are not relevant here, an oral contract "for the sale of goods for the price of $500 or more" is unenforceable.

Notwithstanding the multiple references to "goods" in the Contract, UCC § 2-201 (1) is inapplicable to the facts of this case, because the sale did not involve the exchange of "goods" as set forth at UCC § 2-105 (1); to wit, "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale ...". Rather, third-party defendants purchaser chose to buy the entire corporation - thereby becoming the tenant of record at the premises and the owner of an ongoing restaurant business - rather than contracting to buy Tenant's tangible assets.

Nor does Payano prevail under his argument pursuant to General Obligations Law § 5-701 (a) (2) (the statute of frauds).

Veras claims in his affidavit and in his proposed amended complaint that Payano agreed to buy Veras's restaurant; that Payano would personally pay Veras and assume all of Tenants' obligations under the Lease; and that Payano did business using the name Soho Entertainment Group Owen (SEGO), which was not disclosed to be a corporation. Accepting Veras' statements as true, Veras understood Payano's promises as made on Payano's own behalf, or on behalf of his partnership, and therefore, it would not have been a promise to answer for the debt of another, which would require a writing pursuant to General Obligations Law, §5-701(a)(2). In fact, at the time Payano allegedly made the promises to Veras, there was no debt or other obligation, running from SEGO to Veras, for which Payano could be said to have been answering. Accordingly, Payano's alleged promises would be outside the statute of frauds. See Martin Roofing, Inc. v Goldstein, 60 NY2d 262 (1983).

Moreover, even when a promise is made by a surety, the promise will be outside the statute of frauds "if the promisee has no reason to know that the promisor was acting as a surety." Id. at 264. Here, the Contract describes the purchaser as "SOHO ENTERTAINMENT GROUP OWEN BY VENTURA PAYANO of 2301 COLLINS AVE, MIAMI, County, Florida", and the purchaser signed the contract as: SOHO ENTERTAINMENT GROUP OWEN BY VENTURA PAYANO". Thus, assuming the facts as alleged by Veras, Veras had no reason to know that Payano was acting as a surety, since Veras did not know that SEGO was a corporation.

In addition, Business Corporation Law (BCL) § 301 (a)

provides, with exceptions not relevant here, that:

> the name of a domestic or foreign corporation:
>
> (1) Shall contain the word "corporation," "incorporated" or "limited," or an abbreviation of one of such words; or, in the case of a foreign corporation, it shall, for use in this state, add at the end of its name one of such words or an abbreviation thereof.

Florida law on corporate names is even more explicitly aimed at avoiding deception of those who deal with a corporation. The governing statute provides that a corporate name:

> Must contain the word "corporation," "company," or "incorporated" or the abbreviation "Corp.," "Inc.," or "Co.," ... as will clearly indicate that it is a corporation instead of a natural person, partnership, or other business entity.

Fla Stats Ann § 607.0401 (1). SEGO's name fails to comply with either statute in that it gives no indication that SEGO is a corporation. Accordingly, when Veras entered into the Contract, he had no reason to know that SEGO was an entity legally separate from Payano.

Although in seeking dismissal, Payano argues that a corporate officer is not bound by a contract that he enters into on behalf of the corporation, here, Veras asserts that he was without knowledge that he was dealing with a corporation, rather than an individual and a partnership, or group of investors. A reading of the third-party complaint suggests that Payano not only failed to disclose that he was acting on behalf of a corporation, but that the omission from SEGO's name of anything identifying SEGO as a corporation, together with the inclusion of the word "Group" in its name, was designed by Payano to mislead those who dealt with SEGO

into believing that it was a form of business entity other than a corporation. Thus, dismissal of the first cause of action is denied.

With respect to the cause of action for indemnification, third-party defendants' argue that dismissal is warranted since they never agreed to be liable to Veras for indemnification, and had they so agreed, such agreement was required to have been in writing. Such argument is without merit. In the original complaint, Vanderbilt is suing Veras on Veras' personal guarantee of Tenant's obligations under the lease with Vanderbilt. To the extent that Veras is liable to Vanderbilt as a result of Tenant's breach of its lease, Veras is entitled to common-law indemnification from Tenant. "The general rule is that a right of implied indemnification will arise in favor of one who is compelled to pay for another's wrong." Margolin v New York Life Ins. Co., 32 NY2d 149, 152 (1973), citing 28 NY Jur, Indemnity, § 11, p 27. Thus, dismissal of the cause of action for indemnification is denied.

Veras seeks to serve an amended third-party complaint to allege the verbal promises made by Payano, as detailed in Veras' affidavit, and in order to assert that, as the guarantor of Tenant's obligations under its lease, Veras is equitably subrogated to the rights of Vanderbilt against Payano and SEGO. The doctrine of equitable subrogation provides that:

> "Where property of one person is used in discharging an obligation owed by another [...], under such circumstances that the other would be unjustly enriched

> by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee [...]."

King v Pelkofski, 20 NY2d 326, 333 (1967), quoting Restatement: Restitution § 162 (1932); see also Teichman v Community Hosp. of Western Suffolk, 205 AD2d 16 (1st Dept 1994), affd as mod 87 NY2d 514 (1996). Here, if Vanderbilt recovers damages from Veras for breach of the Lease by Tenant, Vanderbilt will not, thereby, be unjustly enriched. Therefore, there is no basis for Veras to be subrogated to Vanderbilt's rights, which, in any event, would run solely against Tenant because Vanderbilt had no dealings with Purchaser. However, to the extent that Veras seeks to amend his complaint to allege the verbal statements that he reports in his affidavit, the amendment is appropriate.

Accordingly, it is hereby

ORDERED that the motion to dismiss the third-party complaint is denied; and it is further

ORDERED that the cross-motion to amend the third-party complaint is granted, in part, to the extent that, with the exception of paragraph 21 thereof, the amended third-party complaint in the form proposed as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the third-party complaint is denied with respect to proposed paragraph 21 and that paragraph is stricken; and it is further

ORDERED that that branch of the cross motion that seeks an

extension of time to serve the initial third-party complaint upon Soho Entertainment Group Owen is denied as moot; and it is further

ORDERED that the third-party defendants shall answer the amended third-party complaint within 20 days from the date of said service; and it is further

ORDERED that within 30 days of entry of this order, third-party plaintiff shall serve a copy upon all parties with notice of entry.

Dated: 7/7/07

Hon. Doris Ling-Cohan, J.S.C.

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