Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

THE KOREA CHOSUN DAILY TIMES, INC. x

- against -

DOUGH BOY DONUTS, INC., etc. x

Index Number 26850 2003

Motion Date April 11, 2007

Motion Cal. Number 39

Motion Seq. No. 1

The following papers numbered 1 to 11 read on this motion by plaintiff The Korea Chosun Daily Times, Inc. for an order dismissing defendant's affirmative defenses and granting summary judgment on the first cause of action for breach of the lease and for damages in the sum of $437,548.50; granting summary judgment on the second cause of action for an account stated in the sum of $75,457.32; and granting partial summary judgment on the third cause of action for attorney's fees and setting the matter down for a hearing to determine the amount of the attorney's fees.

| | Papers Numbered |
|---|---|
| Notice of Motion -Affidavit-Affirmation - Exhibits(A-0)..... | 1-5 |
| Opposing Affirmation - Exhibits(A-E)..... | 6-8 |
| Reply Affidavit-Exhibit (A)..... | 9-11 |

Upon the foregoing papers it is ordered that this motion is determined as follows:

On October 30, 2002 defendant Dough Boy Donuts Inc. (Dough Boy) entered into a written lease with plaintiff Korean Chosun Daily Times Inc. for the premises known as 12-12 Queens Plaza South, Long Island City, New York. The lease term commenced on January 1, 2003 and was to expire on December 31, 2009. The second paragraph of the lease provided that the tenant agreed to use the premises as "a warehouse and/or a distribution facility warehousing and distributing Bakery and related items. The premises will not be used as food and/or bakery processing or

cooking. Landlord represents that premises can be used for above purposes." Paragraph 30 of the rider to the lease set forth the yearly amount of rent, and paragraph 40(B) set forth a formula for the payment of certain municipal taxes as additional rent. Paragraph 31 of the rider provides that "[t]enant agrees to obtain, before the commencement of the business activities at the rented premises, all the necessary permit, license and other registrations or documents or qualifications required by any governmental agencies so as to maintain the legal use of the premises as described in the Second Paragraph of Lease. The landlord represents that the use clause is allowed under the building department code." Paragraph 37 of the rider states that "[t]enant may build separate entrance and/or extra drive-in overhead door on 12th street side of the building at his/her own cost, or on Queens Plaza South, if allowed by Building Dept."

On November 18, 2002 Dough Boy filed a land use review application with the New York City Department of Planning in which it sought approval for "a 15'0 curb cut on the south side of Queens Plaza South distant 52'2" east of 12th Street pursuant to ZR 13-553." This application stated that the premises is located in a manufacturing district (M1-4), that the building has an existing entrance on 12th Street, and that the proposed entrance would provide better vehicular movement for the applicant's trucks and other area traffic.

On December 18, 2002, the landlord and tenant entered into a written acknowledgment and consent to sublease said premises, whereby it was agreed that street vendors' push-carts (mobile food carts) may be stored and garaged at the premises and the tenant could enter into a license and storage agreements for this purpose without seeking further consent from the landlord. The landlord also consented to sublease no more than 1/3 of the premises by Dough Boy, to the sublessee City Wide Enterprises Corp., who was to be the distributor and vendor of baked goods, coffee, paper goods and related products, to push-cart vendors.

In June 2003, approximately six months after the application for a curb cut was submitted to the Department of Planning, Dough Boy vacated the premises. In August 2003 the landlord commenced a non-payment proceeding in Civil Court, Queens County and on September 12, 2003 served a petition, with a demand for a judgment in the sum of $75,447.00 for rent due from March 1, 2003 to August 1, 2003, real estate taxes from January 2003 through August 2003, and for gas and electric for August 2003. The parties entered an agreement in October 2003, whereby the tenant surrendered the premises as of October 7, 2003, and the landlord agreed to discontinue the non-payment proceeding "without prejudice

to any and all claims Landlord and Tenant may have against the other with respect to the Lease."

Plaintiff commenced this action on November 14, 2003. The first cause of action alleges a breach of the lease agreement and seeks to recover rent and additional rent, in the sum of $105,000.00 through November 2003. The second cause of action alleges an account stated in the sum of $105,000.00. The third cause of action seeks to recover reasonable attorneys' fees incurred as a result of the tenant's failure to pay rent and additional rent, pursuant to the terms of the lease. Defendant Dough Boy served an answer and interposed nine affirmative defenses.

Plaintiff sold the subject premises to a third-party on September 27, 2005. While this action was pending, plaintiff filed for Chapter 11 bankruptcy and on August 17, 2006 the United States Bankruptcy Court, Eastern District of New York, issued an order for a final decree, stating in pertinent part that "the Debtor's scheduled, pre-petition causes of action against Dough Boy Donuts for unpaid rent and against Auxiliary Graphic Equipment, Inc. on a contract claim, not having been administered by the Debtor under the Plan, are deemed abandoned to the Debtor and survive entry of this Final Decree."

Plaintiff now moves for an order dismissing defendant's affirmative defenses and for an order granting summary judgment on its first and second causes of action, and for partial summary judgment on the third cause of action, and setting the matter down for a hearing to determine the amount of the attorney's fees.

The first affirmative defense alleges that defendant applied to the Department of Buildings for permission to construct a secondary means of egress to permit the proposed use of the premises for the storage of mobile food vending carts, that after taking possession of the premises such permission was not granted, and therefore defendant was unable to use and occupy the demised premises for its intended purposes. Defendant thus asserts that the lease fails by mutual mistake of the parties or by mistake on the part of the defendant and fraud on the part of the plaintiff. The second affirmative defense alleges that defendant was unable to use and occupy the premises for its intended purposes, and that as a result of "such material interference and material breach by plaintiff lease agreement, and such constructive eviction," defendant vacated the premises in May 2003. These affirmative defenses are not supported by the evidence. Defendant's president, Anastasios Papadopoulos, states in his affidavit that on November 18, 2002 he filed an application for a curb cut as a

secondary means of access, that six months later it had yet to be approved, that he was unable to use and occupy the premises for its intended purposes, and therefore he vacated the premises in June 2003. However, there is no evidence that the application for a curb cut was disapproved, as alleged in the defendant's answer. Nor is there any evidence that a secondary means of egress was essential to the defendant's use and occupancy of the warehouse. Although the lease agreement does not manifest an intent to use the demised premises for the purpose of storing mobile food carts, it was a permitted use under the sublease agreement. The evidence presented by plaintiff establishes that the leased premises were actually used by the defendant, or its sublessee, as a warehouse for mobile food carts and related supplies, and that some of these items were abandoned after the defendant vacated the premises. Finally, there is no evidence that the plaintiff interfered with the lease agreement in any manner so as to constructively evict defendant from the premises. Plaintiff's request to dismiss these affirmative defenses is granted.

The third affirmative defense alleges that before the rent claimed in the complaint became due, defendant surrendered the demised premises on May 31, 2003 and all residue of the unexpired term therein and has not been in occupancy and possession of thereof. The fourth affirmative defense alleges that before the rent was due on October 8, 2003, defendant surrendered the demised premises to the plaintiff and all residue of the unexpired term therein and has not been in occupancy and possession of thereof. These affirmative defenses are not supported by the evidence presented here. Rather, the documentary evidence establishes that the parties entered into a written agreement in October 2003 which provided that the defendant surrendered the premises to the plaintiff as of October 7, 2003. The parties expressly did not release their claims against each other under the lease. The tenant's surrender of the premises thus does not preclude the landlord from seeking to recover unpaid rent and additional rent. Plaintiff's request to dismiss these affirmative defenses is granted.

The fifth affirmative defense contains language pertaining to tort claims and does not state a defense to any of the plaintiff's claims, and therefore is dismissed.

The sixth affirmative defense of unclean hands, the seventh affirmative defense alleges that the complaint is barred by the doctrines of estoppel, laches, and/or waiver, and the eighth affirmative defense which alleges that the defendants are entitled to a set off or credit from the plaintiff, are not supported by the evidence and therefore these defenses are dismissed.

The ninth affirmative defense must be dismissed as the plaintiff had no duty to mitigate damages. Once the tenant abandoned the premises prior to the expiration of the lease, the landlord was within its rights to do nothing and collect the full rent due under the lease (Holy Properties Ltd., L.P. v Kenneth Cole Prods., 87 NY2d 130, 133-135 [1995]).

Turning now to plaintiff's request for summary judgment, it is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form that demonstrates the absence of any material issues of fact (see Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; Alvarez v Prospect Hosp.,68 NY2d 320 [1986]; Stahl v Stralberg, 287 AD2d 613 [2001]). The motion must be supported by an affidavit from a person with knowledge of the facts, setting forth all material facts (CPLR 3212[b]). The affidavit of Kyo-Jong Kim, plaintiff's president, as well as the documentary evidence including photographs, establish that mobile food carts and related supplies were stored in the demised warehouse, that some these items were abandoned by the defendant, or its sublessee, after they vacated the premises in June 2003, and that the tenant failed to pay rent and additional rent through November 2003 in the sum of $105,000.00, and failed to pay rent and additional rent through the lease term which necessarily ended upon the sale of the premises on September 27, 2005. The court therefore finds that the plaintiff has established a prime facie case of breach of the lease agreement by the defendant.

Mr. Papadopoulos' affidavit, submitted in opposition, is insufficient to raise a triable issue of fact on the claim for breach of contract. The fact that the defendant's president applied for a curb cut, subleased the premises so that it could be used to store mobile food carts and related supplies, and then vacated the premises before any decision was made on the curb cut application, is insufficient to establish that the defendant was unable to use the premises for its intended use and purpose. In addition, the fact that defendant may have desired a secondary means of ingress does not raise any triable issue of fact, as there is no evidence that the existing means of egress and ingress was inadequate or prevented the use and occupancy of the premises as warehouse.

Dough Boy's voluntary abandonment of the premises without justification, entitles plaintiff to recover damages for rent and additional rent, which includes the tenant's proportionate share of real estate taxes, from the time of the breach until the time the plaintiff sold the building on September 27, 2007 (see Gannett

Suburban Newspapers v El-Kam Realty Co., 306 AD2d 312, 314 [2003]; Olim Realty Corp. v Big John's Moving, 250 AD2d 744 [1998]; GAB Mgt. v Blumberg, 226 AD2d 499 [1996]; see also Barr v Country Motor Car Group, Inc., 15 AD3d 985, 986 [2005]). The lease provided for a two-month rent concession upon the execution of the lease in October 2002, so that the defendant's obligation to pay rent commenced on January 1, 2003. Plaintiff therefore is entitled to recover the all unpaid rent through September 2005, as well as defendant's proportionate share of the real estate taxes for the period of January 2003 through September 2005. Defendant does not contest the amounts sought and has not presented any evidence as to whether any rent and additional rent was paid. The evidence presented by plaintiff, however, is somewhat contradictory and fails to make clear whether defendant paid any rent in 2003, or whether it paid rent through some portion of March 2003. The court, therefore, is unable to calculate at this time the amount of damages plaintiff is entitled to recover for unpaid rent and additional rent consisting of real estate taxes.

To the extent that plaintiff also seeks to recover electric and water charges for which the defendant was responsible for under paragraph 39 of the rider to the lease, the court notes that charges for utilities are not included in the rent, and cannot be recovered as rent or additional rent. To the extent that plaintiff seeks to recover clean up costs and sanitation fees, such costs are not included in the lease and cannot be recovered as rent or additional rent. Since the first cause of action for breach of the lease only seeks to recover rent and additional rent, plaintiff's requests to recover damages for these expenses is denied at this time.

That branch of plaintiff's motion which seeks summary judgment on the second cause of action for an account stated in the sum of $75,457.32 is denied. "An account stated is nothing more or less than a contract express or implied between the parties. It is an agreement which they have come to, regarding the amount due on past transactions" (Rodkinson v Haecker, 248 NY 480, 484-485 [1928]). A party meets the "initial burden of establishing its entitlement to judgment as a matter of law on its cause of action based upon an account stated by establishing, with admissible evidence, the receipt and retention of bills without objection within a reasonable time" (LD Exch. v Orion Telcomms., 302 AD2d 565 [2003], citing Jovee Contr. v AIA Envtl., 283 AD2d 398 [2001]; Sullivan v REJ, 255 AD2d 308 [1998]; see generally Sullivan v REJ, 255 AD2d 308 [1998]; Parola v Lido Beach Hotel, 99 AD2d 465 [1984]; Fink, Weinberger, Fredman, Berman & Lowell v Petrides, 80 AD2d 781 [1981]). "A key element of a prima facie account stated claim is evidence that [the plaintiff]

delivered one or more invoices for the amount claimed to defendant, so that he received them" (Commissioners of State Insurance Fund v Kassas, 5 Misc 3d 1012A [2004]). Here, although the complaint alleges an account stated in the sum of $105,000.00, there is no evidence that plaintiff ever served defendant with a bill or invoice for that amount. To the extent that plaintiff now alleges an account stated in the sum of $75,457.32 this claim is based upon the September 12, 2003 service of a non-payment petition, which included a breakdown of the amount of rent, real estate taxes, and gas and electric charges then due. The service of a pleading in a discontinued action, however, does not constitute an account stated. Plaintiff thus has failed to establish that it presented the defendant with an account stated.

That branch of plaintiff's motion which seeks partial summary judgment on its third cause of action for reasonable attorneys' fees is granted, as the third paragraph of the lease provides for the payment, as "additional rent", all attorney's fees incurred by the landlord in enforcing any of the obligations of the lease.

In view of the foregoing plaintiff's request to dismiss the defendant's affirmative defenses is granted. Plaintiff's request for summary judgment on the first cause of action for breach of contract is granted as to liability only. Plaintiff's request for summary judgment on the second cause of action for an account stated is denied, and this claim is dismissed. Plaintiff's request for partial summary judgment on the third cause of action for attorney's fees is granted. The amount of damages for rent and additional rent, as well as the amount to be recovered as attorney's fees shall be determined at a hearing to be held on July 27, 2007, at 9:30 A.M. in Court Room 116.

Dated: June 20, 2007

J.S.C.