

Tristar Petroleum, Inc. v Kuss
2007 NY Slip Op 32292(U)
July 23, 2007
Supreme Court, Suffolk County
Docket Number: 0011565/2000
Judge: Melvyn Tanenbaum
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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
Hon. MELVYN TANENBAUM
Justice

(28975-2001) - 004, 005 & 006 - Mot D
MOTION # (11565-2000) - 003, 004 - Mot D
R/D: 030507
S/D: 032907

TRISTAR PETROLEUM, INC.

Plaintiff,

- against -

DONALD J. KUSS and "JOHN DOE 1", "JOHN DOE 2",
and/or "ABC CORPORATION", whose true names are
unknown to Plaintiff, intending to designate the current tenants,
operators, and/or occupants of the premises located at
2664 Route 112, Medford, New York,

Defendants.

PLTF'S/PET'S ATTY:
DAVID A. BRODSKY, ESQ. (Tristar)
20 West Avenue
Chester, NY 10918

CARL S. LEVINE, ESQ. (RAD)
124 Jericho Turnpike
Jericho, New York 11753

DEFT'S/RESP'S ATTY:
SCOTT & SCOTT, LLP
50 Karl Avenue
Smithtown, New York 11787

(Index #28975-2001)

TRISTAR PETROLEUM, INC., and RAD ENERGY CORP.

Plaintiff,

- against -

DONALD J. KUSS and PILOT FUNDING CORP.

Defendants.

(Index #11565-2000)

Upon the following papers numbered 1 to 105 read on this motion _____ Notice of Motion/Order to Show Cause and supporting papers 1-25; Notice of Cross Motion and supporting papers 26-33 Answering Affidavits and supporting papers 34-37 Replying Affidavits and supporting papers 38-41 Other 42-56, 57-81, 82-91, 92-95, 96-97, 98-99, 100-103, 104-105; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Donald Kuss ("Kuss") and Pilot Funding Corp. ("PFC") in Action #1 (#11565-2000) for an order pursuant to CPLR §3211 (a) (1), 3212, 6514 (3) & 602: 1) dismissing plaintiff's complaint based upon documentary evidence; 2) granting summary judgment dismissing plaintiff's complaint; 3) cancelling and directing removal of the notices of pendency filed by plaintiffs; and 4) consolidating each action, and the cross motion by plaintiff Tristar Petroleum Inc. ("Tristar") in Action #1 (11565-2000) seeking an order pursuant to CPLR §6301 granting a restraining order preventing defendant "Kuss" from conveying, selling or transferring title to the gas station in issue pending further Order of the Court, and the motion by defendant "Kuss" and "PFC" in Action #2 (#28975-2001) for an order pursuant to CPLR §3212 & 6514 granting summary judgment dismissing plaintiffs complaint and

cancelling the notice of pendency filed by plaintiff "Tristar", and the cross motion by plaintiff "Tristar" in Action #2 (#28975-2001) seeking an order pursuant to CPLR §3212, 1024 & 6001: 1) granting partial summary judgment on the issue of liability for the 1st, 2nd, 3rd and 4th causes of action; 2) amending the caption to substitute "Adrian Kiriscioglu" and "Camlica Inc." for 'John Doe #1 and "ABC Corporation" as named party defendant; and 3) granting an order of attachment and the cross motion by defendant "Kuss" and "PFC" in Action #2 (28975-2001) brought on by Order to Show Cause seeking an order striking new evidence set forth in plaintiffs reply papers are determined as follows:

On February 1, 1993 "Tristar" entered into a 22 year lease with defendant "Kuss" to operate a gas station. The lease provided the tenant with an option to purchase the premises for \$800,000.00 provided the tenant signed a sales contract within five years.

Plaintiff Rad Energy Corp. ("RAD") supplied gasoline to "Tristar". "RAD" commenced an action against "Tristar" to recover money owed to "RAD" for petroleum products. On December 12, 1997 "RAD" and "Tristar" entered into an agreement entitled "Third Master Agreement" which settled the pending litigation between the parties.

Paragraph 4 (a) and (b) of the Third Master Agreement provides:

4. Option to Purchase:

(a) Simultaneously with the execution of this Third Master Agreement, Artukmac shall exercise the option to purchase the Medford Station in accordance with the ¶ "37" of the Lease Agreement. In connection with such exercise, counsel for Tristar shall be listed jointly as Marvin Milich, Esq. and Carl S. Levine, Esq.. Upon exercise RAD shall pay to Artukmac the sum of Twenty-Five Thousand (\$25,000.00) Dollars, in escrow to Carl S. Levine, as escrowee, pending receipt of Kuss' consent to the sublease and the executed contract from Kuss. RAD shall furnish the deposit and shall otherwise be the real party in interest, thereby controlling the transaction from the purchasing side.

(b) If permissible, prior to closing, Tristar shall assign the contract to RAD or a designee of RAD. If such contract is not assignable, then title shall be taken in Tristar and immediately resold to RAD or a designees of RAD. Tristar shall sign a Contract of Sale conveying the Medford Premises to RAD, or a designee of RAD, upon execution hereof, as well as a deed, with the date blank, so as to insure that the Medford Premises are reconveyed at such time. Carl S. Levine, Esq. shall hold such executed documents in escrow pending closing.

"Tristar" claims that on December 23, 1997 it exercised the purchase option and "Kuss" wrongfully refused to transfer title to "Tristar". Paragraph 6 (e) of the "Tristar"/"RAD" Third Master Agreement granted "RAD" authority to commence a civil action against "Kuss" seeking enforcement of the purchase

option. On February 17, 1998 an action to enforce the option agreement was commenced in the United States District Court for the Eastern District of New York entitled Tristar Petroleum v. Donald J. Kuss. On January 11, 1999 "Tristar", "RAD" and "Kuss" agreed to settle the action. Representatives of "Kuss" and "RAD" testified under oath before a court reporter confirming the terms of the Stipulation and Agreement which provided that "Kuss" was to sell the gas station to "RAD". Defendant "Kuss" thereafter refused to transfer title of the gas station to "Tristar" and/or "RAD".

Action #1 seeks a declaration that "Tristar's" exercise of the purchase option was valid and seeks specific performance of the option and of the Stipulation of Settlement entered into between "RAD" and "Kuss" in the action commenced in the United States District Court for the Eastern District of New York entitled Tristar Petroleum v. Donald J. Kuss (CV 98-1186). Action #2 is a related declaratory judgment action commenced by "Tristar" against "Kuss". "Tristar" claims that from May 1998 until September 15, 2001 "RAD" operated the gas station pursuant to an operating agreement with "Tristar" and that when "RAD" abandoned its operation, "Tristar" was wrongfully prevented from regaining possession by the landlord/defendant "Kuss". For purposes of judicial economy the Court has joined all motions submitted by the parties with respect to both Actions.

Defendants "Kuss" and "PFC" submit two summary judgment motions seeking an order granting summary judgment dismissing plaintiffs complaint in both Actions and cancelling the notice of pendency filed by the plaintiffs. Defendants also submit a third motion seeking to strike documents submitted by plaintiff "Tristar" in response to their motion in Action #2. In support of their motions, defendants submit an affidavit from defendant "Kuss", an attorney's affirmation from "Kuss's" attorney who represented "Kuss" in the Federal Court action and six other affirmations of counsel. Defendants claim that both actions must be dismissed based upon documentary evidence which proves that "Tristar" was insolvent at the time the option to purchase the gas station was exercised and plaintiff was therefore not ready, willing and able to perform the contract. Defendants contend that the remedy sought by the purchaser (i.e. specific performance of the option) cannot be granted under these circumstances since the records show that: 1) "Tristar's" president admitted under oath that "Tristar" had not operated the station since January, 1997; 2) "Tristar's" counsel conceded that "Tristar" was unable to make payments required under the option; 3) "Tristar" defaulted in making timely rent payments required by the lease; 4) "Tristar's" president owed co-plaintiff "RAD" \$500,000.00 when the option payment of \$800,000.00 was due and 5) the landlord had rescinded the option based upon "Tristar's" breach of the lease. Defendants also claim that the tenant's ("Tristar") failure to comply with the material conditions of the lease including timely lease payments and continuous operation of the station foreclosed plaintiffs ability to exercise the option to purchase the station. It is defendants position that plaintiff's "Tristar's" complaint seeking specific performance and a declaratory judgment must be dismissed since the undisputed proof establishes "Tristar's" continuing default in making timely rent payments and "Tristar's" inability to perform its obligations to purchase the property as a ready, willing and able purchaser. Defendants argue that "Tristar's" claims must therefore be dismissed since no viable causes of action exist against the defendants.

Defendants claim that plaintiff "RAD's" claim must also be dismissed since they are barred by the Statute of Frauds. Defendants contend "RAD" is not entitled to a judgment granting specific performance since the purported agreement was an oral thus unenforceable agreement to convey realty. Defendants claim the agreement was a statement transcribed by a court reporter during a deposition and does not qualify under the terms of CPLR §2104 since there was no court supervision or memorialization of definite and necessary material terms of the proposed realty transfer. Defendants claim the oral statement was, at most, an unenforceable agreement to agree on the terms of a formal contract.

Defendants claim that the notices of pendency filed by "Tristar" and "RAD" have expired and must be stricken. Defendants request that if their summary judgment motions are denied, Actions #1 and #2 should be consolidated to expedite discovery.

Defendants also claim that "Tristar's" complaint seeking specific performance of the option must be dismissed since "Tristar" seeks to rely upon co-plaintiff "RAD" as a third party to provide the funds required to purchase the gas station. It is defendants' contention that a third party's willingness to provide funding cannot form the basis for demonstrating the primary obligor's ability to have sufficient funds as a ready, willing and able purchaser. Defendants claim no viable causes of action for unlawful eviction, trespass and conversion are stated since "Tristar" was not in possession of the station when the eviction took place after having vacated the premises in January, 1997. Defendants also claim that plaintiffs reply papers must be stricken since evidence in support of a motion or in opposition to a cross motion cannot be submitted in reply papers.

In opposition to defendants motions plaintiff "RAD" in Action #1 submits an attorney's affirmation and claims that defendants motion seeking dismissal of the complaint must be denied since significant issues of fact have been raised concerning: 1) whether "Tristar" was in material breach of the lease when it exercised the option and 2) whether "RAD" had the financial ability to purchase the gas station and was ready, willing and able to finance the purchase under the Third Master Agreement. Plaintiff claims that defendants submission of an attorneys affirmation without submission of an affidavit from a person with knowledge of the facts surrounding the transaction provides insufficient evidence to support a finding granting judgment in favor of the defendants. Plaintiff "RAD" claims that under the terms of the Third Master Agreement "RAD" was obligated to provide the financing and that "RAD" provided financial statements confirming that it possessed sufficient resources to finance the purchase of the premises.

Plaintiff "RAD" asserts that the January 11, 1999 Stipulation and Agreement is a valid enforceable settlement since: 1) the terms of the stipulation were agreed to under oath by defendant "Kuss"; 2) the stipulation was read to Federal Magistrate Pohorelsky in open court in the presence of the parties attorneys and the Magistrate thereafter dismissed the Federal Court action; and 3) Federal District Court Judge Hurley so ordered the dismissal. It is plaintiff's position that the stipulation of settlement is enforceable and defendants are estopped from claiming that the agreement is invalid merely because no written agreement was signed by the parties. Plaintiff claims the Statute of Frauds is inapplicable to an agreement entered into in open court and no basis exists to invalidate the agreement even if a separate agreement was never written.

In further opposition to defendants motion and in support of plaintiff "Tristar's" motions in both actions. "Tristar" submits two affidavits from "Tristar's" corporate president and three affirmation of counsel and claims that no basis exists to grant summary judgment in favor of defendants in Action #1 since: 1) the "Kuss"/"Tristar" lease did not grant the landlord the unilateral right to prevent the tenant from exercising the purchase option based upon the tenant's breach of any lease provision during its entire term; 2) the "Kuss"/"Tristar" lease required 30 days written notice of a material breach to be given by the landlord to permit the tenant to cure and "Kuss", as landlord never provided written notice; 3) "Tristar" did not materially breach the lease when it permitted "RAD" and other companies, in which "Tristar's" principal owned at least a 50% interest, to operate the station since the lease provided that the landlord could not unreasonably withhold written consent to an assignment and permits assignment without landlord consent to companies which "Artukmac" ("Tristar's" principal) owns at least 50% of the companies outstanding stock; 4) plaintiff did not materially breach the lease by failing to pay rent; 5) plaintiff was ready, willing and able to purchase the station pursuant to the terms of the "Tristar"/"RAD" Third Master Agreement; and 6) plaintiff never abandoned operation of the station.

Plaintiff claims that an injunction should be granted to prevent "Kuss" from transferring title and/or ownership interest in the gas station to a third party since "Tristar" is entitled to exercise the purchase option. Plaintiff asserts that "Kuss" has entered into a contract to sell the gas station for \$1.25 million to a third party and argues that "Tristar" will be irreparably damaged if the sale is permitted to take place. Plaintiff further contends no basis exists to consolidate both actions since the actions have previously been joined and claims that discovery including the depositions of all parties has not yet begun.

Plaintiff "Tristar" claims it is entitled to an award of summary judgment against "Kuss" with respect to the four causes of action set forth in the complaint in Action #2 since the landlord "Kuss" breached the lease in failing to provide the tenant "Tristar" with 30 days written notice to permit "Tristar" an opportunity to cure the claimed abandonment. Plaintiff claims defendant "Kuss" had no justifiable ground to evict "Tristar" since the landlord accepted rent payments through August, 2001 and never sought to evict "Tristar" or "RAD" or to recover possession of the leasehold until October 5, 2001. Plaintiff asserts that defendant's claim that notice of lease termination was provided by letter dated May 15, 1997 is contradicted by the landlord's failure to regain possession of the station and by "Kuss's" continued acceptance of rent payments from "Tristar" and "RAD". It is plaintiff's position that a preliminary injunction must be granted directing "Kuss" and "Kuss's" licensee to surrender possession of the station to "Tristar" and that partial summary judgment must be granted against the defendants on the issue of liability for damages incurred as a result of the landlord's breach.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981)).

To succeed on a motion pursuant to CPLR §3211(a)(1), the documentary evidence upon which defendant's motion is predicated must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claims (SIDDIQUI v. NATIONWIDE, 255 AD2d 30, 687 NYS2d 457 (3rd Dept., 1999); FERNANDEZ v. CIGNA, 188 AD2d 700, 590 NYS2d 925 (3rd Dept., 1992)).

General Obligation Law §5-703 (1) provides:

Conveyances and contracts concerning real property required to be in writing

1. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing...

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CPLR §2104 as written in January, 1999 (when the Federal Court Stipulation and Agreement was agreed upon) provides:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered.

Based upon a review of the evidence presented at this preliminary stage of these proceedings where no depositions have been conducted, significant issues of fact exist concerning the parties actions sufficient to defeat plaintiffs and defendants summary judgment motions. An expeditious disclosure and discovery schedule must however be scheduled for the purpose of completing all discovery including depositions of all parties.

With respect to plaintiffs application for an order pursuant to CPLR §6301 a preliminary injunction may be granted upon a clear showing of three things; 1) the likelihood of ultimate success on the merits, 2) irreparable injury to movant absent the granting of the preliminary injunction and 3) balancing of the equities in her favor (ALBINI v. SOLORK ASSOCIATES, 37 AD 2d 835, 325, NYS 2d 150 (2nd Dept., 1971); HUDSON VALLEY TREE, INC. v. BARCANA, INC., 114 AD 2d 400, 494 NYS 2d 124 (2nd Dept., 1985)).

Plaintiff "Tristar" has made the required showing of each element to support an order granting an injunction preventing defendant "Kuss" from transferring title and/or ownership rights of the gas station pending further Order of the Court. Plaintiffs motion for injunctive relief must therefore be granted to that extent. Accordingly, it is

ORDERED that defendants' "Kuss" and "PFC" motions for an order pursuant to CPLR §3211 (a) 1, 3212, 3124, 6514 & 602 are denied, and it is further

ORDERED that plaintiffs cross motion for an order pursuant to CPLR §3212, 3215, & 6001 in Action #2 is denied, and it is further

ORDERED that plaintiffs "Tristar's" motion for an order pursuant to CPLR §6301 is granted to the extent indicated hereinabove, and it is further

ORDERED that plaintiffs motion for an order amending the caption of the action is granted to the extent that "Adrian Kiriscioglu" and "Camlica, Inc." are substituted for John Doe #1 and "ABC Corporation as parties/defendants, and it is further

ORDERED that all other request for relief are denied, and it is further

ORDERED that a preliminary conference shall be held on August 7, 2007 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, 400 Carleton Avenue, Central Islip, New York to resolve all outstanding discovery issues. No appearance shall be required if the parties enter into a preliminary conference disclosure and discovery schedule and submit same to the Court prior to August 7, 2007. A copy of the form is attached to this order for the parties use and convenience. All discovery proceedings must be completed on or before February 1, 2008.

Dated: July 23, 2007

NON-FINAL DISPOSITION

MELVYN TANENBAUM

J.S.C.