

Sala Corp. v D&J Duri Corp.

2007 NY Slip Op 33014(U)

September 6, 2007

Supreme Court, Queens County

Docket Number: 0022157/2006

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 17

	x	
SALA CORP.		INDEX NO. 22157/06
		MOTION SEQ. NO. 2
-against-		BY: KITZES, J.
D&J DURICORP., et al.		DATED: SEPTEMBER 6, 2007
	x	

In this action for breach of contract, replevin, and to recover possession of real property, plaintiff Sala Corp. seeks an order granting summary judgment and striking the answer of defendants DJ Duri Corp., and Dae Hee Yoon; dismissing defendants' counterclaims; amending the caption to reflect the correct name of defendant DJ Duri Corp., as D&J Duri Corp.; and granting judgment against the defendants in the sum of \$80,000, plus outstanding interest of 15% per annum, late charges and collection expenses including attorney's fees and costs. Plaintiff separately moves for an order holding defendants in civil and criminal contempt of the court's order of March 14, 2007, pursuant to Judiciary Law § 756, compelling defendants to return any and all equipment, furniture and/or other chattel from the property located at 193-03/05 Northern Boulevard, Flushing, New York, and awarding attorney's fees and costs in the sum of 2,045.00.

These motions are consolidated for the purpose of a single decision.

Plaintiff Sala Corp. entered into an agreement dated January 14, 2007 whereby it sold its business, the "Wik Lounge" located at 194-03/05 Northern Boulevard, Flushing New York, "including the stock in trade, fixtures, equipment, accounts receivable, contract rights, lease, good will, licenses, rights under any contract for telephone service or other rental, maintenance or use of equipment, machinery and fixtures at the said premises, more particularly described in Schedule A hereto attached, free and clear of any debts, mortgages, security interests or other liens or encumbrances except as herein stated" to defendant D&J Duri Corp. The purchase price was \$200,000, with \$30,000 to be paid upon the execution of the agreement, \$90,000 to be paid upon the execution and delivery of the bill of sale, and \$80,000 to be paid pursuant to the execution and delivery of a promissory note, to be secured by a security interest in the goods and chattels set forth in Schedule A.

Schedule A describes the equipment as including "washing machine and refrigerator" and lists the following: "ITEMS IN BAR AREA": 1 triple sink with ice bucket, 1 double sink with ice bucket, 1 sink with ice bucket, 3 serving stations, 2 refrigerators, one with 2 doors and one with 4 doors; "DJ BOOTH AREA": music equipment, 6 surveillance cameras with recorder and monitor; Emergency and Exit lights; "COMPONENTS OF COMPUTER SYSTEM WHICH INCLUDES": 2 touch screen monitors with printers and

registers, 1 printer in the kitchen, 1 main computer with monitor in the office; 1 ice machine, 2 walking boxes (Refrigerator, Freezer).

The first rider to the contract of sale provides in paragraph 2 that "[a]s part of the payment of the purchase price hereunder, transferee shall provide transferor with a purchase money note, personally executed and guaranteed by Dae Hee Yoon...for the sum of \$80,000.00. The note shall be payable in a lump sum balloon payment eighteen (18) months from the date of the closing. The note shall bear no interest and shall be pre-payable at any time without any penalty. Additionally, the note shall be secured by the filing of a UCC Financing Statement which shall encumber the equipment, furnishings, inventory and other properties associated with the business. The note shall be payable upon demand in the event the transferee is in default under the terms of its lease to the premises, files for bankruptcy or is unable to meet its financial obligations to any creditor, secured or otherwise. Transferee shall be responsible for payment of \$500.00 to transferor's attorney for the preparation of the note."

The closing took place on February 18, 2005, at which time D&J Duri Corp. and Dae Hee Yoon executed two separate promissory notes and security agreements, in the sum of \$68,000, and in the sum of \$12,000. These agreements provide that if the note holder did not receive the full amount due by the end of the

payment term, "we will be assessed interest against all unpaid sums of principal at the rate of 15% per year. We will also be liable to the Note Holder for any and all costs, including reasonable attorney's fees and expenses, which it incurs as a result of efforts to collect the unpaid balance of this Note and to enforce its rights hereunder."

The UCC Financing Statement states that it covers the following collateral: "All right, title and interest of the Debtor in and to all machinery, equipment, furnishings, lighting, inventory, fixtures, property, personal or otherwise, situated and located at 194-05 Northern Boulevard, Flushing, New York."

Sala Corp. commenced an action on October 27, 2005 against the defendants under Index Number 23349/05 for injunctive and declaratory relief to compel the defendants to release from escrow the promissory note in the sum of \$12,000, as well as the sum of \$500, and to recover costs and attorney's fees. The defendants interposed an answer and counterclaims in that action.

Sala Corp. commenced the within action on October 11, 2006, and alleges that the defendants have failed to pay the amounts owing under the contract of sale and two promissory notes, despite a demand for payment made on September 21, 2006. Plaintiff, in its first cause of action, seeks to recover the sum of \$80,000, plus interest in the sum 15% per annum, collection expenses, attorney's fees and costs. The second cause of action

seeks to recover possession of the premises; the third cause of action seeks to recover collection expenses, including reasonable attorney's fees, estimated to be no less than \$10,000; the fourth cause of action seeks the return of the equipment set forth in the UCC-1 financing statement, or to permit the plaintiff to enter the premises in order to take immediate possession of and remove said equipment.

Defendants, in their answer, asserted as affirmative defenses and counterclaims that the plaintiff breached the parties' agreement, in that it created and was aware of serious building code violations at the time the parties entered into the contract, including substandard plumbing and electrical work, which was concealed behind walls and ceilings and thus was not readily apparent to the defendants. Defendants allege that these violations caused a four-month delay in opening their restaurant and seek to recover damages in the sum of \$100,000. Defendants also allege as a third affirmative defense that the service of process was defective. Plaintiff has served a reply to these counterclaims.

In the proceeding commenced under Index Number 23349/05, the court, in an order dated May 19, 2006, directed the release of a promissory note in the sum of \$12,000, and the sum of \$500 that was held in escrow, directed that the plaintiff may enter judgment for the statutory costs for commencing said action and directed

that the issue of attorney's fees be reserved for trial. Plaintiff thereafter moved in the within action for an order of seizure, and for injunctive relief and the defendants cross-moved for consolidation of the counterclaim interposed in the 2005 action with this action, and in the alternative to discontinue that counterclaim and permit a similar counterclaim to be interposed in this action. The court in its order of March 14, 2007 denied the request for an order of seizure, on the grounds that the failure to provide a specific description of the items to be seized and the low valuation provided by the plaintiff rendered the application inadequate. The court further found that an order of seizure was not warranted, as the defendants had raised a defense/counterclaim to both the 2005 action and the within action. The court granted the plaintiff's request for an injunction, stating that the defendants were enjoined "from selling, encumbering, transferring, assigning, or otherwise dissipating or disposing of any chattels set forth in Schedule A, as well as any after-acquired property located at 194-03/05 Northern Boulevard, Flushing, except as necessary to maintain the normal operations of the business. Any other dispositions or changes in the status of the property by defendants shall require an order of this court. The foregoing is conditioned on plaintiff filing an undertaking pursuant to CPLR 6312, in the amount of \$500, within 30 days after service of

a copy of this order with notice of entry." The court also granted the defendants' cross motion for consolidation.

Plaintiff's counsel served a copy of the March 14, 2007 order with notice of entry on defendants' counsel on April 13, 2007.

Plaintiff, in an order to show cause dated April 26, 2007, seeks an order holding the defendants in civil and criminal contempt pursuant to Judiciary Law § 756 for violating the injunction set forth in the order of March 14, 2007, and seeks to compel defendants to return all equipment, furniture and/or other chattel from the property located at 193-03/05 Northern Boulevard, Flushing, New York and to recover attorney's fees and costs in the sum of \$2,045. Plaintiff, however, has not submitted any evidence which establishes that it posted the undertaking as required by the order of March 14, 2007. Therefore, as plaintiff has failed to establish that it complied with the terms of the order of March 14, 2007, the injunction contained in said order is a nullity. Plaintiff's request for an order holding the defendants in civil and criminal contempt, and for the return of the subject property, therefore, is denied.

Turning now to plaintiff's motion for summary judgment, it is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material

issues of fact” (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

A party establishes its prima facie entitlement to judgment on promissory notes as a matter of law by producing the promissory notes executed by the defendant and by establishing the defendant’s default thereon. After such a showing, it is incumbent upon the defendant to demonstrate, by admissible evidence, the existence of a triable factual issue (see Allstate Fin. Corp. v Access Bag N Pack, Inc., 245 AD2d 325 [1997]; Dvoskin v Prinz, 205 AD2d 661, 661-662 [1994]). Here, plaintiff has established the existence of the promissory notes and the defendants’ failure to pay the balance when they became due on August 18, 2006, and the defendants have not opposed the motion for summary judgment. Therefore, plaintiff is entitled to judgment on the balance due of \$80,000 (see Brennan v Shapiro, 12 AD3d 547, 548-549 [2004]; Simoni v Time-Line, Ltd., 272 AD2d 537, 538 [2000]; Elmsford-Interstate Bldg. Material Corp. v Elm Ridge Mgt., 243 AD2d 675 [1997]; Ihmels v Kahn, 126 AD2d 701 [1987]). Plaintiff, pursuant to the terms of the promissory notes, is also entitled to recover, as a late

charge, interest of 15% per annum on the unpaid principal of \$80,000.

The promissory notes also provide that defendants are liable for reasonable attorney's fees arising out efforts made to collect the unpaid balance of the notes. Plaintiff's counsel seeks to recover the sum of \$7,000 for the previous proceedings, including the motion practice under the 2005 index number, and \$5,000 for this proceeding, without detailing his hourly rate and the legal services provided. In order for the court to determine whether the sums sought constitute reasonable attorney's fees, plaintiff's counsel is directed to submit an affidavit detailing his hourly rate, and the legal services provided, along with the proposed order to be entered hereon.

Plaintiff's request for summary judgment on the second cause of action to recover possession of the premises is granted, as paragraph 6(c) of the contract, as well as the provisions of the promissory notes, provide that it is entitled to re-claim possession of the subject premises upon the defendants' default.

To the extent that the third cause of action seeks to recover collection costs, plaintiff has failed to establish that it incurred any such costs. Plaintiff, therefore, is only entitled to recover statutory costs. To the extent that plaintiff seeks to

recover attorney's fees, this claim is duplicative of the relief sought in the first cause of action, and shall be disregarded.

Plaintiff's request for summary judgment on its fourth cause of action to recover the equipment set forth in the UCC-1 financing statement, or for an order permitting it to enter the premises in order to take immediate possession of and remove said equipment, is denied. Although plaintiff has submitted a copy of the UCC-1 financing statement, and asserts that it was filed, it has not submitted proof of filing. Plaintiff, thus, has failed to establish that the security interest was perfected (see UCC § 9-501).

Plaintiff's request to strike the defendants' answers to the 2005 and 2006 actions is denied.

Plaintiff's request to dismiss defendants' first counterclaim for breach of contract asserted in the action commenced under Index No. 22157/06, is granted. This claim is based upon paragraph 10 of the rider to the contract, which provides that plaintiff as "[t]ransferor shall be responsible for the removal of any violations, municipal or otherwise, to the premises, for the period of time during which the Transferor operated the business." However, paragraph 6(c) of the rider to the contract of sale provides that "[t]he parties agree that Transferor's attorney shall hold in escrow the sum of \$12,000.00 by way of a note to be executed by the Transferor in Transferee's

favor for a period of ninety (90) days subsequent to closing to satisfy any and all outstanding violations or taxes, municipal or otherwise, which may have accrued during the time Transferor operates the business through the date of closing. Transferee's attorney shall present any such outstanding violations or taxes to Transferor's attorney within such ninety (90) day period. After such period, Transferor's attorney shall release the balance of the escrow to the Transferor." In the action commenced under Index No. 23349/05, the court, in its order of May 19, 2006, directed the release of the \$12,000 held in escrow, on the grounds that the plaintiff had satisfied all of the conditions of the escrow, and defendants had failed to establish that they complied with the terms of the contract by supplying plaintiff's attorney with a list of violations, or that there were any open violations. In view of the court's prior ruling on this issue, the counterclaim for breach of contract based upon unspecified Building Code violations cannot be maintained.

Plaintiff's request to dismiss the second counterclaim for fraud based on fraudulent concealment is granted. Although a cause of action alleging fraud may be predicated on acts of concealment, defendants herein must allege and establish that the plaintiff had a duty to disclose the disputed information (see Ozelkan v Tyree Bros. Envtl. Servs., Inc., 29 AD3d 877, 878 [2006]; E.B. v Liberation Publs., 7 AD3d 566, 567 [2004]). The

counterclaim, which omits any allegations that the buyer defendants had a confidential or fiduciary relationship with the seller plaintiff, fails to state a cause of action for fraud predicated on an act of concealment (see Spencer v Green, 42 AD3d 521 [2007]; Wirsing v Donzi Mar. Inc., 30 AD3d 589 [2006]). Furthermore, as no such confidential or fiduciary relationship existed between the parties, defendant cannot establish that the plaintiff had a duty to disclose the information in controversy.

Plaintiff's request to dismiss the third counterclaim for lack of personal jurisdiction is granted. Although defendants properly reserved this defense in their answer, it does not constitute a counterclaim. In addition, as defendants failed to timely move for relief on this ground, said defense is deemed waived (CPLR 3211[e]).

To the extent that the defendants asserted identical counterclaims in the action commenced under Index No. 23349/05, as well as a claim for punitive damages, said counterclaims are also dismissed.

Plaintiff's request to amend the caption to reflect the correct name of defendant DJ Duri Corp., as D&J Duri Corp., is granted.

In view of the foregoing, plaintiff's motion for an order holding defendants in civil and criminal contempt is denied in all respects. Plaintiff's separate motion for summary judgment is

granted to the extent that it is entitled to a judgment against defendants on the first cause of action in the sum of \$80,000, together with interest of 15%, per annum. That branch of the motion which seeks reasonable attorney's fees is granted and plaintiff's counsel is directed to submit an affidavit detailing his hourly rate and the legal services performed. That branch of the motion which seeks summary judgment on the second cause of action for repossession of the subject premises is granted. That branch of the motion which seeks summary judgment on the third cause of action is granted to the extent that plaintiff is entitled to statutory costs, and is denied in all other respects. That branch of the motion which seeks summary judgment on the fourth cause of action is denied. That branch of the motion which seeks to strike the defendants' answer is denied. That branch of the motion which seeks to dismiss the counterclaims asserted under Index No. 22157/06 is granted, and to the extent that identical counterclaims were asserted under Index No. 23348/05, as well as a claim for punitive damages, said counterclaims are also dismissed. That branch of the motion which seeks to amend the caption in order to reflect the correct name of defendant D&J Duri Corp., is granted.

Settle order.

J.S.C.