

Dell, Inc. v GJF Constr. Corp.

2007 NY Slip Op 33996(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0601271/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Dell Inc et al
-v-
GTF Construction et al

INDEX NO.

601271/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for § 3712 Summary
J/G

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

DEC 12 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: December 4, 2007

JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Dell, Inc., and Dell Marketing USA, L.P.,
as and for themselves and a/s/o
Trinity Centre, LLC,

Plaintiffs,

-against-

GJF Construction Corp., d/b/a
The Builders Group,

Defendants.

Decision/Order

Index 601271/06
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----x
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pltffs' n/m [§ 3212] w/PK affid, NC affirm, exhs, pltffs' s/m of uncontested facts	1,2
Def's x/motion w/IS affid, HJB affirm, exhs	3
Pltffs' reply and in opp to x/motion w/NC affirm, exhs	4

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

This is an action arising from subrogated rights and based upon principles of indemnification. The court has before it plaintiffs' motion for summary judgment, dismissing the answer with counterclaim. Defendant has cross moved for summary judgment, dismissing the complaint. Issue has been joined, but the note of issue has not yet been filed. Therefore, these motions are properly before the court and will be decided. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Legal arguments presented

Trinity Centre LLC owns ("owner") the building located at 115 Broadway, New York, New York. It rented three floors to Plural, Inc., now known as Dell Marketing USA L.P., a named plaintiff in this action (at times "Plural" and at times "Dell Marketing").

In 2002 Plural approached owner about subleasing one of the three floors it was renting to defendant GJF Construction Corp d/b/a The Builders Group ("GJF"). After negotiations, and because GJF was interested in two floors, not just one, the owner, Plural and GJF agreed that instead of a sublease the owner would enter into a lease directly with GJF. To accomplish this, Plural and the owner separately agreed that Plural's lease would be amended. This would be Plural's fifth amendment to its lease ("fifth amendment to lease").

As per the terms of the fifth lease amendment (dated April 22, 2002), Plural would "conditionally surrender" the 16th and 18th floors to GJF. GJF, in turn, would receive a "direct lease" with the owner ("GJF's lease"). GJF's lease was at a lower base rent and had a lower multiplier for other rent than what Plural had been paying under Plural's lease (e.g. under the lease through the 4th lease amendment). Plural, however, would remain obligated for the difference between GJF's (lower) rent and additional rent obligations under its lease with the owner, and Plural's own obligations under the 4th lease amendment. The fifth amendment references the agreement among GJF, Plural and the owner to enter into this arrangement which was not a sublease, but a conditional direct lease.

As per GJF's direct lease with the owner (also dated April 22, 2002), the owner had all the typical rights a landlord has against a commercial tenant, including the right

to: 1) collect rent, 2) enforce rent arrears, 3) serve a default notice in the event of any default, including nonpayment of rent, 4) to recover the premises, 5) terminate the lease before the lease term, 6) enforce the lease through the expiration of its term, and other remedies. GJF's lease was longer than Plural's lease by one year, expiring in June 30, 2007 whereas Plural's lease expired June 30, 2006.

As per the fifth lease amendment (paragraph 7 [a]), if GJF defaulted under its lease with the owner, before Plural's lease ended, Plural would be credited with GJF's payments, but still be responsible for the difference between what GJF had paid and Plural's own base rent and additional rent obligations. In the event GJF defaulted under its lease with the owner before Plural's lease had expired, the fifth lease amendment would be nullified and all of Plural's rent obligations restored to what they had been before the fifth lease amendment had been agreed to, except that the lease term would remain June 30, 2006 (it had been shorter under Plural's lease). Paragraph 7 [b] contains this operative language:

"In the event GJF defaults under the GJF lease and as a result thereof the GJF is terminated prior to the Original Expiration Date [e.g. Plural's lease termination date]: (i) all of this Amendment other than this Paragraph 7 shall therefore be deemed a nullity and of no further force and effect; (ii) the Base Rent, Tenant's proportionate Share and Wage Rate Multiple shall ipso facto be restored to their values existing immediately prior to the execution of this Amendment; (iii) the GJF Space shall be and be deemed to be part of the demised premises . . ."

Section iv of paragraph 7 [b] further provides that upon the termination of GJF's lease the "Owner shall be deemed to have assigned to Tenant [e.g. Plural], without recourse . . . all of Owner's right under the GJF Lease to recover possession of the GJF

Space . . .” Thus, the owner assigned all its rights under the GJF lease, including the default provisions, to Plural.

On June 28, 2002, after the fifth lease amendment was made and the owner had entered into its direct lease with GJF, plaintiff Dell, Inc. (at times “guarantor” at others “Dell Inc.”) executed an office lease guaranty (“guaranty) guaranteeing Plural’s lease obligations to the owner. The guaranty defines the landlord as Trinity, the tenant as Plural, and the premises as all three floors Plural had occupied at 115 Broadway, including those now occupied by GJF. In relevant part, the guaranty provides that the “Guarantor will pay to the Landlord [etc.] any delinquent rent . . .” It also provides that:

“1. GUARANTY. This Office Lease Guaranty is executed by the undersigned Guarantor [Dell] and shall be a joint and several obligation of such Guarantor with Tenant. In consideration of the execution by the Landlord [Trinity Center LLC] of the Fifth Amendment to Lease (the “Fifth Amendment”) between Tenant [Plural Inc.] and Landlord executed as of the date hereof, Guarantor covenants with the Landlord that if default shall at any time be made by the Tenant in payment of rent or in the performance or any other obligations of the Tenant contained in that certain lease dated as of October 19, 1995 between Landlord’s remote predecessor in interest and Tenant, as amended, covering the rental portions of the [14th, 16th and 18th] floors . . . Guarantor will pay to the Landlord . . . any delinquent rent . . . that may arise due to the Landlord under the Lease in consequence of any default by [Plural] . . . In the event the vacate date . . . shall have occurred with respect to the 14th Floor premises, but not the 16th and 18th floors (“the GJF Space”) the Vacate date with respect to the GJF space shall be deemed to be the earlier to occur of: (i) the date GJF Construction Corp. (“GJF”) actually vacates the GJF space, removes all of its property therefrom and lawfully surrenders possession to Owner; or (ii) 120 days after the occurrence of any default pursuant to the GJF Lease which remains uncured . . . Subleasing or assignment of Lease by Tenant, with or without Guarantor’s approval, shall not affect or in any way lessen Guarantor liability under this guaranty agreement.”

[* * *]

"4. MISCELLANEOUS. Guarantor acknowledges that but for the execution of this guaranty, Landlord would not have entered into the Fifth Amendment . . ."

In support of their motion for summary judgment, plaintiffs first contend that GJF's complete noncompliance with their discovery demands is reason, alone, to grant the plaintiffs' motion for summary judgment. Plaintiffs also contend that because GJF has not made any discovery demands of plaintiffs, this demonstrates that GJF is missing no pertinent information to further develop its defenses, or the one counterclaim it has asserted. Thus, plaintiffs argue that summary judgment should be imposed as a sanction under CPLR 3126, resolving all claims against the defendant.

On the merits, plaintiffs contend that most, if not all, the salient facts of this case are not in dispute, or that any differences in facts presented are immaterial. Plaintiffs therefore, contend, and GJF does not deny, that Plural abided by the "conditional surrender" provision of its amended lease with the owner by vacating the 16th and 18th floors in July 2002. At that time, GJF moved in. Plaintiffs allege, and GJF does not deny, that GJF paid rent, as per the GJF lease until July 2004. GJF admits it stopped paying rent effective August 2004. GJF also admits its vacated the premises on February 13, 2005. Plaintiffs contend, and GJF does not deny, that this was only after the owner served defendant with a Five Day Notice.

It is undisputed that the owner commenced a lawsuit against Dell Inc. as guarantor of Plural's obligations under its lease (Trinity Centre, LLC v. Dell Inc. f/k/a Dell Computer Corporation, Supreme Court, N.Y. Co., Index No. 601285/05) (the "Trinity action"). That case was settled when the plaintiffs paid the rent asserted by the owner, and that GJF had not paid. GJF was not a party to that action. According to

plaintiffs, GJF's unpaid arrears were \$1,358,058.34 through the expiration of GJF's lease in June 2007. In support of these damages, plaintiffs provide financial documents from their banking institutions showing wire transfers and payments to the owner with notations indicating what each payment is for, the dates paid, and the amounts.

Plaintiffs contend that because GJF occupied the premises, but defaulted in paying rent that Plural was ultimately responsible for and that Dell Inc. has guaranteed, GJF owes Dell Inc. the money the guarantor paid. Plaintiffs allege this is so as per the express terms of the leases and applying principles of subrogation or indemnification. Alternatively, they urge the application of the equitable principles of equitable subrogation or implied indemnification. These claims are broadly encompassed within the plaintiffs' first cause of action for subrogation and the 2nd cause of action for indemnification.

Plaintiffs argue that because they are subrogated to the rights of the owner, as per the terms the fifth lease amendment, they stand in the shoes of the owner with all its attendant rights to enforce the GJF lease, through its expiration in June 2007 - not just through the end of Plural's lease term a year earlier. They contend that because GJF stayed in the premises, without paying any rent, and Plural's rent obligations were supposed to have been offset by what GJF was obligated to pay under its lease with the owner, the plaintiffs must be made whole so as to not confer a windfall on GJF.

Plaintiffs also challenge all of GJF's defenses and its counterclaims for fraudulent misrepresentation as frivolous.

In opposition to plaintiff's motion, GJF claims that the premises it rented were

filled with toxins following the 9/11 attacks at the World Trade Center, and therefore uninhabitable from the outset. GJF has offered the sworn affidavit of an asbestos investigator who opines that based upon samples he took at the premises, as compared to available statistical data from OSHA, the 16th and 18th floors had high concentrations of heavy metals. The expert also opines further that "*no* amount of any of these pollutants can be safely tolerated in a workplace. . ." (emphasis in original) and that the space should not have been reopened following 9/11.

GJF contends that Dell Inc. is not its surety, but the surety for Plural (now Dell Marketing) and that when the guarantor paid the rent arrears to the owner, all it did was satisfy Plural's existing rental debt which it would have had anyway, regardless of whether GJF leased the space from the owner or not. GJF argues further that it actually reduced Plural's debt to the owner by entering into the lease and paying rent through the end of July 2004.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

At the outset, the court denies plaintiffs' motion for preclusion as a CPLR § 3126

sanction because, as will become clearer, plaintiffs were able to successfully support their motion for summary judgment, even without the documents demanded. Moreover, even though the documents were provided late, defendant did eventually provide them. Therefore, the court turns to the merits of the complaint and the counterclaim.

As GJF correctly asserts, it did not have a direct contractual relationship with either of the plaintiffs. It was the owner's tenant and the only agreement it entered into was with the owner. However, GJF's argument, that plaintiffs paid rent that they owed anyway, therefore GJF does not have to make them whole is erroneous, as a matter of law.

"A suretyship arrangement is, at its core, the confluence of three distinct, yet interrelated, obligations. These obligations are embodied in the tripartite relationship of principal obligor and obligee; obligee and secondary obligor; and secondary obligor and principal obligor. When a secondary obligor is bound to pay for the debt or answer for the default of the principal obligor to the obligee, the secondary obligor is said to have suretyship status." Chemical Bank v. Meltzer, 93 N.Y.2d 296, 302 (1999).

GJF and the owner had one lease and Plural and the owner had another, separate lease. Each was the primary obligor under its own lease while GJF kept current with its rent and other lease obligations. Thus, under Plural's lease, the surrender of the premises was conditional, and GJF's rental payments were to be applied to Plural's own rent. Under GJF's lease, it had a separate, wholly independent obligation to pay rent to the owner. When, however, GJF defaulted, and Plural's lease had not yet expired, the fifth amendment was nullified, and Plural, as per its own lease with the owner, stepped into the shoes of the owner, who had subrogated and assigned

all its rights of enforcement of GJF's lease, including enforcing GJF's lease through the end of its term. Dell Inc., having guaranteed Plural's obligations under its lease with the owner, became obligated (along with Plural), to satisfy the rent arrears due to the owner. Since Dell Inc and/or Plural (Dell Marketing) paid the rent arrears incurred by GJF that were the subject of the Trinity action, and the owner assigned its rights as per paragraph 7 [b] to enforce such rent arrears to the plaintiffs, they now have the right to recover their payments from GJF under principles of subrogation, and as per the guaranty agreement. See: Fehr Bros v. Scheinman, 121 AD2d 13, 15 (1st Dept 1986).

The plaintiffs have also urged the court to consider their claims under the principle of equitable subrogation and implied indemnification. The equitable principle of equitable subrogation is applied where one person discharges the obligation owed by another under such circumstances that the other (discharged) party "would be unjustly enriched by the retention of the benefit thus conferred . . ." Bermuda Trust Co. Ltd. v. Ameropan Oil Corp., 266 A.D.2d 251, 251 (2nd Dept. 1999). On the other hand, a contract to reimburse or indemnify will be implied in law where one party is compelled to make a payment on behalf of another party, which the other party should have made, or "redounds solely to benefit of [the other party] . . ." Brown v. Rosenbaum, 41 N.E.2d 77, 81 (1942). Since the court holds that the plaintiffs' subrogated rights emanate from the express terms of the fifth lease amendment and the owner's lease with GJF, there is no need to reach so far in order to grant plaintiffs' motion for summary judgment against the defendant. See: Federal Ins. Co. v. Arthur Andersen & Co., 75 N.Y.2d 366 (1990). However, even under these equitable principles, plaintiffs would prevail since

they discharged GJF's obligations under its own, separate and independent lease with the owner. GJF benefitted by having these payments made, which it would otherwise have had to pay the owner.

Plaintiffs have proved that GJF failed to pay rent starting August 2004. GJF did not vacate the premises until February 2005. GJF's lease did not expire until June 30, 2007. Although the fifth lease amendment was nullified, GJF's direct lease was not. Therefore, GJF's lease remained effective and enforceable through the end of the lease term.

To defeat plaintiffs' motion, defendant must raise material issues of fact for trial. Defendant contends that it discovered toxins in the floors it had rented. It claims this prevented it from using the premises. These factual allegations are also stated in support its counterclaim for fraudulent misrepresentation. This discovery of toxins is alleged to have occurred some months after they had taken occupancy. As will be seen, this is not an effective defense against plaintiffs' claims for reimbursement of the rent payments it made for GJF, nor does GJF state a valid claim for fraudulent misrepresentation.

A commercial landlord is under no obligation to mitigate damages, but can sue for the full lease term if the tenant vacates the premise before the lease has expired. Holy Properties Limited L.P. v. Kenneth Cole Productions, Inc., 87 NY2d 130 (1995). Furthermore, there is also no implied warranty to habitability for commercial premises. DHB Industries, Inc. v. West-Post Management Co., 9 Misc.3d 1130(A), Slip Copy, 2005 WL 3076345 (N.Y.Sup. 2005) (citing Bomze v. Jaybee Photo Suppliers, Inc., 117 Misc.2d 957 [App. Term 1st Dept.1983]). The premises were leased to GJF "as is."

GJF's principal's contention, that after he entered the lease, he learned "that the Building stands at the heart of what is known . . . as the 'confirmed' part of WTC Dust/Debris Field . . ." is at odds with GJF's application on November 6, 2002 for the WTC Small Firm Attraction and Retention Grant Program. It is at further odds with his further statement that "[b]y 2004 GJF was concerned enough about the risk posed by World Trade Center dust to retain environmental testers . . ." yet GJF did not vacate the premises until many months later, in February 13, 2005, only after the owner served a rent demand, not because the premises were uninhabitable and they were constructively evicted.

A fraudulent inducement claim must allege misrepresentation of facts that are collateral to the contract and which induced the allegedly defrauded party into signing the contract. Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 323 (1st Dept 2004); *See also*: Qrix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 (1st Dept 1998). Thus, GJF would have to allege that Trinity (since plaintiffs stand in the owner's shoes) misrepresented facts. The only allegation remotely meeting this criteria is that GJF believed Trinity was going to clean up or remediate the premises. This, however, is directly contradicted by the premises being delivered "as is." Other claims that "as is" does not apply to latent defects, are offered without any legal authority. In any event, as already addressed, claims by GJF's principal, that it was unaware of the conditions, is contradicted by actions taken by GJF after it took occupancy, and by its remaining in occupancy for almost three years. GJF did not surrender the premises until the owner initiated eviction proceedings by serving the Five Day Notice to Tenant dated January 27, 2005.

Having failed to raise any material facts that have to be tried, plaintiffs are entitled to summary judgment against the defendant on its claims for subrogation and indemnification. Plaintiffs are also entitled to summary judgment dismissing the counterclaim. Defendant's cross motion for summary judgment dismissing the complaint is, therefore, denied.

Damages

Plaintiffs allege that they made payments of \$1,358,058.34 for unpaid rent. GJF concedes it remained in possession through February 13, 2005. Plaintiffs have proved that from August 2004 through February 13, 2005 the unpaid rent arrears were \$437,720.73. Plaintiff have provided evidence they paid \$504,857.46 through April 18, 2005. Through December 21, 2005 they paid another \$846,389.35. Thus, plaintiffs have proved they made total payments of \$1,351,246.80 in connection with the GJF lease. They claim they are owed \$1,358,058.34, plus legal fees, and other collection fees through the end of GJF's lease. Such fees and other fees are permitted under GJF's lease. Therefore, plaintiffs have proved their entitlement to \$1,351,246.80 and that they are also entitled to recovery of their reasonable legal and other fees. GJF has failed to come forward with any disputed facts. Therefore, plaintiffs have proved they are entitled to a money judgment against GJF in the amount demanded, to wit: \$1,351,246.80 for unpaid rent through the end of GJF's lease term. The issue of the reasonable legal and other fees plaintiffs are entitled to is set down for an Inquest on damages before a special referee who shall take testimony and make recommendations to the court in a report.

Conclusion

Plaintiffs' motion, for summary judgment is hereby granted in its entirety.

Defendant's motion is denied in its entirety.

In accordance with the foregoing,

It is hereby

ORDERED that plaintiffs Dell, Inc. and Dell Marketing USA L.P., as and for themselves and a/s/o Trinity Centre, LLC are hereby granted summary judgment on the claims set forth in their complaint; and it is hereby

ORDERED that the clerk shall enter judgment in favor of plaintiffs Dell, Inc. and Dell Marketing USA L.P. as and for themselves and a/s/o Trinity Centre, LLC in the amount of One Million Three Hundred Fifty One, Two Hundred Forty Six Thousand and 80/100 Dollars (\$1,351,246.80) against defendant GJF Construction Group d/b/a The Builders Group; and it is further

ORDERED that the issue of the reasonable legal and other fees plaintiffs are entitled to recover from defendant is set down for an Inquest on damages before a special referee who shall take testimony and make recommendations to the court in a report; and it is further

ORDERED that plaintiff is also granted summary judgment dismissing the defendant's counterclaim for fraudulent misrepresentation and the Clerk shall enter judgment in favor of plaintiffs Dell, Inc. and Dell Marketing USA L.P. as and for themselves and a/s/o Trinity Centre, LLC against defendant GJF Construction Group d/b/a The Builders Group on that counterclaim as well; and it is further

ORDERED that plaintiffs shall serve a copy of this order on the Clerk in the Office of the Special Referee so the referred issues can be scheduled for the Inquest on

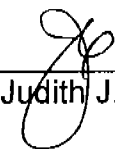
damages; and it is further

ORDERED that any relief requested, but not expressly addressed by the Court is hereby denied; and it is further

ORDERED that this shall constitute the decision, order and judgment of the court.

Dated: New York, New York
December 4, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

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