Golden Eye, Ltc. v Fame Co.

2008 NY Slip Op 30250(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0603166/2007

Judge: Richard B. Lowe

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SCANNED ON 1/29/2008

[* 1]

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

PRESENT: Lowe

Justice

PART 56

Golden Eye, LTD

- v -

Fame Company

INDEX NO. 603166/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 1/16/08

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: AS PART 56

---x

GOLDEN EYE, LTC. d/b/a BIG DROP,

Plaintiff

- against-

FAME COMPANY,

Defendant

---x

Index No: 07/603166

DECISION

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J:

In the instant action Plaintiff Golden Eye d/b/a Big Drop ("Plaintiff" or "Big Drop") seeks specific performance from Fame Company ("Defendant" or "Fame Company") under the lease agreement where the Fame Company has refused to consent to a proposed assignment of the lease between Big Drop and Aerogroup Retail Holdings, Inc. d/b/a Aerosoles ("Aerosoles").

BACKGROUND

On November 3, 2004 Big Drop entered into a lease agreement with Fame Company to lease premises located at 1325 3rd Avenue, New York, New York ("Lease Agreement"). The Lease Agreement's duration was for ten years and contained a provision that allowed Big Drop to make an assignment to third parties provided that they have the prior written consent of the Defendant. The agreement provided that consent should not be unreasonably withheld. In Paragraph 70 of Lease Agreement, the parties agreed that the Plaintiff has the right to assign the lease provided that:

I. Landlord has given his prior written consent to the assignment, which consent shall not unreasonably be withheld;

II. The proposed assignee tenant has a good financial report/credit;

III. At least 30 days prior to any proposed assignment, Tenant shall submit to Landlord a statement containing the name and address of the proposed assignee, and all of the terms of the proposed assignment, including, but not limited to, all financial information of the proposed assignee tenant;

IV. Tenant at the time of requesting Landlord's consent and at the time of the proposed assignment shall not be in default under any of the terms, covenants, conditions, provisions and agreements of this lease;

V. A duplication original of the assignment agreement shall be delivered to the Landlord within five (5) days following the making thereof, and such instrument shall specifically state that it is subject to all of the terms, covenants and conditions of this lease;

***

VII. As a condition to obtaining Owner's consent, said assignee shall be required to deposit an additional month's security at the then graduated rental rate to be held in accordance with the provisions of this lease.

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IX. As a condition of the assignment, a principal of the Assignee tenant who is financially capable must execute a good-guy close for the benefit of Fame Company in place and instead of David Katzav whose personal Guarantee execute in connection with this lease shall terminate. (*Order to Show Cause, Exhibit A)*

In August 2007, Big Drop entered into a preliminary agreement with Aerosoles to assign the Lease Agreement to Aerosoles. Pursuant to paragraph 70 of the Lease Agreement, Big Drop informed Fame Company about the proposed assignment on August 16, 2007 *(Order to Show Cause, Ex. B).*

On August 17, 2007 Defendant's counsel, Ms. Midge Nutman, posed a few questions with respect to the proposed Assignment and demanded a retainer of $5,000.00 from Big Drop *(Order to Show Cause, Ex. C).* In particular, Defendant requested additional documentation as to:

(a) Exact name of Tenant and Good Guy Guarantor;

(b) Recent financial statements, balance sheets and credit reports for both Tenant and any potential guarantor(s); and
(c) Description of the proposed use of the store. (*Id.)*

On September 4, 2007 Plaintiff sent a letter to Ms. Nutman responding that

(a) The name of the Tenant is Aerogroup Retail Holdings Inc. d/b/a Aerosoles. The name of the Guarantor is Aerogroup International, Inc. (parent company of Aerosoles).
(b) Plaintiff requested a Confidentiality and Non-Disclosure Agreement prior to delivery of financial statements; and
(c) State that proposed use of premises is "the retail sale of footwear, handbags, apparel, fashion accessories, or any other merchandise sold under Aerosoles trademark…" *(Plaintiff's Order to Show Cause, Ex. D).*

The letter also advised Defendants that due to the time constraints, prompt attention to the matter was necessary. A retainer of $5,000 was delivered to Defendant on September 5, 2007 *(Plaintiff's Order to Show Cause, Ex. E).* Aerosoles also delivered its financials to Ms. Nutman and Fame Company on September 7, 2007 *(Katzav affidavit).*

The parties exchanged correspondence regarding the status of the proposed assignment on September 10, 2007 and on September 12, 2007 *(Order to Show Cause, Ex. F and G).* Thereafter, Plaintiff's e-mails dated September 17, 2007 and September 18, 2007 went unanswered *(Order to Show Cause, Ex. H and I).* Instead, on September 18, 2007 Defendant sent Plaintiff a letter advising him that consent to the proposed assignment was denied on the grounds that "it would require a change in use of the Premises and no financially capable individual will be guaranteeing the Lease" *(Defendant's Affidavit in Opposition, Ex. F).*

[* 5]

On September 24, 2007 Plaintiff filed a complaint seeking specific performance compelling Defendant to consent to assignment of the Lease. The next day Plaintiff moved by an Order to Show Cause seeking the same relief[1].

In its Order to Show Cause, Plaintiff argues that Fame Company, contrary to the Agreement of Lease, unreasonably withheld its consent to the assignment. Further, Plaintiff alleges that Defendant has no reasonable justification for withholding its consent because Plaintiff has complied with the requirements of paragraph 70 of the Lease Agreement. Lastly, Plaintiff argues there is no question as to the financial strength of the proposed assignee and the intended use of premises is almost identical to the use in the initial Lease Agreement.

Plaintiff argues that the proposed assignee, Aerosoles, posed time constraints for the lease of the premises.[2] Big Drop argues it will be irreparably damaged if Aerosoles goes away from the deal because Plaintiff would have to continue to operate the business and incur expenses. Additionally, it would be hard for Big Drop to find another assignee that has financial capabilities similar to Aerosoles, that will be willing to assume all obligations under the Lease Agreement, that will be able to pay the appropriate consideration for such assignment, and that will have the same use of the leased premises.

Defendant opposes, saying that Big Drop did not comply with the requirements of Paragraph 70 of the Lease Agreement . In addition to the initial letter of rejection, Defendant raised before this Court on October 10, 2007 further arguments. First,

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[1] Defendant clarified at oral argument that Plaintiff's motion was submitted before Plaintiff got the Defendant's letter dated September 18, 2007, denying the assignment. Nevertheless, Plaintiff chose not to withdraw the complaint and the motion *(Transcript, October 10, 2007, page 4, lines 21-23).*

[2] A short extension was granted to Plaintiff after this date in order to obtain Court's decision.

Defendant argues that Plaintiff did not provide complete financial information of the parent company of proposed assignee from Independent Public Accountants for years ending July 1, 2006 and July 2, 2005 for Aerogroup International, Inc. and Subsidiaries. Second, that the guarantee of Aerogroup International, Inc. was inadequate because the Lease Agreement requires an individual guarantee, not a guarantee from a parent company. Third, that the letter of intent to enter into an assignment agreement submitted by the Plaintiff is a non-binding document and therefore Plaintiff failed to provide Defendant with the copy of the proposed assignment agreement and proposed guarantee agreement. (*Defendant's Affidavit in Opposition,* ¶¶ *18-21).*

Defendant also argues that Plaintiff's application is without merit and premature because Plaintiff has not established a likelihood of success on the merits, irreparable harm and balance of the equities in Plaintiff's favor. Moreover, Defendant argues that the issue of "reasonableness" is a factual issue which can not be resolved at this time. As to irreparable harm, Defendant argues that if the relief is not granted at this time Plaintiff is not without a remedy as he can always sue Defendant for money damages.

Defendant also argues that the he did not grant his consent to the assignment, and, therefore, the issue is not about compelling the Defendant to make the decision. Rather, the only issue of fact remains as to whether such refusal was unreasonable.

DISCUSSION

1. Motion for specific performance is denied on procedural grounds.

Before discussing the standards for specific performance, some procedural considerations need be mentioned. This case is unusual because Plaintiff moved for specific performance right after the Defendant was served with a summons and

complaint. The facts in the case at bar are similar to those in *Shapiro v Dwelling Managers, Inc.*, (92 AD2d 52, 52 [1st Dept 1983]). See also *Bragar v Berkeley Associates Co.*, 111 Misc.2d 333, 444 N.Y.S.2d 355 [1981]. (Court applied standards of summary judgment to the motion for preliminary injunction when it was served simultaneously with the summons and complaint.) In *Shapiro* the Court denied plaintiff's motion for judgment declaring that they are entitled to sublease or assign the lease to their apartment and directing the defendant landlord to consent in writing. The Court stated that "[p]laintiff's motion, served with the summons and complaint, is essentially one for summary judgment asking for the full relief that the complaint asks…". Pursuant to CPLR § 3212(a), parties can not move for summary judgment before issue has been joined. In *Shapiro v Dwelling Managers,* the court noted that when the motion was made, issue had not been joined. Accordingly, the court denied the plaintiff's motion on procedural grounds. *(Id)*. Since specific performance is the only relief thought in the Plaintiff's complaint is the same relief thought in the present motion *Shapiro* is applicable to the case at bar and Plaintiff's motion should be denied on procedural grounds. However, even if it is not denied on procedural grounds it should be denied on the merits.

2. Motion for specific performance is denied on the merits.

"A decree for the specific performance of a contract … will be granted against a party who has committed a breach, or is threatening one, if the remedy in damages would not be adequate…". *(Restatement [First] of Contracts § 358 [1])*. Where a party moves for specific performance of a contract right after he serves a summons and complaint, there should be no issues of fact as to the breach of that contract. (*Kazarinov v L.B. Kaye*

Associates, 111 Misc.2d 944, 947; 445 N.Y.S.2d 915, 918 [1981].) Therefore, in deciding this motion, two elements need to be established: (1) breach of the contract as a matter of law and (2) inadequacy of other remedies at law.

Irreparable injury

Generally, a motion requesting specific performance must clearly show that damages are inadequate. Although existence of money damages by itself does not preclude specific performance *(Restatement [First] of Contracts, § 358 [2]),* this award rests solely on the court's discretion and the court will not abuse it where money damages would be adequate as a remedy for breach of contract. (*Van Wagner Adv. Corp. v S & M Enters.,* 67 NY2d 186, 191-194 [1986].) In the case at bar, the Plaintiff alleges that he would be "irreparably harmed" if Aerosoles goes away from the deal. However, he does not support his allegations with any specific claims that money damages would be an inadequate remedy. (See, *Kienle v Gretsch Realty Co.,* 133 AD 391, 394 [2nd Dept, 1909]). Mere allegations of irreparable injury are not sufficient when no facts to support them are plead.

Plaintiff also claims that it would be hard to find another suitable subtenant because premises are perfectly suitable for Aerosoles. For that reason Plaintiff claims that the property is unique. However, the word "unique" would not by itself always be a sufficient ground for granting specific performance. As the Court of Appeals stated: "The word 'uniqueness' is not ... a magic door to specific performance." (See, *Van Wagner Adv. Corp. v S & M Enters,* 67 NY2d 186, 192 [1986].) The court further concluded that specific performance of the lease would not be granted where the value of "unique qualities" of the subject of the lease could be calculated with reasonable certainty. *(Id. at*

194). In the case at bar Plaintiff does not assert any unique qualities of the premises. Furthermore, the allegations that it would be hard to find another suitable subtenant are not supported by facts that damages would be impossible to calculate. Even if Aerosoles goes away from the deal and Plaintiff will have to incur business expenses, those damages could be calculated. Therefore, Plaintiff fails to meet his burden of proof and Plaintiff's motion for specific performance is denied on this ground.

Establishing a breach of the contract by the Defendant as a matter of law.

Plaintiff alleges that the Defendant was unreasonable in withholding his consent and thereby he breached Paragraph 70 of the Lease Agreement. Defendant opposes by arguing that reasonableness is an issue of fact and for that reason Plaintiff's motion should not be granted.

Paragraph 70 (I) of the Lease Agreement provides that "Landlord has given his prior written consent to the assignment, which consent shall not be unreasonably withheld." It is the Plaintiff who has the burden to prove that the Defendant was unreasonable in withholding his consent.

Withdrawal of consent is reasonable when it is based on considerations of objective factors such as financial responsibility of the proposed assignee, the proposed assignee's suitability for the particular building, the legality of the proposed use and the nature of the occupancy (i.e. office, factory, clinic). (see *American Book Co. v Yeshiva University Development Foundation*, 59 Misc 2d 31, 33 [1969]).

Generally, when the issue of the reasonableness of withheld consent to a proposed assignment is based on objective concerns it constitutes a question of fact that precludes summary judgment. (see, *Logan & Logan, Inc. v Audrey Lane Laufer, LLC*, 34 AD3d

539, 540 [N.Y.A.D. 2 Dept., 2006].) ("Genuine issues of material fact as to whether commercial landlord withheld its consent to a proposed lease assignment based on objective concerns, and thus whether its withholding of consent was reasonable, precluded summary judgment in tenant's action to compel landlord to consent to the assignment.") However, refusal can not be based on subjective factors such as "[a]rbitrary considerations of personal taste, sensibility, or convenience" (*American Book Co. v Yeshiva University Development Foundation, Inc.*, 59 Misc 2d 31, 35 [N.Y. Misc. 1969]) Such subjective considerations are not reasonable as a matter of law.

Here, Defendant sent a letter to the Plaintiff refusing to consent to the proposed assignment. In this letter Defendant puts forth two grounds for such refusal: (1) that "it would require a change in use of the Premises" and (2) that "no financially capable individual will be guaranteeing the Lease" *(Defendant's Affidavit in Opposition, Ex. F).* Plaintiff challenges both grounds, arguing that they are not reasonable as a matter of law.

First, as to the alleged change in use of the Premises, "defendant's sole reliance on the purpose clause of the lease as its justification for withholding consent cannot be deemed reasonable as a matter of law." (*Astoria Bedding v Northside Partnership* (239 AD2d 775, 776 [3d Dept 1997].) Similarly in this case, Defendants reason for withholding consent was based on the ground that assignment "would require a change in the use of the Premises." This refusal also is not reasonable as a matter of law in New York.

Second, as to the absence of an individual guarantor, Plaintiff argues that nowhere in the language of the Lease Agreement is an individual guarantor required. Rather the general language of the Lease Agreement requires a guarantee from the "principal" of the

proposed assignee. The principal of an organization could be a parent company, not necessarily an individual. Nothing in the language of the Agreement of Lease implies that "principal" equals "individual". Because the Lease Agreement does not require an individual guarantor, the Defendant's withholding of consent on this ground is unreasonable as a matter of law.

Based on the reasons above, the Plaintiff successfully argues that the refusal to consent to the lease assignment is not reasonable as a matter of law.

Aside from these arguments raised with respect to the letter of refusal, Defendant, in its Affidavit in Opposition, also refers to other grounds for the refusal to the proposed assignment. In particular, that the financial information provided by the Plaintiff is incomplete and that the assignment agreement submitted by the Plaintiff is a non-binding document and, therefore, the Plaintiff failed to provide the Defendant with the copy of the proposed assignment agreement pursuant to Paragraph 70 (V) of the Lease Agreement. *(Defendant's Aff. in Opposition, ¶¶ 18 and 21).*

As to the alleged failure to provide Defendant with the copy of the proposed assignment, the Lease agreement in paragraph 70 (V) specifies:

> A duplication original of the assignment agreement shall be delivered to the Landlord within five (5) days *following the making thereof*, and such instrument shall specifically state that it is subject to all of the terms, covenants and conditions of this lease. (Emphasis added).

Defendant argues that Big Drop did not provide him with the copy of the assignment agreement. However, the language of the Lease Agreement unambiguously states that a copy should be delivered only *after* such assignment was made. In the case at bar only *negotiations* as to assignment were underway. The Letter of Intent between Big

Drop and Aerosoles specifically states "Each party may unilaterally terminate *negotiations* at any time…" *(Plaintiff's Order to Show Cause, Ex. B)* (emphasis added). However, no assignment had been made. Therefore, the Plaintiff was under no duty to submit a duplication of original of the assignment agreement.

Defendant also argues that the financial statements submitted by the Plaintiff were incomplete. Questions as to financial capabilities are objective and constitute issues of fact, and, therefore, could be a valid ground for refusing consent to the proposed assignment. *(American Book Co.* [59 Misc 2d at 33 [N.Y. Misc. 1969].) Had Defendant included the ground of incomplete financials into his letter as a basis of refusing assignment of the Lease Agreement it would increase the likelihood that specific performance would not be granted because an issue of material fact exists. When deciding Plaintiff's motion, however, the Court may not determine reasonableness of withholding consent based on grounds that were not included in the letter refusing consent. (*Astoria Bedding* 239 AD2d at 776 [3d Dept, 1997].)

Since Defendant did not to include these grounds into the letter it is not entitled to raise them at this stage as grounds for refusing assignment. Nevertheless, Plaintiff still fails to meet his burden of proof because, as discussed above, he fails to show irreparable injury if specific performance is not granted.

CONCLUSION

Therefore, based of foregoing, it is hereby

ORDERED that Plaintiff's motion for specific performance is denied.

Dated: January 16, 2008

ENTER:

JUSTICE RICHARD B. LOWE, III

J.S.C.

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE