

R&E Prop. Corp. v Sky Opts., Inc.

2008 NY Slip Op 30435(U)

February 6, 2008

Supreme Court, Nassau County

Docket Number: 4555-05/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

E

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 10

R&E PROPERTY CORP.,

Plaintiff,

**INDEX NO.: 014555/2005
MOTION DATE: 11/30/2007
MOTION SEQUENCE: 002**

-against-

SKY OPTICIANS, INC. and MICHAEL B. LEVINSON,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed.....	1
Defendant's Memorandum of Law in Support of Motion to Renew/Reargue and to Amend his Answer.....	2
Affirmation in Opposition of Andrew M. Roth, Esq. & Exhibits Annexed.....	3
Plaintiff's Memorandum of Law in Opposition.....	4
Reply Affirmation in Support of Motion to Renew/Reargue of Edward G. McCabe, Esq., Affidavits & Exhibits Annexed.....	5
Supplemental Affirmation in Opposition of Andrew M. Roth, Esq. & Exhibits Annexed.....	6
Affirmation in Reply to Supplemental Affirmation of Edward G. McCabe, Esq., Affidavit & Exhibits Annexed.....	7

This motion by defendant, Michael B. Levinson, for an order pursuant to CPLR § 2221(f), permitting him to reargue and renew a prior motion by plaintiff which resulted in an order dated September 15, 2006, granting summary judgment in favor of plaintiff, and upon reargument and renewal for an order denying such relief and granting leave to serve an amended complaint is decided as follows.

This action was commenced by plaintiff who, after completion of discovery, moved for judgment against the defendant guarantor for the full amount due on a commercial lease. Defendant defended on the grounds that the damages were limited by a "Good Guy Clause." The court was persuaded on the strength of the evidence previously presented that the Good Guy Clause was unenforceable pursuant to section 5-701 of the General Obligations Law.

Four or five documents are central to the outcome of this motion.

One is a lease between plaintiff and defendant, Sky Opticians. In fact, there are two leases between plaintiff and defendant Sky Opticians. One is not signed by the plaintiff-Landlord; that is the one defendant seemingly guaranteed. A copy of the aforesaid lease is submitted as Exhibit G to defendant's motion. It is a nine page document consisting of a standard Bloomberg form and a Rider. It states that it is a lease entered into in December and will commence on January 1, 2003 and continue until November 30, 2007. As it happens, November 2002 was the month in which the prior lease between plaintiff and Levinson expired.

The very important Guaranty of the leases was executed on January 22, 2003, by defendant. It provides in relevant part:

The undersigned ... guarantee[s] to the Landlord the payment by the Tenant of the rent, additional rent and all other sums under the Lease within provided for The undersigned guarantees the above throughout the term of this Lease as stated above and throughout any extended term that may be requested and granted. This guaranty shall continue to be effective in regard to all Tenant responsibilities incurred during the time the Tenant retains possession of the demised premises and this guarantee shall continue to be effective for all Lease provisions that survive the termination and/or cancellation of the Lease. This guarantee will remain in effect in the event of assignments of this Lease. Notice of all defaults is waived and consent is hereby given to all extensions of time that any Landlord may grant.

The Guaranty bears the imprint Page 10, in the upper right hand corner, which can only mean that it is page 10 of the 9 page lease, to which it refers five times, and the court so holds.

The third document is a Lease Assignment effective January 22, 2003. It is an assignment of the lease "between Sky Opticians, Inc. (The "Assignor") and Michael B. Levinson (the "Assignee). On this same date Levinson sold his optical business to one Scott Poretzky, who would operate at the same premises under the name Sky Opticians. Poretzky is also a co-guarantor of the lease. Incidental to the sale of his optical business, Levinson arranged to extend

the lease for another five years, allegedly, to commence on January 1, 2003 and continue until November 30, 2007. The Lease Assignment states that it has been consented to by the Landlord, although there is no evidence to support the statement. It states that it is an assignment of a lease dated January _ 2003, for a term beginning on January 1, 2003 and ending on November 30, 2007.

There is also a one page document denominated a "Good Guy Clause." Exhibit B to defendant's motion. Seemingly, although it is not dated, it accompanied the Guaranty, the unsigned lease, and the Lease Assignment, which were forwarded to plaintiff on or about January 22, 2003. It limited defendant's guaranty. It enabled him to terminate and cancel the lease upon Poretsky's default and surrender of the premises. This last, critical document refers to the December 2002 lease between plaintiff and Sky Opticians, and the assignment of that lease. See Exhibit B.

To summarize, after the closing of the sale of Levinson's business to Poretsky on January 22, 2003, all four documents were forwarded to the Landlord who had previously consented to rent the premises to Poretsky, conditioned upon Levinson's guaranty of the lease. This much is not seriously controverted. The crux of the disagreement is Levinson's contention that he gave his guaranty conditioned upon his having the Good Guy Clause.

The issue before the court now is whether, on the basis of the new evidence submitted on this motion, there is a question of fact as to whether the Good Guy Clause is enforceable or is, as previously held, within the Statute of Frauds.

A motion to renew must be based on material facts which existed at the time the motion was made but for some reason were not available to the party seeking renewal and were not, accordingly, made known to the court. Ragus v Law Department, 166 Misc. 2d 157 (Sup. Ct. NY Co. 1992); Brann v. City of New York, 96 A.D.2d 923 (2d Dept. 1983). The new evidentiary material that movant seeks to bring before the court must be pertinent to the decision already rendered. Cisco v. Lavine, 72 Misc. 2d 1087 (Sup. Ct. Nassau Co. 1973). The court is satisfied that the Assignment of Lease was not available to defendant on the prior motion and grants reargument. Simpson v Cook Pony Farm, 12 A.D.3d 496, 498 (2d Dept. 2004).

Newly discovered documents are usually a rarity, but this case is an exception to that rule.

Documents disappear in this case, such as the Good Guy Clause, reappear, such as the Assignment of Lease, and appear altogether for the first time upon memory prompting. It is hard to remember what was acceded to in the prior motion since the documentary support is in a constant state of flux and different explanations are trotted out to explain different combinations of documents. In short, the court finds an ambiguous contract between plaintiff and defendant relative to the guarantee. It is not a wholly integrated writing which can be perfectly understood by its terms.

Plaintiff did not sign the Good Guy Clause. It was on this basis, applying the Statute of Frauds, that the guarantor's damages were not limited in the prior motion. In the prior record plaintiff did not deny negotiating a Good Guy Clause with defendant. Yet, in the end he states that they did not agree to its terms and, thus, he never signed it.

It appears that on January 22, 2003, at the closing of the sale of Levinson's business to Poretsky, the unsigned lease, with the Guaranty and the Good Guy Clause, which had been executed by Levinson, were delivered to plaintiff. Possibly, also the Assignment of Lease.

On January 29, 2003, plaintiff and Scott Poretsky executed the lease. It was for a term ending on November 30, 2010, as opposed to November of 2007. In May of 2003, Poretsky defaulted in payment of the purchase Notes to Levinson, but he apparently paid the rent until approximately January of 2004 at which time he vacated the premises. Defendant Levinson, in reliance on the Good Guy Clause, sent plaintiff a hand written notice stating his intention to exercise the Good Guy Clause, accompanied by a check of \$400.00 on February 28, 2004. Exhibit K to plaintiff's motion.

Reargument may be granted where the court has overlooked, or misapprehended a material factual matter or a controlling principle of law. Cisco v Lavine, 72 Misc. 2d 1087 (Sup. Ct. Nassau Co. 1973). On a motion to reargue, it is inappropriate to raise new arguments which have not previously been advanced upon the court, Simpson v Loehman, 21 N.Y.2d 990 (1968), and new material facts need not be presented in order to reargue. Aldrich v County of Oneida, 299 A.D.2d 938 (4th Dept. 2002). Most importantly, a motion to reargue, or to renew, is not a procedural device to permit counsel to argue the same issues previously considered and decided.

Plainly the Guaranty of the Lease was signed before the lease between plaintiff and the

co-defendant was signed. It is plain that the lease was changed after Levinson guaranteed it. The parties' statements are conflicting on this point. Plaintiff avers that Levinson knew that the lease was to end in 2010. Levinson states that he guaranteed a lease that was for only five years and would not have consented to the additional term of three years.

The law favors his view. A promise to pay the debt of another is a commitment of some import. It is susceptible to faulty recollection, and to fraud. Such a promise is not lightly made and is of some import. Having thus said, it is susceptible to amnesia or faulty recollection. Richardson Press v Albright, 224 N.Y. 497 (1918); Healy v Brotman, 96 Misc.2d 386 (N.Y. Sup. 1978). That is why it is included in the Statute of Frauds. Richardson Press v Albright, 224 N.Y. 497 (1918). Plaintiff asks the court to find that defendant assented to pay the rent for another, whose occupancy was pursuant to a lease that was indefinite as to a material term, i.e. the duration.

Furthermore, it is the law of this State that "any alteration to the terms of an underlying contract for whose performance a guarantor is bound, and without the guarantor's consent, will release the guarantor from his or her obligations." United Natural Foods v Burgess, 488 F.Supp 384, 387 (S.D.N.Y. 2007). Plaintiff comes to this court to enforce the lease that expires in 2010. The evidence is controverted that movant agreed to that date.

This question of fact, if for no other reason, requires granting reargument and renewal. Did Levinson guaranty a lease that he did not approve? Moreover, Levinson cannot be held to be the guarantor of a lease in which the term was changed and the Good Guy Clause was omitted. In short, the deal to which defendant assented was not the agreement to which he is now held. White Rose Food v Saleh, 99 N.Y.2d 589, 590 (2003) ("A guaranty is to be interpreted in the strictest manner. ... A guarantor's obligation cannot be altered without its consent; if the original note is modified without its consent, a guarantor is relieved of its obligation").

Reargument is appropriate as other legal principals are to be considered under the facts as presented in the record. The prior order of summary judgment is cast into doubt by plaintiff's admitted change of mind on the Good Guy Clause. Plaintiff initially denied any knowledge of the Lease Assignment which permitted defendant to recover the premises were Poretzky to surrender possession. Plaintiff firmly denies having any duty to curtail Levinson's guaranty by

reason of the Good Guy Clause. Plaintiff concedes that he prepared the aforesaid document, and was willing to agree. He forwarded his clause to the lawyer representing movant. Defense counsel, seemingly at the closing, made a diminimus change. When it was returned to plaintiff he manifested a change of mind and never signed or returned it. Unbeknownst to defendant.

The mysteries implicated in the underlying transaction have gone to the grave with the untimely demise of Levinson's transaction lawyer. That sad fact notwithstanding the court is persuaded on the basis of the conflicting affidavits and affirmations and incomplete documents and recent production of new documents that the plaintiff's apparently prima facie case has been shown to be patched together with select advantageous document and is not made of whole cloth.

This case depends upon an examination of the law of unsigned instruments. The statute of frauds encompasses, inter alia, those agreements which by their terms are a special promise to answer for the debt of another. G.O.L. § 5-701. 2. Plaintiff established his right to summary judgment for the full amount of a lease by showing that he did not assent in writing to the Good Guy Clause. However, the issue of whether the Good Guy Clause was properly within the Statute of Frauds was not thoroughly addressed by the Court.

Insofar as this is a motion for reargument as well as renewal, the court must examine the legal underpinnings of the prior decision. Beyond dispute, the Guaranty is within the Statute of Frauds as it is a promise to answer for a debt of Sky Opticians, and Scott Poretsky. But the Good Guy Clause, if the argument by plaintiff is to be accepted, is an independent agreement between the Landlord and the Guarantor. Plaintiff separates it from the Guaranty and the other document listed at the outset.

The Good Guy Clause, in fact, is a contract that may be capable of performance within a year and is not otherwise required to be in writing signed by the person against whom enforcement is charged. Stillman v Kalikow, 22 A.D.3d 660, 662 (2d Dept. 2005). The Guaranty, which is essentially not disputed by either party, is for the term of the lease or a sooner default. The default on the lease could have been in the next month...as it almost was.

Also, review discloses that testimony by plaintiff, and testimony by the lawyer representing defendant, one Barry Levine, as well as written communications, may constitute admissions. The Landlord drafted the Good Guy Clause and the only change by defense counsel

was as stated above, diminimus. The question presents, then, is this a counter offer or does the agreement stand as originally proposed. The changes made were of no import to plaintiff. The Good Guy Clause, assuming for purposes of argument, is an agreement as to what happens if Poretzky defaults on the rent and defendant Levinson's guaranty is triggered. It permitted him to recover possession of his former business premises and terminate the lease within a few months. Plaintiff's argument that he did not satisfy other provisions is beside the point. First, it must be established whether the Good Guy Clause was an enforceable separate agreement.

Most telling in analyzing this story of ephemeral documents and reasoned stories without legal support, is the principal of law that when enforcing the terms of a contract, the Court's function is to read the documents as a whole and give effect to the parties' intentions. South Road Associates, LLC v International Business Machines Corp., 4 N.Y.3d 272, 277 (2005). The court is duty bound to adjudicate the rights according to unambiguous provisions and give words and phrases employed their plain meaning. Sanabria v American Home Assurance Co., 68 N.Y.2d 866, 868 (1986).

In this case the agreement of the parties is not clear from their writing, if for no other reason, because there is an inconsistency in the leases. "Faced with ambiguity ... [the Court] turn[s] to extrinsic evidence for guidance as to which interpretation should prevail.." Evans v Famous Music Corp., 1 N.Y.3d 452 (2004). To the view of the Court, if plaintiff expressed an assent to a Good Guy Clause, the changes made by defendant's transaction lawyer are so diminimus, and of no import to plaintiff, that the document as it is written suffices to be the same as the offer by plaintiff. He testified that he accepted the idea and wanted it to be in the terms he used.

Further, and perhaps most important of all, the Guaranty and the Good Guy Clause, together with the lease, are arguably a single transaction. Viewed as a single transaction, even if the Lease was consensually changed, the Good Guy Clause need not be signed by the signor of the lease if it is considered to be a single transaction. Scheck v Francis, 33 A.D.2d 91, 96 (1969) citing to Crabtree v Elizabeth Arden Sales, 305 N.Y. 48; AAA Viza, Inc. v Business Payment System, 38 A.D.3d 802 (2d Dept. 2007). Either the Lease, the Guaranty and the Good Guy Clause are a single transaction which satisfies the Statute of frauds or the Good Guy clause is a

separate contract and is not within the Statute of Frauds. Viewed as a single transaction an assent to the lease by the Landlord is an assent to the guaranties.

Viewed as a whole the documents and their language are conflicting, the arguments by the parties as to material facts is directly controverted, and the new documents presented on this motion require the court to grant renewal and reargument and to vacate the prior order granting summary judgment in favor of plaintiff.

A conference and oral argument on so much of the motion as seeks leave to serve an amended complaint will be held before the undersigned on March 28, 2008, at 9:30 A.M.

Dated: February 6, 2008


J.S.C.

ENTERED

FEB 11 2008

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