SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

110 STEWART AVE. ASSOCIATES LLC,

Plaintiff,

INDEX No. 18325/07

MOTION DATE: Jan. 3, 2008
Motion Sequence # 001

-against-

ZACHARY SLAVIN,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affidavit.... X

This motion, by plaintiff, for an order pursuant to CPLR 3213 granting plaintiff 110 Stewart Avenue LLC summary judgment in lieu of complaint against defendant Zachary Slavin and entering a money judgment against the defendant herein in the principal amount of Eighty-Five Thousand Fifty Five and 09/100 ($85,055.09) Dollars together with interest at 9% per annum from August 1, 2007, costs, disbursements and reasonable attorneys fees, all as set forth in defendant's continuing and unconditional Guaranty dated May 12, 2004, as thereafter amended together with such other, further and different relief as this Court deems just and proper including costs, expenses and attorneys fees, is determined as hereinafter set forth.

110 STEWART AVE. ASSOCIATES, LLC v SLAVIN Index no. 18325/07

FACTS

The plaintiff entered into a Lease agreement with Haven Funding Ltd, and Finest Capital Ltd (herein the "Company") on May 12, 2004 to rent the second floor space located at 110 Stewart Ave., Hicksville N.Y., (herein the "premises") for a period of five years. Defendant is the secretary and shareholder of the Company. Defendant admits back rent is owed to plaintiff through the surrender date of the property, and admits to signing personal guarantees assuring the Company would meet its obligations under the Lease. Multiple guarantees were signed in a series, with the last one extending through till the ending date of the lease, May 30, 2009. The Company surrendered the premises back to the plaintiff on June 4, 2007.

PLAINTIFFS' CONTENTIONS

The plaintiff avers that the defendant made unconditional, absolute, and continuing personal guarantees that the Company would meet its obligations due under the Lease; and that the Company was chronically late with its obligations beginning from the inception of the agreement, causing plaintiff to seek assurances from the defendant in the form of personal guarantees. The plaintiff avers that these guarantees made defendant personally liable for the obligations and allowed action to be taken against the defendant, regardless of the legal posture toward the Company. The plaintiff further avers defendant originally signed the Lease, as a guarantor, and without that guarantee the deal would not have been entered into, and simultaneously signed a further personal guaranty. Plaintiff maintains that these guarantees held that after the expiration of the first year of the Lease, provided the Company was not in default, defendant would only be liable for rents owed until surrender, as opposed to liability for both the rents owed until the end date and the liquidated damages clause, as well as other provisions. Plaintiff further contends, and offers four other personal guarantees signed by the defendant, extending the guaranty through the end of the lease. Notwithstanding, the Company was in default of the Lease within the first year and continuing throughout, and plaintiff asserts that the defendant was liable pursuant to the provision in the Lease, regardless of the guarantees. Plaintiff additionally offers a check written by the defendant where, in a notation, defendant acknowledged his obligations in broad language and indicated the intention to obtain a sub tenant. The plaintiff asserts that this check was returned for insufficient funds; and offers a letter dated December 27, 2005, from the defendant, acknowledging back rent obligations. Plaintiff avers it was unable to re-lease the premises as of the date of this motion therefore defendant is personally liable for back rents in the amount of $85,055.09, plus liquidated damages in the amount of

$61,666.64, and fixed annual rent, under the Lease, in the amount of $94,999.92, thereby totaling $241,721.65 plus reasonable attorneys fees .

DEFENDANT'S CONTENTIONS

The defendant admits he was a tenant of the premises and signed all of the guarantees submitted as proof in the plaintiff's motion, as well as the Lease. Defendant avers that some of the guaranties, however, were signed under economic duress because the plaintiff, after the Lease was in breach, said they would take action to evict. Defendant admits to owing plaintiff rents not paid through the date of surrender, but denies owing any additional amount, averring plaintiff has not met its burden of proving any additional amount is applicable. Defendant further contends that discovery is warranted in order to investigate plaintiffs' efforts to re-let the premises as of the date of the surrender through the date of the motion.

PLAINTIFF'S REPLY

The plaintiff avers that the defendant's duress argument is inapplicable because defendant was warned on several occasions about chronically late payments, and was reminded of its obligations under the Lease. It contends that the defendant signed the guarantees in order to avoid eviction, which was the defendant's option. The plaintiff further maintains it did not have to re-let the premises under the terms of the Lease, but attempted to do so regardless because it was in their best economic interests. The plaintiff offers evidence, in the form of a communication between the plaintiff and a commercial real estate broker dated January 2008, discussing the efforts made in attempting to re-let the premises since June 14, 2007.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate

> the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying these principles to the facts in the case at bar has warranted an intensive examination of the record.

In order to defeat a motion for summary judgment, the opposing party must establish a triable issue of fact by producing evidentiary proof in admissible form, mere conclusions or hope that discovery will reveal something helpful will not suffice. (**Bryan v City of New York**, 206 A.D.2d 448, 2nd Dept., 1994). However, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (**State Bank of Albany v McAuliffe**, 97 A.D.2d 607, 3rd Dept., 1983).

Plaintiff moves for summary judgment under the theory of account stated. "An account stated is an agreement between the parties to an account based on their prior transactions with respect to the correctness...for the balance due...in favor of one party or the other."(**Gould v Burr**, 194 A.D.2d 369, 1st Dept., 1993). Receipt and retention of a party's accounts without objection within a reasonable time, gives rise to an account stated action entitling the movant to summary judgment. (**Rosen Colin Freund Lewis & Cohen v Edelman**, 160 A.D.2d 626, 1st Dept., 1990). Silence is deemed acquiescence, and partial payment is considered acknowledgment of the correctness of the account. (**Chisholm-Ryder Company, Inc. v Sommer & Sommer**, 70 A.D.2d 429, 4th Dept., 1979).

In the case at bar, plaintiff submits the Lease and multiple personal guarantees to the

obligations thereunder signed by the defendant. Further, the defendant admits to being liable throughout and up till the surrender date of June 4, 2007. Under the provisions of the Lease, defendant remained liable for the liquidated damages clause for the duration of the agreement due to the Company's default status during the first year, and for the fixed annual rent provision, as well as stipulated rent payments. Nowhere in the defendant's affidavit does he deny the signing of the Lease on the guarantees. Defendant's continuing and multiple personal guarantees, together with payments made under the Lease for over three years, demonstrates his acquiescence to the terms of the Lease.

Defendant avers a defense of economic duress in his affidavit in opposition to the motion. Economic duress is demonstrated when a party to a contract has threatened the ***breach*** of the contract by withholding performance for a further demand. (**805 Third Ave. Co. v M.W. Realty Assoc.**, 58 N.Y.2d 447, 1983). The defendant avers that plaintiff threatened to take eviction action because of the Company's breach of the agreement unless plaintiff signed personal guarantees. The flaw in the defendant's argument is that the plaintiff did not threaten a ***breach***, only that they would rightfully enforce the provisions of the agreement in the absence of further assurances. The plaintiff had the option at each one of the *five* guarantees to choose not to sign the agreement. Assuming, *arguendo,* that the defendant makes a case for the latter guarantees, this still does not vitiate his personal guarantee that was simultaneous with the inception of the Lease. Clearly the plaintiff at that point could not have threatened eviction whereas the Company had not yet taken occupancy of the premises.

Defendant avers that discovery is warranted on the issue of plaintiffs' efforts in re-letting the premises which would mitigate the fixed annual rent. Plaintiff submits a letter from a commercial real estate broker handling the re-letting discussing efforts made since the month of the surrender, and contends that this effort is not obligatory because the lease doesn't require it to re-let the premises. The language of the Lease is clear and unambiguous and plaintiff has demonstrated that it has expended its best efforts to re-let the premises. The intent of the parties to the Lease is found within the four corners of the Lease and this Court will not alter the meaning and intent of the Lease contradictory to the intent of the parties (see, **International Marine Investors & Management Corp. v Wirth**, 245 AD2d 544, 666 NYS2d 503, 2nd Dept., 1998). Defendant states a conclusion, that plaintiffs' efforts are lacking, and offers no evidence in support of this claim. The defendant has not met his burden to create an issue of fact.

In conclusion, the plaintiff has made out a **prima facie** case for account stated

entitling them to judgment as a matter of law. The defendant has established no triable issue of fact, and has not produced any evidence of the defenses raised. The plaintiff's motion is **granted** in the sum of $241,721.65 plus additional sums that become due and owing through the date of judgment together with interest of 9% per annum plus costs, fees and disbursements.

The issue of reasonable attorneys fees must be determined at a hearing. This matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of attorneys fees to be held on March 18, 2008 at 9:30 a.m.. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated FEB 29 2008

Stephen A Bucaria
J.S.C.

ENTERED
MAR 05 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE