

Worldwide Dreams, LLC v Arrow Woven Label, Inc.
2008 NY Slip Op 30737(U)
March 13, 2008
Supreme Court, New York County
Docket Number: 0115557/2006
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

Index Number : 115557/2006

WORLDWIDE DREAMS

vs

ARROW WOVEN LABEL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

MAR 17 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/13/08

Luy
LOUIS B. YORK
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: IAS PART 2**

-----x

WORLDWIDE DREAMS, LLC,

Plaintiff,

Index No. 115557/2006

-against-

**ARROW WOVEN LABEL, INC. and
ADAPT IDENTIFICATION, LLC,**

Defendants.

-----x

FILED
MAR 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

York, J.S.C.:

This is an action for damages due to the alleged failure of defendants to pay rent due under a written lease and an oral expansion of the lease. Plaintiff and defendant Arrow Woven Label, Inc. ("Arrow") were parties to the agreements in question. Defendant Adapt Identification LLC ("defendant") became the tenant of the premises and paid rent to plaintiff after Arrow left.

Background

During the period in question, plaintiff, as transferee of a lease between landlord the Empire State Building and tenant RGA Accessories, was a tenant in the Empire State Building. Plaintiff leased most of the 21st floor and part of the 20th floor. On March 30, 2001, it subleased an office located in room 2021 of the building to Arrow. The sublease term was May 1, 2001 through August 30, 2011. The rent was \$3,765.42 from the lease's commencement until April 30, 2006, and \$4,088.17 from May 1, 2006 until the expiration of the agreement. The sublease also incorporated most of the provisions of the original lease, including an attorney's fees

provision. The parties also allegedly agreed that Arrow would lease additional space, office 2022A, from plaintiff. The alleged lease term was August 1, 2003 to August 30, 2011. This admittedly was an oral rather than a written agreement.

According to plaintiff, Arrow defaulted on its obligation to pay rent and surrendered possession of the premises. The surrender letter, which Arrow sent along with the keys, is dated August 14, 2006 and also includes a request for the return of its security deposit. Also, the letter is on Arrow's letterhead and states that "Arrow . . . hereby surrenders the above [premises]." Exhibit D (Arrow letter of Aug. 14, 2006).

At some point before Arrow returned the keys, defendant took over possession of the premises and made rental payments directly to plaintiff. Plaintiff does not specify the date this occurred, but indicates that defendant moved in around late 2003 and remained there until the August 14, 2006 surrender of the premises.

Plaintiff also discusses the relationship between Arrow and defendant. At paragraph 9 of its complaint, plaintiff states that "during the term of the subtenancy, [Arrow] merged with or was acquired by [defendant]." Plaintiff claims that defendant, like Arrow, manufactures tags and labels for the garment industry; and that defendant purchased Arrow's inventory, equipment and fixtures. Defendant acknowledges some of this, but asserts that plaintiff exaggerates the scope of the transfer of assets. Plaintiff additionally asserts that defendant took over Arrow's New Jersey offices as well, that it hired 40 former Arrow employees, and that it kept the same phone number. Plaintiff makes additional assertions, which the Court does not find it necessary to detail for the purposes of this motion.

Apparently, at some point in 2003 or 2004, defendant used one of the two offices in question and paid rent directly to plaintiff. There was no lease between plaintiff and defendant,

but plaintiff suggests that none was necessary. Based on defendant's payment and plaintiff's acceptance of the rent, plaintiff states that defendant "attorned to the landlord and tenant relationship." Exhibit G (Complaint, at ¶ 11).

Plaintiff commenced this action against Arrow and defendant through its complaint, which is dated October 16, 2006. Against Arrow, plaintiff seeks recovery of unpaid rent up to the present and continuing until the end of the lease's term or the reletting of the offices, whichever comes first. It appears that plaintiff seeks recovery for both offices. Plaintiff also states that it is entitled to attorney's fees under the lease. Further, it states that Arrow must reimburse it for "expenses incurred in the preparation for and action of re-renting the subject premises." Exhibit G (Complaint, at ¶ 18-19.) Among these expenses are the cost of disposing of Arrow's abandoned furniture, cleaning up the office spaces, and performing construction/renovation work. Based on its claim that defendant attorned to the landlord tenant relationship by paying rent to plaintiff, plaintiff seeks the same damages set forth above against defendant.

Currently, plaintiff moves for summary judgment against both defendants for back rent and for a hearing on the issues of continuing rental obligations and other costs due and on attorney's fees. Plaintiff also seeks dismissal up to the striking of the answer, against both defendants, based on their purported discovery failures. Defendant cross-moves for summary judgment dismissing the claims against it. Arrow does not oppose the motion. For the reasons that follow, the Court grants plaintiff's motion as to Arrow to the extent of directing a hearing on all issues relating to office 2021, denies summary judgment to the extent that it relates to 2022A, denies plaintiff's motion as to defendant, and grants defendant's motion in part, dismissing the complaint except to the extent that the complaint seeks back rent for the three months defendant actually allegedly occupied one or both of the offices in question yet failed to pay rent.

Claims against Arrow

As stated, plaintiff seeks summary judgment against Arrow. Plaintiff has set out a prima facie case as to liability for its claims based on the sublease of office number 2021. Moreover, plaintiff has provided a copy of the sublease for that office. Arrow answered the complaint but has defaulted on this motion. Therefore, it has not successfully countered plaintiff's arguments.

Plaintiff also seeks summary judgment as to its claims against Arrow relating to the second office space, office 2022A. According to the complaint, Arrow took possession of the second office by oral agreement. Plaintiff makes a valid argument that during the time Arrow remained in the unit, it owed plaintiff rent. This is especially true as plaintiff asserts that, initially, Arrow paid plaintiff an agreed-upon rent.

As plaintiff states, there must be a hearing on the issue of attorney's fees and of ongoing damages. There also must be a hearing to substantiate plaintiff's claim that Arrow owes plaintiff \$32,659.81 in past rent. In support of its statement that Arrow owes plaintiff this amount, the latter submits a list of invoices, lists of charges, and other bills. Some of them have inked in notations that are partly self explanatory but often are vague, unreadable, or both. Moreover, among other things, it is not clear whether any parts of these bills have been paid – and, if so, to what extent; why only pages 0575 through 0592 are provided, where these pages come from, and what the preceding and subsequent pages refer to; and what all the figures on the pages mean.¹

Accordingly, the Court grants judgment on liability as to Arrow, and sends the matter to a referee to determine the amount due to plaintiff under the sublease for office 2021 and the amount due in attorney's fees. In considering attorney's fees, the referee shall distinguish *between legal and nonlegal work and keep in mind that the more routine aspects of the legal*

¹ Some of them appear to be printouts from an adding machine, for example, but it is not clear why these particular numbers have been totaled.

work involved can be completed quickly and by a junior attorney. Also, plaintiff does not justify its contention that the sublease entitles it to recover the expenses associated with cleaning and releasing the office space; does not assert that it has removed, disposed of or stored the equipment and office furniture in the photographs, so has not established the right to recover these expenses; and does not show that Arrow caused any problems in the space necessitating repairs or otherwise detail these problems. Therefore, the referee should not consider plaintiff's claims for recovery of these expenses.

With respect to office 2022A, plaintiff is entitled to recover the rent due through August 31, 2006, the end of the month in which Arrow surrendered the keys and possession. Plaintiff acknowledges that there was no written lease for office 2022A, and it has not set forth an adequate legal or factual justification for its claim for continuing rent and/or other damages as to this space. Therefore, at the hearing the referee shall determine the amount due in rent for office 2022A but shall not consider other aspects of the claim as to this unit.

The Court notes that, as summary judgment is granted in large part against Arrow, the Court need not reach the part of plaintiff's motion seeking discovery sanctions against this defendant.

Claims against Defendant

Plaintiff bases its claims against defendant in large part on the theory of attornment. In its opposition to plaintiff's motion and cross motion to dismiss, defendant argues that attornment does not apply in this context.

Defendant is right that the principal of attornment does not apply here. "As a general matter, the tenant who has attorned continues to hold upon the same terms as he [or she] held of his [or her] former landlord." Mercedes v. Menella, 34 A.D.3d 655, 656, 827 N.Y.S.2d 73, 74

(2nd Dept. 2006); see Fourth Federal Sav. Bank v. 32-22 Owners Corp., 236 A.D.2d 300, 302, 653 N.Y.S.2d 588, 589 (1st Dept. 1997). It applies, for example, in a receivership situation, where the tenant is obliged to pay rent to the receiver, and the receiver is held to the same standards of care as the original landlord. It also applies where a successor landlord attempts to enforce its entitlement to rent or a tenant demands of the new landlord compliance with the warranty of habitability. The court does not find, and plaintiff does not point out, any cases which apply the principal of attornment to a successor tenant. Moreover, in the complaint plaintiff's argument that defendant must comply with the terms of the lease is based solely on the argument. Plaintiff does not clearly articulate any other legal bases for liability under the lease, either in its complaint or in these papers.² Therefore, to the extent that plaintiff seeks to hold defendant to the terms of the lease, and oblige it to pay continuing rent, the costs of re-letting, and attorney's fees, this claim must be dismissed.

Plaintiff does not fully articulate its claim as to the three months during which defendant allegedly remained in the office without paying rent. However, it appears from its papers – in particular, the affidavit of plaintiff's chief operating officer, which has evidentiary value – that plaintiff might be claiming that even if defendant is not liable under the lease, a month-to-month tenancy existed as to the space. Under this argument, to which plaintiff alludes in his reply papers, defendant allegedly owes three months rent, for June, July and August 2006. Although the issue is not articulated fully in the complaint, the Court may consider the affidavit in determining whether plaintiff's claim has merit. See Vigna v. Galeano, 18 Misc. 3d 1121A,

² As noted, plaintiff refers to the relationship between Arrow and defendant in the Complaint and its motion papers, and plaintiff asked numerous questions about the issue at defendant's deposition. However, in the Complaint, plaintiff does not rely on this as the basis for any relief. Moreover, plaintiff does not articulate any basis for relief in its motion and supporting papers.

Index No. 12692/2007 (Civ. Ct. N.Y. County Jan. 17, 2008)(avail at 2008 WL 203757, at * 2)(involving motion to dismiss defense). Based on this argument, summary judgment against defendant on this limited issue is premature at this point. The Court also notes that defendant apparently contends it did not occupy the premises from July 2006 to the present. Exhibit N (Response to Plaintiff's Demand for D & I, Response to Request No. 3). It is unclear whether this means that defendant left at the start of July or the end of the month, but at any rate defendant challenges its responsibility for the August and possibly July rents under either theory of liability.

Plaintiff also seeks sanctions, up to and including striking the answer, based on defendant's alleged discovery failures. However, this prong of the motion is defective because the affirmation of good faith does not set forth the good faith efforts with sufficient specificity. Under NYCRR § 202.7,

The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

Thus, plaintiff's reference to "repeated correspondence and requests," Aff. of Good Faith, at ¶ 5, is inadequate. Plaintiff also has not annexed and pointed out copies of the letters which purportedly would support this statement.

In addition, the Court notes that there is no evidence of any bad faith by defendant here. Defendant attended a discovery conference in this matter. Plaintiff refers to defendant's obligation to respond to plaintiff's demand for a bill of particulars and its document demand. However, defendant responded to both demands at issue. Plaintiff simply objects to the nature and detail of the responses. With respect to the bill of particulars, plaintiff objects because the

response was unverified. Although it is true that plaintiff requested a verified response, this is not a problem necessitating the striking of the answer – especially where, as here, plaintiff does not show that it objected to the unverified document or asked for defendant to resubmit it. If plaintiff makes a good faith effort to obtain a verified response, and defendant refuses to comply, plaintiff may move to compel the verified response, this time including an adequate good faith affirmation.

With respect to the document demand, plaintiff relies on the fact that defendant handed over only 13 pages of document to show defendant's allegedly willful failure to comply with discovery. Plaintiff does not challenge any of the particular items produced, specify the purported deficiencies or point to anything to substantiate its conclusory statement that the production is incomplete. Plaintiff cannot argue that defendant's production of 13 pages of documents is per se sanctionable. Again, too, plaintiff has not adequately documented its purported good faith efforts in this area, so there is no basis for evaluating defendant's conduct.

In addition to the above, defendant also appeared for deposition, producing its CEO for the examination. Plaintiff does not detail any additional problems with defendant's compliance. Accordingly, plaintiff's request for sanctions is denied.

Conclusion

For the reasons above, it is

ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability to the extent that it seeks to recover against Arrow, and this matter is referred to a referee to hear and determine damages, including attorney's fees; and it is further

ORDERED that the causes of action as they relate to Arrow are severed and referred to the Referee's Clerk, who is directed upon filing of a copy of this Order to place those matters on

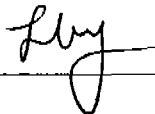
the appropriate referee's calendar to hear and decide the amount due in rent and attorney's fees, in accordance with the guidelines set forth in this order, and to enter a Judgment thereon; and it is further

ORDERED that the prong of the motion seeking summary judgment against defendant Adapt is denied; and it is further

ORDERED that the prong of the motion seeking discovery sanctions is denied as moot as to Arrow and denied on its merits as to defendant Adapt; and it is further

ORDERED that the cross-motion to dismiss the Complaint as to defendant Adapt is granted except as to the first cause of action, to the extent that it seeks unpaid rent for June, July and August 14, 2006, and the second and third causes of action as against defendant Adapt are severed and dismissed.

ENTER:



Louis B. York, J.S.C.

Dated: 3/13/08

LOUIS B. YORK
J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAR 17 2008
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