

Rumpel v Larisa Beyder, Inc.
2008 NY Slip Op 32582(U)
September 24, 2008
Supreme Court, New York County
Docket Number: 0103730/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 103730/2007
RUMPEL, JOHN
vs.
LARISA BEYDER, INC.
SEQUENCE NUMBER : 002
SUMAMRY JUDGMENT

INDEX NO. _____
MOTION DATE 7/31/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-4
5-8
9-10

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 is decided in accordance with the enclosed Memorandum decision and order.

N.B. -- pre-trial conference is scheduled for October 27, 2008 at 2 PM in Part 55.

FILED
SEP 25 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/24/08

JANE S. SOLOMON 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 55

----- X

JOHN RUMPEL, JOYA PATERSON,
and JOSEPH LEUZZI, as Co-Executors
of the Estate of Rita DeLorenzo,

Index No. 103730/07

DECISION and ORDER

Plaintiffs,

- against -

LARISA BEYDER, INC., d/b/a CHIP'S ONE STOP
CLEANER, LARISA BEYDER individually, and
KYUNG WON LEE,

Defendants.

----- X

FILED
SEP 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON, J.:

Defendants Larisa Beyder, Inc. (LBI), d/b/a Chip's One Stop Cleaner, Larisa Beyder, and Kyung Won Lec move, pursuant to CPLR 3212, for summary judgment.

Plaintiffs John Rumpel, Joya Paterson, and Joseph Leuzzi, as co-executors of the Estate (Lorenzo Estate) of Rita DeLorenzo (decedent), cross-move, pursuant to CPLR 3212, for an order (a) granting plaintiffs partial summary judgment and awarding them (i) the payment of rent arrears from January 2004 through July 2004; (ii) the payment of water bills; and (iii) the payment of additional rent representing late fees that began to accrue in June 2001; and (b) severing and setting down for trial the issues of (i) damages to the premises (described below) as a result of the defendants vacating the premises, and (ii) attorney's fees and legal costs as the prevailing party in this action.

The complaint alleges as follows: plaintiffs Rumpel, Paterson, and Leuzzi are the co-executors of the Lorenzo Estate – the owner of the building known as 53 Irving Place, New York, New York. On February 21, 1992, decedent leased (Lease) to defendant Kyung Won Lee

the store premises used as a laundromat in the building (Premises), for a 10-year period, from March 1, 1992 to February 28, 2002. On February 25, 1992, Lee assigned the Lease to LBI, but remained liable under the Lease. On November 10, 1998, decedent and LBI extended the Lease term for a four-year period, ending on February 28, 2006. The first cause of action alleges that LBI and Lee failed to pay rent and additional rent due to plaintiffs in the amount of \$143,350.35.

The second cause of action alleges that LBI was dissolved in 1996, and that Lisa Beyder, the sole stockholder of LBI, operated the laundromat during the term of the Lease. Thus, Beyder is personally liable in the amount of \$143,350.35.

The third cause of action alleges that defendants are liable to pay to plaintiffs all attorney's fees and legal expenses that plaintiffs incurred as a result of defendants' default under the terms of the Lease.

Defendants' Motion

Defendants' motion for summary judgment dismissing the complaint is denied.

The basis for defendants' motion for summary judgment is the claim that LBI does not owe any rent to the plaintiffs. According to defendants, as part of a negotiated settlement of a non-payment proceeding in New York Civil Court (Index No. 04N052708) (Non-Payment Proceeding), initiated by plaintiffs in January 2004, LBI paid all arrears, and vacated the Premises in April 2004 with plaintiffs' consent, and re-let the Premises to "Aspa & Nail, Inc." Defendants argue that the rent that the replacement tenant paid completely negates the rent damages, citing Paragraph 18 of the Lease (tenant to pay as liquidated damages any deficiency between the rent due under the Lease and the rents collected from a subsequent tenant for the balance of the Lease term).

Plaintiffs deny these assertions, and, for their part, defendants do not provide any persuasive support for their assertions of a settlement. The evidence submitted – a letter dated February 10, 2004 from defense counsel to opposing counsel (Exhibit E to Affirmation of Edward Beyder) – is hardly conclusive of any settlement agreement. It is only indicative, at best, of on-going negotiations in that the letter contains an offer of a settlement by defendants, i.e., the vacating of the Premises by April 15, 2004, and the payment of rent through February 15, 2004.

The conclusory assertion by counsel (*see* Affirmation of Joseph Cinquemani, Esq. in Further Support of Defendants’ Motion, ¶ 21) – that all accounts were settled by an “accord and satisfaction” by the payment of \$30,000 – is equally without merit, and without any probative value (*Lewis v Safety Disposal Sys. of Pa.*, 12 AD3d 324 [1st Dept 2004]). Thus, defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material factual issues (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Moreover, Paragraph 18 of the Lease, upon which defendants rely, provides that tenant shall be responsible for, among other things, any deficiency in rent, in the event that the Premises are re-let to another tenant, and defendants have not established that there is no deficiency between the Lease rent and the rent paid by the subsequent tenant.

As for defendant Larisa Beyder, defendants argue that she is an officer of LBI, and, thus, is not personally liable for its obligations. Notwithstanding this circumstance, plaintiffs seek to hold Beyder liable on the ground that, in 1996, LBI was dissolved by proclamation for failure to pay franchise taxes, and defendants have not offered any evidence demonstrating that LBI has been reinstated.

Defendants' reply papers, however, contain evidence from the Secretary of State as to the "Annulment of Dissolution" of LBI, filed July 11, 2008, as well as the Affirmation of counsel for defendants, Joseph Cinquemani, Esq., that LBI has paid all outstanding franchise taxes, and that the temporary dissolution of LBI has been annulled, and LBI has been reinstated into good standing by the New York Secretary of State.

Generally, a company dissolved pursuant to Tax Law § 203-a for failure to pay franchise taxes is restored to the status that it had prior to the dissolution, after payment of required taxes (*see e.g. Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8 [2008]). An officer or principal of the corporation may, nevertheless, be liable for the obligations of that corporation where that individual had knowledge of the dissolution, and, thus, may have fraudulently misrepresented the status of the dissolved entity (*see Lodato v Greyhawk N. Am., LLC*, 39 AD3d 496 [2d Dept 2007]; *see also Flushing Plaza Assoc. # 2 v Albert*, 31 AD3d 494 [2d Dept 2006]).

Thus, the submission in the reply papers of evidence establishing that the dissolution was annulled in 2008 does not dispose of all of the issues pertaining to the cause of action seeking to hold Beyder liable for the rental obligations, if any, of LBI. Although defendants note that plaintiffs do not allege that they engaged in fraud or misrepresentation, the second cause of action does allege that Beyder continued to operate the laundry, and occupy the Premises during the term of the Lease, although LBI was dissolved in 1996, and, as stated above, Beyder purportedly caused LBI, a dissolved entity, to enter into the Lease amendment in 1998. Furthermore, it is only in the reply papers in which defendants assert the reinstatement of LBI. That is more properly done in the moving papers to which the non-movant is then given a chance to respond, which has not been the case here.

Plaintiffs' Cross Motion

In support of their cross motion for summary judgment, plaintiffs allege as follows: in June 2001, defendants began to fall behind in their rent payments for the leased Premises, and, as per the Lease, they were charged late fees totaling \$27,581.48, as of August 2004. Included in the rent arrears are outstanding and due water charges in the amount of \$4,086.71. Additionally, in January 2004 through the time that defendants vacated the Premises, unpaid rent through July 2004 totaled \$47,115.96. Defendants never paid the rent and additional rent that was at issue in the Non-Payment proceeding, and they vacated the Premises in April 2004 (Affidavit of John Rumpel, sworn to on June 19, 2008).

Plaintiffs also allege that, after defendants vacated the Premises, an inspection revealed extensive damage, including fire damage to the ceiling, damaged floor beams, a large amount of debris present, as well as various equipment that was used in defendants' laundry business, causing plaintiffs' financial damages totaling \$47,663.11. Nevertheless, in April 2004, plaintiffs entered into a lease with another tenant, but plaintiffs did not begin to collect rent until after a three-month rent-free period. Plaintiffs are seeking damages for rent arrears, additional rent, money damages caused by defendants' failure to deliver the Premises in the condition required by the Lease, and attorney's fees.

In seeking summary judgment, plaintiffs contend that there are no issues of fact regarding defendants' failure to pay rent arrears from January 2004 through July 2004, and additional rent (i.e., late charges) pursuant to Paragraph 54 of the Lease, outstanding water bills pursuant to Paragraph 28 of the Lease, damages to restore the Premises to a proper condition pursuant to Paragraphs 21 (a) and 44 of the Lease, and attorney's fees and costs in an amount to be

determined.

Plaintiffs' cross motion for summary judgment is denied. As stated above, the summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). Plaintiffs have failed to do so.

There is no dispute that LBI vacated the premises in April 2004. Moreover, Paragraph 18 of the Lease provides that LBI would remain liable for any deficiency resulting from a subsequent lease. Aside from this, there remain several material issues of fact which relate to the issue of liability as well as damages.

In Paragraph 14 of his affidavit, Rumpel states that the rent arrears from January 2004 through July 2004 total \$47,115.96. However, in Paragraph 34 of his affidavit, Rumpel states that the arrears for this period total \$46,854.18. More significantly, Rumpel refers to Exhibit E to his affidavit as support for the assertion of the amount of rent arrears owed. A review of that exhibit, however, fails to identify the amount sought. Thus, although a mere discrepancy in the amount owed does not preclude the granting of summary judgment, plaintiffs are required to clearly explain and document the amount of arrears allegedly due (*see Moskowitz v Jordan*, 27 AD3d 305, 306 [1st Dept], *lv dismissed* 7 NY3d 783 [2006]). Furthermore, it appears that water charges, renovation costs, and other expenses that are not recoverable in this action (*see below*) are intertwined in the account statement with the overdue rent charges and additional rent.

There are also issues pertaining to the subsequent tenancy (identified as "Aspa & Nail, Inc." by defendants and as "Avanti Nail & Skin Care, Inc." [Avanti] by plaintiffs), because the terms of the subsequent lease impact on rent deficiency that may be owed even after LBI vacated

the Premises (*see* Paragraph 18 of the Lease). Plaintiffs refer to a copy of a lease agreement, dated April 2004 between plaintiffs and Avanti, but the motion papers contain only an unsigned (and mostly illegible) copy of a lease that does not even identify the parties thereto (*see* page 1 of the lease). Moreover, plaintiffs specifically refer to Section 5.1 of the lease, but this section is not among the motion papers. Hence, plaintiffs have not provided support for their assertion that Avanti did not begin paying rent until three months after it began its occupancy of the Premises. Furthermore, the unsigned side letter, purportedly from plaintiffs to Avanti, dated May 1, 2004, also attached as an exhibit, is of no probative value as to this issue.

As for the alleged damage to the Premises, this is not part of the complaint, and thus, plaintiffs cannot recover on this unpleaded claim (*Moskowitz v Jordan*, 27 AD3d 305, *supra*). Plaintiffs allege that, after LBI vacated the Premises, an inspection revealed extensive damage, totaling \$47,663.11. However, this inspection occurred in 2004 (*see* contractor's invoice dated April 13, 2004) but the complaint, filed in 2007, fails to make any mention of these damages, and it seeks to recover only rent, additional rent, and attorney's fees. The same is true for the water charges allegedly owed. Also denied is the request for attorney's fees, because the only basis upon which plaintiffs claim entitlement to such an award is that they represent the "prevailing party" (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Accordingly, it is

ORDERED that defendants' motion is denied; and it is further

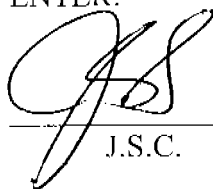
ORDERED that plaintiffs' cross motion is denied, and it is further

ORDERED that counsel appear in Part 55 for a pre-trial conference on October 27, 2008

at 2 PM.

Dated: September 24, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
SEP 25 2008
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