

**IG Second Generation Partners, LP v Broadway
Meat Market, Fruit, Fish, Vegetable Food Warehouse
Ctr., Inc.**

2008 NY Slip Op 32806(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 602428/05

Judge: Shirley Werner Kornreich

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

PRESENT:

PART 54

Index Number : 602428/2005

IG SECOND GENERATION

vs

BROADWAY MEAT MARKET

Sequence Number : 003

DISMISS

INDEX NO. _____

NOTION DATE 6/12/08

NOTION SEQ. NO. _____

NOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Dated: 10/6/08

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 54

-----X
IG SECOND GENERATION PARTNERS, LP

Plaintiff,

-against-

BROADWAY MEAT MARKET, FRUIT, FISH,
VEGETABLE FOOD WAREHOUSE CENTER, INC.
and RAMON AQUINO as GUARANTOR, and
FEDERICO RAFAEL SANTANA d/b/a S.M. OF NY
FOOD CORP. and MI QUISQUEYA RESTAURANT
and PEDRO GARCIA as GUARANTOR,

Defendants.
-----X

KORNREICH, SHIRLEY WERNER, J.:

Index No.: 602428/05

DECISION
and ORDER



This action arises out of a commercial lease entered into between plaintiff IG Second Generation Partners, LP (IG) and defendant Broadway Meat Market, Fruit, Fish, Vegetable Food Warehouse Center, Inc. (Broadway). Broadway and defendant Ramon Aquino now move for summary judgment, pursuant to CPLR § 3212, to dismiss the complaint against them. Plaintiff opposes.¹

I. Background

A. Defendants Proof

On or around May 31, 2001, Broadway executed a 15 year commercial lease with plaintiff's managing agent Bristol Management Co., and agreed to rent the premises located at

¹On November 1, 2007, defendants made the instant motion as both a motion to dismiss and for summary judgment. On January 22, 2008, the court issued an interim order stating that it would be treating the instant motion as a motion for summary judgment and provided the parties with notice and an opportunity to provide further submissions for the record. *Bacchiochchi v. Ranch Parachute Club, Ltd.*, 273 A.D.2d 173, 174 (1st Dept 2000).

3428 Broadway, New York, New York (Premises). The lease was guaranteed by defendant Ramon Aquino. Mr. Aquino avers that he signed the lease on behalf of Broadway as its president. That same day, he also signed a guarantee, which states, *inter alia*:

Notwithstanding the foregoing, this guaranty shall bind the Guarantor only for the performance and observance of the agreements to be performed and observed under the Lease that accrue while Tenant is in possession of the premises. This Guaranty shall not apply to any performance or observance after Tenant surrenders possession of its premises in the condition required by the terms of the Lease.

Defendants Exhibit A.

Regarding assignments, the lease states, *inter alia*:

11. Tenant...expressly covenants that it shall not assign...this agreement...without the prior written consent of Owner in each instance. If this lease be assigned...Owner may, after default by Tenant, collect rent from the assignee...and apply the net amount collected to the rent herein reserved, but no such assignment...shall be deemed a waiver of the covenant, or the acceptance of the assignee...or a release of Tenant from the further performance by Tenant of covenants on the part of the Tenant herein contained.

Defendants Exhibit A.

The lease also contains a provision which states that if any part of the lease conflicts with the rider, the rider shall govern. *Id.* In reference to assignments, the rider states:

#53 Assignment Clause

Notwithstanding anything to the contrary herein contained in any other paragraphs of this Lease, it is distinctly understood and agreed that the within Lease may be assigned and/or the entire premises sublet twice upon written consent of the Landlord, which consent shall not be unreasonably withheld, and only upon fulfilling the following conditions:

- (a) The aforementioned Lease shall be in full force and effect at the same time of such assignment and/or subletting and there shall be no defaults thereunder on the part of the Tenant
- (b) The assignment and/or subletting shall only be for the same purposes permitted by the Lease
- (c) The assignee shall assume in writing all of the terms, covenants and conditions of the Lease

Defendants Exhibit A.

In June of 2002, Broadway assigned the lease to defendant Federico Rafael Santana (Santana Assignment). Defendants Exhibit B. In pertinent part, the Santana Assignment states:

Assignor assigns to the Assignee all of the Assignor's right, title and interest in a) the Lease and b) the security deposit, if any, stated in the Lease.

Assignee agrees to pay the rent promptly and perform all of the terms of the Lease as of the date of this Assignment. Assignee assumes full responsibility for the Lease as if Assignee signed the Lease originally as Tenant.

Id. This assignment was signed by Messrs. Aquino and Santana and was also signed by the landlord under a section which states "Landlord hereby consents to this assignment." *Id.* Mr. Aquino further avers that it was the understanding of all the parties involved that pursuant to the lease and guarantee, he would only be liable so long as Broadway was in possession of the Premises. Mr. Aquino states that following this assignment, Broadway removed itself from the Premises and turned over possession to Mr. Santana. Mr. Aquino avers that right after assigning the lease, Broadway ceased its business operations. On or about September 16, 2002, Broadway filed a corporate certificate of dissolution with the State of New York. Defendants Exhibit G.

On or about June 18, 2003, Mr. Santana assigned the lease to defendant MI Quisqueya Restaurant Inc. (MIQ). On or about November 1, 2003, MIQ defaulted in its rental payments and was subsequently evicted from the Premises on or about November 5, 2004. On or around June 27, 2005, plaintiff commenced this action seeking past due rent and fees from November 1, 2003 through June 1, 2005.

B. Plaintiff's Opposition - Affidavit of Robert Rapuano

In opposition, plaintiff's Vice President Robert Rapuano avers that Mr. Aquino was never released from any of his obligations under the lease and guarantee. Mr. Rapuano does not deny

that Broadway was no longer in possession of the Premises following its assignment to Mr. Santana. However, he states that Broadway did not deliver possession of the premises in compliance with paragraph 21 of the lease, which states, *inter alia*:

Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, broom clean, in good condition, ordinary wear expected, and tenant shall remove all its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease.

Mr. Rapuano states that the Premises was not "broom clean" and "in good condition" when Broadway turned over possession prior to the assignment to Mr. Santana.

II. *Conclusions of Law*

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion.

Zuckerman, supra, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Broadway first argues that it cannot be sued since it dissolved on September 16, 2002, three years prior to commencement of this action. However, a dissolved corporation "may sue or be sued...in its corporate name, and process may be served by or upon it." *Bruce Supply Corp. v. New Wave Mechanical, Inc.*, 4 A.D.3d 444, 445 (2d Dept 2004) quoting BCL 1006(a)(4). It is also well settled that personal jurisdiction over a dissolved corporation can be obtained via service on the Secretary of State. *Bruce Supply*, 4 A.D.3d at 445 citing *Camacho v. New York City Transit Auth.*, 115 A.D.2d 691, 693 (2d Dept 1985). In addition, corporate dissolution "shall not affect any remedy available to or against such corporation...for any right or claim existing or any liability incurred before such dissolution." *Bruce Supply*, 4 A.D.3d at 445 quoting BCL 1006(b). A dissolved corporation retains the inherent power to wind up its affairs including the ability to fulfill or discharge any existing contracts. *Id.* citing BCL 1006(b) & (a).

Here, the genesis of plaintiff's claims arises out of its original commercial lease with Broadway. This lease was executed on or around May 31, 2001, prior to Broadway's dissolution in September 2002. Therefore, Broadway's motion for summary judgment on this ground is denied.

However, "[i]t is well established that a general, unqualified assignment of ones's rights, title and interest in a lease...divests the assignor of all rights...existing thereunder." *Ull v. Lerner*, 308 A.D.2d 396 (1st Dept 2003) quoting *Singer v. Boychuk*, 194 A.D.2d 1049, 1051 (3d Dept

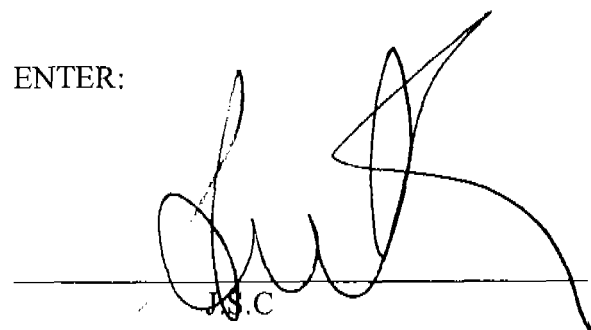
1993). Here, the language in the lease clearly divests Broadway of any further obligations following its assignment to Mr. Santana. There is nothing in either the lease or Santana Assignment maintaining that plaintiff reserved any rights against Broadway. Plaintiff's argument that Broadway did not turnover possession of the Premises broom clean and in good condition conflicts with the rider's assignment clause which states that Broadway may not assign the lease if there are any "defaults thereunder." At best, paragraph 11 of the lease is ambiguous as to whether or not Broadway had any remaining obligations following its assignment to Mr. Santana. As drafter, such ambiguities are to be construed against the plaintiff. *Guardian Life Ins. Co. v. Schaefer*, 70 N.Y.2d 888, 890 (1987) (rule of construction provides that ambiguities in a contract are to be construed against drafter). By agreeing to the Santana Assignment, plaintiff manifested that Broadway was not in default of any conditions contained within the lease. The Santana Assignment unambiguously states that Mr. Santana was assuming full responsibility of all the obligations contained within the lease as if he was the original tenant. Plaintiff signed and clearly consented to this assignment. In addition, all of the actions complained of by the plaintiff were allegedly committed by MIQ, under its assignment from Mr. Santana, well after Broadway assigned away its interest in the lease. *See Shek Assocs. v. Benenson*, 24 A.D.3d 532 (2d Dept 2005) (individual who assigned their rights under lease well before rent arrears accrued had no further obligations under the lease). It thus follows that if Broadway's rights under the lease extinguished when it relinquished possession of the Premises and assigned its interest to Mr. Santana, Mr. Aquino's obligations as guarantor terminated at this time as well. Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendants Broadway Meat Market, Fruit, Fish, Vegetable Food

Warehouse Center, Inc. And Ramon Aquino; and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remained of the action is severed and shall continue.

ENTER:



J.S.C.

Date: October 6, 2008
New York, New York

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OCT 09 2008
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