

Jalor Color Graphics v Marburt Holding Corp.

2008 NY Slip Op 32811(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 103208/08

Judge: Marilyn Shafer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Martyn Shaper
Justice

PART 8

Index Number : 603637/2007

JALOR COLOR GRAPHICS

INDEX NO. _____

vs

MARBURT HOLDING CORP.

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ^{Memorandum of Law} ...	1, 2, 3
Answering Affidavits — Exhibits <u>Memorandum of Law</u>	4
Replying Affidavits _____	5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted in accord with the annexed memorandum,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/4/08

Martyn Shaper
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

JALOR COLOR GRAPHICS F/K/A/ JALOR COLOR
PROCESS, INC.,

INDEX NO. 103208/08

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO.

MARBURT HOLDING CORP.,

Defendant.

The following papers, numbered 1 to 5, were read on this petition under Article 78 of the Civil Practice Law and Rules:

Notice of Motion – Affirmation – Exhibits

Memorandum of Law

Memorandum of Law

Reply Affirmation

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

1,2

3

4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion to dismiss the complaint is granted.

Defendant landlord, Marburt Holding Corp., moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint of plaintiff tenant, Jalor Color Graphics, Inc., seeking an accounting and refund of any overpayments made during the past 8 years.

Background

The parties entered into a lease for commercial space in 1988 pursuant to which Jalor agreed to pay a percentage of any increased operating costs of the building over the base year.

Jalor had the right to inspect Marburt's books and verify the amounts demanded upon timely notice. The record show that Jalor requested review of the books, but it is unclear whether these demands were timely made, pursuant to the lease requirements. The complaint alleges that access to Marburt's books was never granted, although there is a letter agreeing to a review upon the execution of a confidentiality agreement.

The parties entered into two lease amendments, in 2005 and 2006. In each amendment the parties acknowledged Jalor's debt of a sum certain in arrears for operating costs and agreed to a payment schedule. The second amendment, in addition, gave the Marburt the right to evict Jalor without cause on nine months' notice.

It appears that Jalor did not make the agreed payments and Marburt commenced two summary proceedings for *inter alia* the 2006 operating expenses. In May, 2007, Marburt served a notice of eviction as of February, 2008, about 1 1/2 years prior to the end of the lease. In January, 2008, Jalor defaulted in the Civil Court and a judgment has been entered against it for the 2006 operating costs. Two days later, Jalor initiated this action seeking a review of Marburt's books since 2001, which review is to be paid for by Marburt; refund of any overpayments; and the costs of this action, including attorney's fees.

Discussion

The law is clear that on on a CPLR §3211 motion to dismiss, the factual allegations of the complaint are deemed true and the affidavits submitted on the motion are considered only for the limited purpose of determining whether the plaintiff has stated a claim, not whether plaintiff has one (*Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept 1999]). It is well settled that a pleading shall be liberally construed and will not be dismissed for insufficiency merely because it

is inartistically drawn (*Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]). The relevant inquiry is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four corners of the complaint (*Id.*). “Defects shall be ignored if a substantial right of a party is not prejudiced” (*Id.* at 65). Even under this most liberal test, the complaint herein cannot stand.

The plaintiff has failed to demonstrate that it is entitled to the accounting it seeks or that it was ever denied access to Marburt’s books. Moreover, the sums owed for operating costs from 2001 to 2006 have been the subject of two duly entered agreements and one duly entered judgment.

Jalor argues that it entered into the agreements as a result of economic duress. Its allegations do not support such a claim. A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will. (*Stewart M Muller Constr Co v New York Tel Co*, 40 NY2d 955 [1976]) The threatened exercise of a legal right cannot constitute duress. (*Third Avenue LLC v ORIX Capital Markets, LLC*, 26 AD3d 216 [1st Dept 2006]) Marburt was entitled, under the lease, to assess a percentage of its operating costs. Jalor’s only complaint was that it could not afford to pay monies it legitimately owed.

Finally, Jalor’s claims and/or defenses can be fully litigated in Civil Court.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that the complaint is dismissed.

This reflects the decision and order of the court.

Dated:

10/6/08

MAKIN SHAFER
J.S.C. S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK