

**Citicorp Vendor Fin., Inc. v University Heart Scan,
L.L.C.**

2008 NY Slip Op 33604(U)

June 17, 2008

Supreme Court, New York County

Docket Number: 119477/03

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED

PART 60

Justice

CITICORP VENDOR FINANCE, INC. f/k/a
COPELCO CAPITAL INC.,

INDEX NO. 119477/2003

MOTION DATE 3-11-04

Plaintiff,

vs.

MOTION SEQ. NO. 1

UNIVERSITY HEART SCAN, L.L.C. and
ALLAN E. RUBENSTEIN, M.D.,

MOTION CAL. NO. 11

Defendants.

The following papers, numbered 1 to _____ were read on this 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
JUN 22 2004
CLERK OF SUPREME COURT
NEW YORK

BERNARD J. FRIED
J.S.C.

Dated: 6/17/04

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 PARI' 60

..... X
CITICORP VENDOR FINANCE, INC. f/k/a
COPELCO CAPITAL INC.,

Plaintiff,

DRAFT

Index No.: 119477/03
DECISION/ORDER

-against-

UNIVERSITY HEART SCAN, L.L.C. and
ALLAN E. RUBENSTEIN, M.D.,

Defendants.

..... X
FRIED, J.:

In this commercial contract action, plaintiff moves, pursuant to CPLR 3212, for summary judgment on the complaint as against the second co-defendant,' and to dismiss that co-defendant's affirmative defenses (motion sequence number 001). For the following reasons, plaintiff's motion is granted.

On January 4, 2000, co-defendant University Heart Scan, L.L.C. (University) executed a master equipment lease (the Lease) with plaintiff's predecessor, Copelco Capital Inc. (Copelco).² See Notice of Motion, Lasseter Affidavit, ¶ 5. As an inducement to enter into the Lease, co-defendant Allan E. Rubenstein, M.D. (Rubenstein)³ had given Copelco a personal guaranty on

¹ University has never appeared in this action, and is currently in default. Plaintiff states that it intends to apply for a default judgment against University in the near future.

² On October 18, 2000, Copelco amended its certificate of incorporation to change its name to "Citicorp Vendor Finance, Inc." See S. Goldberg Reply Affirmation, Exhibit C.

³ Before this action was commenced, Rubenstein was a principal in the management company which controlled University's operations. See Rubenstein Affidavit in opposition, ¶ 4.

week earlier, on December 30, 1999 (the Guaranty). Id., ¶¶ 3-4. The Guaranty imposed a maximum obligation on Rubenstein of \$100,000.00 toward University's indebtedness. Id.; Rubenstein Affidavit in Opposition, ¶ 2. The other portions of the Guaranty which are relevant to this motion provide that:

10. * * * This instrument shall for all purposes be governed by and interpreted in accordance with the laws of the State of New Jersey. ...
11. This Guaranty shall inure to Copelco's benefit or to the benefit of Copelco's successors and assigns and shall be binding on [Rubenstein] and [his] heirs, administrators, executors, successors and assigns. ...
12. This Guaranty shall be released provided each of the following conditions are met:
 - (I) No event of default having occurred under the terms of the Lease;
 - (ii) [Rubenstein] provides evidence in form and substance satisfactory to Copelco of \$100,000.00 invested by [Rubenstein] in [University]; or
 - (iii) [University] achieves a 1.5x cash flow coverage ratio in excess of Copelco's debt service obligation for the then immediately preceding *[sic]* twenty-four (24) months of the Lease term.

See Notice of Motion, Exhibit C.

At some point in 2001, University evidently breached its obligations under the Lease by failing to remit monthly equipment rental fees. Plaintiff Citicorp Vendor Finance, Inc. (Citicorp) alleges that University's first default occurred on March 21, 2001. See Notice of Motion, Lasseter Affidavit, ¶ 7. Counsel for Rubenstein contends that University's first default did not occur until July of 2001. See D. Goldberg Affirmation in Opposition, ¶ 6.

As a result of this default, Citicorp commenced this action in November of 2003 to recover for University's alleged breach of the Lease, and for Rubenstein's alleged breach of the Guaranty. See Notice of Motion, Exhibit A. In January of 2004, Rubenstein served an answer

which included three affirmative defenses⁴ and two cross claims. Id., Exhibit B. Citicorp now moves for summary judgment on its cause of action against Rubenstein,⁵ and to dismiiss Rubenstein's affirmative defenses.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Wincgrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Trans. Auth., 304 AD2d 340 (1st Dept 2003). The court's function, on a motion for summary judgment, is one of issue identification, not issue determination. See e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957); Grullon v City of New York, 297 AD2d 261 (1st Dept 2002). This motion requires the court to determine, pursuant to New Jersey law, whether Citicorp has adequately proven its claim that Rubenstein breached the Guaranty.

Causes of action for breach of contract have the same elements in both New Jersey and New York - i.e., a valid and binding contract, performance by the complaining party, non-performance or defective performance by the defendant, and damages arising from defendant's

⁴ These include: 1) that Citicorp lacks standing; 2) that the terms of the Guaranty show provide that Rubenstein was released from his obligations; and 3) that Citicorp has failed to mitigate its damages. See Notice of Motion, Exhibit B.

⁵ **As** previously mentioned, University has not appeared in this action and is currently in default. The instant motion is not directed at University, however, and only requests relief as against Rubenstein.

breach. See e.g. Bell Atlantic Yellow Pages Co. v Padded Wagon, Inc., 292 AD2d 317 (1st Dept 2002); Coyle v Englander's, 199 NJ Super 212,222 (NJ Super AD 1985). Plaintiff contends both that the terms of the Guaranty are unambiguous, and that there are no triable issues as to Rubenstein's breach. See Memorandum of Law in Support of Motion, at 1-2 (pages not numbered). In support, plaintiff has presented a copy of the Guaranty, and the affidavit of Citicorp vice president Victoria Lasseter, who recites that Citicorp performed its obligations under the Lease with University, that University defaulted on its rental obligations, and that Rubenstein failed to remit payment of the \$100,000.00 after due demand was made. See Notice of Motion, Lasseter Affidavit, ¶¶ 4-8; Exhibit C. This evidence, standing alone, is sufficient to prove a breach of contract claim under New Jersey law. Accordingly, it is incumbent upon the defendant to present evidence of the existence of a triable issue of fact which would preclude granting the plaintiff summary judgment at this juncture. Here, Rubenstein's arguments in opposition mirror his three affirmative defenses.

Rubenstein's first affirmative defense is that Citicorp lacks standing because there is no evidence of its relationship to Copelco. See Notice of Motion, Exhibit B; D. Goldberg Affirmation in Opposition, ¶ 12. However, this argument is conclusively disproven by the amendment to Copelco's certificate of incorporation which Citicorp submitted with its reply papers. See S. Goldberg Reply Affirmation, Exhibit C. Accordingly, Rubenstein's standing argument is insufficient to defeat Citicorp's application for summary judgment, and the affirmative defense premised upon this theory should be dismissed.

Rubenstein's second affirmative defense concerns the release provision set forth in paragraph 12 of the Guaranty. See Notice of Motion, Exhibit B. As previously mentioned, that

paragraph provides that:

This Guaranty shall be released provided each of the following conditions are met:

- (i) No event of default having occurred under the terms of the Lease;
- (ii) [Rubenstein] provides evidence in form and substance satisfactory to Copelco of \$100,000.00 invested by [Rubenstein] in [University]; or
- (iii) [University] achieves a 1.5x cash flow coverage ratio in excess of Copelco's debt service obligation for the then immediately preceding [sic] twenty-four (24) months of the Lease term [emphasis added].

See Notice of Motion, Exhibit C. In his opposition papers, Rubenstein raises two arguments in connection with this contractual provision.

Rubenstein first contends that paragraph 12 is ambiguous and, therefore, an improper basis upon which to grant summary judgment. He states that “[t]he ... Guaranty makes clear that, so long as [University] achieved the requisite cash flow, ... Rubenstein would be released from his obligations ...”; and that “[t]here is no requirement that [University] not be in default at the time.” See Goldberg Affirmation in Opposition, ¶ 8. He then argues that “to the extent that ... Citicorp claims that ... Rubenstein was not to be released ... if, notwithstanding [University]’s achievement of the requisite cash flow, it was nevertheless in default - the terms of the release ... are ambiguous.” Id., ¶ 9. I disagree, because this asserted “ambiguity” derives from an improperly disjunctive reading of the contractual language.

New Jersey law requires that a “document must be read as a whole, in ‘accord with justice and common sense’ [citation omitted];” and that “[i]t should not be interpreted to render one of its terms meaningless.” Cumberland County Improvement Authority v GSP Recycling Co., Inc., 358 NJ Super 484,497 (NJ Super AD 2003). Further, the New Jersey Supreme Court has stated that “[w]here a contract is ambiguous, courts will consider the parties’ practical

construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation; where the terms of a contract are clear, however, the court must enforce it as written [emphasis added]." County of Morris v Fauver, 153 NJ 80, 103 (1998).⁶ Here, paragraph 12 of the Guaranty states that "each" of a list of three conditions prerequisite to Rubenstein's release must be met, and then lists those conditions as (i), (ii) "or" (iii) [emphasis added]. Bearing in mind New Jersey's policy against interpreting contracts so as to render them meaningless, it is, thus, clear that paragraph 12 of the Guaranty must be read as meaning that two possible combinations of two conditions, (i) and (ii) or (i) and (iii), would release Rubenstein from his obligations. There is no written requirement that all three conditions be met; only that each component of a two-part combination be present. Rubenstein is, therefore, clearly mistaken in his contentions that "[t]here is no requirement that [University] not be in default," and that such default could not nullify the release "notwithstanding [University]'s achievement of the requisite cash flow." Accordingly, I reject the contractual ambiguity argument.

Rubenstein's next argument is that paragraph 12 of the Guaranty is enforceable, that he has met all of its criteria, and that he is entitled to be released from his obligations on behalf of University. He first claims that: 1) University did not default on its obligations under the Lease until July of 2001; and 2) he had purchased \$176,000.00 worth of University's stock by the end

⁶ New York follows the same rule. See e.g. Maysek & Moran, Inc. v S.G. Warburg & Co., Inc., 284 AD2d 203, 204 (1st Dept 2001) ("[O]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself [internal citation omitted]").

of June 2001. See Rubenstein Affidavit in Opposition, ¶ 2. Rubenstein concludes that, by operation of subparagraphs 12 (I) and (ii) of the Guaranty, “upon contributing \$100,000.00” he was “automatically released from any obligations under the ... Guaranty.” Id. This argument is not supported by the facts.

Rubenstein presents no evidence in support of his allegation that University did not default until July of 2001. Instead, his counsel states only that Citicorp has failed to respond to discovery demands for its records of University’s rent payment history. See D. Goldberg Affirmation in Opposition, ¶ 7. The Court of Appeals has recently reiterated that “‘averments merely stating conclusions, of fact or of law, are insufficient’ to ‘defeat summary judgment’ [citations omitted].” Banco Popular North America v Victory Tax Management, Inc., 1 NY3d 381, 383 (2004). In any event, Citicorp denies Rubenstein’s allegation, and has submitted copies of records which show that University paid no rent during the months of December of 2000 through March of 2001. See S. Goldberg Reply Affirmation, ¶ 14; Exhibit B. It is, thus, clear that Rubenstein has failed to meet his burden of proof. See e.g. Zuckerman v City of New York, 49 NY2d 557 supra.

Even if there were an issue of fact as to the date of University’s default, however, Rubenstein’s argument would still fail. Subparagraph 12 (ii) of the Guaranty required Rubenstein to “provide[] evidence in form and substance satisfactory to Copelco of \$100,000.00 invested by [Rubenstein] in [University] [emphasis added].” Although Rubenstein has presented copies of bank records⁷ which show that he purchased some \$176,000.00 worth of University’s stock by the end of June 2001, he has presented no evidence that he ever notified Citicorp of these stock

⁷ See Rubenstein Affidavit in Opposition, Exhibit 1.

purchases.⁸ As previously mentioned, New Jersey law requires that “where the terms of a contract are clear ..., the court must enforce it as written.” County of Morris v Fauver, 153 NJ at 103. Rubenstein’s contention, that “upon contributing \$1 00,000.00” he was “automatically released from any obligations under the ... Guaranty,” is, therefore, plainly incorrect because it ignores Rubenstein’s obligation to provide notice. **As** a result of this failure to document such notice, Rubenstein has again failed to meet his burden of producing “evidentiary proof, in admissible form,” that he discharged his own obligations under subparagraph 12 (ii) of the Guaranty. See Zuckerman v City of New York, 49 NY2d at 563. Accordingly, I find that Rubenstein’s argument is insufficient to defeat plaintiffs application for summary judgment.

Rubenstein’s fourth argument is directed at subparagraph 12 (iii) of the Guaranty, which provides for his release in the event that “[University] achieves a 1.5x cash flow coverage ratio in excess of Copelco’s debt service obligation for the then immediately proceeding [sic] twenty-four (24) months of the Lease term.” **&** Notice of Motion, Exhibit C. Rubenstein specifically contends that “University achieved the requisite cash flow to release me from my obligations under the ... Guaranty,” and that “there was no requirement that [University] not be in default at the time.” See Rubenstein Affidavit in Opposition, ¶ 3. I also find that this argument is not supported by the facts.

As stated earlier, paragraph 12 of the Guaranty authorizes Rubenstein’s release only upon the happening of one of two combinations of prerequisite events, which are enumerated in that paragraph as (i) and (ii) or (i) and (iii). Because (i) refers to the non-occurrence of a default by

⁸ Citicorp’s vice president, Victoria Lasseter, avers that Rubenstein never provided Citicorp with a notice of termination, as required by paragraph 8 of the Guaranty, either. See Lasseter Reply Affidavit, ¶ 9.

University, Rubenstein is, therefore, incorrect that “there was no requirement that [University] not be in default.” In any event, as previously discussed, I find that Rubenstein has failed to present any persuasive evidence of his claim that University defaulted in July of 2001.

Even if there were an issue of fact as to the date of University’s default, however, Rubenstein’s argument would still fail because the Lease had not been in effect for **24** months prior to any alleged default.⁹ As stated, New Jersey law requires that an unambiguous contract must be enforced as written. See County of Morris v Fauver, 153 NJ at 103. The written terms of the instant Guaranty state that the cash flow ratio calculation, upon which Rubenstein could request release, must be made **24** months after the inception of the Lease. Because the requisite time had not expired, I find that Rubenstein may not base a request for relief upon subparagraph 12 (iii). I also note that, in any event, Rubenstein’s opposition papers are devoid of any evidence of University’s cash flow ratio.” Thus, I find that Rubenstein’s argument cannot defeat plaintiff’s application for summary judgment. In light of the foregoing, Rubenstein’s second affirmative defense, which alleges that he satisfied the terms of the Guaranty, should be dismissed.

Rubenstein’s third affirmative defense is that Citicorp failed to mitigate its damages. See Notice of Motion, Exhibit B. Citicorp correctly points out that paragraph 1 of the Guaranty does not require it to mitigate damages, but, rather, states that Rubenstein’s obligations are unconditional. See Memorandum of Law in Support of Motion, at 4-5 (pages not numbered);

⁹ The Lease term commenced in January 2000, and 24 months would have expired in December of 2002. This date is later than the default dates alleged by both parties.

¹⁰ Rubenstein’s attorney again claims that Citicorp has not responded to discovery demands for this material. See D. Goldberg Affirmation in Opposition, ¶ 11.

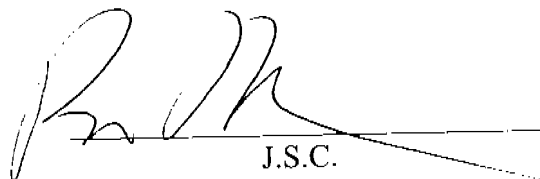
Notice of Motion, Exhibit C. Although, neither Rubenstein nor his counsel addresses this issue in their opposition papers, New Jersey law evidently does permit the application of the doctrine of mitigation of damages in the context of commercial contract actions. (See e.g. N.J. Industrial Properties, Inc. v Y.C. & V.L., Inc., 100NJ 432,461 (1985), where the New Jersey Supreme Court has observed that “[s]ince the purpose of the rule is to put the injured party in as good a position as he would have enjoyed but for the breach, it is generally accepted that damages are not recoverable for avoidable consequences.”) However, since Citicorp’s purpose in obtaining the Guaranty was to protect itself against the possibility of a default by University, requiring Citibank to obtain a guaranty for Rubenstein’s Guaranty would stretch, absurdly, the mitigation of damages rule. For this reason, Rubenstein’s third affirmative defense should also be dismissed.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Citicorp Vendor Finance, Inc. f/k/a Copelco Capital Inc. for summary judgment, pursuant to CPLR 3212, is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Citicorp Vendor Finance, Inc. and against defendant Allan E. Rubenstein, M.D. in the amount of \$100,000.00, together with interest as prayed for allowable by law, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the affirmative defenses of defendant Allan E. Rubenstein, M.D. are dismissed.

Dated: 6/17/04


J.S.C.