

**Financial Pac. Leasing, LLC v Funding
Assoc., Inc.**

2009 NY Slip Op 30747(U)

March 27, 2009

Supreme Court, Nassau County

Docket Number: 19259-05

Judge: Antonio I. Brandveen

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.

S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

FINANCIAL PACIFIC LEASING, LLC,
Plaintiff,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 19259/05

- against -

Motion Sequence No. 005, 006

FUNDING ASSOCIATES, INC., JOHN LUPO and
SANDY LUPO, Individually,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	_____
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	<u>3</u>
Defendant's / Respondent's	_____

The plaintiff moves for summary judgment against the defendant Sandy Lupo, individually, and dismissing this defendant's answer dated June 5, 2008, on the ground there are no triable issues of fact. Lupo opposes this motion, and cross moves for an award pursuant to CPLR 8303-a and 22 NYCRR § 130-1 [c] granting costs and sanctions. The plaintiff opposes this cross motion. The underlying action is predicated upon an alleged breach of a lease agreement dated December 19, 2003, between the plaintiff and another corporation. The action alleges the defendants John Lupo and Sandy Lupo, executed personal guarantees in favor of the plaintiff for all payments due to the plaintiff under that lease agreement. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to these motions.

Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D.2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; *see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

A contract should be read as a whole to determine its purpose and intent (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). “[I]n searching for the probable intent of the parties, lest form swallow substance, our goal

must be to accord the words of the contract their ‘fair and reasonable meaning’” (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982], quoting *Heller v Pope*, 250 NY 132, 135 [1928]).
Cave v. Kollar, 2 A.D.3d 386, 387, 767 N.Y.S.2d 856 (2nd Dept., 2003).

The exception occurs, as a matter of law, when the nature or contents of a lease agreement are intentionally misrepresented to a person, such as the defendant here, and the defendant signs relying on that misrepresentation, and under mistake as to the document’s true nature or contents.

CPLR 4536 provides: “Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted.” “Once a court determines the genuineness of a handwriting specimen, an expert or a jury may compare a disputed writing to the known specimen, even in the absence of an expert opinion (*see, People v. Molineux*, 168 N.Y. 264, 330, 61 N.E. 286; *People v. Hunter*, 34 N.Y.2d 432, 435-436, 358 N.Y.S.2d 360, 315 N.E.2d 436)” (*People v. Fields*, 287 A.D.2d 577, 578, 731 N.Y.S.2d 492 [2nd Dept., 2001]).

Moreover, “a party will not be excused from his failure to read and understand the contents of a release. A party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms.” (*Shklovskiy v. Khan*, 273 A.D.2d 371, 372, 709 N.Y.S.2d 208 [2nd Dept., 2000]). The plaintiff has provided evidence the defendants John Lupo, as president of the defendant corporation and Sandy Lupo, as secretary of the defendant corporation executed, in writing personal guarantees in favor of the plaintiff for all payments due to the plaintiff under the subject lease agreement. The plaintiff has presented evidence showing payment has not been made as agreed. The plaintiff establishes its *prima*

facie entitlement to judgment as a matter of law by presenting such evidence (*North Fork Bank v. ABC Merchant Services, Inc.*, 49 A.D.3d 701, 853 N.Y.S.2d 633 [2nd Dept., 2008]).

In opposition, the defendant Sandy Lupo raises a triable issue of fact. The commentary states:

When proof of handwriting is made on the basis of comparison, CPLR 4536 requires that the genuineness of the specimen first be established to the court's satisfaction. The authenticity of the specimen, therefore, is not a question that should be submitted to the jury. The jury's task should be simply to decide the authenticity of the disputed document on the basis of comparison between it and the specimen whose genuineness has already been determined by the court Alexander, Practice Commentaries, McKinney's CPLR Rule 4536, Book 7B

The defendant submits an affidavit dated December 23, 2008, together with an affirmation dated December 23, 2008, by defense counsel, which deny the allegations of the plaintiff, and claims the signature on the guarantee is a forgery. The defendant stated, in an affidavit dated May 8, 2006, "I never signed as a personal guarantee for an [sic] such lease." Yet, the defendant stated, in the verified answer dated June 5, 2006, "the alleged contract was fraudently [sic] executed as myself & John Lupo were told to sign in blank forms." The defendant stated, in an affidavit dated August 15, 2008, "the alleged Guarantee, proffered as proof by Plaintiff, was never executed by me and the signature it bears is a forgery." These sworn statements by the defendant are the defendant's signature.

In support of their motion, the plaintiffs demonstrated a *prima facie* entitlement to judgment as a matter of law by proffering sworn, express denials that the signatures on the withdrawal slip and bank check were genuine, and sworn, express denials that they either closed or received the moneys in the subject account. However, in opposition and in support of its cross motion, the defendant raised a triable issue of fact as to whether the signatures were genuine (see CPLR 4536; *People v. Fields*, 287 A.D.2d 577, 731 N.Y.S.2d 492; *Seoulbank, N.Y. Agency v. D & J Export & Import Corp.*, 270 A.D.2d

193, 707 N.Y.S.2d 12; *Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224). Thus, neither party was entitled to summary judgment on the issue of the genuineness of the disputed signatures and underlying transaction.

James v. Albank, 307 A.D.2d 1024, 1025, 763 N.Y.S.2d 838 [2nd Dept., 2003]).

“The parties’ conflicting affidavits presented credibility issues which should not be resolved on a motion for summary judgment (*see, Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 313 N.E.2d 776; *Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224).” (*Heller v. Hicks Nurseries, Inc.*, 198 A.D.2d 330, 331, 605 N.Y.S.2d 888 [2nd Dept., 1993]). “The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept.1992); *Barr v. County of Albany*, 50 NY2d 247,254 (1980); *James v. Albank*, 307 A.D.2d 1024, 763 N.Y.S.2d 838 (2d Dept.2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993)” (*Sarro v. Nassau*, 2008 WL 2724624), 2008 N.Y. Slip Op. 31900 [Sup Ct, Nassau Co, 2008]). Thus, the Court finds here there is an issue of fact which needs resolution by the trier of fact.

The defense contends the plaintiff cannot demonstrate any good faith argument for bringing this motion when the pleadings and motions submitted from the inception of the litigation until the current time show this motion lacks any reasonable basis. The defense claims, as a result of this frivolous motion practice, the defendant incurred expenses.

22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in

the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

22 NYCRR § 130-1.1 (c) provides:

For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

CPLR 8303-a (a) provides

If in an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime, and such action or claim is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.

CPLR 3401 provides:

The chief administrator of the courts shall adopt rules regulating the hearing of causes, which may include the filing of notes of issue, the preparation and publication of calendars and the calendar practice for the courts of the unified court system. Insofar as practicable, such rules within the city of New York

shall be uniform.

Uniform Rules of Court § 202.121 (a) provides:

No action or special proceeding shall be deemed ready for trial or inquest unless there is first filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice, in the form prescribed by this section. Filing of a note of issue and certificate of readiness is not required for an application for court approval of the settlement of the claim of an infant, incompetent or conservatee. The note of issue shall include the county clerk's index number, the name of the judge to whom the action is assigned, the name, office address and telephone number of each attorney who has appeared, the name, address and telephone number of any party who has appeared pro se, and the name of any insurance carrier acting on behalf of any party. Within ten days after service, the original note of issue, and the certificate of readiness where required, with proof of service where service is required, shall be filed in duplicate with the county clerk together with payment of the calendar fee prescribed by CPLR 8020 or a copy of an order permitting the party filing the note of issue to proceed as a poor person, and a duplicate original with proof of service shall be filed with the clerk of the trial court. The county clerk shall forward one of the duplicate originals of the note of issue to the clerk of the trial court stamped "Fee Paid" or "Poor Person Order."

The Court finds the plaintiff has not met the burden with respect to the plaintiff's request. This court considered the circumstances under which the plaintiff and the plaintiff attorney's conduct took place, including the time available for investigating the legal or factual basis of the conduct; and whether or not the plaintiff or the plaintiff attorney's conduct continued when the plaintiff or the plaintiff attorney's purported lack of legal or factual basis was apparent, should have been allegedly have been apparent to the plaintiff or the plaintiff's attorney, or was allegedly brought to the attention of the plaintiff's counsel or the plaintiff. The Court finds the defendant has not met her burden with respect to frivolous conduct as defined in the statutes (*see* 22 NYCRR § 130-1.1 [c]; CPLR 8303-a [a]).

Accordingly, the motion and cross motion are denied.

So ordered.

Dated: **March 27, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
MAR 31 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE