

Three S's & an R LLC v Goda Rest. Corp.
2009 NY Slip Op 31457(U)
June 23, 2009
Supreme Court, New York County
Docket Number: 112321/08
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 112321/2008
THREE S'S AND AN R, LLC
VS.
GODA RESTAURANT CORP.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

is denied

per attached

FILED
JUL 06 2009
COUNTY CLERKS OFFICE
NEW YORK

Dated: 6/23/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

EMILY JANE GOODMAN

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 PART 17

-----X
THREE S'S AND AN R, LLC AND MORTON RUDERMAN,
Plaintiffs,

-against-

GODA RESTAURANT CORP d/b/a PIZZA HUT,
STATEWIDE MANAGEMENT AT FORDHAM ROAD,
INC., GODA ABDELMENAN AND SAJID SOHHAIL,
Defendants.

Index No.
112321/08

FILED

X JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
GOODMAN, EMILY J.S.C.:

This matter arises in connection with a series of leasing transactions of the ground floor, first floor, and mezzanine of 110-112 East Fordham Road, Bronx, New York (the Premises). As of May 1, 1999, plaintiff Three S's and an R (SSSR) leased the Premises (the Main Lease) from non-party Sidley Holding Corporation (Sidley). Concurrent with the Main Lease, plaintiff Morton Ruderman executed a guaranty, pursuant to which, and subject to its express terms and conditions, Ruderman guaranteed to Sidley the full and prompt performance by SSSR of SSSR's obligations under the Lease (Ruderman Guaranty).

On that same date, SSSR also entered into an agreement with defendant Statewide Management at Fordham Road (Statewide), under which SSSR subleased to Statewide portions of the first floor, ground floor and storage space of the Premises for a term beginning on September 1999 and ending on August 9, 2008 (the Statewide Sublease). The Statewide Sublease was guaranteed by Sajid Sohail. It also disallowed the assignment or sublease of the Premises without the consent of Sidley, and the term "assignment" was defined to include the transfer of more than fifty percent (50%) of the ownership interests in Statewide. The remainder of the Premises was apparently subleased to non-party Laughing Party Co. LLC. Sidley

consented, as required in the Main Lease, to both subleases in writing, also on that same date.

As of December 31, 2001, SSSR executed a sublease with defendant Goda Restaurant Corp d/b/a Pizza Hut Goda (Goda) for the portion of the Premises originally leased to Statewide (the Goda Sublease). The Goda Sublease was executed in conjunction with a personal guaranty from defendant Goda Abdelmenan (the Goda Guaranty).

Notwithstanding the allegations of the complaint that “the term of the Goda Sublease began on the date on which Goda obtained possession of the Premises and ended on August 9, 2008,” the Goda Sublease, which contains a merger clause (*see* ¶ 25) specifically provides, in paragraph 15, that “this Sublease is subject to and conditioned upon [SSSR] obtaining the written consent ... of [Sidley, and i]t is expressly understood and agreed that notwithstanding anything to the contrary contained herein, the Term [of the Sublease] shall not commence, nor shall Subtenant take possession of the Subleased Premises or any part thereof, until the consent has been obtained.” The Goda Guaranty, according to its own terms, was offered “for value received, in connection for, and as an inducement to [SSSR] entering into [the Goda Sublease].”

By letter dated January 25, 2002, SSSR was apparently advised that Goda purchased all of the stock of Statewide. By March 7, 2002, SSSR had failed to obtain the written consent of Sidley to the Goda Sublease, as described in paragraph 15 of that document, apparently because Goda’s financials were inadequate. On that date, acknowledging that the consent had not been obtained, and that Goda had been unable to offer satisfactory financial documentation to Sidley, counsel for SSSR advised Goda that “our client has elected to withdraw its request for consent from Sidley and pursue other opportunities with respect to the Premises. *The [Goda] Sublease, insofar as a condition precedent to its validity, i.e. Sidley’s consent, never took place, is a legal*

nullity, and any offer of our client to enter into a sublease with you client is hereby withdrawn.”

See Reply Affirmation, 7 March 2002 Letter of Robert T. Holland (emphasis added).

That letter goes on to inform Goda, that its current occupancy of the Premises, which was accomplished via purchase of all of the stock of Statewide, “constitutes a violation not only of the [Statewide Sublease], but also may constitute a violation of the [Main Lease]. ... We reserve the right to declare your client and Statewide in default of Statewide’s sublease by virtue of the referenced sale of the corporate stock to your client”

Apparently, in response to this letter, Goda reconveyed fifty-one percent (51%) of the stock of Statewide, with an irrevocable right to repurchase that stock in the future, but remained in occupancy of the Premises, with the alleged knowledge of Sidley.

According to the complaint and documentation, it appears that Statewide continued to occupy the Premises until approximately June 2007, and continued to perform Statewide’s obligations under the Statewide lease, with rent being paid to SSSR on Statewide’s checks, signed by Goda Abdelmenan. In November 2007, rent payments stopped.

On or about 12 February 2008, Sidley commenced a commercial holdover proceeding in the Civil Court of the State of New York, County of Bronx, Non-Housing Part 52 against SSSR, Goda, Statewide and other entities to end their occupancy of the Premises. See *Sidley Holding Corp. v Three S’s and an R, LLC.*, Index No. 900282/08 (the Holdover Action). On 1 April 2008, Sidley obtained judgment in the Holdover Action.

On or about 12 March 2008, Sidley also commenced an action in the United States District Court for the Southern District of New York entitled *Sidley Holding Corp. v Morton Ruderman*, (SD NY) Index No. 08 Civ. 2513, in which Sidley seeks to recover from Ruderman

under the Ruderman Guaranty of the Main Lease.

SSSR now seeks to recover its expenditures under the Main Lease, and its costs due to the extant litigation, from Abdelmenan under the Goda Guaranty. The first cause of action seeks recovery from Goda for breach of the Statewide Sublease, and the Goda Sublease. Under the second cause of action, SSSR seeks to recover from Abdelmenan under the Goda Guaranty. It also appears that plaintiff Ruderman seeks to recover under the Goda Guaranty as a third party beneficiary.

Goda moves, upon documentary evidence (CPLR 3211 [a] [1]), to dismiss the complaint because Sidley never consented, as required, to the Goda Sublease, and the Guaranty is unenforceable for lack of consideration. Goda makes no arguments with regard to its alleged responsibilities under the Statewide Sublease. Hence, the portion of the motion to dismiss the first cause of action that is directed to Goda's responsibility under the Statewide Sublease is denied.

SSSR argues that Goda is responsible under the Goda Sublease because, though never officially approved in writing, it was executed by Goda's de facto occupancy of the Premises, with the knowledge, if not, the consent by passage of time (waiver), of Sidley. SSSR maintains that the Goda Guaranty is enforceable because: (i) the Goda Sublease was executed and consented to by Sidley; (ii) it expressly provides that "the validity of this Guaranty and the obligations of Guarantor herein shall in no wise [sic] be terminated, affected or impaired by reason of the invalidity or unenforceability of the Sublease" and (iii) it is supported by consideration because "[t]he Goda Guaranty was given as an inducement for SSSR to enter into the Goda Sublease" (Plaintiffs Mem of Law in Opp at 14).

The portion of the first cause of action pertaining to Goda's responsibility under the Goda Sublease must be dismissed because the Goda Sublease, in SSSR's own words, "is a legal nullity" because the condition precedent of consent from Sidley never took place. As the Goda Sublease states that "notwithstanding anything to the contrary contained herein, the Term [of the Sublease] shall not commence" until Sidley has given its consent, the condition precedent undermines the formation or existence of the Goda Sublease itself. *See Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 (1995) (because the prime landlord's written consent to certain tenant work was not obtained by a certain date and was a condition precedent to the sublease, the sublease was null and void and of no force and effect); Calamari and Perillo, *Contracts* § 11-5, at 440 (3d ed).

The second cause of action must be dismissed because (1) the language of the Goda Guaranty precludes any argument that the consideration for it was the fact that SSSR was "induced" to enter into the Goda Sublease¹ and (2) the Goda Sublease could not be the consideration for the Goda Guaranty because it is a legal nullity. The Goda Guaranty was made "FOR VALUE RECEIVED, in connection for, and as an inducement to THREE S's AND AN R LLC. (the "Landlord") entering into a sublease with GODA RESTAURANT CORP" (emphasis added). The consideration is not specified as the value received is not specified. Although the Goda Guaranty provides that it was "an inducement" to SSSR to enter into the Sublease, the word inducement, is separated from the word value received, by the word "and." Accordingly, contrary to SSSR's argument, the inducement to enter into the Goda Sublease cannot be the

¹The Court need not, and does not, decide whether an inducement to enter into a sublease is consideration for a guaranty when the sublease is null and void because a condition precedent never occurs.

value received. Further, the value received cannot refer to the Goda Sublease, a legal nullity, because the approval of Sidley, a condition precedent to the Sublease, was never obtained (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690).

SSSR's argument that the Goda Sublease was substantially performed is confuted by the facts. Goda purchased the shares of Statewide, rent payment were made under the name of Statewide, and when the occupation of the Premises was questioned by SSSR, it did so on the basis of violation of the Statewide Sublease.

In any event, the Court of Appeals has made clear that "[t]he flexible concept of substantial compliance stands in sharp contrast to the requirement of strict compliance that protects a party that has taken the precaution of making its duty expressly conditional. If the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event." *Oppenheimer & Co.*, 86 NY2d at 692 (internal quotation marks and citations omitted); *see also* Restatement (Second) of Contracts § 237, comment d, at 220; 2 Farnsworth, *Contracts* § 8.12, at 415 (2nd ed 1990).

SSSR's argument that Sidley somehow waived its right to consent to the Goda Sublease is discredited by the Goda Guaranty itself, which states that there shall not be "any waiver of the any rights or powers of Landlord or consent by Landlord be valid unless in writing duly executed by Landlord." Similarly, the Goda Sublease contains a provision stating that "[f]ailure ... to insist upon the strict performance of any one or more of the obligations of the other party under this Sublease ... shall in no manner be or be deemed to be a waiver by such party ... or a waiver ... of the requirement of strict performance" Goda Sublease ¶ 24.

While the court is cognizant that defense to an executed contract of want of consideration

is generally disallowed (*see e.g. Young Foundation Corp. v A. E. Ottaviano*, 29 Misc 2d 302, 304 [Sup Ct, Westchester County 1961], *affd* 15 AD2d 517 [2nd Dept 1961]), here the failure of the condition precedent undermined the formation or existence of the Goda Sublease. Indeed, all parties agree that Goda took possession of the Premises via a stock purchase, and not via the Goda Sublease. Therefore, while the ends of the Goda Sublease were accomplished, they were accomplished by other means. In fact, SSSR recognized as much by informing Goda by letter of March 7, 2002, that the occupancy of the Premises through the purchase of Statewide's stock "constitutes a violation of not only the sublease between Statewide and [SSSR], but also may constitute a violation of the overlease between [SSSR] and Sidley." If the Goda Sublease had any force or validity whatsoever, a right of occupancy being implicit is a lease of premises, such violations could not have been up for discussion.

Finally, months after noting that Goda's occupancy of the Premises without the permission of Sidley was a potential violation of the Main Lease and the Statewide Sublease, on December 20, 2002, SSSR executed an assignment of its rights to the premises and the rights of Statewide under its Sublease to Goda, subject to the approval of Sidley. The assignment of Statewide's rights would be of little value if Goda already had a valid sublease.

Accordingly, the Second Cause of Action based on the Goda Guaranty must be dismissed in its entirety because no consideration existed for the Goda Guaranty.

As previously noted, dismissal of that portion of the First Cause of Action related to the breach of the Goda Sublease is granted and is denied as to breach of the Statewide Sublease. There have been no submissions in relation to the issue of breach of the Statewide Sublease and there are indications that Goda assumed the responsibilities of the Statewide Sublease (e.g., by

Goda purchasing Statewide's stock, occupying the Premises, and later executing an Assignment and Assumption of Lease in December of 2002).

Accordingly, it is hereby

ORDERED that the motion of defendants Goda Restaurant Corp d/b/a Pizza Hut, Statewide Management at Fordham Road, Inc., and Goda Abdelmenan to dismiss the complaint pursuant to CPLR 3211 (a) (1), is partially granted, and the portion of the first cause of action that seeks recovery under a sublease of 110-112 East Fordham Road, Bronx, New York to Goda Restaurant Corp d/b/a Pizza Hut, and the second cause of action, are dismissed; and it is further

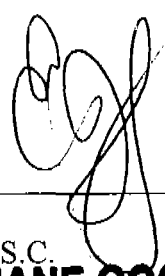
ORDERED that the complaint is hereby severed and dismissed as against Goda Abdelmenan, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

This Constitutes the Decision and Order of the Court.

Dated: June 23, 2009

FILED
JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.
EMILY JANE GOODMAN