

Nara Bank v Kahn

2009 NY Slip Op 31578(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 116888/06

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Nava Bank f/k/a

INDEX NO. 116888/06

Nava Bank NA

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

*Muhammad R. Kahn v
FARHAT KAHN*

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *by plaintiff* is *decided in accordance with the attached memorandum decision*

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

FILED
JUL 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/14/09

J.S.C.

JUSTICE DORIS LING-COHAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----- X

NARA BANK, f/k/a NARA BANK, N.A.,

Plaintiff,

INDEX NO.
116888/06

-against-

Action 1

MUHAMMAD R. KAHN and FARHAT KAHN,

Motion Seq.:

001

Defendant.

----- X

SAHAR USA, INC.,

Plaintiff

INDEX NO.
118112/06

-against-

Action 2

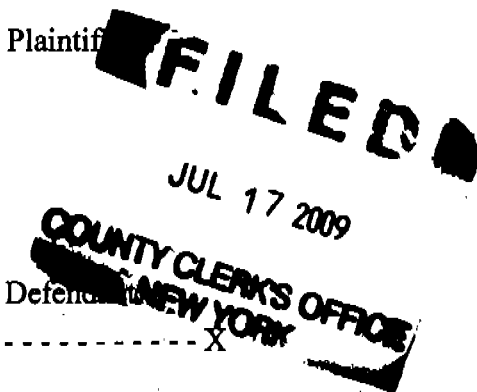
NARA BANK, f/k/a NARA BANK, N.A.,

Motion Seq.:

002

Defendant.

----- X



DORIS LING-COHAN, J.:

Motion sequence number 001 in Action 1 and motion sequence number 002 in Action 2 are consolidated herein for disposition. In Action 1, motion sequence number 001, plaintiff Nara Bank ("Nara") moves: (i) pursuant to CPLR 3212(a) for summary judgment on its complaint; (ii) pursuant to CPLR 3212 for summary judgment dismissing action 2; and (iii) pursuant to CPLR 3211 dismissing any defense asserted by defendants in Action 1.

In Action 2, motion sequence number 002, plaintiff Sahar USA Inc. ("Sahar") moves: (i) to consolidate Action 1 and Action 2 pursuant to CPLR 602; (ii) to dismiss Action 1 pursuant to CPLR 3211(a)[1] and [7]; and (iii) for summary judgment on its complaint in Action 2. Nara cross-moves: (i) to dismiss "a portion of Sahar USA, Inc.'s motion" pursuant to CPLR 3211(a)[1] and [7] and 3212; (ii) for summary judgment pursuant to CPLR 3212(a) on

its complaint in Action 1; (iii) for summary judgment pursuant to CPLR 3212 dismissing Action 2 "because Sahar ... is not entitled to the declaratory relief sought therein"; and (iv) pursuant to CPLR 3211 dismissing any defense asserted by defendants in Action 1.

That branch of Sahar's motion (seq. no. 002 in Action 2) which seeks to consolidate both actions for joint trial is granted on consent. The two actions are clearly intertwined and it appears that the parties previously stipulated to consolidation (see exhibit F to Sahar's moving papers), but that stipulation was never filed with the court. The two actions will henceforth proceed jointly under the caption used herein, and they shall maintain their original, separate index numbers.

Both actions stem from a commercial lease dispute between the parties. Pursuant to a sublease dated May 1, 2003 (exhibit 1 to Action 1 complaint, Nara's moving papers, exhibit B), Sahar, a perfumer, sublet from Nara, commercial space in a building at 29 West 30th Street in Manhattan (the "premises"). Sahar's obligations under the sublease were personally guaranteed by Sahar's president, Farhat Khan ("Khan"), and Muhammad R. Khan (collectively "the Khan defendants"), the defendants in Action 1. Sahar failed to pay \$58,883.61 in real estate taxes billed by Nara as additional rent, and Nara brought Action 1 to recover such sum directly from the guarantors. The Khan defendants assert as an affirmative defense that Sahar was not in default because it had paid everything it was obligated to pay under the sublease, and that the amount claimed by Nara was based on the real estate taxes due on the entire building rather than on the taxes corresponding to the premises as provided for by the sublease.

It is noted that the Khan defendants do not dispute their liability to Nara, as guarantors of the sublease, but rather argue that the additional rent sought by Nara is not in fact owed by Sahar. Thus, as liability on the guaranty is not an issue, plaintiff Nara is entitled to

partial summary judgment as to liability against the Khan defendants, conditioned upon a determination, as detailed below, that additional rent is in fact owed to Nara.

Sahar commenced Action 2 seeking a declaratory judgment that it had not defaulted under the sublease and a Yellowstone injunction, which was granted on consent (see "so ordered" stipulation at exhibit F to Nara's moving papers).

The dispositive question in both actions of whether Sahar defaulted in its payment obligations under the sublease hinges on how those obligations are defined. The sublease obligates Sahar to pay on Nara's behalf "for Additional Rent, an amount equal to 15% of all Real Estate Taxes ... levied against the Premises in excess of real estate taxes for any 'Tax Year' ... during the term exceed[sic] Real Estate Taxes for the period July 1, 2000 through June 30, 2001" (sublease, § 8.1).

Each side construes this language differently. Nara argues that since the prime lease obligates it to pay 20% of all real estate taxes assessed against the building, Sahar's 15% also refers to the entire building's tax assessment, which leaves Nara obligated to its landlord for the balance of 5%. Sahar argues that the sublease only obligates it to pay 15% of the tax amount corresponding to the premises.

The language of the sublease supports Sahar's argument. "Premises" is specifically defined in the sublease as "the approximately 13,200 rentable square feet, without representation, of space in the Building located on the basement and the first floor" (sublease, § 1.10); in essence, the premises sublet by Sahar. To interpret § 8.1 of the sublease as argued by Nara, "premises" would have to be defined as the entire building; this meaning is contrary to the express terms of the agreement.

"[W]ords in a contract are not to be ignored when seeking to arrive at the expressed intent" (River View Associates v. Sheraton Corp. of America, 33 AD2d 187, 190-191 [1st Dept 1969], affd 27 NY2d 718 [1970], rearg. den. 27 NY2d 817 [1970]). "The intent of the parties must be ascertained from an examination of the whole lease, and not from the particular cause alone". (Peoples Savings Bank of Yonkers v. County Dollar Corp., 43 AD2d 327, 331 [2d Dept 1974]). If the parties had initially agreed on Nara's current interpretation of the real estate tax provision, the sublease could have specifically provided that Sahar pay 15% of the taxes assessed against the "Building", rather than "Premises". (See Bensons Plaza v. Great Atlantic & Pacific Tea Co., Inc., 44 NY2d 791-793 [1978]). Here, however, the term "Premises" is specifically used with respect to Sahar's tax obligation, and not the word "Building". "When the contract is in writing, the intention of the parties must be ascertained from what they wrote" (Ditmars-31st Development Corp. v. Punia, 17 AD2d 357, 361 [2d Dept 1962]).

Nara further asserts that since "real estate taxes" is defined in the sublease as all real estate taxes "assessed against the Building and Premises" (sublease, § 8.1), Sahar's reading of its obligations under that same section is irrational. However, this argument at best serves to create an ambiguity, since the clause which obligates Sahar to pay 15% of the real estate taxes explicitly refers only to those taxes "levied against the Premises" (id.). Any ambiguity in the sublease is to be construed against Nara, which as the landlord is presumed to be the drafter.¹ (cf. Westview Associates v. Guaranty National Insurance Co., 95 NY2d 334, 339 [2000]; Belt

¹ Although in his supporting affirmation to mot. seq. no. 002 in Action 2 the attorney for Sahar and the guarantors affirms that "[a]s discussed in the accompanying affidavit of Farhat Khan, the [sublease] was prepared by [Nara] and its attorneys" (¶ 28), the court has been unable to find any such statement in Khan's affidavit. However, since it is customary for the landlord to draft the lease and Nara has not made any statement to the contrary, the court will presume Nara to be the author of the sublease.

Painting Corp. v. TIG Insurance Co., 100 NY2d 377, 383 [2003]).

Moreover, Sahar has prior custom in its favor. It seems from Nara's previous bills (dated December 21, 2004 and June 16, 2005), that both parties interpreted "15% of all real estate taxes levied against the Premises" to mean that Sahar should pay 15% of Nara's 20%, which would amount to only 3% of the total real estate taxes for the building (see Nara's bills and Sahar's checks at exhibits I and J to Sahar's moving papers). Arguably, this billing history constitutes evidence of the meeting of the minds, as well as a ratification or waiver by Nara (see Madison Ave. Leasehold, LLC v. Madison Bentley Associates LLC, 30 AD3d 1, 5-11 [1st Dept 2006], affd 8 NY3d 59 [2006], rearg den 8 NY3d 867 [2007]. "Moreover ... it is clear the parties' practical construction comports with the plain meaning of the [real estate tax] clause.... [Nara's] long-term acquiescence in [Sahar's] interpretation of that clause undermines [Nara's] present claim.... Although the result of this construction of the...clause is economically harsh, parties are free to make their own contracts, and courts do not serve as business arbiters between parties in approximately equal stances" (CBS, Inc. v. P.A. Building Co., 200 AD2d 527 [1st Dept 1994]).

It was not until some point in 2005 that Nara started billing Sahar for 15% of the Building's taxes instead, including billing for arrears on the prior years resulting from recalculation of the bills previously paid by Sahar (see Sahar's exhibit K-M and Nara's exhibit I and J). Nara does not provide an explanation of why it changed its calculating methods midstream; indeed, it does not even acknowledge that such change occurred. When giving its version of the facts, Nara, conveniently, skips from the point when the lease and guaranty were signed to the point where it demanded that Sahar pay its additional rent arrears (see, e.g., Marsh

* 7]
supporting affidavit, ¶¶ 7-12; supporting memorandum, p 3; opposing memorandum, p 3; Marsh cross-moving affidavit, ¶¶ 7-12). Such practice by Nara is disingenuousness.

However, notwithstanding the above determination of the meaning of section 8.1 of the sublease, the court is unable to ascertain from the submitted papers, the precise percentage of the building's real estate taxes which Sahar is obligated to pay, or whether any monies are in fact owed to Nara as additional rent. As Khan points out in his affidavit (¶¶ 4, 6), 15% of Nara's 20% is not an accurate interpretation of the sublease clause, since the subject premises comprised only two of the three floors leased by Nara and the 20% paid by Nara was the tax levied against all three floors, not the premises. Since the building receives a single tax bill, the tax levied against the premises would be the percentage of that bill corresponding to the percentage of the building's square footage constituted by the premises (i.e., 13,200 sq. ft./building's total square footage). However, the building's footage is apparently unknown to all parties. Although throughout its papers Nara states that Sahar is subletting 15% of the space in the building, that seems to be an arbitrary figure perhaps inspired by the 15% used in the sublease, since, in response to Sahar's first set of interrogatories in Action 2, Nara stated that it "does not know the exact amount of floors or square footage of the Building" (Answer 1 at exhibit A to Owen's opposing affirmation). As such, a hearing will be necessary as detailed below.

Based upon the above, it is hereby

(1) ORDERED that Nara's motion (seq. no. 001 in Action 1) is granted only to the extent that partial summary judgment is granted as to liability against defendants (guarantors) Muhammad R. Kahn and Farhat Kahn, conditioned upon a determination by the Special

Referee, as detailed below, that monies are in fact owed by Sahar for additional rent; should there be a finding by the Special Referee, in favor of Nara, a money judgment shall be entered against such defendants; it is further

(2) ORDERED that Sahar's motion (seq. no. 002 in Action 2) for a joint trial of both actions pursuant to CPLR 602 is granted on consent; that branch of Sahar's motion seeking dismissal of Action 1 pursuant to CPLR 3211(a)[1] and [7] is denied; the branch of Sahar's motion which seeks summary judgment on its complaint in Action 2 is granted to the extent that it is hereby adjudged and declared that:

Sahar's obligation under § 8.1 of the sublease is to pay "for Additional Rent, an amount equal to 15% of all Real Estate Taxes ... levied against the Premises in excess of real estate taxes for any "Tax Year" ... during the term exceed[sic] Real Estate Taxes for the period July 1, 2000 through June 30, 2001" with "Premises" defined as "the approximately 13,200 rentable square feet, without representation, of space in the Building located on the basement and the first floor" (sublease, § 1.10);

and is otherwise denied. The remaining issue concerns damages. The issues of: (a) what percentage of the building's real estate taxes is attributable to the premises; (b) whether, if at all, any of the parties should be credited for any underpayment or overpayment of Sahar's additional rent; and (c) whether additional rent is in fact owed to Nara, shall be determined at a hearing before a Special Referee (in accordance with CPLR 3212[c]), at which all parties shall produce all necessary documentation, **on condition that counsel serve a copy of this order with notice of entry upon opposing counsel and the Special Referee Clerk in the Motion Support Office (Part 50R, Room 119), within 45 days of entry of this order**, in order to obtain a calendar date; failure to comply with this provision will be deemed a waiver and warrant a dismissal of both actions; a money judgment shall be entered against the appropriate party/ies, upon

determination by the Special Referee that monies are owed to any party; and it is further

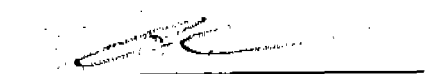
(3) ORDERED that Nara's cross-motion in Action 2 is denied (except to the extent indicated above in paragraph (1)) conditionally granting Nara summary judgment as to liability in Action 1; and it is further

ORDERED that all parties shall appear before this court on September 30, 2009, at 10 a.m., Room 428, 60 Centre Street, to apprise the court as to the status of the reference to the Special Referee, as well as settlement negotiations.²

ORDERED that within 30 days of entry of this order, counsel for Sahar shall serve a copy upon all parties with notice of entry.

This decision constitutes the order of the court.

DATED: July 14, 2009


Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\nara bank.sahar.wpd

FILED
JUL 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

² By separate order, this court has required that the parties exchange settlement proposals.