

Parkchester Preserv. Co., LP v Abston

2009 NY Slip Op 31801(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 106074/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106074/2008

PARKCHESTER PRESERVATION CO.,

vs.

ABSTON, FREDERICK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/15/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-4
5-8
9-10

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 decided in accordance with the annexed memorandum decision and order.

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

FILED

AUG 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/11/09

JANE S. SOLOMON
J.S.C.

J.S.C.

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NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
PARKCHESTER PRESERVATION COMPANY, LP,

Plaintiff,

Index No. 106074/08

-against-

FREDERICK ABSTON,

Defendant.

DECISION and ORDER

-----X
JANE SOLOMON, J.:

FILED
AUG 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

This matter concerns the enforcement of a form guaranty (the "Guaranty"), which was attached to a lease. The Guaranty was prepared by plaintiff, Parkchester Preservation Company, LP (PPC), and signed by defendant Frederick Abston. PPC contends that Abston personally issued the Guaranty in its favor to secure payment due by non-party East Bronx Day Care Center (EBDCC), the tenant under the lease. Abston alleges that he signed the Guaranty only in his capacity as Chairman of the EBDCC Board.

In November of 2002, PPC leased to EBDCC premises known as 67 Metropolitan Oval a/k/a Unit H-1 in the Parkchester South Condominium, 71 Metropolitan Oval, Bronx, NY 10462 (the Lease). The Guaranty was attached to the Lease with other documents.

According to the complaint, EBDCC failed to make Lease payments for the period of August 2007 through April 2008, resulting in unpaid and additional rent due of \$83,681.¹ PPC seeks, via the Guaranty, to recover the total rents due from EBDCC from Abston

¹ PPC was awarded a default judgment against EBDCC for rents due up to November 2007, in the amount of \$37,678.52, entered on January 7, 2008, which remains unsatisfied. *See Parkchester Preservation Company LP v East Bronx Day Care Center*, Civil Court, Bronx County, Hon. Sharon A. M. Aarons, Index No. 901978/07.

(first cause of action), plus attorneys' fees costs and expenses (second cause of action).

PPC moves, pursuant to CPLR 3212, for summary judgment as to liability on both causes of action, and pursuant to CPLR 3211 (a) and (b), to dismiss all of Abston's affirmative defenses. Abston cross-moves, pursuant to CPLR 308 and 3211 (e), to dismiss the complaint due to improper service and lack of personal jurisdiction.

PERSONAL JURISDICTION OVER ABSTON

PPC argues, citing CPLR 3211 (e), that Abston has waived his right to object to jurisdiction on the grounds of improper service because he failed to move for dismissal on this basis within 60 days of service of the Answer, which contain this affirmative defense. Abston, who, until retaining counsel to answer this motion, was appearing in this matter pro se, seeks an extension of the time to object to jurisdiction due to undue hardship. Abston argues that he is of advanced age, was unable to acquire funds to retain counsel, and was recovering from a hospital stay and the physical trauma associated with the amputation of his right leg at the knee.

The inability to timely secure counsel is not sufficient to demonstrate undue hardship under 3211 (e) (*see e.g. Vandemark v Spangler*, 267 AD2d 672, 672 [3rd Dept 1999]). Moreover, while Abston experienced regrettable medical problems, an extension of time based upon undue hardship must arise from specific obstacles to timely compliance, not the overall circumstances of the party (*see e.g. Abitol v Schiff*, 180 Misc 2d 949, 951 [Sup Ct, Queens County 1999], *affd as mod* 276 AD2d 571 [2nd Dept 2000]; *Yellow Book Co. v Rose*, 182 Misc 2d 263, 265 [Dist Ct, Nassau County 1999]). Abston's markedly nebulous application for an extension of the 60-day time limit is denied.

In any event, Abston's allegations of improper service under CPLR 308 are

without merit. PPC maintains, and offers documentation, that it served Abston properly using the “nail and mail” method. *See* CPLR 308 (4). Abston maintains that: (i) he did not receive the summons and complaint, which was allegedly served in May of 2008, or notice, until September of 2008, when he received a supplementary mailing; and (ii) the person that allegedly verified Abston’s residence at the address set forth in the affidavit of service is unknown to Abston.

PPC’s affidavit of service is prima facie evidence that Abston was properly served (*see Benjamin v Avis Rent-A-Car Systems*, 208 AD2d 449, 450 [1st Dept 1994]). The most important aspect of service of process is not, as Abston implies, whether he actually received the documents served, but whether the method of service was “reasonably calculated to give [him] actual notice of the proceedings and an opportunity to be heard” (*Workmen’s Compensation Bd. v Eriksen*, 43 AD2d 597, 598 [3rd Dept 1973]). In addition, Abston’s acquaintance, or lack thereof, with the person who confirmed his residence to the process server would not be competent to rebut proper evidence of service (*see Chinese Consol. Benevolent Assn v Tsang*, 254 AD2d 222, 223 [1st Dept 1998]).

Indeed, Abston never denies that he lives at the address appearing on the affidavit of service, and confirms that he was not home to receive service of process on the dates alleged in that affidavit. Hence, whether the “nail and mail” service was accomplished is not a matter within his personal knowledge. Abston’s conclusory assertion that he did not receive the summons and complaint is insufficient to overcome documented proof of proper service (*see Feinstein v Bergner*, 48 NY2d 234, 240 [1979]).

Abston waived his right to object to improper service by failing to demonstrate, or properly address, undue hardship that prevented him, with ordinary diligence, from serving a

motion to dismiss. What is more, Abston's arguments to challenge the proof of proper service are without merit. The motion to dismiss for lack of personal jurisdiction is denied.

SUMMARY JUDGMENT: ENFORCEMENT OF THE GUARANTY

It has long been the policy of the courts that a guaranty, being an instrument of great legal and financial importance, is to be interpreted strictly (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; compare *Page v Krekey*, 137 NY 307, 314 [1893]; *Evansville Natl. Bank v Kaufmann*, 93 NY 273 [1883] [a guarantor is entitled to the application of the strict rules of construction and cannot be held beyond the precise terms of his undertaking]).

Here, PPC argues that Abston signed the Guaranty, which was part of the Lease (included in the Lease package as page 37), and that his notation on the signature line "Chairman Bd. Of Dir. East Bronx Day Care" does not relieve him of his obligation to pay the amounts due under the Lease. In general, PPC's legal theory on this point is sound. See *Bank of Tokyo-Mitsubishi, Ltd., New York Branch v Kvaerner a.s.*, 243 AD2d 1, 6 (1st Dept 1998) (where the history and subject matter shows them to be unified, a guaranty and the contract it indemnifies should be read together); *Chemical Bank v Kaufman*, 142 AD2d 526 (1st Dept 1988) (descriptive notations describing the guarantor as a corporate officer do not automatically relieve signatory from personal liability) .

Nonetheless, the Guaranty is not enforceable against Abston because it is indefinite, and is not triggered when read together with the Lease. As a preliminary matter, the court notes that a grant of summary judgment requires a demonstration of entitlement to judgment as a matter of law. CPLR 3212 (b). The Guaranty has no parties listed, no date, and no witness. It is procedurally dubious to rely upon a partially completed document for so drastic a

remedy as summary judgment (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). However, these are not fatal flaws, because, as noted above, the Guaranty is to be read in conjunction with the Lease (*see also Catskill Natl. Bank v Dumary*, 206 NY 550, 555 [1912] [guaranty and contract made at the same time are to be considered as one instrument]).

Turning to the Lease, it provides that it is the entire agreement between the parties, and that all modifications must be in writing (Lease, ¶ 12.13). The Lease also states in the “Basic Lease Provisions” that “Guarantor” is “N.A.,” and the space for the address of a would be Guarantor is left blank. The Guaranty similarly leaves the space for the names of the Landlord and Tenant, and the date of the Lease blank. As such, the Lease and the Guaranty, when read as a whole (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 7 [1st Dept 2004]), plainly indicate that there is no Guarantor of the Lease.

To overcome the presumption of this plain meaning, and the prohibitory provisions for modification of the Lease, the Guaranty must, at a minimum, carry the indicia of a cognizable contract in its own right. The Guaranty, however, does not state the names of the parties to the underlying Lease, is undated, and contains no specification that would allow this court to rewrite the Lease, especially over the objection of one of the parties (*see Tri-State Employment Servs. v Mountbatten Sur. Co.*, 99 NY2d 476, 483 [2003]; *National Mechanics' Banking Assn v Conkling*, 45 Sickels 116, 90 NY 116 [1882] [a surety's “liability is always strictissimi juris and must not be extended by construction”]). This Guaranty is a legal nullity.

As Abston is entitled to the benefit of every favorable inference (*see Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]), and the Guaranty is to be read, inasmuch as it is readable, in his favor (*see Levine v Segal*, 256 AD2d 199, 200 [1st Dept 1998]), the motion for summary

judgment must be denied.

The parties, through their arguments and affidavits, have addressed the issues of law fully, and made it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course (*see Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). Furthermore, it has been determined herein, as a matter of law, that interpretation of the Lease and the Guaranty as a single instrument indicates that there would be no personal liability of Abston under the Guaranty. The court therefore exercises its power under CPLR 3212 (b) to grant summary judgment dismissing the complaint. Accordingly, it is hereby


ORDERED that the motion of defendant, Frederick Abston, to dismiss the complaint due to improper service and lack of personal jurisdiction, is denied; and it is further

ORDERED that the motion of plaintiff, Parkchester Preservation Company LP, for summary judgment as to liability on both causes of action is denied, and upon searching the record (CPLR 3212 [b]) the court grants summary judgment to the defendant and dismisses the complaint; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint, without costs and disbursements.

Dated: August 11, 2009

ENTER:


 JANE S. SOLOMON
 J.S.C.

FILED
 AUG 12 2009

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