

Credit Suisse Sec. (USA) LLC v 11 Madison Ave. LLC
2009 NY Slip Op 32063(U)
September 9, 2009
Supreme Court, New York County
Docket Number: 600544/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHÉ, J.S.C.

PART 10

Index Number : 600544/2009

CREDIT SUISSE SECURITIES (USA) LLC

vs.

11 MADISON AVENUE LLC

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 600544/09

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

SEP 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/09/09

JUDITH J. GISCHÉ, J.S.C. J.S.C.

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT NON-FINAL DISPOSITION

... IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: IAS 10

-----x
Credit Suisse Securities (USA) LLC,

Plaintiff,

Decision/Order

-against-

Index#600544/09
Seq. # 001

11 Madison Avenue LLC,

Defendant.

-----x
Hon. Judith J. Gische:

Pursuant to CPLR §2219(a) the following numbered papers were considered by the court on this motion:

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PAPERS	NUMBERED
Notice of Motion, ABF affd., exhibits.....	1
LVD affirm. in opp., exhibits.....	2

Upon the foregoing papers the decision and order of the court is as follows

Plaintiff, Credit Suisse Securities (USA) LLC ("Credit Suisse") moves for partial summary judgment on its breach of contract claim. Defendant, 11 Madison Avenue, LLC. ("11 Madison") opposes the motion. Issue has been joined and no Note of Issue has been filed. The motion is, therefore, properly before the court at this time. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Pursuant to a written lease ("over lease"), Credit Suisse leases multiple floors ("leased premises") at the building located at 11 Madison Avenue, New York, New York ("building"). 11 Madison is the landlord/owner of the building. Credit Suisse claims that it is up to date on the rental payments due under the over lease.

On or about February 14, 2008 Credit Suisse and 11 Madison entered into a

sublease ("sublease") in which Credit Suisse subleased to 11 Madison a portion of the first floor and first floor mezzanine of the leased premises. Under the sublease, 11 Madison was required to pay \$106,495.92 per month beginning November 1, 2008. Credit Suisse also claims in its complaint that 11 Madison is required to pay a proportionate share of the real estate taxes, but those amounts are not sought on this motion. Credit Suisse states that 11 Madison failed to pay monthly rent for the period beginning November 1, 2008 through February 1, 2009, despite due demand therefore.

Credit Suisse, thereafter, commenced this plenary action for breach of the sublease, which seeks damages for unpaid rent and real estate charges and attorneys fees. It now seeks partial summary judgment in the amount of the unpaid base rent and its reasonable attorneys fees. It also seeks permission to set off any judgment this court may grant it against future rent that it will owe 11 Madison under the over lease.

In opposition, 11 Madison claims that there are issues of fact regarding whether there is a valid sublease in place and whether Credit Suisse's claim for damages is fair and equitable. It argues that the motion is premature and made without the benefit of discovery and that certain procedural aspects of the sublease was not satisfied, thereby precluding the collection of rent under the sublease. Finally it argues that the collateral remedy of offset is not permitted under the sublease. 11 Madison does not deny the authenticity of the operative documents. Nor does it deny that it has not paid any rent or real estate escalations under the sublease.

Discussion

"The proponent of a summary judgment motion must make a *prima facie*

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64. When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003).

Credit Suisse has made out a *prima facie* case that rent is owed it under the sublease for the months of November 1, 2008 through February 1, 2009 in the total amount of \$425,983.69 (\$106,495.92 x 4 months). 11 Madison has failed to raise any triable issues of fact warranting a denial of judgment on the rent due.

The court rejects 11 Madison's argument that the sublease is invalid and/or that Credit Suisse has not fulfilled the conditions necessary to create an enforceable sublease. The over lease was originally made on September 10, 1997. It was later modified in writing, including a second modification that was made on June 12, 2000. Paragraph 5 of the modification prohibited Credit Suisse from subleasing anything less than the entire leased premises and further provided that in the event of a sublease the landlord (11 Madison) was entitled to notice to exercise a right of recapture. 11 Madison claims that when Credit Suisse subleased only a portion of the leased premises to it, Credit Suisse violated the over lease by not leasing the entire premises.

It claims that the over lease was further violated when it was not notified of its right to recapture. 11 Madison claims that this failure to comply with the procedural requisites of the over lease renders the sublease invalid and unenforceable. Paragraph 8.3 (xxxv) of the sublease, however, expressly provides that article 5 of the second modification is deleted. Indeed, since 11 Madison was wearing two hats in the sublease transaction, it only makes sense that as owner and landlord, it could agree to have the tenant sublease any portion of its own property back to it, without having to be separately notified of its right to recapture.

11 Madison has not presented any other valid legal argument as to why the sublease agreement is invalid.

11 Madison's argument that summary judgment is premature because there has been no discovery is also unavailing. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006). 11 Madison has not shown that there may be any information not already known to it which is material and relevant and within Credit Suisse's sole possession. Therefore, this argument fails.

Credit Suisse also seeks to recoup its reasonable attorneys fees incurred in connection with this action. In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Credit

Suisse has no express provision in the sublease that authorizes it to collect legal fees from 11 Madison. Instead, it relies upon the provisions of the over lease, which under certain circumstances permits the "landlord" to collect its legal fees from the tenant. In the over lease, however, Credit Suisse is not the landlord, it is the tenant. Thus, there is no contractual basis on which to award Credit Suisse any legal fees.

The final remedy sought by Credit Suisse on this motion is that it be permitted to offset any judgment it receives from the court against the future rent it is required to pay under the over lease. There is no specific right to such an offset under the sublease. Credit Suisse is relying on the common law right of offset. Mutual debts and credits between parties may be set off, even where they arise from different transactions. In the Matter of Liquidation of Midland Ins., 79 NY2d 253 (1992). The predicate to ordering offset, however, is that the claims must be owed between the same persons and in the same right. Debts that arise when those parties were acting in different capacities will not be considered. Capacity means legal capacity. In the Matter of Liquidation of Midland Ins., *supra*; JB Industries, Inc. V. Suchde, 2000 WL 1174997 (SDNY 2000).

Credit Suisse has not established that the claims it seeks to offset are between parties acting in the same capacity. Under the over lease, 11 Madison is the landlord. Under the sublease, 11 Madison is the tenant. This issue was further muddied at oral argument when it was disclosed to the Court that the rent being paid by Credit Suisse under the over lease may be going to a receiver. The receiver is not a party to this action, because 11 Madison is only being sued in its capacity as a subtenant, not an

owner. Moreover, there is no cause of action for a declaration of a determination of the right to offset.

The court, therefore, denies summary judgment declaring that a right to offset any judgment against future rents exists at this time. In this regard, however, the court makes no direction about the remedies Credit Suisse may or may not have as a judgment creditor, nor does it establish any priority for them against any other creditor that may exist.

Accordingly, the motion for partial summary judgment is granted only to the extent that plaintiff is entitled to a money judgment against in the amount of \$425,983.69 representing rent due through February 1, 2009, plus interest from January 1, 2009, which the court sets a reasonable intermediate date. The claim for rents is severed and the clerk is directed to enter a judgment in accordance herewith. In all other respects the motion is denied.

There is currently a compliance conference set for November 9, 2009 at 9:30 a.m. The parties are to report to the court at that time what, if any, issues remain outstanding in this action and to certify such issues as ready for trial.

Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the Court.

Dated: New York, NY
September 9, 2009

FILED
SEP 11 2009
SO ORDERED:
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NEW YORK
J.G. J.S.C.