

**1407 Broadway Real Estate, LLC v H.C.A. Leasing Corp.**

2009 NY Slip Op 32311(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 600914/09

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 : 600914/2009

1407 BROADWAY REAL ESTATE LLC

vs  
H.C.A. LEASING CORP.

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 6/15/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-4

5-7

8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the amended memorandum decision, order, declaration and partial judgment.

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/5/09

Jane S. Solomon  
JANE S. SOLOMON J.S.C.

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 55

-----x

1407 BROADWAY REAL ESTATE, LLC,,  
Plaintiff,

DECISION, ORDER  
DECLARATION AND  
PARTIAL JUDGMENT

-against-

Index No. 600914/09

H.C.A. LEASING CORP. and CHARLES GAMMAL,  
Defendants.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative of the party must appear in person at the Judgment Clerk's Office (Room 1415).

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Jane S. Solomon, J.:

This lawsuit involves the validity of an agreement to extend a commercial lease. Plaintiff 1407 Broadway Real Estate, LLC (1407 Broadway) is the landlord, as net lessee, of a building located at 1407 Broadway in Manhattan. Defendant H.C.A. Leasing Corp. (H.C.A.) was 1407 Broadway's tenant. Defendant Charles Gammal (Gammal) is H.C.A.'s president, who executed a guaranty of H.C.A.'s obligations under the lease.

1407 Broadway seeks damages for a breach of the lease, a declaration that an alleged lease extension dated in November 2008 is valid and enforceable, costs and attorney's fees under the lease extension, and judgment against Gammal under the guaranty for all unpaid amounts. H.C.A. counter-claimed for a declaration that the lease extension is void and unenforceable. It moves for summary judgment on the counter-claim, and 1407 Broadway cross moves for summary judgment on its request for a declaration, and partial summary judgment as to liability on the

other claims. For the reasons below, the motion is denied, and 1407 Broadway's cross motion is granted.

H.C.A. entered into a lease dated May 2, 2003 for the subject premises with Gettinger Associates, LP. The lease had a four year term ending July 31, 2007, and had attached to it a "good guy" guaranty, whereby Gammal personally guaranteed payment of money due by H.C.A. under the lease subject to certain limits not relevant here (see Affidavit of Charles A. Gettinger in Support of Plaintiff's Cross Motion, Ex. B). By a letter agreement dated December 30, 2005 (2005 Lease Renewal, Affirmation of Kenneth M. Lieblich, Esq. in Support of Defendants' Motion, Ex. C), Gettinger Associates, LP agreed with H.C.A. to renew the lease and extend its term to December 31, 2008, to increase the rent for the years 2006 through 2008, and to extend Gammal's guaranty to the renewal. In January 2007, Gettinger Associates, LP assigned its interest in the operating lease to 1407 Broadway. After this assignment, 1407 Broadway's property manager was Gettinger Management, LLC (Gettinger Management).

In November 2008, Gettinger Management sent to H.C.A. a proposed five year lease extension with a term beginning January 1, 2009 and ending December 31, 2013 (Lieblich Aff., Ex. E, hereinafter referred to as the Second Lease Extension). The Second Lease Extension named H.C.A. as tenant and 1407 Broadway

as landlord, with an address "c/o" Gettinger Management. Gammal signed the for H.C.A. and in his personal capacity, agreeing to continue as guarantor under the terms of the earlier "good guy" guaranty. H.C.A. then returned the lease to Gettinger Management, which subsequently delivered to H.C.A. a lease Gammel had signed that was executed by Gettinger Management on behalf of 1407 Broadway.

The Second Lease Extension further provides that part of the previously premises leased to H.C.A., designated as Suite 1514, was no longer within the demised premises, and H.C.A. agreed to surrender possession of Suite 1514 by January 10, 2009 (paragraph 2[a]). 1407 Broadway agreed to construct, at its own expense, a wall separating Suite 1514 from the rest of the premises (paragraph 2[b]). The Second Lease Extension also increased the base rent, which in the final year of the 2005 Lease Renewal was \$45,066 per month, to \$49,900.42 per month in 2009 (paragraph 3), and obligated H.C.A. to provide additional funds for the security deposit (paragraph 5).

After the Second Lease Extension was signed, H.C.A. vacated Suite 1514. According to Gammal, it had never intended to extend the lease for this space beyond December 31, 2008, and had begun to move employees from it as early as September 2008 (Affidavit of Charles Gammal, paragraph 12). 1407 Broadway then performed its obligation to construct a wall separating the space

from the rest of the premises. H.C.A. did not pay the increased rent in January 2009, instead continuing to pay the 2008 rent, and it did not send additional funds to supplement the security deposit. By a letter dated February 20, 2009, H.C.A. notified 1407 Broadway that it considered the Second Lease Extension to be unenforceable, void, and in violation of the Statute of Frauds (Lieblich Aff., Ex. G). It "rescinded" its offer to extend or modify the lease, and offered instead to remain in possession as a month to month tenant, paying the 2008 rent. A February 26, 2009 letter from 1407 Broadway's lawyer ensued disputing H.C.A.'s contentions. Also, on February 25, 2009, 1407 Broadway issued a letter stating that effective January 4, 2007, Gettinger Management was authorized to execute and deliver leases, lease amendments, notices and contracts on its behalf, and that 1407 Broadway ratified all such lease documents executed and delivered by Gettinger Management (Gettinger Aff., Ex. E). The letter specifically ratified the Second Lease Extension with H.C.A.

#### DISCUSSION

1407 Broadway's complaint has four causes of action. The first is for breach of contract, the second is for declaratory judgment, the third is to recover costs, disbursements and attorneys' fees in connection with this action as provided for in the Second Lease Extension, and the fourth is to enforce Gammal's personal guaranty.

The motion and cross motion are addressed to the issue of whether the Second Lease Extension is invalid under General Obligations Law (GOL) § 5-703, which is the section of the Statute of Frauds requiring real estate transactions to be in writing to be enforced. Plaintiff's cross motion also seeks partial summary judgment as to liability on the first, third and fourth causes of action, to which there is no meaningful opposition.

GOL § 5-703 (1) provides that "An estate or interest in real property, other than a lease for term not exceeding one year, cannot be created, granted, assigned, surrendered or declared, unless by operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing." GOL § 5-703 (2) states that "A contract for the leasing for a longer period than one year, . . . is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by its lawful agent thereunto authorized by writing. GOL § 5-703 (4) states that nothing in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

GOL § 5-1111 states that if executed by an agent, any

agreement or offer required under GOL § 5-1103, GOL § 5-1105, GOL § 5-1107 or GOL § 5-1109 to be in writing, which affects or relates to real property or an interest therein as stated in GOL § 5-703(1) or (2), shall be void unless such agent was thereunto authorized in writing. GOL § 5-1103 states that an agreement to change or modify a lease shall not be invalid because of the absence of consideration, provided that it shall be in writing and signed by the party against whom it is sought to enforce the change.

H.C.A. argues that the Second Lease Extension is void under GOL §§ 5-703 (1) and 5-111 because it was signed by Gettinger Management as landlord without demonstrating to H.C.A. that Gettinger Management had written authority to execute a lease on behalf of 1407 Broadway (Lieblich Aff., paragraph 9). The previous leases for these premises had been executed by the landlord, not a property manager. H.C.A. further argues that it did not partially perform its obligations when it vacated Suite 1514 because it intended to vacate that space even before it executed the Second Lease Extension, and it actually vacated that area before the 2005 Lease Renewal expired. It never paid the higher rent or added to the security deposit. Therefore, argues H.C.A., there is no basis for the court to impose specific performance on the grounds of partial performance under GOL § 5-703 (4).

1407 Broadway's argument is threefold: First, these provisions of the Statute of Frauds does not void the Second Lease Extension because H.C.A. is the party to be charged in this dispute, and it admits signing the lease (see, *Kaplan v Lippman*, 75 NY2d 320 [1990]). Second, even if H.C.A. were to prevail on its argument that the landlord failed to execute the lease, H.C.A. partially performed its obligations under the lease, so 1407 Broadway would be entitled to specific performance under GOL § 5-703 (4). Third, plaintiff expressly ratified the Second Lease Extension and its agent's authority to execute it. Plaintiff's argument is well founded on each point.

The Court of Appeals decision in *Kaplan v Lippman* is illustrative. In that case, a sublessee of a cooperative apartment sought to exercise an option in the sublease agreement to purchase the sublessor's shares in the cooperative apartment (75 NY2d 323). The sublessor had sought to defeat the sublessee's claim on the grounds that the attorney who signed on behalf of the sublessee did not have authority (*id.* at 324). The Court held that the option was subject to the Statute of Frauds, and that it had satisfied the statute's requirements. It further noted that

"the sublessor's Statute of Frauds argument was doomed from the outset because it demonstrates an essential misunderstanding of the way in which the statute operates. The Statute of Frauds requires that a contract for the sale or long-term lease of property be signed by the party to be charged, i.e., the party against whom enforcement of the

contract is sought. The absence of a signature by the party seeking to enforce the agreement is without legal significance." (75 NY2d at 324, footnote 1)

Here, 1407 Broadway is the party seeking to enforce the contract, and H.C.A. and Gammal are the parties to be charged. Defendants' admit executing the Second Lease Extension, so their Statute of Frauds argument based on an alleged failure by 1407 Broadway to execute the lease fails under *Kaplan*.

While it is therefore unnecessary to consider whether plaintiff must establish H.C.A.'s part performance under GOL § 5-703 (4), it is worth noting that H.C.A.'s argument that it intended to vacate Suite 1514 even before it executed the Second Lease Extension misses the point. This simply shows that H.C.A. successfully negotiated its interest in surrendering Suite 1514. If it remained a month to month tenant under the 2005 Lease Renewal, it would still be in possession of Suite 1514, which it admits it is not. Moreover, it is undisputed that 1407 Broadway itself partially performed in reliance on the contract when it constructed the dividing wall before H.C.A. repudiated the contract. "Because the doctrine of part performance is based upon the equitable principle that it would be a fraud to allow one party, insisting on the Statute, to escape performance after permitting the other party, acting in reliance, to substantially perform, the acts of part performance must have been those of the party insisting on the contract, not those of the party insisting

\* 10 ]

on the Statute of Frauds" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v Aegis Group PLC*, 93 NY2d 229, 237 [1999] [citations omitted]). Here, there was part performance by 1407 Broadway, which would be sufficient to invoke the § 5-703 (4) exception to the Statute of Frauds.

GOL § 5-1111 provides that agreements, promises, etc., within the Statute of Frauds are void when executed by an agent whose authority is not in writing, and applies only where the party sought to be charged is the agent's principal (see, *Lane-Real Estate Department Store, Inc. v Lawlet Corp.*, 28 NY2d 36 [1971]). This is not the circumstance presented in this action. Defendants are the parties to be charged, and in any event, 1407 Broadway ratified the Second Lease Extension and recognized Gettinger Management's authority to sign on its behalf.

Finally, H.C.A. admits that it did not pay rent or provide additional funds for the security deposit, so there is no triable issue of fact with respect to liability under the first, third or fourth causes of action, and 1407 Broadway is entitled partial to summary judgment (CPLR 3212[b]). Accordingly, it is

ORDERED that defendants' motion for summary judgment on the counter-claim is denied; and it further is

ORDERED, ADJUDGED and DECLARED that 1407 Broadway's cross motion for summary judgment on the second cause of action for declaratory judgment is granted, and the Second Lease

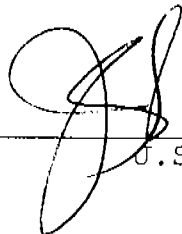
Extension is declared valid and enforceable; and it further is  
ORDERED that 1407 Broadway's cross motion for partial  
summary judgment as to liability against defendants on the first,  
third and fourth causes of action is granted, and the issue of  
the amount of money due under the Second Lease Extension,  
including the amount of reasonable attorneys' fees, costs and  
disbursements incurred by 1407 Broadway in connection with this  
action, is referred to a to a Special Referee to hear and report  
with recommendations, except that, in the event of and upon the  
filing of a stipulation of the parties, as permitted by CPLR  
4317, the Special Referee, or another person designated by the  
parties to serve as referee, shall determine the aforementioned  
issue; and it further is

ORDERED that entry of judgment on the first, third and  
fourth causes of action shall be held in abeyance pending the  
report and recommendations of the Special Referee and a motion  
pursuant to CPLR 4403 or receipt of the determination of the  
Special Referee or the designated referee with a proposed  
judgment to be settled on notice; and it further is

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days on the Referee Clerk in the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee.

Dated: October 5, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C.

**JANE S. SOLOMON**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).