

**2 GCT Partners LLC v Stadia Capital, L.L.C.**

2009 NY Slip Op 32624(U)

November 5, 2009

Supreme Court, New York County

Docket Number: 105485/2009

Judge: Walter B. Tolub

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

PRESENT: TOLUB

PART 15

Justice

Index Number : 105485/2009

**2 GCT PARTNERS LLC.**

vs.

**STADIA CAPITAL LLC**

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

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IS DECIDED

NOV 10 2009

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 11/5/09

W. Tolub 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 15

-----X  
2 GCT PARTNERS LLC,

Plaintiff,

Index No.

-against-

105485/09

STADIA CAPITAL, L.L.C. a/ka STADIA CAPITAL, LLC  
and FRONTPOINT PARTNERS, LLC,

Defendants.

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WALTER TOLUB, J.

**FILED**  
NOV 18 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

This action arises out of a commercial lease dispute for premises encompassing the entire thirty-first floor of a midtown Manhattan commercial property. By this motion, defendant Frontpoint Partners, LLC (Frontpoint) moves to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7).

Plaintiff is the owner and landlord of 140 East 45<sup>th</sup> Street, New York, New York (the building). By written lease, dated August 10, 2004, plaintiff's predecessor-in-interest, Two Grand Central Tower, LLC, as owner, leased to defendant Stadia Capital, L.L.C. (Stadia), as tenant, the entire 31<sup>st</sup> floor of the subject building (the leased premises).

Plaintiff claims that at some point in 2007, Frontpoint took possession of the premises. Plaintiff further contends that by January 2009, defendants had ceased paying the required rent, resulting in plaintiff's commencement of a summary nonpayment proceeding in the Civil Court, City of New York, Non-Housing Commercial part under L&T Index No. 57060/09 (the Civil Court Proceeding). On March 19, 2009, the parties entered into a stipulation discontinuing the Civil Court Proceeding, whereby the defendants consented to the entry of a Final Judgment of Possession against them for possession of the premises and agreed to vacate the premises.

Plaintiff expressly reserved its claims against defendants in the stipulation, and defendants vacated the premises on March 24, 2009.

On April 17, 2009, plaintiff commenced this action seeking both the unpaid rent and the additional rent that was, and would be due and payable for the balance of the lease term. Plaintiff additionally seeks damages that are otherwise due and payable pursuant to the lease. The complaint alleges that Frontpoint assumed the lease by operation of law and is therefore liable for the unpaid rent, as well as for attorneys' fees. This motion to dismiss followed.

In support of their motion, Frontpoint argues that plaintiff has failed to demonstrate that Frontpoint had not only been assigned the lease, but assumed it. Frontpoint further claims that plaintiff's allegations, devoid of any claims that Frontpoint had any communications with either Stadia or defendant about assuming the lease, are mere legal conclusions and are therefore insufficient to bind them to the lease.

In particular, Frontpoint asserts that plaintiff's claim that the defendants shared the premises are based on the contention that both defendants allegedly shared employees and personnel, and are both subsidiaries of Morgan Stanley & Co. Incorporated (Morgan Stanley). The allegations advanced by plaintiff that are meant to indicate assignment of the lease include claims that Frontpoint used the same office space, equipment and telephone number as used by Stadia; had items shipped to the premises, care of Stadia; generated a directory listing the premises as offices for itself and its personnel teams, Frontpoint Stadia and Frontpoint Brookville; generated business cards listing the premises as its office location and utilizing the name "Frontpoint Stadia"; and had mail, magazine subscriptions, office furniture and equipment delivered to the premises. Regarding payment of the rent, plaintiff alleges that Frontpoint,

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through its parent company, Morgan Stanley, paid rent to plaintiff. The complaint does not allege that Frontpoint made direct payments to plaintiff.

While acknowledging that possession of the premises along with payment of the rent establishes a presumption of assignment that satisfies the statute of frauds (*see Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP*, 13 AD3d 869, 870 [3d Dept 2004]), Frontpoint claims that the complaint lacks essential allegations to support the conclusion that Stadia assigned the lease to Frontpoint. At most, plaintiff alleges that defendants are sharing the premises. Frontpoint avers that assignment would require Stadia to relinquish exclusive possession and control of the premises. Frontpoint claims that such a relinquishment is not alleged.

Even if the court were to find that the complaint adequately pled an assignment to Frontpoint, Frontpoint argues that any privity of estate between plaintiff and Frontpoint was allegedly extinguished when plaintiff regained possession of the premises. According to Frontpoint, once said privity is extinguished, there was no express assumption of the lease, and once plaintiff took possession of the premises, any obligations Frontpoint owed to plaintiff allegedly ceased.

Frontpoint seeks the dismissal of plaintiff's claim for attorneys' fees because Frontpoint did not assume the obligations of the lease and, therefore, cannot be liable for said fees based on a default under the lease.

In opposition to the motion, plaintiff states that it has made an adequate claim of assignment and assumption of the lease. To qualify as an assignment, plaintiff states that it need only show a partial relinquishment of the premises by Stadia. Plaintiff argues that it has

submitted as proof sufficient documentary evidence that Frontpoint was assigned a part of the premises previously possessed by Stadia. Plaintiff claims that additional evidence provided by discovery would allegedly confirm the allegations of assignment.

Plaintiff asserts that it need not allege that Frontpoint paid rent directly to plaintiff or that Frontpoint directly contacted plaintiff to assert an assumption of the lease.

In the context of a motion to dismiss, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*Retropolis, Inc. v Goldman Sachs & Co.*, 17 AD3d 209 [1<sup>st</sup> Dept 2005]). The sole function of the court is to determine whether the complaint states any cognizable theory (*see, Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, mere conclusory assertions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient against a motion to dismiss (*see, Sud v Sud*, 211 AD2d 423,424 [1<sup>st</sup> Dept 1995]).

The parties refer to *Gateway I Group, Inc. v Park Avenue Physicians, P.C.*, 877 NYS 2d 95 (2d Dept 2009). With respect to assumption of a lease, the *Gateway* court found the following factors determinative: defendant took possession of certain suites within the premises; defendant paid rent; defendant placed its name on the directory; defendant referred to the lease as its lease in letters to plaintiff; defendant maintained liability insurance on the premises; and defendant listed the subject suites as the principal place of business with the New York State Department of State. According to *Gateway*, when these allegations are supported by documentary evidence, a viable claim for assumption is present.

Here, plaintiff alleges that Frontpoint was in partial possession of the premises with

Stadia; that Frontpoint, in one form or another through its parent company, Morgan Stanley, paid or reimbursed Stadia for its payment of rent; and that Frontpoint generated a directory listing the premises as offices for itself and its personal teams. There are no allegations or evidence that Frontpoint referred to the lease as its lease, or referred to itself as the lessee of the premises; that Frontpoint maintained liability insurance on the premises; or that Frontpoint listed the premises as its principal place of business with the New York State Department of State.

Plaintiff has provided an adequate claim that Frontpoint allegedly assumed the assignment of the lease. Morgan Stanley, the parent company, provided rent on Frontpoint's behalf and Frontpoint shared facilities with Stadia. Stadia did not have to totally relinquished the premises. Plaintiff has also provided an adequate claim for attorney's fees.

Accordingly, it is

ORDERED that Frontpoint's motion to dismiss the complaint is denied; and it is further

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

DATED:

ENTER

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Hon. Walter B. Tolub, J.S.C.

FILED  
2009 JUN 11 10:00  
NEW YORK  
COUNTY CLERK'S OFFICE  
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