

New York Noodle House v Goldman

2009 NY Slip Op 32710(U)

August 11, 2009

Supreme Court, Queens County

Docket Number: 6361/2004

Judge: Valerie Brathwaite Nelson

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON IA Part 7
Justice

NEW YORK NOODLE HOUSE, et al.,	x		Index Number <u>6361</u> 2004
Plaintiffs,			Motion Date <u>August 11</u> 2009
- against -			
JANE H. GOLDMAN, et al.,			Motion Cal. Number <u>28</u>
Defendants.			Motion Seq. No. <u>4</u>
	x		

The following papers numbered 1 to 24 read on this motion by defendants for an order (1) amending the pleadings to the proof pursuant to CPLR 3025(c); (2) granting partial summary judgment on the first and second counterclaims for money due under the Net Lease in the sum of \$601,845.54 with interest, pursuant to CPLR 3212(b) and/or (e); (3) granting summary judgment dismissing plaintiff's fifth and sixth causes of action to return the security deposit, pursuant to CPLR 3212(b) and/or (e); (4) striking plaintiff's jury demand; and (5) compelling plaintiff's principal Jung Ok Kim to produce the documents demanded at her deposition. Plaintiffs cross-move for an order granting partial summary judgment on the issue of liability pursuant to CPLR 3212(e).

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavits-Exhibits (1-28)	
- Memorandum.....	1-8
Notice of Cross Motion-Affidavit-Affirmation -Exhibit (A)	
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Upon the foregoing papers this motion and cross motion are determined as follows:

Plaintiffs New York Noodle House and Dae Dong Restaurant Inc. seek to recover a portion of the insurance proceeds which were paid to defendants as a result of a total fire loss which occurred on May 31, 2001 at the premises located at 46-07 Queens Boulevard, Sunnyside, New York. Plaintiffs' claim is based upon a letter agreement entered into on January 10, 2002, by the parties' then respective counsel on behalf of the parties. Plaintiffs also seek to recover a security deposit in the sum of \$50,000.00.

Defendants seek to amend their answer in order to substitute 4601 Queens Boulevard LLC in their place. This court does not have jurisdiction over 4601 Queens Boulevard LLC, as it has not been served with process. Defendants thus may not utilize the provisions of CPLR 3025(c) in order to substitute another entity in its place (*see Smith v Garo Enterprises*, 60 AD3d 751 [2009]). Therefore, that branch of defendants' motion which seeks to substitute 4601 Queens Boulevard LLC in their place, is denied.

Defendants also seek to amend the counterclaims by reducing the total amount they seek to recover, but have failed to state the exact reduced amounts sought on each of the counterclaims. Therefore, that branch of defendants motion which seeks to amend the counterclaims, is denied.

This court in its order of October 13, 2006 stated that the owners of the subject premises are defendants Jane H. Goldman, Allan H. Goldman and Louisa Little as co-Trustees of the Lillian Goldman Marital Trust. The court also stated that the plaintiffs are the assignees of a "net lease" and operated a restaurant at the subject premises, based upon the representations of the parties.

However, the documentary evidence submitted herein undermines the court's prior recognition of the defendants as the owner of the subject real property, as well as plaintiffs' status as assignees of a lease. Defendants have submitted three deeds: a "correction deed" dated June 30, 1997 whereby the subject real property was conveyed by "Avon Associates, Inc., a New York Corporation" to "Sol Goldman, d/b/a Empire Associates Realty Co.," which was recorded on March 28, 1998; a deed dated April 29, 1994 whereby the subject real property was conveyed by "Empire Associates Realty Co., a New York corporation" to "JANE HARRIET GOLDMAN, ALLAN HOWARD GOLDMAN, AND LOUISA LITTLE, AS CO-TRUSTEES OF THE LILLIAN GOLDMAN MARITAL TRUST UNDER THE WILL OF SOL GOLDMAN" which was executed by Allan Howard Goldman as President of Empire Associates Realty Co.; and a deed dated July 25, 2002 whereby "JANE HARRIET GOLDMAN, ALLAN HOWARD GOLDMAN, AND LOUISA LITTLE, AS CO-TRUSTEES OF THE LILLIAN GOLDMAN MARITAL TRUST UNDER THE WILL

OF SOL GOLDMAN” transferred the subject property to “4601 Queens Boulevard LLC” and recorded in August 2002.

Defendant has also submitted a lease for the subject real property, dated February 21, 1996, between “JANE GOLDMAN, ALLAN GOLDMAN, AND LOUISA LITTLE, AS CO-TRUSTEES OF THE LILLIAN GOLDMAN MARITAL TRUST” as Landlord, and 46-07 Realty Corp., as Tenant, and was executed by Jung Ok Kim as secretary and treasurer of 46-07 Realty Corp. Jung Ok Kim also executed a personal guaranty of said lease on February 26, 1996. The tenant occupied the entire premises, and the lease term was extended by the said co-trustees on April 15, 1999 and on April 30, 2001.

The court has examined the lease and finds that page 33 of the lease contains paragraph 40, which appears to end in mid-sentence. Pages 34 and 35 of lease are in a different type face, and begins with paragraph 62 and ends with paragraph 67. Paragraph 65 is crossed out in pen.

Paragraph 64 of the lease provides that “It is understood and agreed that lease dated October 14, 1998 by and between THE ESTATE OF SOL GOLDMAN, D/B/A EMPIRE ASSOCIATES REALTY CO. as Landlord and 46-07 REALTY CORP. as Tenant shall be cancelled and of no further force and effect on either party as of June 30, 1996 except the [sic] outstanding rent, charges, additional rents, etc. due and owing to landlord shall be the responsibility of the tenant under this new lease.”

Paragraph 64 clearly refers to another lease agreement, entered into more than two years after the February 21, 1996 lease, in which the landlord is identified as the Estate of Sol Goldman, d/b/a Empire Associates Realty Co., and not Jane Goldman, Allan Goldman, and Louisa Little, as Co-Trustees of the Lillian Goldman Marital Trust. The parties offer no explanation for any of these discrepancies. Therefore, it is unclear as to which lease paragraphs remained in effect at the time of the fire.

The 1997 deed establishes that the subject real property was owned by Sol Goldman. The designation in the deed, d/b/a Empire Associates Realty Co., is merely a trade name, and did not vest title to said real property in Empire Associates Realty Co. (*see Provosty v Lydia E. Hall Hosp.*, 91 AD2d 658 [1982], affirmed 59 NY2d 812 [1983]; *Little Shoppe Around Corner v Carl*, 80 Misc 2d 717 [1975]). Defendants have not submitted documentary evidence which establishes when Empire Associates Realty Corp. was incorporated, and have not submitted a deed which establishes that Sol Goldman, the owner of the subject real property, transferred said real property by deed or any other instrument to Empire Associates Realty Corp. In addition, the parties have not submitted documentary evidence which establishes that the plaintiffs entered into a written sublease or assignment of the lease with

46-07 Realty Corp. Therefore, as it is unclear as to whether the subject real property was properly transferred by deed or other instrument to the defendant trustees, and exactly what lease terms were agreed to and assigned to the plaintiffs or ratified by the parties, that branch of defendants' motion which seeks partial summary judgment on the amended counterclaims, is denied.

That branch of defendants' motion which seeks to dismiss plaintiffs' fifth and sixth causes of action to recover the security deposit is also denied, as it is unclear whether the defendants owned the real property at the time they entered into the lease agreement with the named tenant, whether the lease was assigned to or ratified by the plaintiffs, whether a sublease was entered into by the plaintiffs, and exactly what lease terms were in effect at the time of the fire.

That branch of defendants' motion which seeks an order directing the plaintiffs' to produce the documents demanded at the deposition of Jung Ok Cha, plaintiffs' principal, is granted to the extent that plaintiffs are directed to comply with the defendants' counsel's document demand set forth in the letter of June 9, 2008. Plaintiffs are to serve said documents within 15 days from the date of service of this order, together with notice of entry. In the event that the plaintiffs have served any of these documents, or are not in possession of these documents, they are to so state in an affidavit to be served within 15 days from the date of service of this order, together with notice of entry.

That branch of defendants motion which seeks to strike plaintiffs' jury demand is granted. "The prevailing rule is that the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial" (*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 481 [2009], quoting *Hebranko v Bioline Labs.*, 149 AD2d 567, 568 [1989]; see CPLR 4102[c]; *Mirasola v Gilman*, 104 AD2d 932 [1984]; *Tanenbaum v Anchor Sav. Bank*, 95 AD2d 827, 827 [1983]). However, "[w]here a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial" (*Hebranko v Bioline Labs.*, *supra* at 568).

Here, plaintiffs allege separate causes of action for the imposition of a constructive trust and an accounting, in addition to the claims to recover the portion of the insurance proceeds and the security deposit. The actions to impose a constructive trust and for an accounting sound in equity and monetary damages would not provide the full relief sought here. Accordingly, by including these equitable causes of action in the amended complaint, the plaintiffs have waived their right to a jury trial.

Turning now to plaintiffs' cross motion for partial summary judgment, the January 10, 2002 letter agreement is signed by Judith M. Brener, counsel to the Lillian Goldman Marital Trust, and approved and signed by Edmund Nahas, an attorney who represented Mr. and Mrs. Cha in their commercial transactions. This agreement was entered into prior to the commencement of any action by the parties. Therefore, contrary to plaintiffs' assertion, the letter agreement does not constitute an enforceable stipulation (*cf.* CPLR 2104; *Hallock v State*, 64 NY2d 224 [1984]; *Clark v Bristol-Myers Squibb and Company*, 306 AD2d 82 [2003]). However, Ms. Brener testified at her deposition that she was authorized by Jane Goldman and Louisa Little and "perhaps also" Allan Goldman to sign the January 10, 2002 letter agreement on their behalf, and none of the co-trustees assert that Ms. Brener was not authorized to so act. Mr. and Mrs. Cha both state that Mr. Nahas was authorized to act on their behalf, and it appears from both their affidavits and Mr. Nahas' affirmation that he also represented the plaintiffs who occupied the subject premises prior to the fire. Therefore, as the signatories to said agreement were authorized to so act by their principals, the terms of the January 12, 2002 letter agreement is binding upon the parties herein.

However, in view of the above mentioned deficiencies in the documentary evidence submitted by the parties, the court can make no determination at this time as to whether the plaintiffs were assignees of the lease or subtenants, and therefore bound by the terms of the lease, whether the defendants properly acquired title to the real property and thus were entitled to enter into the lease, and whether the terms of the lease constitute the complete lease agreement. Until these issues are resolved, the court cannot make any determination as to whether the plaintiffs properly cancelled the lease, whether they had a continuing obligation to pay rent, whether they are entitled to a return of the security deposit, and whether they are entitled to recover all of the sums sought under the letter agreement. Therefore, plaintiffs' cross motion for an order granting partial summary judgment on the issue of liability pursuant to CPLR 3212(e), is denied.

In view of the foregoing, defendants' motion is granted to the extent that plaintiffs' demand for a jury trial is stricken, and plaintiffs are directed to comply with defendants' document demand in the manner set forth above. Defendants' motion is denied in all other respects. Plaintiffs' cross motion for partial summary judgment is denied.

Dated:

VALERIE BRATHWAITE NELSON, J.S.C.