

Mutual Auto Park, Inc. v T&T Assoc., LLC

2009 NY Slip Op 32828(U)

November 17, 2009

Supreme Court, New York County

Docket Number: 602816/08

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT.

PART 17

Justice

Index Number : 602816/2008
MUTUAL AUTO PARK, INC.,
 vs.
T & T ASSOC., LLC
 SEQUENCE NUMBER : # 001
 DEFAULT JUDGMENT

INDEX NO. 602816-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on 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

is decided for

at Full

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

FILED
 DEC 03 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 11/18/09

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
MUTUAL AUTO PARK, INC.,

Plaintiff,

Index No. 602816/08

-against-

T&T ASSOC., LLC, MICHAEL NICKLOUS,
and DONATELLI & DONATELLI, LLP,

Defendants.

-----X

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.S.C.:

In this action for breach of a contract, plaintiff Mutual Auto Park, Inc. (Mutual) moves, pursuant to CPLR 3212, for an order granting summary judgment against defendants T&T Assoc., LLC (T&T) and Michael Nicklous (Nicklous) and a default judgment against Donnatelli & Donnatelli, LLP, who is a stakeholder and escrow agent. For the reasons stated below, the motion is denied.

According to the complaint, Mutual was a tenant of non-party 11-15 50th Avenue, LLC. On May 23, 2005, Mutual entered into a lease termination and surrender agreement with 11-15 50th Avenue, LLC (Termination Agreement). Pursuant to this agreement, Mutual was granted a right of first offer to either lease or purchase a parking garage being built on the premises.

Also on May 23, 2005, Mutual entered into an agreement with defendants T&T and Nicklous, as guarantor, which provided for

various payments to Mutual upon the expiration of its right of first offer.¹ Specifically, the agreement provided that T&T and Nicklous would pay \$200,000 to Mutual within ten days of the expiration of the notice of right of first offer.

The complaint alleges that Mutual was served with notice of the right of first offer by 11-15 50th Avenue, LLC on July 11, 2008. The right of first offer expired fifteen days later, on July 26, 2008, because Mutual did not make an offer on the premises. As such, Mutual alleges that T&T and Nicklous were required to pay Mutual \$200,000 within ten days of the expiration of the notice of right of first offer, i.e. by August 5, 2008. Mutual states that it made a demand by letter dated August 8, 2008, but payment was not made.

The complaint also alleges that T&T had agreed to pay Mutual an additional \$75,000 if: 1) 11-15 50th Avenue, LLC sent Mutual a notice of right of first offer; 2) Mutual was unsuccessful for any reason in either leasing or purchasing the parking garage; and 3) Mutual vacated the premises in accordance with the termination agreement.

Mutual states that all three conditions were satisfied because it received a notice of right of first offer from 11-15 50th Avenue, LLC, it was unsuccessful in either leasing or purchasing

¹ Nicklous states that he is the managing member of T&T.

the parking garage and it vacated the premises in accordance with the termination agreement. Mutual states that T&T is therefore liable to it in the sum of \$75,000.00.

Mutual further states that the agreement provided that the \$75,000 payment was to be placed in escrow at the time the agreement was executed. Defendant Donatelli & Donatelli, LLP was the escrow agent charged with holding the \$75,000 and paying that money to Mutual in the event that plaintiff (1) received a notice of right of first offer from 11-15 50th Avenue, LLC, (2) was unsuccessful in either leasing or purchasing the garage, and (3) vacated the premises in accordance with the termination agreement. Mutual alleges that, at the direction of T&T, Donatelli & Donatelli, LLP failed to pay over the \$75,000.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. Winegrad v New York University Medical Center, 64 NY2d 851 [1985]); Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

As set forth above, Mutual's claims against T&T and Nicklous

are based on the parties' agreement of May 23, 2005. However, the authenticity of the agreement submitted by Mutual in support of its motion is in dispute.

First, defendants point out that the agreement is not signed by Mutual's president, Elliot Brownstein. However, it is Brownstein's affidavit that Mutual relies on in support of its motion.

Furthermore, the agreement contains numerous handwritten revisions which defendants contend were not contained in the agreement that Nicklous signed. Nicklous submits an affidavit stating that he did not see or consent to any of the changes and did not know of their existence until he received the papers in support of the instant motion. In its reply papers, Mutual relies on an affirmation of its attorney, rather than one from someone with personal knowledge of the underlying facts, regarding Mutual's contention that "all the changes have been initialed by the parties."

In light of the foregoing, the court finds that Mutual has not demonstrated that it is entitled to summary judgment on its claims against T&T and Nicklous. Among other things, issues of fact exist as to the authenticity of the agreement upon which plaintiff relies in support of the instant motion for summary judgment. At this time, the court need not address defendants' argument that Mutual

acted in bad faith by letting the offer expire, without attempting to negotiate for a new lease or purchase of the garage, or, Mutual's argument that the contract would nevertheless call for payment, based on the language requiring payment where "Tenant is not successful for any reason" in securing a new lease or purchase of the garage.

Mutual also seeks a default judgment against Donatelli & Donatelli, LLP for failure to file an answer. Where no default judgment exists, a meritorious defense need not be proved in the First Department, though may be accepted by the court. "While technically there was no need for defendants to set forth a meritorious defense in support of their motion to compel acceptance of their answer, since no default order or judgment had been obtained by plaintiff, we note that defendants have adequately set forth such a defense." Nason v Fisher, 309 AD2d 526 [1st Dept 2003], citing DeMarco v Wyndham Intl., Inc., 299 AD2d 209 [1st Dept 2002]; see also Guzetti v City of New York, 32 AD3d 234 [1st Dept 2006]). Here, no default has been entered and in any event, defendant has adequately demonstrated that it did not file an answer due to excusable law office failure (Papandrea v Acevedo, 54 AD3d 915 [2d Dept 2008]). Further, defendant has demonstrated that it has a meritorious defense in that, as set forth above, questions of fact exist as to whether Mutual is entitled to distribution of

the escrow funds, and because agreement provides that the escrowee is not liable unless it acts in bad faith, in willful disregard of the contract, or is grossly negligent. The court also notes that Mutual has not demonstrated that it has been prejudiced by the failure to file an answer. Therefore, the motion for a default judgment is denied.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion for a default judgment is denied.

DATED: November 17, 2009

This Constitutes the Decision and Order of the Court.

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE