

**Morgan Bldr., Inc. v Han**

2010 NY Slip Op 30135(U)

January 20, 2010

Supreme Court, New York County

Docket Number: 105076/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.

PART 10

Index Number : 105076/2009

MORGAN BUILDERS

vs

HAN, SANG H

Sequence Number : 001

SUMMARY JUDGMENT

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

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

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**  
JAN 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JAN 20 2010

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Morgan Builders, Inc.

Plaintiff,

-against-

Sang H. Han and Rugged Sole, Inc.,

Defendants.  
-----X

**DECISION/ ORDER**  
Index No.: 105076/09  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's n/m (CPLR 3212) w/SM, GB affids, exhs .....	1
Pltf's opp w/SH affid, exhs .....	2
Def's reply w/SM affid, exhs .....	3

**FILED**

JAN 25 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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

This is a breach of contract action in which plaintiff, Morgan Builders, seeks to recover monies due on a commercial lease and guaranty. Plaintiff moves, pursuant to CPLR § 3212, for summary judgment in its favor against defendants, Rugged Sole, Inc. ("Rugged Sole"), the Lessee and Sang H. Han, president of Lessee and guarantor of Lessee's commercial lease. Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. [CPLR § 3212, Brill v. City of New York, 2 NY3d 648 (2004)].

The following facts are established by the documentary evidence and affidavits submitted in support of this motion.

Plaintiff asserts two causes of action: (1) breach of contract for payment of fixed rent and additional rent, including real estate taxes, totaling \$69,839.36 plus interest at the rate of 18% per annum; and (2) attorney's fees.

It is undisputed that defendant Rugged Sole ("Rugged Sole"), as Lessee, entered into a commercial lease for a store with plaintiff, as Lessor, of the premises located at 7 West 8<sup>th</sup> Street, Ground Floor Store, New York, NY (the "Premises"). The defendants operated a sneaker store at the ground level of that location for a number of years, starting on February 1, 1995. The original 1995 Commercial Lease agreement (the "1995 Lease") between plaintiff and Rugged Sole expired after a ten (10) year term on January 31, 2006.

On October 1, 2005, plaintiff and Rugged Sole entered into a second Commercial Lease agreement (the "2006 Lease") for the Premises. The 2006 Lease commenced on February 1, 2006 and was for a term of two (2) years, set to expire on January 31, 2008. The annual rent under the 2006 Lease was set at \$120,000.00, with Rugged Sole to pay the rent to plaintiff at a rate of \$10,000.00 per month. In addition, the 2006 Lease required Rugged Sole to pay real estate taxes as additional rent. Defendant Sang H. Han ("Sang Han") signed a personal guaranty ("guaranty") dated October 1, 2005 guaranteeing the tenant's obligations under the 2006 Lease.

By letter dated October 24, 2007, from and signed by plaintiff, and countersigned by Rugged Sole, the parties agreed to a renewal of the 2006 Lease for an additional year, commencing on February 1, 2008 and ending on January 31, 2009, with the monthly rent to remain at \$10,000. The renewal expressly states that, other than rent and term, all other provisions of the existing 2006 Lease shall remain in full force and

effect. Defendants do not dispute that the guaranty extends to the renewal.

Plaintiff, through its president, Shepard Morgan, and based upon its business documents, establishes that through January 31, 2009, defendants owe base rent in the amount of \$55,000 and additional rent, including real estate taxes, in the amount of \$14,839.36.

Defendants, who are jointly represented, make the following arguments in opposition to the motion for summary judgment: (1) that plaintiff's motion should be denied because defendants are entitled to a rent credit for \$25,116.70 plus interest, representing two months of pre-paid rent for the last two months of the 1995 Lease; (2) that plaintiff and defendants specifically agreed that no real estate taxes would be paid by Rugged Sole for the period of February 2006 through January 31, 2008; (3) that defendants already paid plaintiff \$10,000 for the month of October 2008 and that the amount plaintiff seeks from defendants should be reduced accordingly; (4) that Rugged Sole suffered substantial water damage to its inventory on the Premises due to water leaks in the building caused by negligence of the plaintiff; and (5) that defendants should not have to pay legal fees.

### **Discussion**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v.

City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues 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 (2d Dept 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). A lease is a form of contract. Ford v. Domino's Pizza, LLC., 67 AD3d 633 (2d Dept 2009).

Plaintiff has established its prima facie case that through January 31, 2009, Rugged Sole owes \$55,000 in rent and \$14,839.36 in additional rent under the 2006 Lease and its renewal. It has further been established that Sang Han personally guaranteed the amounts owed. Defendants' opposition does not raise any triable issues of fact or set forth any legal arguments that defeat plaintiff's motion for summary judgment or warrant its denial for the reasons that follow.

Defendants argue that plaintiff's motion should be denied because they are entitled to a rent credit for \$25,116.70 plus interest, representing two months of pre-paid rent for the last two months of the 1995 Lease. There is no evidence that the pre-paid rent paid pursuant to the 1995 Lease was carried over to the 2006 Lease. Additionally, defendants do not show that they were not credited for pre-paid rent on the 1995 Lease. Therefore, defendants' argument, that they are entitled to a rent credit for \$25,116.70

plus interest, fails.

Next, defendants argue that plaintiff and defendants specifically agreed that no real estate taxes would be paid by Rugged Sole for the period of February 2006 through January 31, 2008. Section 3 of the 2006 Lease agreement specifically states that:

"A. Subject to section B of this paragraph, Lessee shall discharge and pay as additional rent during the entire term of this lease all duties, sales taxes, taxes (except for any income or other personal taxes imposed upon Lessor), water and sewer rents and charges and assessments of any kind . . . extraordinary as well as ordinary, general or special, foreseen as well as unforeseen, which shall during the term be levied, imposed or assessed upon or become due and payable . . . by virtue of any present or any future law of the United States or the State of New York or of any county of municipality thereof, or of any other governmental or municipal authority (hereinafter referred to a "real estate taxes").

B. One hundred percent (100%) of any increased real estate taxes imposed on the land and building of the total tax lot on which the premises is located over and above the 2005/2006 base year shall be paid by Lessee within five (5) days of presentation of the tax bill. In the event Lessee does not pay the taxes, or any other amounts required to be paid by this lease, and Lessor advances the money, each advance shall be deemed additional rent and shall bear interest at 18% per annum until paid."

There is no evidence presented by defendants that the parties subsequently agreed that Rugged Sole would be relieved of its duty to pay real estate taxes. The 2006 Lease expressly provides for its payment. Moreover, paragraph 45 of the 2006 Lease goes on to state:

". . . This lease contains the entire understanding arrived at between the parties and all prior discussions and negotiations are merged herein and may not be extended, renewed, terminated or otherwise modified except by an instrument in writing signed by the party against whom enforcement of any such modification is sought. . ."

There is no writing produced by defendants which modifies the 2006 Lease requirement to pay real estate taxes. Therefore, defendants' claim, that Rugged Sole does not owe real estate taxes for the period of February 2006 through January 31, 2008, is rejected by the Court.

Defendants next assert that they already paid plaintiff \$10,000 for the month of October 2008 and that the amount plaintiff seeks from defendants should be reduced by that amount. Plaintiff, however, has produced its business ledger, showing that the defendants' October 2008 check of \$10,000 was used as a set-off for and credited to the month of August 2008, in which defendant did not pay rent. Defendants were given credit for all amounts paid.

Defendants then assert that Rugged Sole suffered substantial water damage to its inventory on the Premises due to water leaks in the building caused by negligence of the plaintiff. Plaintiff's position is that even if repairs were needed, under the 2006 Lease, they were the tenant's obligations and, therefore, these claims neither state a viable defense nor are they raised as an actionable counterclaim.

Defendants' claim, that Rugged Sole suffered water damage, does not raise any issue of triable fact. The 2006 Lease specifically makes repairs and maintenance the Lessee's responsibility. Paragraph 4 provides that:

“ . . . Lessor shall receive gross rent and additional rent free from insurance, assessments, rent taxes, charges, expenses, damages and deductions of every kind and description, and that Lessee shall pay at its own cost and expense the real estate taxes specified herein . . . and all other expenses and charges incurred in the operation of any business or in the operation, repair and maintenance of the premises, including but not limited to replacement and maintenance of the roof, the heating and air conditioning units of the premises, if any, structural and non-structural repairs and maintenance of the premises . . . ”

Additionally, defendants provide no proof or details of such damage, aside from a one page hand-written list and calculation of damages to support this argument, and defendants have made no counterclaim against the plaintiff in regard to water damage.

Having considered the 2006 Lease, the business ledger, and weighed arguments set forth by each side, the Court finds that plaintiff has proved it is entitled to payment of fixed rent and additional rent, including real estate taxes. Defendants have failed to raise triable issues of fact to defeat plaintiff's motion. Therefore, plaintiff's motion for summary judgment is granted.

For the months of February 1, 2008 through January 2009, plaintiff is entitled to an award of rent totaling \$55,000 plus interest from July 17, 2008 (as a reasonable intermediate date [CPLR § 5001(b)]), at a rate of 18% per annum until entry of judgment. For the months of July 1, 2006 through December 31, 2008, plaintiff is entitled to an award of real estate taxes totaling \$14,839.36 plus interest from October 1, 2007 (as a reasonable intermediate date [CPLR § 5001(b)]), at a rate of 18% per annum until entry of judgment.

While defendants have not disputed the guaranty agreement, the Court finds that the guaranty is valid and enforceable and that Sang Han is personally responsible for the sums owing. Paragraph 1 of the guaranty agreement states:

"1. (A) Guarantor hereby unconditionally and absolutely guarantees to Landlord the full and prompt payment when due of (i) all amounts payable by Tenant pursuant to the Lease, including, without limitation, Fixed Rent and additional rent, as well as amounts otherwise payable by Tenant for use and occupancy, accruing from the Commencement Date under the Lease including, without limitation, reasonable attorneys' fees and disbursements."

While a guarantor should not be bound beyond the express terms of its guaranty, the guaranty that Mr. Yoshida signed is "absolute and unconditional." 665-75 Eleventh Avenue Realty Corp. v. Schlanger, 265 AD2d 270 (1<sup>st</sup> Dept 1999).

### Legal Fees

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). Although defendants argue they should not have to pay plaintiff's legal fees, the 2006 Lease expressly provides that Rugged Sole is liable for plaintiff's reasonable attorneys' fees, costs and expenses incurred, in instituting, prosecuting or defending any action or proceeding in connection with any default by Rugged Sole under the 2006 Lease. Consequently, Rugged Sole is responsible for such fees and Sang Han is responsible for the fees under the guaranty.

Plaintiff has not provided an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of the amount that plaintiff may recover from defendants for its reasonable attorneys' fees, costs and disbursements to hear and report for recommendation to the court. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that Plaintiff's motion for summary judgment is granted and Plaintiff is entitled to summary judgment against Defendants; and it is further

**ORDERED** that the Clerk shall enter a money judgment in favor of Plaintiff, Morgan Builders, Inc., and against the Defendants Rugged Sole, Inc. and Sang H. Han jointly and severally in the following amount: rent totaling \$55,000 plus interest from July 17, 2008 (as a reasonable intermediate date), at a rate of 18% per annum until entry of judgment and real estate taxes totaling \$14,839.36 plus interest from October 1, 2007 (as a reasonable intermediate date), at a rate of 18% per annum until entry of judgment; and it is further

**ORDERED** that the Court finds that defendants are required to pay plaintiff's reasonable attorneys' fees incurred in the prosecution of this action; and it is further

**ORDERED** that the issue of the amount of reasonable attorneys' fees, costs and disbursements is hereby referred to a Special Referee to hear and report back to the Court; and it is further

**ORDERED** that Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference identified herein can be assigned.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
January 20, 2010

So Ordered:

**FILED**  
JAN 25 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
HON. JUDITH J. GISCHE, J.S.C.