Griffith Energy, Inc. v Williamson Farms, Inc.
2010 NY Slip Op 30198(U)
January 27, 2010
Supreme Court, Wayne County
Docket Number: 68882
Judge: Kenneth R. Fisher
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

GRIFFITH ENERGY, INC.,

Plaintiff,

DECISION AND ORDER

v.

Index #68882
2009

WILLIAMSON FARMS, INC.,
MRS TRADING COMPANY, INC,
EBRAHIM MURTADA, HOME LOAN
INVESTMENT BANK, FSB, and John
Doe, (said name being Fictitious,
it, being the intention of Plaintiff
to designate any and all persons in
possession of the chattels sought to
be recovered in this action),

Defendants.

Plaintiff, Griffith Energy, Inc., moves for an order pursuant to CPLR 3211 dismissing defendants' defenses and counterclaims, for an order pursuant to CPLR 3212 granting summary judgment in plaintiff's favor for the relief demanded in the complaint, for an order directing defendant Williamson Farms to turn over plaintiff's personal property (or an order directing the sheriff to recover the same), and for costs and disbursements. Murtada Ebrahim filed a cross-motion "reply/response to Notice of Motion," sworn to December 21, 2009, requesting oral argument.[1] Oral argument is deemed unnecessary.

[1] In his responsive papers, defendant refers to himself as Murtada Ebrahim (#08B3308), incarcerated at the Cape Vincent Correctional Facility. The caption, however, refers to an individual named "Ebrahim Murtada," despite the relevant contract

This action was commenced on August 17, 2009. The individual defendant filed a *pro se* answer on September 2, 2009, containing counterclaims. Plaintiff replied to the counterclaims on September 15, 2009. Defendant Home Loan served a Notice of Appearance on August 24, 2009. Home Loan does not oppose the relief requested so long as there is no damage to the premises.

In this action, plaintiff seeks to recover equipment and personal property from Williamson Farms, to recover on a note made by MRS, and on the personal guaranty of Murtada Ebrahim.

Defendant MRS purchased the premises located at 3885 Route 104, Williamson, NY from plaintiff on August 31, 2006. On that same date, Williamson Farms entered into a Retail Dealer

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documents which refer to "Murtada Ebrahim," as the Williamson Farms President, and "Ebrahim Murtada" as the MRS Trading Group President. The Guarantee of Mortgage, dated August 31, 2006, was signed by "Murtada Ebrahim" individually (using SS #118-78-1686) and by the same person separately in his capacity as Williamson Farms President. In his pleadings, defendant refers to himself as "Murtada Ebrahim, pro se." Plaintiff's Reply to the Answer and Counter-Claim continue the "Ebrahim Murtada" formulation except at the end, on page 4, when it uses "To: Murtada Ebrahim-DIN #08-B-3308" at the Cape Vincent Facility. In these circumstances, and especially because defendant appeared and answered the complaint as well as the motion without raising the issue, he "cannot avoid liability under th[e] indemnification agreemen[t] simply because the party named . . . in those agreemen[t] was not named by plaintiff in the summons and complaint." Sullivan v. FC Bruckner Associates, L.P., 62 A.D.3d 417 (1st Dept. 2009) ("circumstances would warrant amendment of the summons and complaint to correct the error" - done sua sponte). See also, Staheli v. Aetna Ins. Co., 52 A.D.2d 754 (4th Dept. 1976). Accordingly, the clerk is ordered to amend the caption to the individual defendant's correct name, Murtada Ebrahim.

Agreement for the supply of Citgo gas to the marketing premises. In connection with the RDA, plaintiff leased certain personal property to Williamson: Wayne Nucleus electronic point of sale equipment and four Dresser Wayne dispensers pursuant to a Sign and Equipment Rider annexed to the RDA. Plaintiff was and is the owner of that equipment, which is personal property and is not affixed to the premises.

In October 2008, defendant Murtada Ebrahim was convicted of Grand Larceny 3rd and Offering a False Instrument, and was sentenced to 2-6 years. Since that date Williamson Farms has failed to operate the premises as required under the RDA, thus constituting a default under the RDA causing plaintiff to terminate the RDA. A default under the RDA also constitutes a default under the Sign and Equipment Rider. The Sign and Equipment Rider provides for recovery of costs and expenses, including reasonable attorneys' fees, incurred in recovering the equipment. Defendants have failed and refused to return the equipment to plaintiff. Plaintiff's first cause of action seeks return of the equipment, as well as fees incurred in securing that return.

On August 22, 2007, defendant MRS executed a mortgage note in the amount of $64,444.42. The note is in default, despite demand for payment. A balance of $60,777.54 remains due, which plaintiff seeks recovery of in the second cause of action, plus

interest.

Defendant Murtada Ebrahim personally guaranteed payment by MRS of existing or subsequently arising debts by a guaranty dated August 31, 2006. Plaintiff seeks payment under the guaranty on the third cause of action.

Summary Judgment

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also, Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also, Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater

Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

Pro Se Answer

First, to the extent the individual defendant seeks to appear *pro se* on behalf of the corporate entities, he may not do so. See N.Y. CPLR 321.. As such, issue is not joined as to these defendants, and summary judgment may not be granted. The court would entertain a motion for a default judgment as to these entities brought pursuant to CPLR 3215. As Murtada Ebrahim is appearing *pro se* in this action, out of an abundance of caution the court declines to exercise plaintiff's request for other and further relief in the notice of motion to grant a default judgment to plaintiff against the corporate entities. Justice is better served ensuring that all facets of CPLR 3215 are complied with prior to entering a default judgment against the corporate defendants.

Any assignment of corporate causes of action to Murtada Ebrahim by the corporate defendant does not allow an individual to circumvent the requirements of CPLR 321. While Murtada Ebrahim is allowed to assign the corporate claims to the individual defendant, see, e.g., Kinlay v. Henley, 57 A.D.3d 219

(1st Dept. 2008); Med. Facilities, Inc. v. Pryke, 172 A.D.2d 338 (1st Dept. 1991), defendant does not supply, and the court cannot find, any support for allowing the purpose of CPLR 321 to be subverted by assigning a defense of a corporation to an individual. Indeed, the cases uncovered by the court do not allow the assignment of a corporate defense to an individual. See JP Morgan Chase Bank, N.A. v. Complete Environ. Serv., Inc., 21 Misc.3d 1113(A), *3 (Sup. Ct. Nassau Co. 2008); Boglioli v. Advantage Diagnostics Inc., 16 Misc.3d 1105(A) (Sup. Ct. Nassau Co. 2007); Rembrandt Personnel Grp. Agency v. Van-Go Transport Co., 162 Misc.2d 64 (Sup. Ct. App. Term 1994). As no appearance is made in this action on behalf of the corporate defendant, no motion to dismiss based upon improper service ("informally" made by Murtada Ebrahim in his affidavit) is properly before the court. The court notes that, because of the nature of the motion pending, no proof of service in this action against the corporation was required to be provided by plaintiff.

Murtada Ebrahim

The third cause of action is stated against Murtada Ebrahim on a guaranty executed by him. The guaranty of mortgage is attached to plaintiff's complaint, purports to bear Murtada Ebrahim's signature, and is witnessed by Stanley Gordon. Plaintiff thus submits proof of the guaranty, as well as of nonpayment of the indebtedness for which it seeks recovery on the

second cause of action. Plaintiff's counsel affirms that Murtada Ebrahim was represented by the Woods Oviatt firm, of which the aforementioned Stanley Gordon, Esq. is a member.

Nothing set forth by Murtada Ebrahim in his *pro se* answer raises an issue of fact to preclude judgment in plaintiff's favor on the guaranty. The motion for summary judgment on the third cause of action is granted.

To the extent any allegation is made against Murtada Ebrahim on the first cause of action, it is made within his capacity as president of Williamson Farms, Inc. not in his individual capacity. There is no indication that Murtada Ebrahim is personally liable on any documents alleged within the first cause of action.

Motion to Dismiss

On a motion to dismiss pursuant to CPLR §3211(a)(7) the complaint must be given every favorable inference and the allegations in the complaint are deemed to be true. See Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dep't 1992). When considering such a motion, it is the task of the court to determine whether, "'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995)(citations omitted). If the court determines "that plaintiffs are entitled to relief on any

reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. See id. Plaintiff seeks dismissal of defendant's defenses and counterclaims set forth in the *pro se* answer.

To the extent Murtada Ebrahim's answer alleges any sort of fraud, the answer lacks required particularity as contemplated by CPLR 3016. See Answer, ¶4. Moreover, to the extent any particularly is purportedly provided, the answer is largely incomprehensible. Likewise, while Murtada Ebrahim alleges unfamiliarity with the English language, plaintiff avers and the evidence demonstrates that Murtada Ebrahim was well represented by Woods Oviatt in these business dealings. Thus, Murtada Ebrahim's allegation is not supported by the facts of this case and the conclusory allegation fails to state a valid defense. Additionally, the Truth in Lending Act, cited by Murtada Ebrahim in his defense, expressly applies to consumer credit, whereas this transactions was commercial in nature. See 15 U.S.C. §1601 *et seq.* 15 U.S.C. §1603 specifically states that credit for business or commercial purposes are exempt from coverage.

Finally Murtada Ebrahim raises as a defense unlawful entry onto the premises. The premises were foreclosed upon by defendant Home Loan, which does not contest the relief sought herein. As the premises has been foreclosed upon, Murtada Ebrahim does not appear to have any right to deny plaintiff's

entry.

Plaintiff's motion to dismiss the defenses raised in the *pro se* answer is granted.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 27, 2010
Rochester, New York