

Dayan 26-522 LLC v Salton

2010 NY Slip Op 30765(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 112520/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 112520/2009

DAYAN 26-552 LLC

VS.

SALTON, EVAN

SEQUENCE NUMBER : 001

MONEY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

In 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

FILED

APR 05 2010

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION,**

*Preliminary conference
scheduled for May 13, 2010
@ 9:30 am @ 600 Rm 232*

Dated: MAR 31 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: IAS PART 10**

-----X
Dayan 26-522 LLC,

Plaintiff (s),

-against-

Evan Salton a/k/a Evan Saltom,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 112520/09
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):

Papers	Numbered
Summons and n/m (SJLC), SG affid, DSF affirm, exhs	1
Def opp w/ES affid, exh	2
Pltf's reply w/DSF affirm	3

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

GISCHE J.:

This is plaintiff's motion for summary judgment in lieu of complaint based upon a personal guaranty signed by defendant. Defendant is opposed arguing (among other things) that he did not personally guaranty the obligations sought to be enforced and, in any event, the guaranty is not an instrument for the payment of money only.

Arguments

Plaintiff owns the building located at 552 Seventh Avenue, New York, New York. Plaintiff entered into an office lease with ES&G Trading Company ("ES&G) for the rental of the penthouse apartment in that building. The lease, was made "June 2007."

It was for a term of five years, commencing July 1, 2007 ("lease"). The lease was signed by defendant Evan Saltom, the president of ES&G (the tenant). He also signed a separate "guaranty" also dated "June 2007."

ES&G stopped paying rent to the plaintiff in October 2008 and thereafter, plaintiff commenced a non-payment proceeding against ES&G and various "Jane and John Does" who were identified as sub or undertenants of ES&G (Civil Court of the City of New York L&T 098358-08) ("L&T action"). Salton was also a named respondent in that proceeding and identified as the guarantor of the lease. The only respondent who answered the petition and appeared was ES&G. Its answer was verified by Russell Goldfarb as the "president of the corporate tenant [ES&G]." Although there is also proof of service of the petition on Salton, he did not answer the petition or appear in that action.

Hon. Joan M. Kenney struck ES&G's answer (for reasons set forth in the stenographic minutes of the hearing before her) and held an inquest on March 30, 2009. At the Inquest, Judge Kenney directed entry of a judgment against ES&G in the amount of \$65,772.40 including legal fees. Judge Kenney also severed the claims against the guarantor stating that although there was a "good guy clause" the "good guy didn't get out." The claims were severed without prejudice to the commencement of this plenary action.

Following the Inquest, there was extensive litigation in Civil Court (i.e. orders to show cause) and in Bankruptcy Court (ES&G filed for bankruptcy). ES&G was eventually evicted from the penthouse on August 3, 2009 and the landlord was restored to possession. By the time ES&G was evicted it not only owed the \$65,772.40 that was

the subject of the money judgment in the summary proceeding, rent and additional rent had accrued from March 31, 2009.

Plaintiff seeks entry of a money judgment against defendant based on his personal guaranty of ES&G's rent/additional rent obligations under the lease. According to plaintiff, it is entitled to a money judgment in the sum of \$152,664.34.

In opposition, defendant first argues that he did not personally guarantee the lease but signed it in his official capacity as president of ES&G. He also contends that he resigned as the president of ES&G effective March 18, 2008. The resignation was sent to Kristin Goldfarb, the wife of the son of the current ES&G president, Russell Goldfarb, the person who verified the petition in Civil Court. Salton claims he had "issues" with the Goldfarbs because they pursued their own interests and they reneged on other aspects of their business agreement.

Defendant contends that the guaranty is not an instrument for payment of money only because external proof concerning the calculation of rent and additional rent arrears is necessary. Furthermore, defendant denies that he is legally obligated for the legal fees plaintiff expended to evict the undertenants, even if the guaranty is enforceable.

The guaranty that is the subject of the parties' dispute identifies the "Evan Saltom" as the "Guarantor" and is signed by "Evan Salton." Defendant corrected the printed name when he signed it. The body of the guaranty states as follows:

"The undersigned unconditionally guaranties payment on demand of any and all amounts due by Tenant [ES&G Trading, Inc.] to Landlord of any type whatsoever, pursuant to the lease of even date hereof. The liability hereunder shall accrue and continue until such date (the

* 5]

Termination date) that ...Landlord accepts another guaranty in connection with an assignment of the Lease in lieu of this guaranty or ... both the following occur: (a) the premises...are surrendered to the Landlord; and (b) a Surrender of Lease ...is executed and delivered to Landlord. The Guarantor's liability hereunder shall continue after the Termination Date as to any liability accruing prior to the Termination Date."

Discussion

A motion for summary judgment in lieu of complaint is available when the action is based upon an instrument for the payment of money only or upon any judgment (CPLR § 3213). Summary judgment in lieu of a complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a prima facie cause of action (Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 [1st Dept. 1968] *aff'd* 29 N.Y.2d 617 [1971]).

The issue of whether an agreement is ambiguous is a question of law for the court to decide (Kass v. Kass, 91 N.Y.2d 554 [1998]). It is well established law that the officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually (PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 [1st Dept 2001]). Here, however, defendant signed a guaranty which unambiguously sets forth his agreement to be personally obligated for ES&G's debt (PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 [1st Dept 2001]). The guaranty identifies the guarantor as "Evan Salto[n]" and it is signed by "Evan Salton." There is no indication anywhere in the guaranty that he was signing it in his capacity as president of ES&G (*compare* Stuyvesant Plaza, Inc. v. Emizack LLC., 307 A.D.2d 640 [3rd Dept. 2003]). Defendant's argument, that he did not personally

* 6]
guaranty ES&G's payment of rent under the lease is, therefore, unavailing and not a basis to deny plaintiff's motion for summary judgment.

Even assuming defendant could prove at trial that he resigned as ES&G's president on March 18, 2008, this would not be an effective defense against plaintiff's claims, that defendant personally guaranteed the lease and no substitute guarantor was ever provided to, let alone accepted by, the landlord. The guaranty sets forth the only conditions under which the guaranty can be terminated. None of those conditions were satisfied. Although there is a "good guy" clause limiting the guarantor's liability for the corporate tenant's debts, the tenant did not surrender the premises, but was evicted (Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP v. Sheraton Holding Corp., 304 A.D.2d 455 [1st Dept 2003]). Thus, defendant's obligation as the guarantor remained enforceable and did not terminate until August 3, 2009, when ES&G was finally evicted and the plaintiff was restored to possession.

An unconditional guaranty is an instrument for the payment of money only, whether or not it recites a sum certain (European Am. Bank v. Cohen, 183 AD2d 453, 453 [1st Dept 1992]). The guaranty that defendant signed is unconditional. There is no covenant by the guarantor to perform any of the tenant's other covenants, conditions or agreements under the lease; defendant's sole obligation is to pay "any and all amounts due by Tenant to Landlord of any type whatsoever, pursuant to that Lease" (*compare* Times Square Associates v. Grayson, 39 A.D.2d 845 [1972]). Thus, defendant agreed to pay any money the tenant owed.

Judge Kenney decided at the Inquest how much unpaid rent and additional rent ES&G owed to the plaintiff. She also awarded the plaintiff legal fees because they

were recoverable under the lease; these awards were reduced to a money judgment against ES&G.

Although all the respondents - including the guarantor - could have defended the Civil Court proceeding on the merits, the case proceeded by Inquest for reasons that Judge Kenney set forth in the record before her. Thus, plaintiff has a unpaid money judgment against the tenant (ES&G) which it is seeking to enforce against the guarantor who not only personally guaranteed the tenant's debts, but also was a party in that action.

A money judgment is itself an instrument for the payment of money only (CPLR 3213). Thus, not only did defendant agree to pay "any and all amounts due by Tenant to Landlord of any type whatsoever," the amount of unpaid rent, additional and legal fees has been reduced to a judgment. It is not, as argued by defendant, an unknown amount. Thus, the plaintiff has established its prima facie case which is that there is an instrument for the payment of money (i.e. the personal guaranty) and proof of non-payment (Seaman-Andwall Corp. v. Wright Machine Corp., supra). Plaintiff is, therefore, entitled to summary judgment in the amount of \$65,772.40, which is the amount that it was awarded by Judge Kenney at the Inquest before her.

Defendant has, however, raised triable issues of fact about the unpaid rent/additional rent that ES&G owed, but allegedly did not pay after March 31, 2009 up until the time that ES&G was evicted from the premises and plaintiff regained possession (Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634 [2nd Dept. 1992]). Although simple non-payment is alleged, the amount allegedly owed by ES&G has never been determined. Defendant contends he was no longer an active

participant in ES&G after he resigned as president and he does not know whether payments were made by ES&G but not credited. The guaranty does not contain a waiver of defenses, furthermore outside proof is required to establish the plaintiff's post-March 30, 2009 claims of unpaid rent and additional rent. As to the post March 30, 2009 claims of unpaid rent and additional rent, plaintiff's motion for summary judgment in lieu of a complaint must be denied. Those claims are, however, converted to an ordinary action by deeming the motion and supporting papers the complaint. The opposition papers are deemed defendant's answer.

Plaintiff has proved it is entitled to summary judgment in lieu of a complaint as to its claims for unpaid rent and additional rent through and including March 30, 2009. Defendant has failed to raise issues of fact that would require a trial of those claims. The clerk shall enter a money judgment against defendant in the amount of \$65,772.40 with interest from March 30, 2009.

The balance of plaintiff's claim for unpaid rent and additional rent guaranteed by defendant from March 31, 2009 forward is, however, converted to a conventional action. A preliminary conference will be held in this case on **May 13, 2010 in Part 10 at 9:30 a.m.**, 60 Centre Street, Room 232. No further notices will be sent.

Conclusion

It is hereby:

ORDERED that plaintiff's motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213 is granted as to its claims for unpaid rent and additional rent which were reduced to a money judgment in the Civil Court action (i.e. through March

30, 2009; and it is further

ORDERED that the clerk shall enter a money judgment in plaintiff Dayan 26-552 LLC against defendant Evan Salton a/k/a Evan Saltom in the amount of Sixty Five Thousand Seven Hundred Seventy Two and 40/100 Dollars (\$65,772.40) with interest from March 30, 2009; and it is further

ORDERED that as to plaintiff's post March 30, 2009 claims, they are converted to an ordinary action by deeming the motion and supporting papers the complaint; the opposition papers are deemed defendant's answer; and it is hereby

ORDERED that any relief requested that has not been addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 31, 2010

So Ordered:



Hon. Judith J. Gische

FILED
APR 05 2010
NEW YORK
COUNTY CLERK'S OFFICE