

**1515 Broadway Fee Owner LLC v Citadel Constr.
Corp.**

2010 NY Slip Op 30941(U)

April 14, 2010

Supreme Court, New York County

Docket Number: 109591/09

Judge: Judith J. Gische

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

PRESENT: GISCHE
HON. JUDITH J. GISCHE Justice

PART 10

1515 BROADWAY

INDEX NO. 10959/09

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -
C. TADEL

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

FILED

APR 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*Prelem cont scheduled for
May 27, 2010 @ 9:30 am
in Part 10*

APR 14 2010

Dated: 4/14/10

[Signature]
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
1515 Broadway Fee Owner LLC,

Plaintiff (s),

-against-

Citadel Construction Corp.,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 109591-09
Seq. No.: 003

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
Pltf n/m (3212) w/NHK affid, JBT affirm, exhs	1
Def x/m (amend) w/ MBW, exhs	2
DPS affid in support x/m (sep back), exhs	3
FRK affirm in support x/m (sep back), exhs	4
Pltf further support, reply w/DHM affirm, exhs	5
Order, Heitler J., 12/22/09	6
Steno mins 1/28/10	7
Steno mins 2/25/10	8

FILED
APR 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

GISCHE J.:

This is an action against the guarantor of a commercial lease. Issue has been joined and plaintiff seeks the dismissal of defendant's affirmative defenses or summary judgment on its complaint. Defendant has cross moved to amend its answer to assert new defenses. Each motion is opposed by the other party against whom relief is sought. Since the motion for summary judgment is brought pre-note of issue, it is timely and will be decided on the merits (CPLR 3212[a]).

Arguments presented

Plaintiff 1515 Broadway Fee Owner, LLC ("owner") owns the building located at 1515 Broadway, New York, New York ("building"). The owner entered into a 10 year commercial lease agreement with non-party Wurk-Times Square, LLC ("Wurk") to lease almost 65,000 square feet of office space on the 11th and 12 floors of the building. The lease, dated and effective September 30, 2008 (the "lease") was later modified in writing dated December 22, 2008 ("lease modification").

Wurk is in the business of offering and leasing "fractional office space." This entails operating and leasing out executive office space to companies and individuals who prefer to share the cost of reception, office, and secretarial services with other professionals. Eventually Wurk defaulted in paying rent and other obligations under its lease. The owner commenced a nonpayment proceeding against Wurk in the Civil Court of the City of New York on July 15, 2009 (1515 Broadway Fee Owner, LLC v. Wurk-Times Square, LLC, L&T 077016-09) ("non-payment proceeding"). That proceeding was resolved on December 2, 2009 with the owner and Wurk entering into a so-ordered stipulation of settlement in which Wurk agreed to a judgment of possession in favor of the owner and the entry of a money judgment against Wurk in the amount of \$3,423,518.80. Other claims were severed and reserved for further litigation in this action which had already been commenced.

Citadel Construction Corp. ("Citadel") is in the interior construction business. At one point David Stack ("Stack") and non-party McCann Construction, LLC were apparently shareholders of Citadel. A dispute arose between Stack and non-party Daniel L. Gordon ("Gordon"). Gordon, on behalf of Citadel, brought an action against

Stack in October 2009, seeking to have him removed (physically) from Citadel's office and other relief. Judge Edmead presided over that case. She denied Gordon's motion and restored Stack to his position as the president of Citadel.

Gordon is the principal of Wurk. He was also at one point the manager of McCann Construction, LLC a limited liability company, and a non-party.

The owner contends that Citadel guaranteed Wurk's lease. The guaranty on the lease indicates it was signed by "David Stack" on behalf of Citadel and the signature is notarized, indicating the "president" signed the document before the notary. The lease modification is also "consented and ratified" by the guarantor (Citadel) and document has the purported signature of "David Stack." Thus owner seeks to recover the unpaid rent and other sums due from Citadel pursuant to its guaranty of Wurk's lease, as amended. Stack, however, contends that the signature on the guaranty and the consent is not his, but a forgery or falsification by Gordon.

Gordon retained lawyers to prepare Citadel's answer. He signed the retainer agreement in his individual capacity. Citadel filed two answers; the first answer asserted three defenses and three counterclaims which had to do with the extent of Citadel's guaranty and a side agreement that Citadel reportedly had with the owner to do interior construction work at the building. Citadel later withdrew its counterclaims by serving an amended answer. Each of these answers were served and filed in August 2009. That law firm has since moved, and been permitted, to withdraw as Citadel's counsel (Order, Heitler, 12/22/09). Citadel's new attorneys were retained by Stack as the president of Citadel.

Citadel seeks permission to serve a (second) amended answer to assert its new

defense that the guaranty is null and void because Stack's name on the guaranty was forged or falsified and he did not consent to Citadel guaranteeing Wurk's rent payments. Stack has provided his sworn affidavit in support of Citadel's cross motion to amend and in opposition to plaintiff's motion for summary judgment. Stack states that Gordon is a convicted fraudster with a long and documented record of falsification, forgery and deceit, beginning in high school (forging grades) and continuing until recently when he was charged with three securities violations. Although one charge was resolved by Gordon agreeing to be permanently barred from serving as an officer or director of any public company, Gordon served 42 months in prison on other fraud charges.

Stack believes that Gordon falsified his (Stack's) name with the help of Gordon's long time assistant who notarized the document. Stack has hired a handwriting expert who opines it is "probable" that Stack's signature was forged by Gordon. Thus, Citadel argues the guaranty is void ab initio, and therefore, the owner's motion for summary judgment should be denied.

In reply and in opposition to Citadel's the cross motion, the owner argues that the newly asserted forgery or falsification claims are no defense because Stack is not individually liable on the guaranty, rather the owner is seeking to hold Citadel, the corporation, responsible as the guarantor and it does not matter who within the corporation signed the guaranty or that the officers/principals of the defendant are having a business dispute.

The owner also argues that twice Citadel has admitted the validity of the guaranty – in the original and first amended answer -- consequently they are (or should

be) estopped from now denying it. Furthermore, the owner argues that it did not know nor have reason to believe (as argued by Citadel) that it was not Stack who signed the guaranty. Alternatively, the owner argues Citadel ratified the guaranty because he discovered the alleged forgery on October 7, 2009, but did "nothing."

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [1st Dept 2003]).

Where a party seeks permission to serve an amended pleading, leave to amend shall be freely given by the court upon such terms as may be just, including the granting of costs and continuances, unless the proposed amendment is patently devoid of merit (CPLR § 3025 [b]). Since summary judgment cannot be had unless and until issue is joined, the court first decides whether the motion to serve an amended answer should be granted. If it is, then summary judgment would be premature.

Stack contends the signature on the guaranty purporting to be his is not, in fact, his signature and that he did not know about the falsification/ forgery until after this case was commenced. On inspection, the signature on the guaranty does not look like

[* 7]

Stack's signature on other documents. Whether a guarantor's signature on a guaranty was forged not only presents an issue of fact that cannot be properly determined on a motion for summary judgment, it is an available defense to the enforcement of a guaranty by the guarantee (Seoulbank N.Y. Agency v. D&J Export & Import Corp., 270 AD2d 193 [1st Dept 2000]).

Although plaintiff argues that Gordon had at least "some position of authority in Citadel," and therefore, it makes no difference whether he signed the guaranty as Stack or himself, this glosses over a number of underlying disputes between these and other (non) parties; it also misstates the law.

In situations where, for example, a forger has as much right to make decisions or issue instructions as the person whose name he signed, then those forged instructions are just as binding as if given by the person whose name was forged (Latallo Establissement v. Morgan Guar. Trust Co. of New York, 155 A.D.2d 214 [1st Dept 1990] *app granted* Latallo Establissement v. Morgan Guar. Trust Co. of New York, 76 N.Y.2d 703 [1990]). Here, however, there is a dispute about whether it is Stack or Gordon that had authority to act for Citadel. According to Stack, Citadel did not ratify the guaranty which was for Wurk's leased space, he did not know about the guaranty, and Citadel neither derived nor accepted any benefit from guaranteeing a lease for Wurk – a company owned by Gordon (*compare*, RLI Insurance Co. v. Athan Contracting, 667 F.Supp.2d 229 [EDNY 2009]).

Arguments that Gordon acted with apparent authority discount Stack's claim that Gordon did not sign the guaranty as "Daniel Gordon" -- but signed it as "Daniel Stack." Thus, the owner was not misled into thinking that Gordon had the right to sign

[* 8] 2
the guaranty, but that it was Stack who had signed it (Standard Funding Corp. v. Levitt, 89 N.Y.2d 546 [1997]).

Consequently, the cross motion to amend is granted. Defendant may serve the proposed amended answer no later than ten (10) days after entry of this decision and order.

The owner's motion for summary judgment is denied at this time since defendant is being allowed to serve an amended answer. The preliminary conference in this case will be held on **May 27, 2010 at 9:30 a.m.**

Conclusion

Defendant's cross motion to amend is granted. Defendant may serve the proposed amended answer no later than ten (10) days after entry of this decision and order. Plaintiff's motion for summary judgment is denied at this time since defendant is being allowed to serve an amended answer. The preliminary conference in this case will be held on **May 27, 2010 at 9:30 a.m.** No further notices will be sent.

Any relief that has not been expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 14, 2010

So Ordered:



Hon. Judith J. Ganche, J.S.C.

FILED
APR 20 2010
NEW YORK
COUNTY CLERK'S OFFICE