

ULM Holding Corp. v Strand Communications LLC

2010 NY Slip Op 30978(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 601077/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER

PART 15

Index Number : 601077/2009
ULM I HOLDING CORP.
 VS.
STRAND COMMUNICATIONS LLC
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. 601077/09
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

n this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
1
2
3, 4
~~_____~~
~~_____~~

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 APR 22 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 4/16/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ULM HOLDING CORP.,

Plaintiff,

Index No.
601077/09

- against -

Seq No.: 001

Decision and
Order

STRAND COMMUNICATIONS LLC AND
CHRISTOPHER STRAND,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action to recover unpaid rent and additional rent due it from defendant Strand Communications LLC (“SCL”) pursuant to a lease agreement, and from defendant Christopher Strand (“Strand”) pursuant to a separately executed Guaranty. Plaintiff now moves for summary judgment pursuant to CPLR 3212. Strand and SCL jointly oppose.

SCL and ULM Holding Corp. (ULM) entered into a lease agreement dated June 12, 2003 for premises on the 9th Floor of 1776 Broadway in the County and State of New York. SCL was a limited liability company, and in order to induce ULM to enter into the lease, Strand agreed to execute a Guaranty, also signed on June 12, 2003, guaranteeing “unconditionally and absolutely . . . the full and prompt payment . . . by Tenant under the Lease.” The lease, by its terms, expires on July 21, 2011. ULM commenced a summary proceeding (L&T Index No. 51864/2009) alleging SCL’s default under the lease, which was settled by and between SCL and ULM by a stipulation of settlement dated February 3, 2009. The stipulation acknowledged SCL’s default in payment and arrears totaling \$60,566.97, and provided for a possessory judgment and a money judgment in the amount of \$60,566.97. SCL vacated the premises on or about March 3, 2009, but the money judgment was not paid.

Plaintiff, in support of its motion, submits: the pleadings; a copy of the lease agreement; a copy of the Guaranty; a copy of the Stipulation of Settlement; and an Entry of Judgment. Plaintiff argues that Strand, pursuant to the Guaranty, is liable for the judgment amount against SCL of \$60,566.97, plus “fixed rent in the amount of \$158,736.42,” representing the total rent SCL failed to pay from March 2009 through November 2009. Plaintiff urges that the rental obligations continued despite SCL’s surrender of the premises due to SCL’s failure to satisfy the money judgment.

Strand and SCL, in opposition, submit an attorney’s affirmation and the affidavit of Strand. Strand argues that a substantial portion (\$158,736.42) of plaintiff’s demand is for rent during the period of time “subsequent to the termination of the Lease.” Strand argues that the Guaranty became invalid due to plaintiff’s breach of the lease, pointing to “Plaintiff’s failure to honor and permit an assignment or sublease of the lease and the failure to provide normal security resulting in the repeated burglaries and theft of equipment required for the continuance of Tenant’s business.” Strand also claims that plaintiff does not show that it attempted to mitigate damages by re-renting the premises after SCL’s surrender. Finally, Strand claims that the Stipulation of Settlement reached in the summary proceeding was meant to encompass and extinguish the Guaranty.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept., 1998])

ULM provides the Guaranty, the stipulation of settlement and resulting money judgment entered against SCL. Additionally, the affidavit of John M. Williams, financial manager of ULM, states that SCL has failed to pay pursuant to its obligations. Regarding ULM's first cause of action, it seeks a money judgment against Strand for the unpaid money judgment consented to by the terms of the stipulation dated February 3, 2009. There is no issue of fact regarding this \$60,566.97, which SCL consented to pay, failed to pay, and which is clearly the subject of the Guaranty.

ULM also asserts a claim for fixed rent for the period March 2009 through November 2009. SCL and Strand argue that ULM had a duty to mitigate and relet the premises.

It is well settled that in a commercial case, "once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages." (*Holy Properties Limited LP v. Kenneth Cole Productions*, 87 NY2d 130,134[1995]).

Strand asserts that the Guaranty terminated with the stipulation of settlement. He points to paragraph 7 of the stipulation of settlement, which states:

This Stipulation constitutes the entire agreement between the parties with respect to the subject matter hereof, and all understandings and agreements heretofore had between the parties shall be merged into the terms of this Stipulation and shall not survive.

The parties to the stipulation of settlement were ULM and SCL. Indeed, Strand signed the stipulation of settlement on behalf of SCL, specifying his title as President. The stipulation, admittedly negotiated and prepared by attorneys for the respective sophisticated parties, never mentions the Guaranty or the Guarantor, nor seeks to limit the responsibilities of the Guarantor in any way. The Guaranty is a separate agreement from the lease, and was signed by Strand in his individual capacity.

Further, the Guarantor's liability did not terminate with the surrender of the premises. The Guaranty itself states:

Guarantor's liability under this Guranty shall terminate prior to the Expiration Date (as that term is used in Lease) upon the last to occur of the following: (a) the date on which Tenant shall vacate and surrender the Premises in accordance with the terms of the Lease free and clear of all liens and all property in which any others have any rights, and free and clear of the use and occupancy of the Premises by any occupant, subtenant, licensee or others; (b) the delivery to Landlord of all keys, magnetic access cards, alarm access codes and other similar items in respect of the premises; (c) the delivery by Tenant to Landlord of a thirty (30) day written notice of such surrender and vacating, specifying the date of such surrender and vacation; and (d) the full payment of all Fixed Rent, Additional Rent and other charges payable by Tenant under the Lease up to the date the last of the foregoing has been completed. Notwithstanding such vacating and surrender, Tenant shall continue to be liable under the terms of the Lease for any breach of the Lease, and no acceptance by Landlord of any surrender or release under this Guaranty shall be deemed to modify, release, satisfy or otherwise relieve Tenant of any liability whatsoever under the Lease.

Clearly, there was no payment of the charges in item (d), which are the subject of plaintiff's first cause of action here.

ULM makes a prima facie showing of its entitlement to judgment. Neither Strand nor SCL raise issues of fact which would preclude a granting of summary judgment.

Wherefore, it is hereby

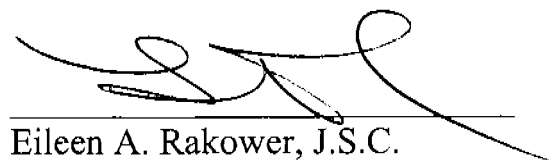
ORDERED that the motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the court is directed to enter judgment in favor of ULM I HOLDING CORP. and against CHRISTOPHER STRAND in the amount of \$60,566.97 with interest as prayed for allowable by law at the rate of 9% per annum from the date of February 5, 2009 until the date of entry of this judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of this court is directed to enter judgment in favor of ULM I HOLDING CORP. and against defendants STRAND COMMUNICATIONS LLC and CHRISTOPHER STRAND in the amount of \$171,124.61, representing fixed rent pursuant to the Lease from March 2009 through November 2009,¹ with interest from the date of entry of this judgment, as calculated by the clerk at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 16, 2010


Eileen A. Rakower, J.S.C.

FILED
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¹Plaintiff refers to an oral modification of the amount of fixed rent, however, paragraph 53F of the Rider to the Lease provides that any modification must be in writing.