

**1911 Richmond Ave. Assoc., L.L.C. v G.L.C. Capitol  
L.L.C.**

2010 NY Slip Op 31075(U)

April 29, 2010

Sup Ct, Richmond County

Docket Number: 101002/2007

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
1911 RICHMOND AVENUE ASSOCIATES, L.L.C.

Plaintiff,

-against-

G.L.G. CAPITOL L.L.C., J.P. TURNER & COMPANY  
L.L.C., ROCCO GUIDICIPIETRO and ROBERT  
PETERS,

Defendant(s).

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DCM PART 5

Present:

HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 101002/2007

Motion No. 003, 004

The following papers numbered 1 to 3 were used on this motion this 13th day of April, 2010:

[003]Notice of Motion [J.P. Turner] (Affirmation in Support) -----	1
[004]Notice of Motion [Plaintiff] (Affirmation in Support) -----	2
Affirmation in Opposition [Plaintiff]-----	3
Reply Affirmation [Plaintiff] -----	4

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The plaintiff commenced this action on or about March 2, 2007, alleging, *inter alia*, breach of two commercial leases between the parties and damage to the property. The defendants interposed an answer on or about May 24, 2007. On or about April 22, 2008, the defendant J.P Turner & Company, LLC [hereinafter “JP Turner”] made a motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (a)(7). The motions were denied with leave to renew after discovery by this Court on July 17, 2008. The motions presently before the Court are the renewal motions after discovery was completed and motions for summary judgment, pursuant to CPLR § 3212, by defendant JP Turner and the plaintiff.

It is undisputed that on or about June 1, 2000, plaintiff, 1911 Richmond Avenue Associates, L.L.C., [hereinafter “1911”] by its managing member Joseph Cannizzaro, entered into a written lease agreement with defendant G.L.G. Capitol L.L.C., [hereinafter “GLG.”] to provide office space known as “Suite 200” for a three year term. On November 1, 2004, 1911 leased to

GLG additional office space known as “Suite 201” for a five year term. Plaintiff contends that GLG signed the two aforementioned leases as an agent/subsidiary/licensee and/or representative of defendant JP Turner. Defendants Rocco Guidici Pietro and Roberts Peters<sup>1</sup> [hereinafter known as the “Guidici Pietro brothers”] are brothers and each own fifty percent of the limited liability company, defendant GLG, and signed personal guarantees for the leases executed with the plaintiff. On June 1, 2006, plaintiff alleges that defendants vacated both office suites, prior to the expiration of the lease term, without the consent of 1911 and are now liable for plaintiff’s loss of rental income and damage to the property.

By way of background, the defendant Guidici Pietro brothers testified<sup>2</sup> that they both hold several licenses to trade stock on various stock exchanges which was the business they operated out of Suite 200 and Suite 201 leased to them by the plaintiff. Further, the evidence indicates that defendant GLG is a “holding company to pay bills” and holds no qualifications/certificates to trade stock in any way. The Guidici Pietro brothers, in order to trade stock on certain exchanges, entered into a licensing/franchise agreement, often referred to as an Office of Jurisdictions (hereinafter known as “OSJ”), with defendant JP Turner<sup>3</sup>. It is undisputed that certain trades made by the Guidici Pietro brothers for their customers required supervisory approval by defendant JP Turner before they could be completed. The brothers were required, through the

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<sup>1</sup>Defendant Robert Peters is also known as Robert Guidici Pietro.

<sup>2</sup>The Court notes that the record before it lacks complete deposition transcripts of the parties.

<sup>3</sup>As described in the “Office of Supervisory Jurisdiction Agreement” JP Turner “is registered as a securities Broker-Dealer with the Securities and Exchange Commission (the “SEC”), is a member of the National Association of Securities Dealers, Inc. (the “NASD”), and is registered to do business in various states”. JP Turner is a limited liability company itself, and provides the service of securing trades/transactions for smaller companies.

license/franchise agreement, to pay JP Turner commissions on each trade and JP Turner possessed a daily supervisory capacity of all trades made through JP Turner. Suites 200/201, out of which the business operated, posted signs on the doors/hallways which read “JP Turner & Company”. The leases for the suites were between plaintiff and defendant Guidici Pietro brothers and GLG, JP Turner is not a signatory, or mentioned in any way, on the leases or the guarantys.

I. Defendant JP Turner’s Motion for Summary Judgment [Motion 003]

As requested by the defendant JP Turner, this Court will address the motions as summary judgment rather than motion to dismiss renewals. At this juncture, with discovery complete, summary judgment is the more appropriate standard.

A “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 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotations omitted]).

With respect to defendant JP Turner’s liability, it must be established that co-defendants Guidici Pietro brothers and GLG possessed a principal-agency relationship with JP Turner

sufficient to make them liable for the alleged breach of the leases/damage to the property. It is well settled that an “[a]gency is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act” (G.K. Alan Assoc. Inc. v. Lazzari, 66 AD 3d 830, 833 [2d Dept. 2009]). Further, “[t]he duties of an agent are defined by the terms of the agreement that gave rise to the agency” (G.K. Alan Assoc. Inc., 66 AD 3d at 833). When a defendant establishes there is no agency relationship, it is proper for a court to award summary judgment in favor of the defendant where liability is premised upon the principal-agent relationship (Smith-Hoy v. AMC Property Evaluations, 52 AD3d 809 [2d Dept. 2008] [holding franchisor could not be held vicariously liable for company’s alleged misconduct because franchisor did not exercise high degree of control over company establishing the existence of an agency relationship]).

Here, defendant JP Turner provides evidence sufficient to establish its entitlement to summary judgment as a matter of law (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The OSJ agreement between JP Turner and co-defendant Guidici Pietro brothers and GLG specifically delineates that the

Licensee shall serve under this Agreement as an independent contractor, and nothing contained in this Agreement shall be construed to create the relationship of employee and employer between Licensee and J.P. Turner. Nothing contained in this Agreement is to be construed to make Licensee the agent or representative of J.P. Turner for any purpose, and Licensee does not have the right, power or authority whatsoever to assume, create or incur any obligation or responsibility for or on behalf of Licensee, or to bind J.P. Turner in any manner whatsoever . . . [n]o partnership, joint venture, agency, fiduciary or employment relationship is intended or created by reason of this Agreement.

Further, in discussing the “Compliance and Supervision” that JP Turner possessed over co-defendants with respect to the highly regulated nature of the business the OSJ states that;

[o]ther than set forth in this Agreement, J.P. Turner has no right to control or direct Licensee; provided, however, that J.P. Turner shall have the responsibility and right to perform such supervisory overview of Licensee as required by all applicable supervisory rules promulgated by the SEC, and NASD or other regulatory authorities.

As evidenced by the agreement between JP Turner and the co-defendants Guidici Pietro brothers and GLG, no principal-agency relationship existed. Further, JP Turner was not a signatory in anyway to the lease or guarantys between plaintiff and the Guidici Pietro brothers and GLG, thus no privity of contract existed either. While the OSJ did dictate that some level of control was given to JP Turner, this was specifically limited to trading stocks and/or conformance with the regulations of SEC/NASD. There is no evidence presented to establish that JP Turner had any authority to direct the co-defendants to enter into/breach/renew any lease or guaranty, these were decisions made by the Guidici Pietro brothers/GLG alone.

In opposition, the plaintiff has failed to raise any questions of fact regarding the alleged principal–agency relationship between JP Turner and GLG (G.K. Alan Assoc. Inc. v. Lazzari, 66 AD 3d 830, 833 [2d Dept. 2009]; Smith-Hoy v. AMC Property Evaluations, 52 AD3d 809 [2d Dept. 2008]). While JP Turner was held out to customers as the entity conducting trades, there was no agreement between plaintiff and JP Turner to lease the space. Plaintiff presented no evidence that JP Turner exercised the requisite control over co-defendants to establish a principal-agency relationship. The relationship between JP Turner and co-defendants existed solely to enable the Guidici Pietro brothers to trade stocks on various stock exchanges. As a result, no questions of fact exist with respect to the fact that no relationship between plaintiff and JP Turner

existed and further, that the relationship between co-defendants and JP Turner was not one of principal-agency sufficient to hold JP Turner liable for co-defendants alleged breach of the lease/damage to the property. Summary judgment is appropriate in favor of defendant JP Turner (G.K. Alan Assoc. Inc. v. Lazzari, 66 AD 3d 830, 833 [2d Dept. 2009]; Smith-Hoy v. AMC Property Evaluations, 52 AD3d 809 [2d Dept. 2008]; Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]).

II. Plaintiff's Summary Judgment Motion on liability [Motion 004]

Here, the plaintiff has made a prima facie showing of entitlement to summary judgment as a matter of law by submitting evidence sufficient to establish that the defendants<sup>4</sup> breached the lease by vacating the premises prior to the expiration of the lease term (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Genovese Drug Stores Inc. v. William Floyd Plaza, 63 AD3d 1102, 1103-1104 [2d Dept., 2009][stating that “[a] lease is a contract. Where the terms of a contract are clear and unambiguous the contract must be enforced according to its term”]). The defendants have presented the leases for both suite 200 and suite 201, which both indicate that

[i]n the event of any such expiration, termination or repossession, Tenant shall pay Landlord all rent up to the time of such expiration, termination or repossession, together with all costs and expenses incurred by Landlord in connection with such termination or repossession including attorney's fees, and thereafter Tenant, until the end of what would have the Lease Term in the absence of such expiration, termination or repossession.

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<sup>4</sup>The Court is only referring to defendants Guidicipietro brothers and GLG, as dismissal was granted against JP Turner.

Further, both Leases provide that “*Twenty-Eight* - This instrument may not be changed orally”. The plaintiff also established, through the testimony of Joseph Cannizzaro, that substantial damage to the premises was discovered upon the defendants vacatur of the premises.

In opposition, the defendant Guidici Pietro brothers and GLG have failed to raise questions of fact sufficient to rebut plaintiff’s showing that they vacated the leasehold prior to the expiration of the lease date (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Leases, as contract, are construed strictly according to their terms, especially where the signatories are sophisticated businessmen (Genovese Drug Stores Inc. v. William Floyd Plaza, 63 AD3d 1102, 1103-1104 [2d Dept., 2009]; REP A8 LLC v. Aventura Tech., 68 AD3d 1087, 1088-1089 [2d Dept., 2009]; Rocar Realty Northeast, Inc. v. Jefferson Val. Mall Ltd., 38 AD3d 744, 746-747 [2d Dept., 2007]). Here, while the defendant Guidici Pietro brothers testified to several conversations with Joseph Cannizzaro with respect to vacating the premise early, the lease itself provided that no oral modifications could be made and such statements are insufficient to rebut plaintiff’s prima facie showing, where the lease itself noted that oral modifications were prohibited (id.). As a result, no questions of fact exist, it is clear the defendants vacated the premises early and plaintiff is entitled to summary judgment on liability against defendants GLG and the Guidici Pietro brothers.

Accordingly, it is

ORDERED that the defendant JP Turner’s motion for summary judgment [Motion 003] is hereby granted, and it is further

ORDERED that the complaint and all cross claims are dismissed as against defendant JP Turner only, and it is further

ORDERED that the plaintiff's motion for summary judgment [Motion 004] on liability is hereby granted as against defendants GLG Capitol LLC and Rocco Guidici Pietro and Robert Peters and it is further

ORDERED that the portion of plaintiff's motion that requests discovery is hereby moot and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further

ORDERED that the Clerk enter Judgment accordingly, and it is further

ORDERED that the case proceed to trial on the issue of damages immediately.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: April 29, 2010

E N T E R,

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Hon. Judith N. McMahon

Justice of the Supreme Court