

Best Souvenirs, Inc. v 516 Fifth Ave. Partners LLC
2010 NY Slip Op 33307(U)
November 22, 2010
Supreme Court, New York County
Docket Number: 113764/08
Judge: Joan A. Madden
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SCANNED ON 12/1/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Best Souvenirs

INDEX NO. 113764/08

MOTION DATE _____

MOTION SEQ. NO. 8

MOTION CAL. NO. _____

516 Fifth Ave

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *and cross-motion are determined in accordance with the annexed decision and order.*

FILED

DEC 01 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 22, 2010

[Signature]
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: PART 11

-----X
BEST SOUVENIRS, INC.

Plaintiff,

INDEX NO. 113764/08

-against-

516 FIFTH AVENUE PARTNERS LLC,

Defendant.

-----X
516 FIFTH AVENUE PARTNERS LLC,

Plaintiff,

-against-

HERZEL OVADYA,

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Additional Counterclaim Defendant.

-----X
JOAN A. MADDEN, J.:

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Additional counterclaim defendant Herzel Ovadya moves for an order pursuant to CPLR 3212 granting partial summary judgment dismissing the third, fourth, fifth and sixth counterclaims as asserted against him by defendant 516 Fifth Avenue Partners LLC ("516 Partners"). 516 Partners opposes the motion and cross-moves for partial summary judgment on the issue of liability against Best Souvenirs as to its third and fifth counterclaims, and against Ovadya as to its sixth counterclaim.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, by tendering evidentiary proof in admissible form establishing the absence of any material issues of fact. See Alvarez v Prospect Hospital, 68

NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once that showing is satisfied, the burden shifts to the opposing party to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial. Alvarez v Prospect Hospital, *supra*. Both parties are required to lay bare their proof, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Zuckerman v. City of New York, *supra* at 562.

516 Partners asserts a first counterclaim for ejectment against Best Souvenirs and Ovadya; a second counterclaim for injunctive relief based on trespass against Best Souvenirs and Ovadya; a third counterclaim for use and occupancy against Best Souvenirs and Ovadya; a fourth counterclaim for damages based on trespass against Best Souvenirs and Ovadya; a fifth counterclaim for attorney’s fees and expenses based on the lease, against Ovadya, as the tenant; and a sixth counterclaim against Ovadya based on his personal guaranty.

By a decision and order dated July 16, 2009, this court dismissed Best Souvenirs’ complaint in its entirety, and awarded 516 Partners summary judgment on its first counterclaim for ejectment against Best Souvenirs and Ovadya. Specifically, the court determined that Best Souvenirs and Ovadya had neither a legal right to remain in possession of the premises nor a viable defense to the ejectment counterclaim, since the documentary proof established that the lease terminated on April 30, 2008, and a month-to-month tenancy was never created after that time. Best Souvenirs and Ovadya subsequently moved to reargue the portion of the decision indicating that Ovadya was the tenant of the premises. By a decision and order dated December 14, 2009, this court granted reargument “to the limited extent of clarifying and determining that Best Souvenirs LLC was the tenant of the premises, and that Ovadya acted in his capacity as a

principal of that corporation in executing the lease documents.”

Ovadya is now moving for summary judgment dismissing the third, fourth, fifth and sixth counterclaims as asserted against him by 516 Partners. In response, 516 Partners is cross-moving for summary judgment on its third, fifth and sixth counterclaims. However, in view of the court’s prior determination that Best Souvenirs (and not Ovadya) was the tenant, 516 Partners acknowledges that with respect to its third counterclaim for use and occupancy and its fifth counterclaim for attorney’s fees and expenses, those claims can be maintained against only against the tenant, Best Souvenirs, since they are based upon the lease. The relief 516 Partners seeks against Ovadya is now limited to the sixth counterclaim which is based on Ovadya’s personal guaranty of the lease.¹

Since 516 Partners essentially concedes that it cannot maintain the third and fifth counterclaims against Ovadya individually, Ovadya is entitled to summary judgment dismissing the third and fifth counterclaims to the extent they are asserted against him. Ovadya is also entitled to dismissal of the fourth counterclaim for damages based on trespass, since the court has determined that he was not the tenant. Although 516 Partners alleges that Ovadya was present at the premises after the lease expired, that fact alone is insufficient to support a claim for trespass

¹516 Partners submits an attorney’s affirmation, stating as follows: “Landlord’s fifth counterclaim seeks legal fees and expenses from Landlord’s tenant, originally believed to be Ovadya, based on breach of lease. The Court has now determined that Best was Landlord’s tenant and therefore Best is liable to Landlord for legal fees and expenses based on its breach of the lease with Landlord. Ovadya remains liable for Best’s obligation for use and occupancy and legal fees pursuant to his guaranty (the sixth counterclaim).”

In its memorandum of law, 516 Partners appears to take an inconsistent position arguing that Ovadya’s alleged “presence at the Premises and his use of it also make Ovadya liable to Landlord for use and occupancy,” citing 520 East 81st Street Associates v. Lenox Hill Hospital, 276 AD2d 395 (1st Dept 2000). In view of counsel’s statements quoted above, the court will not consider this argument.

against him personally.

In opposing Ovadya's motion for summary judgment, 516 Partners argues that the court's prior decisions in this action are law of the case which preclude Ovadaya and Best Souvenirs from raising any issue as to Best Souvenirs' liability, including whether Best Souvenirs became a tenant-at-will after the lease expired and whether Best Souvenirs was partially actually evicted. The court previously dismissed Best Souvenirs' complaint against 516 Partners, which sought injunctive and declaratory relief, and compensatory and punitive damages, and asserted causes of action for breach of the covenant of quiet enjoyment, trespass, nuisance, breach of the lease, breach of the implied covenant of good faith and fair dealing, and obtaining building permits "under false pretenses and in violation of law." The court also rejected as without merit, Best Souvenirs' assertions as to the creation of a month-to-month tenancy, and determined that after the First Amendment to the Lease expired on April 30, 2008, Best Souvenirs had no right to remain in possession of the premises. On that basis, the court dismissed Best Souvenirs' complaint in its entirety, and awarded 516 Partners judgment as a matter of law on its first counterclaim for ejection and a judgment of possession. Notably, in none of the papers submitted in connection with the prior motions, did Best Souvenirs assert that it was a tenant-at-will. Under these circumstances, the court will not revisit any issue as to Best Souvenirs' status upon termination of the lease, or any other issue as to Best Souvenirs' liability.

In view the court's prior determination awarding 516 Partners judgment as a matter of law on its ejection counterclaim, Best Souvenirs, as the tenant under the lease, is obligated to pay use and occupancy for the period during which it continued to occupy the premises after the expiration of the lease. See RPAPL § 601; South Street Limited Partnership v. Jade Sea

* 6]

Restaurant, 187 AD2d 397 (1st Dept 1992). 516 Partners is therefore entitled to partial summary judgment against Best Souvenirs on the issue of liability as to its third counterclaim for use and occupancy.

The attorney's fees provision in paragraph 18C of the lease, states that the tenant agrees to pay, as additional rent, all reasonable attorneys' fees and disbursements (and all other court costs or expenses of legal proceedings) which Landlord may incur or pay out by reason of or in connection with: (i) any action or proceeding by Landlord to terminate this Lease in which Landlord prevails; (ii) any other action or proceeding by Landlord against Tenant . . . in which Landlord prevails; (iii) any default by Tenant in the observance or performance of any obligation under this Lease . . . whether or not Landlord commences any action to proceeding against Tenant; (iv) any action or proceeding brought by Tenant against Landlord . . . in which Tenant fails to secure a final unappealable judgment against Landlord; and (v) any other appearance by Landlord . . . as a witness or otherwise in any action or proceeding whatsoever involving or affecting Landlord, Tenant or this Lease.

Based upon the clear terms of this provision, as the prevailing party in the instant action, 516 Partners is entitled to recover its reasonable attorney's fees and expenses from the tenant, Best Souvenirs. 516 Partners is therefore awarded partial summary judgment against Best Souvenirs on the issue of liability as to its fifth counterclaim for reasonable attorney's fees and expenses.²

Finally, based on Ovadya's personal guaranty of the "payment and performance of Tenant's obligations under and in accordance with the Lease," Ovadya is personally liable for the use and occupancy, and attorney's fees Best Souvenirs is obligated to pay 516 Partners in accordance with the lease. The guaranty also includes a separate attorney's fees clause providing that Ovadya "will reimburse Landlord for all reasonable costs and expenses incurred by Landlord

²Since 516 Partners acknowledges that it is bound by the court's decision that Best Souvenirs is the tenant, the court will deem the fifth counterclaim as amended to assert a claim against Best Souvenirs for attorney's fees based on the lease.

in connection with the enforcement of this guaranty, including, without limitation, reasonable attorney's fees." Thus, pursuant to the terms of Ovadya's personal guaranty, 516 Partners is entitled to partial summary judgment against Ovadya on the issue of liability as to its sixth counterclaim.

Accordingly, it is

ORDERED that Herzel Ovadya's motion for summary judgment is granted to the extent of severing and dismissing those portions of the third, fourth and fifth counterclaims that are asserted against him, and the motion is denied as to the sixth counterclaim; and it is further

ORDERED that the cross-motion by 516 Fifth Avenue Partners LLC is granted and 516 Fifth Avenue Partners LLC is awarded partial summary judgment against Best Souvenirs, Inc. on the issue of liability with respect to its third and fifth counterclaims; and it is further

ORDERED that 516 Fifth Avenue Partners LLC is also awarded partial summary judgment against Herzel Ovadya on the issue of liability with respect to its sixth counterclaim; and it is further

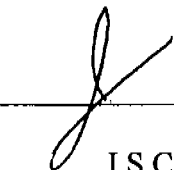
ORDERED that the parties are directed to appear for a status conference on December 2, 2010 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.³

DATED: November 20, 2010

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³Since this the second round of summary judgment motions, the parties shall not make any further motions for such relief without prior approval of this court.