

400 Mazel LLC v Bromberg

2010 NY Slip Op 33451(U)

December 16, 2010

Supreme Court, New York County

Docket Number: 106578/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 106578/2008
400 MAZEL LLC
vs.
BROMBERG, JOSHUA
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1,2
5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3,4

Upon the foregoing papers, it is ordered that this motion *and cross motion*
are decided to the extent set forth in the accompanying
memorandum decision.

FILED

DEC 16 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/10

[Signature]
JUDGE DORIS LING-COHAN 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: 1AS PART 36

-----X
400 MAZEL LLC,

Plaintiff,

-against-

JOSHUA BROMBERG and ALERO ENTERPRISE
INC.,

Defendants.
-----X

Index No. 106578/08

Motion Seq. No. 004

FILED

DEC 16 2010

DORIS LING-COHAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This action is based on Alero Enterprise Inc.'s breach of a written commercial lease entered into between plaintiff 400 Mazel LLC, as landlord, and Alero Enterprise Inc. ("Alero"), as tenant, for the operation of a hair salon located at 400 East 77th Street, New York, NY a/k/a 1476 First Avenue, New York, NY (the "Premises"). Joshua Bromberg, as the principal shareholder of Alero, is the individual guarantor of the lease.

In August 2007, plaintiff commenced an illegal sublet/assignment holdover proceeding against Alero in Civil Court, in which it was held that Alero unlawfully sublet/assigned the lease and the use and occupancy of the Premises to Hair Company of New York, Inc. ("Hair Company"). A judgment of possession, warrant of eviction, and a money judgment in the amount of \$51,184.37 were entered in that case. In March 2008, plaintiff commenced a holdover proceeding against Hair Company. Hair Company defaulted and a judgment of possession, warrant of eviction, and a money judgment in the amount of \$24,000 were awarded. On April 4, 2008, plaintiff recovered legal possession of the Premises.

Plaintiff alleges that partial payments on the judgments were made and thereafter

commenced this action to recover the remaining amounts on the judgments. Defendant Bromberg subsequently commenced a third-party action in this case against Alla Shusterman (“Shusterman”) and Aleksey Inoyatov (“Inoyatov”), alleging that, as principals of Hair Company, they agreed to indemnify him under his guaranty of the lease to plaintiff. The following causes of action are alleged in the third-party complaint: (1) indemnification for the judgments obtained by plaintiff, 400 Mazel LLC; (2) reimbursement of the security deposit; and (3) breach of fiduciary duty.

Third-party defendant Inoyatov now moves for summary judgment, pursuant to CPLR 3212, dismissing the third-party complaint or, in the alternative, for partial summary judgment dismissing any claims against movant that are for past debts and judgments against Alero and Bromberg and an order stating movant and Hair Company has satisfied all debts and judgments entered against them in favor of plaintiff. Third-party plaintiff opposes the motion and cross-moves for summary judgment against third-party defendant Inoyatov.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment.” *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dep’t 2002). In deciding such a motion, the court’s role is “issue-finding, rather than issue-determination.” *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

In support of his motion for summary judgment, third-party defendant Inoyatov makes the following arguments. First, movant contends that Bromberg has no claim for indemnification because the instant action is not a result of Bromberg's personal guaranty of the lease, but instead of Bromberg's own actions in improperly assigning the lease, which caused the judgments to be entered against him. Second, movant argues that he has already made payment of all debts owed by Hair Company, which consisted of rent owed for the period Hair Company occupied the premises, but that plaintiff has misapplied those payments to debts owed by Alero. Inoyatov asserts that any further recovery by Bromberg of payments from Inoyatov would be unjust. Third, movant contends that Bromberg breached his fiduciary duties to Hair Company and should not profit from his own failures as an officer/director.

In opposition, third-party plaintiff contends that summary judgment should be granted in his favor based on the indemnification language in the stockholders agreement between the parties. Further, Bromberg asserts that third-party defendant failed to set a date on which his deposition would take place and failed to produce discovery documents as requested in third-party plaintiff's demands and pursuant to court orders.¹

In or around December 2005, Inoyatov, Bromberg and Shusterman entered into a stockholders agreement and formed Hair Company. A provision in the stockholders agreement addressed Bromberg's guaranty of the lease by stating: "During such period of time that Inoyatov and Shusterman are employees of the corporation, they agree to hold harmless and indemnify Bromberg for any liability or damages as a result of Bromberg's personal guaranty of the lease."

¹ The Court notes that, although third-party plaintiff raises third-party defendant's failure to participate in discovery in support of his cross motion for summary judgment, third-party plaintiff is not seeking relief for such discovery herein.

Inoyatov Aff, Exh I at 3.

While third-party defendant focuses on the fact that Bromberg himself caused the default under the lease by failing to make a proper assignment of the lease, such argument is unpersuasive. The language in the stockholders agreement between third-party plaintiff and third-party defendants unequivocally provided that Inoyatov and Shusterman would indemnify Bromberg for “*any* liability or damages as a result of Bromberg’s personal guaranty of the Lease.” *Id.* (emphasis added). Such language is broad on its face, encompassing and covering “any” liability. Indemnification was not limited to situations in which Bromberg did not cause the default or where Inoyatov had the ability to take actions to prevent any default under the lease from occurring.

As Bromberg guaranteed “the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by Tenant” (Inoyatov Aff, Exh G), and the lease provided that “Tenant . . . expressly covenants that it shall not assign . . . the demised premises . . . without the prior written consent of Owner in each instance” (Inoyatov Aff, Exh F at ¶ 11), it follows that any liability resulting from Bromberg’s failure to obtain consent prior to assigning the premises is covered by such indemnification clause. Thus, based on that provision alone, Inoyatov is required to indemnify Bromberg for any liability resulting therefrom.

However, another provision in the stockholders agreement is also relevant. Third-party plaintiff and third-party defendants also agreed that: “Inoyatov will not be responsible for the debts of Alero Enterprises, Inc., nor shall he be responsible for any expense of Hair Company of New York, Inc. prior to 3/15/06.” *Id.*, Exh H at 4. Therefore, while movant would be

responsible to indemnify Bromberg for his liability under his guaranty of the lease, movant would not be responsible for any portion of Alero's liability or, as a result, Bromberg's liability, prior to Hair Company's possession of the Premises on March 15, 2006. Thus, of the judgments that plaintiff seeks to collect from Bromberg and Alero (and Bromberg, consequently, seeks indemnification of, from Inoyatov), movant is only responsible to indemnify Bromberg for any judgment against Hair Company, i.e. the money judgment entered against Hair Company in the amount of \$24,000, and not for the judgments against Alero, i.e. the money judgment entered on January 8, 2008 in the amount of \$51,184.37.

With regard to the judgment against Hair Company, Inoyatov contends that he made payments directly to plaintiff to satisfy any outstanding rent owed by Hair Company and, thus, it would be unjust for Bromberg's action for indemnification to continue against him. In support of his position, Inoyatov attaches various checks allegedly sent to plaintiff in an effort to satisfy any outstanding debts. However, movant fails to sufficiently demonstrate that he is entitled to judgment as a matter of law dismissing the entire third-party action against him, as he has not adequately proved that full payment on the Hair Company judgment has been made sufficient to defeat Bromberg's claim of indemnification. Further, third-party defendant has not demonstrated *prima facie* entitlement to summary judgment dismissing the second and third causes of action.

Inoyatov contends that he paid plaintiff a total of \$64,000 for all of the past rent due by Hair Company, which should have been applied to satisfy Hair Company's judgment. Aleksey Inoyatov Aff ¶¶ 13, 15, 17, 27. However, the court first notes that a large portion of the checks is illegible, making it difficult to clearly decipher who all the checks were made to, how much they were for, and on what dates they were written. Second, from the dates that can be seen, it

