

Hancock Parking Corp. v 619 Hancock St., LLC

2010 NY Slip Op 33553(U)

December 6, 2010

Sup Ct, Queens County

Docket Number: 7526/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

619 HANCOCK PARKING CORP. a.k.a.
HANCOCK PARKING CORP.,
Plaintiff,

Index No. 7526/09
Motion
Date September 7, 2010

-against-

619 HANCOCK STREET, LLC, YVES C.
FRANCOIS and FLUSHING SAVINGS BANK,
FSB,
Defendants.

Motion
Cal. No. 35
Motion
Sequence No. 4

619 HANCOCK STREET, LLC,
Third-Party Plaintiff,

-against-

WALID SALEM,
Third-Party Defendant.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits..... 1-4
Opposition..... 5-6

Upon the foregoing papers it is ordered that the branch of plaintiff/third-party defendant's motion for an order dismissing the third-party complaint pursuant to a defense founded on documentary evidence and CPLR 3211(a)(7), or in the alternative, for summary judgment pursuant to CPLR 3211(c) and 3212, against defendant 619 Hancock Street, LLC is hereby denied.

This action stems from plaintiff's lease of a two-story parking garage located at 619 Hancock Street, Brooklyn, New York. Third-party plaintiff commenced this action seeking damages as a result of, inter alia, breach of lease and fraudulent inducement. Third-party defendant now moves to dismiss the third-party complaint.

A. Dismissal pursuant to a defense founded on documentary evidence and Summary Judgment pursuant to CPLR 3211(c) and 3212.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

That branch of third-party defendant's motion to dismiss third-party plaintiff's cause of action pursuant to a defense founded on documentary evidence is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v. Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

To the extent the motion is based upon all of third-party plaintiff's causes of action which are grounded in a lease executed on February 2, 2009, this documentary evidence is insufficient to dispose of these causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (Held v. Kaufman, 91 NY2d 425 [1998]; Teitler v. Max J. Pollack & Sons, 288 AD2d 302 [2001]). Here, the lease is insufficient to dispose of the causes of action. Moreover, there are triable issues of fact regarding, inter alia, whether or not the corporation was formed at the time of the signing of the lease and in what capacity was the agreement signed.

B. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendants for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***." (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608; Leon v. Martinez, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 Washington Ave. Assocs. v. Rose & Kiernan, supra, 770-771). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." (Jericho Group, Ltd. v. Midtown Development, L.P.,

32 AD3d 294 [1st Dept 2006][internal citations omitted]).

Applying these principles in this case, the court decides as follows:

Third-party defendant failed to make a prima facie showing that the complaint fails to state any cause of action cognizable at law regardless of whether the plaintiff will ultimately prevail on the merits. Third-party defendant failed to demonstrate that the third-party complaint does not state a cause of action pursuant to CPLR 3211(a)(7). As such, the burden does not shift to the third-party plaintiff to produce evidence in opposition to the motion. The motion must be denied regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). The Court "need not consider whether the [third-party plaintiff's] papers in opposition to the [third-party defendant's] motion were sufficient" to state a cause of action". (See, Loadholdt v. New York City Transit Authority, 12 AD3d 352 [2d Dept 2004]).

Accordingly, that branch of third-party defendant's motion is denied.

C. CPLR 1010

That branch of third-party defendant's motion which seeks to sever the third-party action pursuant to CPLR 1010 due to undue prejudice and delay is hereby denied. Pursuant to CPLR 1010,

"the court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party".

(See also, Musco v. Conte, 22 AD2d 121 [2d Dept 1964]; Annaquartey v. Passeser, 260 AD2d 517[2d Dept 1999]). In the instant case, "[t]he third-party defendant did not adequately establish that it would be prejudiced if required to proceed to trial." (Flood v. Zucker, 58 AD2d 786 [1st Dept 1977]). In the instant case, third-party defendant failed to state how it will

suffer undue delay and prejudice. Accordingly, this branch of the third-party defendant's motion is denied.

D. CPLR 1007

That branch of third-party defendant's motion which seeks to dismiss the third-party Complaint as 619 Hancock Street, LLC's impleader of third-party defendant in the instant case is improper is denied. Accordingly, this branch of the third-party defendant's motion is denied.

This constitutes the decision and order of the Court.

Dated: December 6, 2010

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Howard G. Lane, J.S.C.