

BNB Bank N.A. v Eastern Is. Food Inc.

2011 NY Slip Op 30348(U)

February 3, 2011

Sup Ct, Nassau County

Docket Number: 025271-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BNB BANK NATIONAL ASSOCIATION,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

Index No: 025271-09

Motion Seq. No: 2

-against-

Submission Date: 12/10/10

**EASTERN ISLAND FOOD INC., KI HUN KWON,
DONNA M. KWON, MILLER REALTY ASSOCIATES,
and "JOHN DOE # 1-5" AND "JANE DOE # 1-5",**

Defendants.

-----x

The following papers having been read on this motion:

- Order to Show Cause, Affirmation in Support,**
- Affidavit in Support and Exhibits.....x¹**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Defendant Miller Realty Associates ("Miller") on November 19, 2010 and submitted on December 10, 2010. For the reasons set forth below, the Court directs that this Order to Show Cause shall be the subject of a Conference in Aid of Disposition before the Court on February 16, 2011 at 9:30 a.m., and directs Plaintiff to provide the Court, and opposing counsel, on or before February 14, 2011, with 1) statutory or other authority in support of Plaintiff's assertion that it must obtain the consent of the Small Business Administration ("SBA") prior to agreeing to deem the property at issue abandoned, and 2) documentation reflecting Plaintiff's

¹ As Defendant failed to obtain the Court's permission to submit a reply to its Order to Show Cause, the Court declines to consider the Reply Affirmation in Support submitted by Defendant.

efforts to obtain the consent of the SBA to resolve the issues raised by this Order to Show Cause.

BACKGROUND

A. Relief Sought

Miller moves for an Order 1) directing that the property that is the subject of this action be deemed abandoned by Plaintiff BNB Bank National Association (“Bank” or “Plaintiff”) and authorizing Miller to remove the property from its premises; or, in the alternative, 2) directing Plaintiff to remove the property from the premises of Miller within thirty (30) days from the Notice of Entry; 3) awarding to Miller the storage costs incurred by Miller in storing the Plaintiff’s property over the past eight months; and 4) dismissing the Amended Verified Complaint (“Amended Complaint”) against Miller.

Plaintiff opposes Miller’s application.

B. The Parties’ History

The parties’ history is set forth in detail in a prior decision of the Court dated July 16, 2010 (“Prior Decision”) in which the Court granted Plaintiff’s motion (“Prior Motion”) to amend the initial complaint to add Miller as a party defendant. As noted in the Prior Decision, the initial complaint alleged as follows

Defendants executed a Security Agreement in favor of Plaintiff, as collateral for a Note dated December 13, 2007, payable to Plaintiff in the original amount of \$280,000. Plaintiff alleges, further, that Defendants Ki Hun Kwon and Donna M. Kwon executed guarantees pursuant to which they unconditionally guaranteed payment of the Note. The Complaint contains causes of action for breach of contract and unjust enrichment based on Defendants’ failure to make required payments, and Defendants’ improper retention of items constituting collateral under the Security Agreement.

In her Affirmation in Support of the Prior Motion, counsel for Plaintiff affirmed that, when Plaintiff initially commenced this action, Plaintiff had not completed its investigation regarding the location of business assets (“Assets”) belonging to Defendant Eastern Island Food, Inc (“Eastern Island”). Plaintiff subsequently learned that Eastern Island is no longer an ongoing business, and believed that Miller was in possession of the Assets which are the subject of a Security Agreement and UCC-1 lien in favor of the Plaintiff, and may have converted those Assets in violation of Plaintiff’s UCC lien. Plaintiff’s counsel also affirmed that attempts to

arrange for the inventory and surrender of these assets had been unsuccessful. Plaintiff argued that it was necessary to add Miller as a party defendant, and the Court granted Plaintiff's motion to amend.

Plaintiff subsequently filed the Amended Complaint (Ex. A to McQuair Aff. in Supp.) which contains a cause of action against Miller, labeled the Third Cause of Action and set forth in paragraphs 15-17 of the Amended Complaint, on the theories of unjust enrichment and conversion based on Miller's alleged continued possession of the Assets, and Miller's alleged refusal to allow Plaintiff to inventory and remove the Assets.

In his Affidavit in Support of the instant motion, Edward Miller ("Edward"), the President of Miller, affirms as follows:

Miller owns and operates the premises ("Premises") located at 3683 Hempstead Turnpike, Levittown, New York. Miller rented the Premises to Eastern Island in April of 2006. In March of 2009, Eastern Island was evicted ("Eviction") from the Premises due to non-payment of rent.

In May of 2009, Miller received a notice from Plaintiff advising Miller that Plaintiff held a chattel mortgage on the fixtures and equipment in the unit rented by Eastern Island. Edward advised Plaintiff on several occasions that Miller would make the Premises available to Plaintiff to retrieve the property ("Property") in question, or hold an auction there. In August of 2010, Edward made the Premises available to Plaintiff to allow them to inventory and value the Property in which it claims to maintain a lien. Plaintiff never contacted Edward to set a date for the inventory or auction. In July of 2010, Plaintiff filed the Amended Complaint.

As a result of Plaintiff's failure to retrieve its Property, Miller is unable to rent out the Premises and is losing thousands of dollars in monthly rent. Moreover, Miller continues to store the Property. Miller is now operating the Premises at a loss and seeks an Order from the Court either declaring the Property abandoned, or directing Plaintiff to retrieve the Property from the Premises, store it at Plaintiff's expense, and compensate Miller for the storage costs it has incurred.

In his Affidavit in Opposition, Ted Morgan ("Morgan"), Senior Vice President of the Bank, affirms as follows:

Morgan affirms the truth of the allegations in the Amended Complaint regarding

Defendants Eastern Island, Ki Hun Kwon and Donna M. Kwon pursuant to relevant commercial instruments. Morgan confirms that Miller advised the Bank of the Eviction of Eastern Island from the Premises and affirms that the Bank conducted an inspection and appraisal of the Property. The Bank also contracted with an auction company to conduct an on-site inspection and auction in January of 2010, as reflected by the documentation provided (Ex. A to Morgan Aff. in Opp.).

The auction never took place, however, because Miller demanded that Plaintiff deposit the sum of \$5,000 with Miller's counsel to cover costs that Miller might incur as a result of the auction. Plaintiff attempted, unsuccessfully, to negotiate with Miller regarding the amount of the requested deposit.

Morgan affirms, further, that the Bank provides loans that are underwritten by the Small Business Administration ("SBA"). Liquidation of any assets purchased using the loan proceeds must be completed in accordance with guidelines established by the SBA, and the Bank must abide by those guidelines. Morgan affirms that it must receive the approval of the Federal Government to deem the Property in question abandoned.

Counsel for the Bank confirms that the Bank must obtain the approval from the SBA to deem the Property abandoned "which agreement Plaintiff has not yet received" (Donato Aff. in Opp. at ¶ 13). Neither Morgan nor counsel for the Bank provides statutory or other authority regarding the SBA's role in the instant dispute, or any details regarding Plaintiff's efforts to obtain the consent of the SBA to declare the Property abandoned, or otherwise resolve this matter.

RULING OF THE COURT

Miller affirms, and Plaintiff concedes, that Miller has attempted to cooperate with Plaintiff in its efforts to protect its rights with respect to the Assets. Moreover, the Court does not view as unreasonable Miller's request for a deposit in connection with any auction that may be conducted at the Premises. The Court cannot resolve this matter, however, without fully understanding the role of the SBA with respect to the liquidation of the Assets and knowing the extent to which Plaintiff has communicated with the SBA to resolve the issues raised.

Accordingly, the Court directs that this Order to Show Cause shall be the subject of a Conference in Aid of Disposition before the Court on February 16, 2011 at 9:30 a.m., and directs

Plaintiff to provide the Court, and opposing counsel, on or before February 14, 2011 with
1) statutory or other authority in support of Plaintiff's assertion that it must obtain the consent of
the SBA prior to agreeing to deem the property at issue abandoned, and 2) documentation
reflecting Plaintiff's efforts to obtain the consent of the SBA to resolve the issues raised by this
Order to Show Cause.

ENTER

DATED: Mineola, NY
February 3, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE