

71 Spring LLC v Ontrend Intl., Inc.

2011 NY Slip Op 30365(U)

February 14, 2011

Supreme Court, New York County

Docket Number: 101733/10

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

-71 Spreng LLC

INDEX NO.

101733/10

MOTION DATE

- v -

MOTION SEQ. NO.

001

MOTION CAL. NO.

Ontrend International

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

Motion granted in part and denied in part.

pc set for 3/24/11 @ 9:30 am

FILED

FEB 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/14/11

J. GISCHE
HON. JUDITH J. GISCHE 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: IAS PART 10

-----X
71 SPRING LLC,

Plaintiff (s),

-against-

ONTREND INTERNATIONAL, INC. and
CHIH-CHIN SUN,

Defendant (s).

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Pltf n/m (3212) w/ AL affid, SL affirm, exhs	1
Def opp w/ CCS affid, AMP affirm, exhs	1
Pltf reply w/ MB affid, SL affirm, exhs	1

FILED

-----X
FEB 16 2011

Upon the foregoing papers, the decision and order of the court is as follows:
NEW YORK

COUNTY CLERK'S OFFICE

GISCHE J.:

This is an action by Plaintiff, 71 Spring LLC ("Spring"), to recover damages accrued under a commercial lease agreement that the defendant Ontrend International, Inc. ("Ontrend") entered into and that defendant Chih-Chin Sun ("Sun") personally guaranteed. Plaintiff now moves for summary judgment pursuant to CPLR § 3212. Defendants, Ontrend and Sun, oppose this motion in its entirety. Issue has been joined and the note of issue has not yet been filed. Summary judgment relief is, therefore, available. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 [2004].

Facts Considered and Arguments Presented

It is undisputed that on June 25, 2007, Plaintiff leased commercial premises

located at 73 Spring Street, Suite 307, New York, New York, to defendant Ontrend, subject to the terms of a lease and attached rider ("Lease"), for a four-year term ending June 30, 2011. As further consideration for plaintiff's agreement to lease the space to Ontrend, defendant Sun signed a personal guaranty of the lease (the "Guaranty"). It is further undisputed that Defendants relinquished possession of the premises in July 2009, by a mailing of the keys to plaintiff.

Plaintiff claims that Ontrend further defaulted under the Lease by failing to make the payments of Fixed Rent due on September 1, 2008, May 1, 2009, and each month thereafter; as well as by failing to pay real estate and other taxes due on January 1, 2009, which are deemed Additional Rent under the Lease.

Defendant alleges that the rent arrears should be reduced because Plaintiff failed to mitigate their damages. Plaintiff argues that it mitigated defendants' damages by re-letting the premises for the tenant's benefit, although at a lower rate than that under the breached contract. Plaintiff argues that it is expressly permitted to do so under paragraph 18 of the Lease and is permitted to do so without releasing Defendants from liability under the Lease.

At the time this action was filed, Plaintiff asserts that the amount of the claim for rent and other fees totaled \$43,189.00, plus interest and attorney's fees. Plaintiff further claims that additional unpaid rent, late fees, and interest and attorney's fees have accrued pursuant to the terms of the Lease since the filing of the action.

Defendants contend that Plaintiff issued a final statement contemporaneous with their vacating the premises, and that only \$3,726.00 was outstanding. The Plaintiff argues that the Defendants waived the security deposit when the Lease was breached.

However, Defendants claim that upon relinquishment of the leased premises plaintiff applied the security towards the outstanding rent in the contemporaneous statement. (Def's Exh. A).

Defendants also argue that plaintiff wrongfully withheld the security deposit. However, Plaintiff claims that defendants forfeited their right of the return of, or credit for, the security deposit by failing to satisfy to "Good Guy" clause in the Guarantee. Specifically, the Guaranty states that "[i]t is agreed that any security deposit shall not be computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty of the Lease."

The terms of the "Good Guy" clause in the Guaranty are operable if Tenant: (1) vacated and surrendered the Premises to the Landlord broom clean and free of any and all tenants, occupants, violations and mechanics liens, and ; (2) delivered keys to the Premises to the Landlord, and (3) Paid to Landlord all Accrued Rent to and including the date which is the later of (a) the actual receipt by Landlord of said Accrued Rent, (b) the surrender of the Premises and receipt by Landlord of the keys to the Premises (Pltf's exh. D). Should the guarantor violate any prong of the "Good Guy" clause terms, Sun will be held personally liable for the outstanding arrears. Plaintiff claims that the defendants failed to satisfy the conditions of the "Good Guy" clause by failing to meet the third prong, namely by not paying all Accrued Rent and thereby forfeiting the right of the return of, or credit for, the security deposit.

Defendants also argue that the plaintiff is not entitled to recover attorney's fees. Paragraph 58 of the Rider to the Lease (Pltf's exh. C) contains the following provision: "Attorney's Fees: Tenant agrees to pay to landlord upon demand, as Additional Rent, a

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sum equal to all costs and expenses (including reasonable attorney's fees, cost of investigation and disbursement) incurred by landlord in enforcing any or all of its rights hereunder, specifically including the cost of collecting sums due through judicial proceeding, or levying and collecting on any judgment or arbitration award in Landlords favor."

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the

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court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

Breach of Lease

A lease is a form of contract (Havana Cent. NY2 LLC v Lunney's Pub. Inc., 49 A.D.3d 70 (1st Dept. 2007). To establish a prima facie case of breach of contract, plaintiff must plead facts that show: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage, Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986); see Açoli v. Lynch, 2 A.D.3d 553 (2d Dept. 2003) (citing PJI). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based, Sud v. Sud, 211 AD2d 423 (1st Dept. 1995); Atkinson v. Mobil Oil Corp., 205 AD2d 719 (2d Dept. 1984).

Ontrend entered into a binding Lease agreement with 71 Spring. 71 Spring has established that Ontrend subsequently unilaterally breached the agreement by non-payment of rent and a mailing of the keys to the premises to 71 Spring. This lack of performance on the part of Ontrend, namely the non-payment of the monthly rent, incurred a disputed and outstanding balance that has yet to be satisfied. Thus, Ontrend is in default of its Lease agreement with 71 Spring.

Notwithstanding that 71 Spring has established that Ontrend breached the lease by not paying rent, the amount of rent outstanding remains disputed. Specifically, Defendants claim that, contemporaneous with abandoning the premises, 71 Spring sent an invoice totaling \$3,726.00 as outstanding (once the deposit had been credited), but does not clarify whether and/or when said amount was in fact paid.

The Plaintiff has submitted the affirmations of Albert Laboz ("Laboz"), a member of 71 Spring LLC, and Miriam Brick ("Brick"), the bookkeeper of 71 Spring LLC; both of which deny that Sun was released from liability under the "Good Guy" clause of the Guaranty, due to the failure to meet certain conditions, as discussed *supra*. Plaintiff further denies that the Defendants' Exhibit A is a true final invoice, rather that it is the Defendants' own book-keeping materials. Finally, defendant claims that contemporaneous with the abandonment of possession, an email was sent by the plaintiffs in-house counsel reminding Sun that \$20,428.76 was outstanding and that she would be liable under the Guaranty until such payment was made. Plaintiff now claims that since no payment was made, as of October 28, 2010, Defendants owe a total of \$55,080.94, plus interest and attorney's fees.

In this case, the parties have submitted contradictory affidavits and invoices totaling differing outstanding sums. Thus, the extent and the amount of damages is not susceptible to summary judgment.

Personal Guaranty

" 'A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation. The principal debtor is not a party to the guarantee and the guarantor is not a party to the principal obligation' " (Midland Steel Warehouse Corp. v. Godinger Silver Art, 276 A.D.2d 341, 343 [1st Dept 2000], *quoting* Shire Realty Corp. v. Schorr, 55 A.D.2d 356, 359-360 [2d Dept 1977]). Thus, the guarantor will be required to make payment only when the primary obligor has first defaulted (Weissman v. Sinorm Deli, 88 N.Y.2d 437, 446 [1996]).

As a guarantor of the Lease of Ontrend, Sun is required to make payment only if Ontrend, as the primary obligor, has defaulted (Weissman v. Sinorm Deli, supra). Having established, *supra*, that Ontrend is in default of its obligations under the Lease, the court now examines whether Sun, by operation of the executed personal Guaranty to 71 Spring, is liable to make the outstanding payments or whether Sun is excused from liability do to compliance with the "Good Guy" clause found within the guaranty.

Here, Sun failed to meet the third prong of the "Good Guy" clause. Namely, to be released from liability, pursuant to the terms of the Guaranty, it was incumbent upon Sun to satisfy all outstanding balances owed to 71 Spring upon the occurrence of the later of payment of (a) all accrued rent or (b) the surrender of the keys. Sun claims that she was under the impression that only \$3,726.00 was outstanding (once the deposit had been credited), yet she has not submitted any evidence that even these arrears were were satisfied at or around the time of Ontrend's surrender of the keys.

Thus, by the operation of the guaranty executed by Sun, and the terms of the Lease executed by Ontrend, 71 Spring has established that Sun is in default of the Guaranty. For the same reasons that the amount of rent due remains a disputed issue under the lease, it also remains a disputed issue in connection with the Guaranty.

Conclusion

Partial summary judgement is granted to Plaintiff on the issue of liability as against both defendants. Entry of judgment, however, must await a determination of damages, after trial. Since no discovery has taken place, the matter is set down for a preliminary conference.

For the foregoing reasons, it is hereby:

ORDERED that plaintiff, 71 SPRING LLC's motion for summary judgment against defendants, ONTRENDE INTERNATIONAL, INC. and CHIH-CHIN SUN, is granted in part only as to a determination of defendants' liability for the breach of the lease and Guaranty; and it is further

ORDERED that summary judgment is denied on the issue of damages, which must await trial, and it is further


ORDERED that a **Preliminary Conference** is hereby scheduled for **March 24, 2010 at 9:30 a.m. in Part 10, 60 Centre Street**; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
February 14, 2011

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

FEB 16 2011

NEW YORK
COUNTY CLERK'S OFFICE