

Northern Star LLC v SCG Off. Assistants, Inc.

2011 NY Slip Op 31207(U)

May 5, 2011

Supreme Court, New York County

Docket Number: 105514-2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

Justice

PART 10

Northern Star LLC

Plaintiff (s),

INDEX NO. 1.10457
105514/09

- v -

MOTION DATE _____

CSG Office Assistants

MOTION SEQ. NO. 004

Defendant(s).

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAY 06 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 5/5/11

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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
NORTHERN STAR LLC,

Plaintiff (s),

-against-

CSG OFFICE ASSISTANTS, INC. D/B/A
CONCEPT SOLUTIONS GROUP and
CARAL LOPEZ and ANTHONY MARTINEZ,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 105514-2009

Seq. No.: 004

Present:

Hon. Judith J. Gische

J.S.C.

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

Papers

FILED

Numbered

Pltf n/m (3212) w/DMB affirm, exhs	1
Def AM opp w/AM affirm, exhs	2
Def AM x/m (3212) w/AM affirm, exhs	3
Pltf reply	4
Transcript of OA 1/27/11	5

MAY 06 2011

NEW YORK

COUNTY CLERK'S OFFICE

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

Gische J.:

This is an action to recover unpaid rent and other amounts due under two commercial leases and to enforce personal guarantees allegedly signed by the named individual defendants ("Lopez" and "Martinez"). Presently before the court is plaintiff Northern Star, LLC's ("Northern Star") motion for partial summary judgment against Martinez on his personal guaranty of one lease only and severance of Martinez's counterclaims. Martinez has cross moved for partial summary judgment dismissing the claim against him.

Only Martinez has appeared and answered the complaint in this action. CSG

Office Assistants, Inc. d/b/a Concept Solutions Group ("CSG") and Caral Lopez ("Lopez") defaulted in answering the complaint. The court granted Northern Star's motion for entry of a default judgment against CSG and Lopez. In its order dated March 17, 2010 granting that motion, the court ordered an Inquest on damages to be held at the time of trial. The court also granted a motion by Northern Star dismissing the second and third counterclaims asserted by Martinez (Order, Gische J., 3/2/10). The sole remaining counterclaim by him is for tortious interference with contractual relations. Subsequently, Northern Star and Martinez stipulated to a partial discontinuance of plaintiff's second cause of action, only as to its claim based upon a 2003 personal guaranty signed by Martinez.

Issue was joined, therefore, summary relief is available. Since the note of issue was not yet filed, the motion and cross motion can and will be decided on their respective merits (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

Arguments

Northern Star is the owner and landlord of Units 300 and 301, located at 15-17 West 39th Street, New York, New York 10018 (collectively "units"). Northern Star entered into two lease agreements ("leases") for the units with CSG Office Assistants, Inc. d/b/a Concept Solutions Group ("CSG"). The first lease was made in 2003 lease for unit 300. The other lease was made in 2004 lease for unit 301. Each lease was originally set to expire on November 30, 2013 and each lease was signed by defendant Caral Lopez as "president" of CSG. Martinez is not signatory to, nor mentioned in, either lease.

Northern Star seeks partial summary judgment against Martinez based upon a document dated August 10, 2004 identified as an "Agreement" which is signed by him. This document states that "the undersigned Principal (if more than one, then jointly, severally) ... "guarantees to Landlord the payment and performance of Tenant's obligations under and in accordance with the lease, including without limitation, the payment of fixed and additional rent (the "obligations") ..." (hereinafter "2004 guaranty"). Northern Star contends the document is Martinez's personal guaranty of the CSG 2004 lease and since CSG defaulted in paying its rent, Northern Star seeks to collect the unpaid rent from Martinez who has, thus far, refused to pay same. Northern Star also seeks an order severing Martinez's counterclaims for tortious interference with business relationship on the basis that the two actions are wholly unrelated and, therefore, plaintiff's claims can be decided now as there are no triable issues of fact.

Martinez opposes plaintiff's motion only insofar as North Star seeks partial summary judgment against him on its second cause of action, but not as to the issue of whether his counterclaims should be severed. He does not address this point at all, but states that he leaves that matter to the court's discretion. Martinez has, however, cross moved for partial summary judgment in his favor dismissing the second cause of action.

At various times Martinez has stated that he is "not sure" whether he signed the 2004 guaranty, he does not remember signing it, or that he signed it but somehow it was altered because there is a code on some pages, but not others, Martinez has now acknowledged that he did sign the 2004 guaranty and that the signature is authentic (see Transcript OA 1/27/11). In his cross motion he also admits there are no triable issues of fact, only of law.

According to Martinez, the guaranty is ambiguous and, therefore, unenforceable, because the identity of the "Principal" in that document is undefined. He contends that the only "principal" and sole shareholder of CSG was – and has always been – Lopez, who has defaulted in this action. Martinez denies he was ever the principal or even a shareholder of CSG or that he voluntarily agreed to be responsible for any of CSG's debts appurtenant to it leasing the commercial space. He denies that he ever intended to personally guaranty CSG's obligations under the lease, although he signed the personal guaranty. Martinez offers no explanation for why he signed the 2004 guaranty. He points out, however, that he is not a signatory of the lease for unit 301 made in 2004 and consequently his signature on the 2004 guaranty as "principal" is erroneous.

According to Martinez, he was simply an independent consultant for CSG and had no stake in the corporation. Although he contends plaintiff knew this, North Star is not a party to the consulting agreement nor is it referenced in the lease or guaranty. Notably, the consulting agreement refers to Martinez as "owning the rights to certain registered trademarks including 'Concept Solutions Group' . . ." and that he has agreed to license the use of "the Consultant's business name, logo and slogan in connection with its New York business . . . "

Alternatively, Martinez argues that CSG Office Assistants, Inc. d/b/a Concept Solutions Group later restructured itself to do business as "Suites NY" and that the guaranty does not extend or apply to the "new" company's default in paying rent under the 2004 lease, even if he is found to be a guarantor. He also claims discovery is incomplete, and he would like to take depositions.

Law Applicable to a Motion for Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

Discussion

A prima facie case for breach of a guaranty is established by submitting proof of a personal guaranty bearing the guarantor's signature and the defendants' failure to make payment in accordance with the terms of the underlying agreement and guaranty (North Fork Bank Corp. v. Graphic Forms Associates, Inc., 36 A.D.3d 676 [2nd Dept 2007]). Submission of an unconditional guaranty along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212 (European American Bank & Trust Co. v Schirippa, 108 AD2d 684 [1st Dept., 1985]).

North Star has established that CSG had a 2004 lease and that it defaulted in making payments of rent and additional rent under that lease. North Star has also proved that pursuant to the 2004 personal guaranty signed by Martinez, he guaranteed CSG's payment of rent, additional rent and other obligations under the 2004 lease. Despite initial protestations, Martinez acknowledges that he signed the guaranty and that the signature thereon is authentic. The guaranty not only bears his signature, it also has

his home address and social security number. The tenant listed under the 2004 lease and under the 2004 guaranty is exactly the same: CSG Office Assistants, Inc. d/b/a Concept Solutions Group. In establishing these facts, North Star has proved Martinez unconditionally guaranteed CSG's obligations under the 2004 written lease and that he has breached his personal guaranty of those obligations.

Martinez's statement, that he did not "intend" to personally guaranty the 2004 lease is unavailing. Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement (National Westminster Bank USA v. Sardi's Inc., 174 A.D.2d 470 [1st Dept., 1991]). Martinez does not allege any fraud on the part of Northern Star in obtaining his signature to the 2004 guaranty. Nor has he indicated he was under duress to sign it or that some other wrongful act took place. Therefore, he is bound by the terms of the agreement unless he has a valid defense thereto.

One defense is that he was never a principal of CSG. The consultation agreement, however, does identify him as owning the rights to certain registered trademarks including "Concept Solutions Group" which he apparently licensed to CSG Office Assistants, Inc., allowing it to do business under an assumed name. Thus, while Martinez insists he was simply an independent contractor, the actual relationship between these parties was more complicated. In any event, in order to create a genuine issue of fact, Martinez is required to offer more than his own conclusory and unsubstantiated statements (National Westminster Bank USA v. Sardi's Inc., 174 A.D.2d at 470 *internal citations omitted*). Martinez was, in fact, the "owner" of Concept Solutions

Group.”

Even assuming, however, that Martinez has proved he neither a principal nor officer of CSG, this is not a defense to plaintiff’s claims against him based upon the 2004 personal guaranty. The 2004 guaranty makes it clear that the signatory is entering into the agreement to personally guaranty the obligations of the tenant. The 2004 guaranty even contains a “good guy” clause, releasing the guarantor from any further obligations, once the tenant surrenders the premises. Regardless of whether Martinez signed the 2004 guaranty as the “principal” of CSG or without that titular designation, he is personally and individually bound. The fact that an individual defendant includes his or her title after their signature does not help them avoid personal liability under a personal guaranty (Florence Corp. v. Penguin Const. Corp., 227 A.D.2d 442 [2nd Dept 2006]). Thus, the designation “principal” neither adds nor detracts from Martinez’s guaranty of the tenant’s obligations under the lease. In any event, there is no good reason why Martinez should be permitted to use his independent contractor relationship with CSG as a shield against liability to Northern Star since Northern Star is not a signatory to that consultation agreement and he admits he signed the personal guaranty.

Although CSG may have stopped doing business as “Concept Solutions Group,” a mere name change in how a corporation presents itself to the public will not automatically discharge the surety (see, Richardson v. Steuben County, 226 N.Y. 13 [1919]). The tenant of unit 301 did not change— it remained the same: CSG Office Assistants, Inc. The difference is that CSG proceeded to do business under a different assumed name. While Martinez dwells on the differences in the business conducted by

CSG before and after the change in its assumed name, the differences are not so significant to signal a completely new entity. Furthermore, under the guaranty, occurrences such as “reorganization, composition, adjustment, dissolution, liquidation . . .” (Guaranty C.2 [d]) do not relieve the guarantor from his obligations. Moreover, Martinez never took any steps to notify North Star that he intended to terminate his guaranty once he learned that CSG would be doing business as “Suites NY” (Guaranty C.9). Having undertaken the serious obligation of guaranteeing CSG’s obligations under the lease, Martinez had the equally serious obligation of staying on top of what was going on with the lease and the business being conducted in Unit 301 (27th Street Associates, LLC v. Lehrer, 4 A.D.3d 165 [1st Dept 2004]).

North Star has proved it is entitled to partial summary judgment on its claim against Martinez based upon the 2004 lease which he personally guaranteed. In opposition, Martinez has failed to raise triable issues of fact. His general belief, unsupported by any specific details, that further discovery may reveal additional facts to support his case, does not provide sufficient basis pursuant to CPLR 3212(f) for delaying determination of the summary judgment motion (Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 [1st Dept 2004]). Therefore, North Star’s motion for partial summary judgment is granted and Martinez’s cross motion for partial summary judgment dismissing the *breach of contract claim against him* is denied.

North Star’s motion, for severance of Martinez’s tortious interference with business relationship, is granted. Severance of a counterclaim to allow for entry of partial summary judgment is proper, even where the counterclaim might exceed claims

upon which summary judgment was granted, if the counterclaim is so unrelated to the cause of action that severance would not prejudice trial of remaining issues (Del Monte Corp. v. Mercantum (U.S.) Corp., 175 A.D.2d 72 [1st Dept.,1991]). There has been discovery on the counterclaim and it is based upon facts wholly unrelated to the breach of guaranty claims asserted by Northern Star. The counterclaim is hereby severed and continued as a plenary action, provided that defendant Martinez obtains a new index number and file a new RJI within Thirty (30) Days from service of an entered copy of this decision and order (CPLR §§ 407, 602; District Council No. 9 Intern Brotherhood of Painters & Allied Trades v. MTA, 115 Misc2d 810 [Sup. Ct. N.Y. Co. 1982] aff'd 92 AD2d 791 [1st Dept 1983]).

Plaintiff Northern Star shall file its note of issue no later than June 15, 2011, so that the hearing on damages may be scheduled, at which it may recover against Martinez on its second cause of action and proceed to Inquest on the 1st cause of action against CSG and the 2nd cause of action against Lopez. Additionally, plaintiff shall serve a copy of this decision on the Office of Trial Support and the Clerk of the Court so the proper administrative steps may be taken by those offices to schedule thee matters.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that Northern Star's motion for partial summary judgment on its 2nd cause of action against Anthony Martinez based upon the 2004 personal guaranty is granted and the issue of damages is to be tried; and it is further

ORDERED that defendant Martinez's cross motion for partial summary judgment is denied; and it is further

ORDERED that Northern Star's motion for an ordering severing Martinez's counterclaim is granted; the counterclaim is hereby severed and continued as a plenary action, provided that defendant Martinez obtains a new index number and file a new RJI within Thirty (30) Days from service of an entered copy of this decision and order and; it is further

ORDERED that plaintiff Northern Star shall file its note of issue no later than June 15, 2011, so that the hearing on damages it may recover against Martinez on its second cause of action and the Inquest on the 1st cause of action against CSG and the 2nd cause of action against Lopez can be scheduled; and it is further

ORDERED that plaintiff shall serve a copy of this decision on the Office of Trial Support and the Clerk of the Court so the proper administrative steps may be taken by those offices; and it is further

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

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

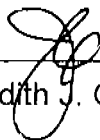
Dated: New York, New York
May 5, 2011

So Ordered:

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE



Hon. Judith J. Gische, JSC