

Lee v Cris

2011 NY Slip Op 32440(U)

September 9, 2011

Sup Ct, NY County

Docket Number: 102420-11

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

Index Number : 102420/2011
LEE, ANDREW S.
vs.
CRIS, EMMANUEL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and pretrial conference
scheduled for Nov 10, 2011 at 9:30 am*

FILED

Dated: 9/9

SEP 12 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
ANDREW S. LEE,
Plaintiff,

Decision and Order
Index No.: 102420-11
Seq no.: 001

-against-

EMMANUEL CRIS
Defendant.
-----X

Present:
Hon. Judith J. Gische

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

Papers

Numbered

FILED

Lee n/m SJ (3213) w/ ASL affid, exhs	1
Cris opp w/LWR affirm, exhs	2
Lee reply affid, DE supp affirm (sep back)	3,4
Cris surreply w/LWR	5

SEP 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X
GISCHE, J. :

Plaintiff moves for summary judgment in lieu of complaint (CPLR 3213).

This is a case involving a default in rent payments pursuant to a lease personally guaranteed by defendant. Plaintiff provides proof of a lease between the landlord, the entity under his control, and the tenants, one of whom is defendant. Plaintiff also provides proof of a guaranty signed by defendant, which assures that defendant shall guarantee the prompt payment of rent pursuant to the lease. Plaintiff states that by assignment of the lease, the new tenant became a corporation called Small Giants, Inc. (Small Giants). Thereafter, the landlord assigned the lease to plaintiff personally. Notice of said assignment was duly given to defendant and Small Giants.

On February 24, 2011, defendant signed a statement containing a breakdown of the rent arrears owed by Small Giants for the years 2008 and 2009, and acknowledging the sum due of

\$232,264. Plaintiff contends that the guaranty signed by defendant is binding and that defendant is liable for payment of the aforesaid sum. Plaintiff also contends that the guaranty entitles him to reasonable attorney's fees, for which he requests an inquest following the granting of his summary judgment motion.

Plaintiff asserts that he is entitled to summary judgment in lieu of complaint because he has shown that he has a suit for the payment of money only, and that there is no material issue of fact involving the nature of this dispute.

In opposition to this motion, defendant states that plaintiff has not provided the proper documents required by CPLR 3213. According to defendant, the guaranty is too broad, referencing both the prompt payment and performance of all obligations of the tenant under the lease. Defendant maintains that the statement signed by defendant is subject to certain terms and conditions. Defendant further argues that the motion must be denied because there are additional requirements needed in order to interpret the lease.

Defendant also argues that issues of fact prevent summary judgment, specifically, that plaintiff and Small Giants entered into a lease modification agreement, whereby, in exchange for forbearance by plaintiff, Small Giants would make weekly payments in excess of the rent reserved under the lease in order to pay off the arrears. Defendant states that Small Giants has performed its part of the agreement to date, and that plaintiff has failed to credit such payments. Defendant also states that he has performed certain maintenance work for plaintiff on plaintiff's additional properties, work that he was obligated to do pursuant to the modification agreement. He asserts that these are important matters not mentioned by plaintiff, which dispute the sum certain alleged by plaintiff.

In reply, plaintiff argues that all the additional allegations brought by defendant are not substantiated, as no documentary evidence has been submitted. Plaintiff states that defendant has provided no lease modification agreement or evidence of weekly payments made by Small Giants. There are also no copies of cancelled checks or rent receipts as proof of payment. Plaintiff claims that defendant's performance of maintenance work at plaintiff's properties is not supported by any proof.

In its reply, defendant asserts that subsequent to this motion, Small Giants stipulated in Kings County Civil Court to the entry of a money judgment. Apparently, plaintiff sought an eviction proceeding against its tenant, Small Giants. Small Giants agreed to a judgment of \$232,264, which was stayed pending certain other future events, and allegedly cannot be enforced at this time. Defendant states that, pursuant to this stipulation, plaintiff agreed to forebear from evicting Small Giants from the premises, to not enforce the judgment before August 16, 2011, and to entertain Small Giants's request to assign the lease. Defendant asserts that plaintiff is prevented by the terms of the stipulation from seeking immediate relief in this court. According to defendant, plaintiff cannot get summary judgment on the money judgment, and since the Civil Court still retains jurisdiction over the proceeding, all matters concerning the money judgment are stayed.

Defendant contends that, since plaintiff has failed to disclose the full nature of this controversy, he is not entitled to this special type of summary judgment. As defendant claims that the civil court judgment is conditional, defendant claims that the instrument is not a proper subject for a CPLR 3213 motion.

Discussion

CPLR 3213 states that when an action is based upon an instrument for the payment of money only or upon any judgment, plaintiff may serve a summons with a notice of motion for summary judgment and the supporting papers in lieu of complaint. This relief is generally available if there is an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time. *See Juste v Niewdach*, 26 AD3d 416 (2d Dept 2006). In order for an instrument to be considered an instrument for the payment of money only, repayment of the amount owed must not be conditional and is “required at a fixed maturity date.” *Machidera Inc. v Toms*, 258 AD2d 418 (1st Dept 1999). “[A] prima facie case would be made out by the instrument and a failure to make the payments called for by its terms [internal quotations and citations omitted]”. *Neuhaus v McGovern*, 293 AD2d 727, 728 (2d Dept 2002).

With respect to the settlement and the stipulation which involve plaintiff and Small Giants, plaintiff has not fully disclosed all of the information underlying these instruments, making the situation more complicated than originally claimed. An issue of fact as to conditions surrounding Small Giants’ debt to plaintiff has been adequately raised by defendant, who has legally guaranteed Small Giants’ payments. An instrument would not qualify as an instrument for the payment of money only “if outside proof is needed, other than simple proof of nonpayment or a similarly *de minimis* deviation from the face of the document.” *See Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231 (1st Dept 2008). The need for outside proof to determine the amount owed by defendant prevents the granting of this relief.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff's moving papers are hereby deemed the complaint in this action, and defendant's answering papers are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a **preliminary conference in Part 10, Room 232 at 60 Centre Street, on November 10, 2011, at 9:30 a.m.**; and it is further

ORDERED that any relief requested but not addressed is hereby denied.

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

DATED: September 9, 2011

So Ordered:

Hon. Judith J. Gische, JSC

FILED
SEP 12 2011
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