

Banc of Am. Leasing & Capital, LLC v Palmieri

2011 NY Slip Op 32530(U)

September 16, 2011

Sup Ct, Nassau County

Docket Number: 004880/11

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X
BANC OF AMERICA LEASING & CAPITAL, LLC,

Plaintiff,

-against-

VITO A. PALMIERI, individually and d/b/a PALMIERI
& CASTIGLIONE LLP, and PALMIERI &
CASTIGLIONE LLP

Defendants.

-----X

TRIAL/IAS PART 21

INDEX # 004880/11

Motion Seq. 1
Motion Date 7.22.11
Submit Date 8.5.11

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Motion by the attorneys for the plaintiff for an order pursuant to CPLR 3211 and 3212 striking the defendants' affirmative defenses and granting summary judgment in favor of the plaintiff is granted only as to defendant Palmieri and Castiglione, LLP, and denied as to defendant Vito A. Palmieri, individually.

The underlying lease agreement dated 12/30/08 was between Banc of America and Palmieri & Castiglione LLP. Pursuant to the terms of the lease agreement, Palmieri & Castiglione LLP leased certain equipment from the plaintiff. Vito Palmieri signed the lease agreement as a partner. The alleged default occurred on or about July 1, 2010.

Palmieri & Castiglione LLP registered as a New York Domestic Limited Liability Partnership on January 18, 2001.

The registration was revoked on June 28, 2006 for failing to pay the appropriate fees.

On June 14, 2011, Palmieri & Castiglione LLP filed a certificate of consent with New York State reinstating the limited partnership liability partnership *nunc pro tunc*.

Partnership Law § 121-1500 provides that:

(g) . . . Any registered limited liability partnership whose registration was so revoked may file in the department of state a certificate of consent certifying that either a statement required by this subdivision has been filed or accompanies the certificate of consent and all fees imposed under this chapter on the registered limited liability partnership have been paid. The filing of such certificate of consent shall have the effect of annulling all of the proceedings theretofore taken for the revocation of the registration of such registered limited liability partnership under this subdivision and (1) *the registered limited liability partnership shall thereupon have such powers, rights, duties and obligations as it had on the date of the publication of the proclamation, with the same force and effect as if such proclamation had not been made or published and (2) such publication shall not effect the applicability of the provisions of subdivision (b) of section twenty-six of this chapter to any debt, obligation or liability incurred, created or assumed from the date of publication of the proclamation through the date of the filing of the certificate of consent.* The filing of a certificate of consent shall be accompanied by a fee of fifty dollars and if accompanied by a statement, the fee required by this subdivision. (emphasis added)

Partnership Law § 26(b) provides that:

(b) . . . , no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), *for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership* or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such a partner or acting (or omitting to act) in such capacity or rendering

professional services or otherwise participating (as an employee, consultant, contractor or otherwise) in the conduct of the other business or activities of the registered limited liability partnership. (emphasis added).

Palmieri & Castiglione LLP is deemed registered as of January 18, 2001.

Plaintiff's reliance on *Mudge Rose Guthrie Alexander v Ferdon v Pickett*, 11 F.Supp.2d 449, is misplaced. The court in *Mudge* opined that:

Partners of an LLP . . . are not completely protected from liability to third party creditors of the partnership. The limitation of liability they enjoy, first of all, protects them only against liabilities of the firm 'which are incurred, created or assumed by such partnership while such partnership is' an LLP. N.Y. Partnership L. § 26(b). *They remain liable for any obligations incurred prior to the registration of the partnership as an LLP.* (emphasis added)

Since Palmieri & Castiglione LLP is deemed registered *nunc pro tunc* as of January 18, 2001, the individual partner (Palmieri) cannot be held personally liable for obligations of Palmieri & Castiglione LLP from January 18, 2001 to the present. Defendants' attorney requested dismissal of the complaint against Palmieri, individually, in the affirmation in opposition without making a formal cross-motion. CPLR 3212(b) provides in its last sentence that "if it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion." *See Rye v Public Service Mutual Insurance Company*, 42 AD2d 749, 752. Based on this Court's determination that he cannot be held personally liable, Vito A. Palmieri shall be deleted as a party defendant and the action against him is dismissed.

Pursuant to the terms of the lease, Palmieri & Castiglione LLP agreed to lease from Banc of American Leasing & Capital, LLC equipment for an aggregate value of \$35,940 payable in

sixty (60) consecutive monthly installments, each in the sum of \$599 plus applicable taxes. The equipment was delivered to Palmieri & Castiglione LLP on or before January 6, 2009. Palmieri & Castiglione LLP made (17) payments of \$599 pursuant to the lease, totaling \$10,183 through June of 2010. Palmieri & Castiglione LLP is in default of the lease and breached the lease by failing to pay the lease payments that were required to be paid on or before July 1, 2010. As a result of Palmieri & Castiglione LLP's default, all of its obligations under the lease became due and payable (see affidavit of facts sworn to by Debra Turkington, V.P. Risk Operations Unit Manager for Banc of American Leasing & Capital, LLC).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The plaintiff has made an adequate *prima facie* show of entitlement to summary judgment by submitting an affidavit from a person with personal knowledge of the facts.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422;

Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660.

Palmieri & Castiglione LLP has not submitted any opposition to the motion for summary judgment by an individual familiar with the facts. Palmieri & Castiglione LLP failed to oppose the motion for summary judgment with evidence sufficient to raise a triable issue of fact. Palmieri & Castiglione LLP's submission papers consist largely of opposing a determination that Palmieri was personally liable for the obligation, but did not present any proof in evidentiary form to create an issue of fact to preclude the granting of summary judgment in favor of the plaintiff against the defendant Palmieri & Castiglione LLP on the issue of liability.

Plaintiff asserts it entered a default judgment against Palmieri & Castiglione LLP and Vito A. Palmieri individually in the Circuit Court in the County of Oakland, State of Michigan (the Michigan Judgment) for breach of the lease agreement. The copy of the Michigan Judgment submitted by plaintiff lists only Palmieri & Castiglione LLP as the defendant. There is no indication the Michigan Judgment was against Palmieri individually. While the merits of a judgment of a sister state may not be collaterally attacked, a judgment debtor may challenge the judgment on the basis of lack of personal jurisdiction. *JDC Finance Company I, L.P., v Donald K. Patton*, 284 AD2d 164. Palmieri & Castiglione LLP contend the plaintiff never obtained jurisdiction pursuant to Michigan law. The partners of Palmieri & Castiglione LLP allege they were never served with a copy of the Summons and Complaint pursuant to the Michigan Rules for service on a partnership. Plaintiff asserts that Palmieri & Castiglione LLP never raised the issue of jurisdiction in its answer to the Summons and Complaint. In light of the fact that the

plaintiff made a *prima facie* showing of entitlement to summary judgment based on the default and that Palmieri & Castiglione LLP offered no credible documentary evidence to create an issue of fact as to the default, this Court need not reach the issue of the validity of the Michigan Judgment. *Zuckerman v City of New York, supra*. This Court awards judgment on the issue of liability on the merits in favor of the plaintiff against Palmieri & Castiglione LLP.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of **CCP for a hearing on the issue of damages and attorneys' fees on October 19, 2011 at 9:30 a.m.**

A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing officer or a Court Attorney/Referee as he or she deems appropriate.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 16, 2011

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ENTERED
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