

**Surfside Asset Group v Metro Diet LLC**

2011 NY Slip Op 32556(U)

September 27, 2011

Supreme Court, New York County

Docket Number: 113018/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

SURFSIDE ASSET GROUP, A PARTNERSHIP AND  
IRVJOY 3RD GENERATION CORP., A CORPORATION  
DOING BUSINESS, AS PARTNERS IN THE NAME AND  
STYLE SURFSIDE INVESTMENT COMPANY,  
A PARTNERSHIP,

Plaintiffs,

INDEX NO. 113018/2009

- against-

MOTION DATE \_\_\_\_\_

METRO DIET LLC, ALAN CHEVREUX AND  
MICHAEL STAISIL, AS GUARANTORS,

MOTION SEQ. NO. 002

Defendants.

The following papers were read on this motion by the plaintiffs for summary judgment and a default judgment and defendant Chevreux's cross-motion for summary judgment.

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

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

**FILED**

Cross-Motion:  Yes  No

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Surfside Asset Group (Asset) and Irvjoy 3rd Generation Corp. (Irvjoy) move for summary judgment on liability against Alan Chevreux (Chevreux) and for a default judgment against Metro Diet LLC (Metro) and Michael Staisil (Staisil). Chevreux cross-moves for summary judgment dismissing the complaint against him. The motion and cross-motion are consolidated for disposition and decided as noted below.

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**Parties and Procedural History**

According to the complaint in this action (motion, Exhibit E), Irvjoy is a corporation that is in a partnership arrangement with Asset, and they do business as Surfside Investment Company (Investment) (¶¶ 1-3). The complaint states that Investment entered into a lease with Metro dated October 2, 2002 (the Lease) for the rental of commercial space of approximately

2000 square feet for use as a restaurant in the building located at 141 East 56th Street, New York, N. Y. (the Premises) (*id.*, ¶ 6) and that Staisil and Chevreux (together, the Guarantors), who owned Metro, executed a personal guaranty (the Guaranty) (*id.*, ¶¶ 5, 7). The complaint further states that Metro breached the Lease on October 3, 2003 by failing to make payments due under the Lease and that the Guarantors breached their obligations by failing to make payments allegedly due under the Guaranty (*id.*, ¶¶ 8-9).

Chevreux has interposed an answer, denying the allegations of the complaint, together with affirmative defenses. Metro and Staisil have not interposed answers nor have they submitted any papers on this motion, for the reasons set forth below.

The Court notes that plaintiffs' motion, which seeks a default judgment against Metro and Staisil, was not served on them, but only on Chevreux's attorney (Steiner affidavit of service). Moreover, the complaint is not verified and the affidavit of Michael Johnson states that he is "one of the agents of the Plaintiff" (¶ 1), but it does not present any basis for his purported knowledge of the underlying facts constituting the claim (CPLR 3215 [f]). Johnson's affidavit annexes a purported copy of the rental history of the Premises.

Similarly, Chevreux's cross-motion lacks any affidavit by a party with personal knowledge of the facts.

Plaintiffs have also annexed a copy of a stipulation (the Stipulation) dated May 20, 2004, so-ordered by Hon. Saliann Scarpulla in an action in the Civil Court of the City of New York, N.Y. County (the Civil Court Action) entitled *Surfside Investment v Metro Diet Inc.*, L & T index numbers 104747/2003 and 108602/2003. Plaintiffs state that payments were not made in accordance with the Stipulation's terms and Metro was evicted (Wolf affirmation dated January 6, 2011, ¶ 4).

On March 3, 2005, Investment commenced an action in this Court against Metro, Chevreux and Staisil under index number 601018/2005 (the 2005 Action), asserting that it

entered into the Lease with Metro, that the Guarantors signed the Guaranty, that defendants vacated the Premises on August 10, 2004 and that defendants owe base rent from December 1, 2003, as well as additional charges including water, sewer, commercial rent tax and other charges (2005 Action complaint, ¶¶ 4-5, 8, 10). By order dated May 20, 2009, Justice Louis York denied Investment's motion for summary judgment and dismissed the 2005 Action. Justice York denied reargument by order dated August 17, 2009.

This action was commenced on September 14, 2009, but when plaintiffs filed the request for judicial intervention in connection with this motion, they failed to identify the 2005 Action in the section for related cases.

### **Summary Judgment**

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*see Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Additionally, an attorney's affirmation can serve as the vehicle for the submission of appropriate attachments, such as deposition transcripts or documents, which provide evidentiary proof in admissible form, but unsworn documents are insufficient (*see Zuckerman*, 49 NY2d at 563; *Tortorello v Carlin*, 260 AD2d 201, 204 [1st Dept 1999]).

Moreover, an affidavit that is "not based on personal knowledge, and [is] otherwise

conclusory ... [is] insufficient to satisfy [the movant's] prima facie burden on the motion" (*Bartee v D & S Fire Protection Corp.*, 79 AD3d 508, 508 [1st Dept 2010]; see also *Casey v New York*, 82 AD3d 639, 640 [1st Dept 2011]).

### **Analysis**

Initially, the portion of plaintiffs' motion for default judgment against Metro and Staisil is denied for failure to serve them with this motion and failure to satisfy the requirements of CPLR 3215 (f).

The portion of plaintiffs' motion that seeks summary judgment against Chevreux is also denied. The cursory affidavit of Johnson is insufficient to support summary judgment, since it fails to specify the basis for his purported knowledge (see *Grullon v City of New York*, 297 AD2d 261, 263 [1st Dept 2002] [holding that the failure to specify the basis for an affiant's belief renders it conclusory]). Johnson's affidavit does not set forth any facts as to Irvjoy or Asset, the relationship between them, their relationship to Investment, the records of these entities, the scope of any search for such records, whether such records are made and kept in the ordinary course of business or any basis to support consideration of such records as evidentiary proof in admissible form. Plaintiffs have not made an adequate showing of entitlement to summary judgement (see *Alvarez*, 68 NY2d at 325; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) and, accordingly, their motion must be denied.

Similarly, the absence of any affidavit by Chevreux or any other party with personal knowledge warrants denial of his cross-motion, since there is no evidentiary basis presented by him rebutting plaintiffs' claim that he is liable under the Guaranty. Consequently, the motion and cross-motion are both denied.

### **Conclusion**

It is, therefore,

ORDERED that the portion of plaintiffs' motion that seeks default judgment against

Metro Diet LLC and Michael Staisil is denied; and it is further,

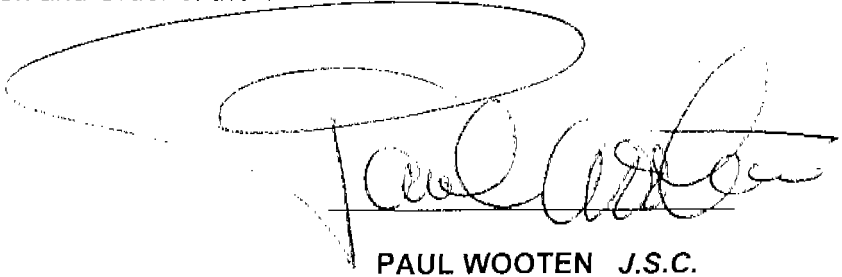
ORDERED that the portion of plaintiff's motion that seeks summary judgment on liability against Alan Chevreux is denied; and it is further,

ORDERED that Alan Chevreux's cross-motion for summary judgment dismissing the complaint against him is denied; and it is further,

ORDERED that the parties are directed to appear for a preliminary conference on November 30, 2011, at 11:00 a.m. in Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

Dated: 9-27-11

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE

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