

958 Sixth Ave. Bake, LLC v SCG Realty II, LLC

2012 NY Slip Op 30794(U)

March 1, 2012

Sup Ct, NY County

Docket Number: 602700/2009

Judge: Lucy Billings

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

LUCY BILLINGS

PRESENT: _____ J.S.C. Justice

PART 46

Index Number : 602700/2009
958 SIXTH AVENUE BAKE, LLC
VS.
SCG REALTY II, LLC
SEQUENCE NUMBER : 003
STRIKE

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

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ and ~~adjudged~~ that:

The court grants plaintiffs' motion for partial summary judgment and to dismiss defendants' affirmative defenses to the extent set forth and otherwise denies the motion, pursuant to the accompanying decision. C.P.L.R. §§ 3211(b), 3212(b) and (e).

FILED
MAR 29 2012
NEW YORK
COUNTY CLERKS OFFICE

Dated: 3/1/12

Lucy Billings

LUCY BILLINGS J.S.C.
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

958 Sixth Ave, LLC, et al

INDIVIDUAL ASSIGNMENT PART 46

STIPULATION

v.

INDEX NO. 602700/09

SCG Realty II, LLC, et al.

MOTION CALENDAR NO.

DATE March 3, 2011

IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

① Defendants hereby stipulate to the withdrawal/~~dismissal~~ ~~of~~ ~~the~~ ~~second~~ ~~and~~ ~~third~~ ~~affirmative~~ ~~defenses~~ dismissal of their second and third affirmative defenses with prejudice.

② Defendants consent to summary judgment on Plaintiffs' first cause of action and will return the letter of Credit to Plaintiffs counsel on or before March 17, 2011.

FILED

MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

Attorney for Plaintiff, Ranakdevi Londoner
Kossoff & Unger

Attorney for Defendant Dustin Levine
Ancon Associates
516-739-1803

Date: 3/3/11

So Ordered.

Attorney for Defendant

ENTER: Lucy Billings
LUCY BILLINGS J.S.C.
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

958 SIXTH AVENUE BAKE, LLC, and
ALEXANDER P. XENOPOULOS,

Index No. 602700/2009

Plaintiffs

-against-

DECISION AND ORDER

SCG REALTY II, LLC, and
SALVATORE J. BULLARO,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

FILED
MAR 29 2012
NEW YORK
COUNTY CLERKS OFFICE

I. BACKGROUND

Plaintiff 958 Sixth Avenue Bake, LLC, and defendant SCG Realty II, LLC, executed a lease dated July 8, 2008. The lease provided for SCG Realty to deliver the leased premises at 1330 Broadway, New York County, to 958 Sixth Avenue Bake by January 31, 2009. In lieu of a security deposit, 958 Sixth Avenue Bake gave a letter of credit to SCG Realty. Although the parties disagree regarding the specific contents and timing of the parties' negotiations for the lease, during their dealings plaintiff Xenopoulos, a managing member of plaintiff limited liability company (LLC), paid \$250,000.00 to defendant Bullaro, a member of defendant LLC. Bullaro then executed a handwritten promissory note to repay Xenopoulos, with interest from February 1, 2009. By the terms of another handwritten agreement dated July 8, 2008, plaintiffs' attorney was to hold the promissory note in escrow and release it to Xenopoulos only in the event SCG

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Realty did not deliver possession of the premises to 958 Sixth Avenue Bake. Defendants never delivered the premises.

Plaintiffs claim, first, that the letter of credit be returned; second, breach of the promissory note; and third, damages for lost good will from breach of the lease. Plaintiffs moved for summary judgment on the first and second claims, but not the third, and to dismiss defendants' five affirmative defenses. C.P.L.R. §§ 3211(b), 3212(b) and (e). At oral argument the parties stipulated that the court may consider both the lease and the deed to the premises as authenticated and admissible for purposes of plaintiffs' motion. Aff. of Alexander Xenopoulos (Nov. 30, 2010) Exs. E and J. In a written stipulation dated March 3, 2011, defendants consented to summary judgment on plaintiffs' first claim.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment on plaintiffs' second claim, plaintiffs must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiffs satisfy this standard, the burden shifts to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913

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(2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for plaintiffs' motion, the court must construe the evidence in the light most favorable to defendants and accept their version of the facts as true. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

The court may dismiss an affirmative defense if the defense is without merit. C.P.L.R. § 3211(b). Upon plaintiffs' motion to dismiss defendants' affirmative defenses, it is not defendants' burden to establish their defenses by admissible evidence, but plaintiffs' burden to establish that the defenses are legally inapplicable. Rosenzweig v. Givens, 62 A.D.3d 1, 7 (1st Dep't), aff'd, 13 N.Y.3d 774, 775-76 (2009); 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541, 542 (1st Dep't 2011); Vita v. New York Waste Servs., LLC, 34 A.D.3d 559 (1st Dep't 2006); Santilli v. Allstate Ins. Co., 19 A.D.3d 1031, 1032 (1st Dep't 2005).

III. PLAINTIFFS' PRIMA FACIE CLAIM FOR BREACH OF THE PROMISSORY NOTE

Plaintiffs establish a prima facie claim by Xenopoulos for Bullaro's breach of the promissory note to repay Xenopoulos's loan to Bullaro. Plaintiffs present the note bearing Bullaro's signature, authenticated on personal knowledge, along with Xenopoulos's further attestation on personal knowledge to Bullaro's failure to repay the loan. Xenopoulos Aff. ¶¶ 8-9, 30 and Ex. K. See Carlin v. Jemal, 68 A.D.3d 655, 656 (1st Dep't 2009); Takeuchi v. Silberman, 41 A.D.3d 336, 337 (1st Dep't 2007).

The promissory note, by its terms, is between only Xenopoulos and Bullaro. Even accepting that Xenopoulos extended the loan in connection with the lease between the LLCs, plaintiffs present no evidence that the LLCs are themselves parties to or obligated for the note or underlying loan. Although the dates handwritten in the note impose obligations under the note before its handwritten date of execution, Xenopoulos's affidavit, the lease, and the escrow agreement provide ample extrinsic evidence to make a prima facie showing that the note in fact was executed concurrently with the lease, July 8, 2008, rather than July 8, 2009, as written. Foot Locker, Inc. v. Omni Funding Corp. of Am., 78 A.D.3d 513, 515 (1st Dep't 2010); Caruso v. Northeast Emergency Med. Assoc., P.C., 54 A.D.3d 524, 526-27 (3d Dep't 2008); JP Morgan Chase Bank, N.A. v. Cellpoint Inc., 54 A.D.3d 366, 367-68 (2d Dep't 2008); United States Fid. & Guar. Co. v. Delmar Dev. Partners, LLC, 14 A.D.3d 836, 838 (3d Dep't 2005). See Burgos v. Metro-North Commuter R.R., 40 A.D.3d 377, 378 (1st Dep't 2007); Ian Woodner Family Collection v. Abaris Books, 284 A.D.2d 163, 164 (1st Dep't 2001). Even if the note is accepted as written, despite its incongruent dates, it does not alter Bullaro's fundamental obligation to pay the debt specified in the note.

IV. DEFENDANTS' REBUTTAL

Defendants rely on the handwritten escrow agreement presented by plaintiffs, which provides that, if defendant "SLG Realty II is prevented by circumstances beyond its control to

deliver the Premises, but diligently pursuing its ability to deliver, the undersigned [plaintiffs' attorney] shall not release the note [to the payee Xenopoulos] until April 30, 2008."

Xenopoulos Aff. Ex. L. Although the escrow agreement's execution July 8, 2008, may raise a factual question whether the parties to the agreement intended the final date for release of the note to be April 30, 2009, rather than 2008, the parties do not dispute that defendants never delivered the premises to plaintiffs. Thus plaintiffs' attorney released the note to Xenopoulos according to the escrow agreement's terms, entitling him to payment according to the note's terms.

Although defendants claim plaintiffs rather than defendants breached the lease, by repudiating it before April 30, 2009, nothing in the terms of the promissory note, escrow agreement, or lease transforms a repudiation, rescission, or other avoidance of the lease into a similar nullification of the escrow agreement's outer date for release of the note. Even if 958 Sixth Avenue Bake waived strict compliance with the lease's deadlines for SLG Realty II's performance, plaintiff LLC's waiver of defendant LLC's obligation would not alter defendant Bullaro's obligation to plaintiff Xenopoulos under the note. See Josephthal Holdings, Inc. v. Weisman, 5 A.D.3d 221, 222 (1st Dep't 2004). Defendants themselves stress that the lease and note are separate agreements between different parties. E.g., V. Answer to Am. Compl. ¶¶ 4-5. Defendants therefore fail to rebut plaintiffs' prima facie claim.

V. DEFENDANTS' DEFENSES

Plaintiffs' prima facie claim will dispose of defendants' first affirmative defense, of failure to state a claim for breach of the promissory note, as long as plaintiffs ultimately succeed on that claim. See Plemmenou v. Arvanitakis, 39 A.D.3d 612, 613 (2d Dep't 2007); Salerno v. Leica, Inc., 258 A.D.2d 896 (4th Dep't 1999); D'Agostino v. Harding, 217 A.D.2d 835, 836 (3d Dep't 1995). The stipulation dated March 3, 2011, also dismisses defendants' second and third affirmative defenses with prejudice on their consent.

Defendants' fourth affirmative defense, of 958 Sixth Avenue Bake's failure to state a claim under the promissory note, is only against liability to 958 Sixth Avenue Bake and not to Xenopoulos. Given plaintiffs' failure to present evidence that 958 Sixth Avenue Bake is a party to or otherwise obligated for the note, this defense remains completely viable. E.g., Rosenzweig v. Givens, 62 A.D.3d at 7, aff'd, 13 N.Y.3d at 775-76; Cromwell v. Le Sannom Bldg. Corp., 177 A.D.2d 372 (1st Dep't 1991); Smith v. Kinsey, 50 A.D.3d 1456, 1457 (4th Dep't 2008); Santilli v. Allstate Ins. Co., 19 A.D.3d at 1032. Defendants' fifth affirmative defense, of plaintiffs' failure to state a claim under the note against SCG Realty II, is only on behalf of SCG Realty II and not Bullaro. Given plaintiffs' failure to show that SCG Realty II is a party to or third party beneficiary of the note, this defense remains equally viable.

VI. CONCLUSION

The court grants plaintiffs' motion for summary judgment on their first cause of action and motion to dismiss defendants' second and third affirmative defenses according to the stipulation March 3, 2011. After oral argument and for the foregoing reasons, the court also grants plaintiffs' motion for summary judgment on their second cause of action to the extent of granting summary judgment to plaintiff Xenopoulos against defendant Bullaro, for \$250,000.00 plus interest at 16% per year from February 1, 2009. C.P.L.R. § 3212(b) and (e). Since plaintiffs have succeeded on a claim by Xenopoulos for breach of the promissory note, the court also grants plaintiffs' motion to dismiss defendants' first affirmative defense. C.P.L.R. § 3211(b). The court otherwise denies plaintiffs' motion. This decision constitutes the court's order.

DATED: March 1, 2012

FILED

MAR 29 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

NEW YORK
COUNTY CLERKS OFFICE

LUCY BILLINGS
J.S.C.