

BLDG ABT Enters., LLC v 711 Second Ave. Corp.

2012 NY Slip Op 31305(U)

May 11, 2012

Sup Ct, NY County

Docket Number: 110703/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

BLDG ABI ENTERPRISES, LLC,

INDEX NO. 110703/11

Plaintiff,

MOTION DATE

-v-

MOTION SEQ. NO. 001

711 SECOND AVE. CORP. and IAN CHENG, as
GUARANTOR,

Defendants.

MOTION CAL. NO.

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

PAPERS NUMBERED

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

FILED

Answering Affidavits Exhibits

MAY 16 2012

Replying Affidavits

NEW YORK
COUNTY CLERK'S OFFICE

CROSS-MOTION: YES / NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM.

Dated: 5/11/12

DM
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
DONNA M. MILLS, J.S.C.

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

----- x
BLDG ABI ENTERPRISES, LLC,

Plaintiff,

Index No. 110703/11

- against -

711 SECOND AVE. CORP. and
IAN CHENG, as GUARANTOR,

Defendants.
----- x

HON. DONNA M. MILLS, JSC.:

Defendants 711 Second Avenue, Inc. s/h/a 711 Second Ave. Corp. and Ian Chen ("Chen") move, pursuant to CPLR 3211(a)(1), (5), (7), (8), and (10), to dismiss the Complaint in this debt collection action.

BACKGROUND

Plaintiff, BLDG ABI Enterprises, LLC ("BLDG ABI"), commenced this action seeking to recover \$50,960 in rent allegedly due under a lease agreement with the corporate defendant. The following facts are gleaned from the submissions of the parties.

By Standard Form of Store Lease, dated September 1, 2009, BLDG ABI, as Landlord, agreed to lease to 711 Second Ave. Corp., as Tenant, a retail store and basement at the premises located at 711 Second Avenue, New York, New York (the "demised premises"), for a term of approximately 12 years (see Lease, Not of Mot, Exh D). The Lease permitted 711 Second Ave. Corp. to "use and occupy the demised premises as a Japanese restaurant only" (*id.*).

Furthermore, Article 15 of the Lease states, in part:

Tenant has inspected the demised premises and

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SECOND JUDGE OFFICE

accepts them "as-is", subject to the riders annexed hereto with respect to Owner's work, if any, in any event. Owner makes no representation as to the condition of the demised premises, and Tenant agrees to accept the same subject to violations, whether or not of record

(id.).

Clause 40 of the Rider to the Lease sets forth the monthly and annual base rent for the demised premises during the lease term (Rider to Lease, id.). Clause 40 also states that a late charge of five (5%) percent of the monthly rental rate will be charged for rent paid after the 10th day of each month. Clause 65 of the Rider states, in part:

If Tenant at any time is in default hereunder or has breached this Lease, and if the Landlord institutes an action of summary proceeding against the Tenant based upon such default or breach then, Tenant shall be responsible to pay all costs, and expenses, including, without limitation, reasonable attorneys' fee, court costs and disbursements
...

(id.). Clause 70 of the Rider states that "[a]ny notice, request or demand permitted or required to be given under the terms of this Lease, or by any law or government regulation shall be in writing" (id.).

A Limited Guaranty, appended as Exhibit A to the Lease, states, in part:

Ian Cheng ("Guarantor"), is the legal and beneficial owner of all of the issued and outstanding shares of 711 Second Ave. Corp. ("Tenant"), the tenant under lease dated on the 1st of July 2009 (the "Lease"), and in

order to induce Landlord to execute and enter into the Lease, guarantees to Landlord, Landlord's successor(s) and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the Lease Notwithstanding the foregoing, this Guaranty shall bind the Guarantor only for payments, performance and observance of the agreements to be performed and observed under the Lease that accrue while Tenant is in possession of the premises demised under said Lease ("Premises") and prior to surrenders same. This Guaranty shall not apply to any performance or observance after Tenant surrenders possession to Landlord of its Premises in the condition required by the terms of the Lease which surrender shall be evidenced by the delivery of the keys providing access to the Premises

(Limited Guaranty, *id.*).

A dispute arose under the Lease, and this action ensued. Plaintiff essentially claims that Tenant vacated the demised premises on June 17, 2010, owing rent in the amount of \$50,960 for the period March 2010 to December 2010. Plaintiff further claims that Tenant and Cheng, as Guarantor, failed to pay the past due rent despite due demand therefore. The submissions include a Fair Debt Collection Notice, dated September 16, 2011, that plaintiff reportedly sent to Tenant (Not of Mot, Exh A).

Defendants deny receiving a written demand for rent. In addition, defendants contend that plaintiff wrongfully evicted Tenant in February 2010, when plaintiff unlawfully entered the demised premises, changed the lock, and failed to provide Tenant with new keys. As such, defendants argue that under the terms of the Guaranty, no rent was due after February 2010. Defendants

also assert that Tenant satisfied rental obligations through March 2010, and should be reimbursed for the March 2010 rental payment.

Plaintiff denies evicting Tenant, stating instead, that plaintiff needed emergency access to the demised premises to address maintenance issues. Plaintiff also states that since Tenant's Japanese restaurant was not yet opened for business, and Tenant did not respond to plaintiff's access requests, plaintiff entered the demised premises to address the emergency maintenance issues, as permitted by Article 13 of the Lease. Plaintiff further asserts that it then changed the locks and sent a letter notifying Tenant where to obtain new keys if Tenant decided to return to demised premises.

On September 20, 2011, plaintiff filed the Complaint in this action alleging causes of actions against 711 Second Ave. Corp., and Cheng, as Guarantor, to recover past due rents (first cause of action); late fees (second cause of action); and legal fees (third cause of action). Defendants now seek to dismiss the Complaint on various grounds, including lack of personal jurisdiction, failure to join a necessary party, and failure to state a cause of action.

DISCUSSION

CPLR 3211(a)(8) directs that a party may move to dismiss an action against it on the ground that the Court lack personal jurisdiction over the defendant. Cheng asserts that the Court

lacks personal jurisdiction over defendants since neither defendant was legally served in this action.

The Affidavits of Service state that the Summons and Complaint with Fair Debt Collection Notice was served (1) on 711 Second Avenue, Inc. s/h/a 711 Second Ave. Corp. by service on an authorized agent in the Office of the Secretary of State of the State of New York, and (2) on Ian Cheng by service on a 30 to 40-year old Black female, a person of suitable age and discretion at defendant's actual place of business located at 116 West 28th Street, New York, New York (Affidavits of Service, Not of Mot, Exh C).

Cheng asserts that the address for service does not appear on the Affidavit of Service pertaining to 711 Second Avenue, Inc., and that it is his understanding that the New York State Department of State was unable to effect service.

Cheng does not deny actual receipt of service on him as the individual defendant. Instead, he asserts that Affidavit of Service incorrectly states that he was served at his actual place of business. He notes that the address on the Affidavit of Service pertaining to him is that of the Marriot Corporation Fairfield Inn and Suites Hotel, which is not his actual place of business. He also asserts that the Lease does not provide for personal service on him at a hotel.

Cheng's assertions do not justify dismissal on the grounds of ineffective service. As stated, Cheng does not deny receipt

of service. Nor does he dispute that the person listed on the affidavit is a "person of suitable age and discretion" to receive process on his behalf. Furthermore, he does not rebut the process server's account with an affidavit that the Secretary of State was actually unable to effect service on 711 Second Avenue, Inc. (see *DeLuca v Ricci*, 194 AD2d 457, 458 [1st Dept 1993]). Thus, the branch of the motion that seeks to dismiss the Complaint for lack of personal jurisdiction should be denied.

However, dismissal is warranted on the ground that the Complaint fails to state valid causes of action against Cheng.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*id.*). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d

268 [1977]). "Although in assessing a motion to dismiss made pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any consideration" (*Riback v Margulis*, 43 AD3d 1023 [2d Dept 2007]).

The Guaranty in this action conclusively establishes a defense to the causes of action against Cheng. "It is well established that '[a] guaranty is to be interpreted in the strictest manner' ..., particularly in favor of a private guarantor ..., and cannot be altered without the guarantor's consent (*LO-HO LLC v Batista*, 62 AD3d 558, 559 [1st Dept 2009]). "A 'guarantor should not be bound beyond the express terms of his guarantee'" (*id.* at 559-560).

Here, the Guaranty specifically refers to a lease agreement, dated July 1, 2009, and does not refer to the Lease at issue. As such, the Guaranty cannot be used to impose liability on Cheng for payment under the September 1, 2009 Lease. Thus, the branch of the motion that seeks to dismiss the Complaint against Cheng is granted.

However, construing the pleadings in the light most favorable to plaintiff, the Complaint states valid claims against the corporate defendant under the September 1, 2009 Lease. The Complaint sufficiently specifies the terms of the Lease, the consideration, the performance by Landlord, and the basis of the

alleged breach by Tenant so as to survive a motion to dismiss (see *Furia v Furia*, 116 AD2d 694, 695 [2d Dept. 1986]).

Defendants' challenges to the structure of the pleadings do not warrant dismissal. The assertion that the pleading does not name the actual corporate defendant is unavailing. It cannot be disputed that Landlord and Tenant entered into a lease for the premises at 711 Second Avenue, New York, NY. Moreover, the Affidavit of Service clearly states that service was effected upon the Secretary of State on 711 Second Avenue, Inc., the actual corporation.

Equally unavailing is the assertion that the Complaint is inadequate because it was signed only by an attorney, and not verified by an individual with personal knowledge. A review of the Complaint reveals that the attorney's signature thereon complies with the requirement of 22 NYCRR §130-1.1-a. Furthermore, contrary to defendants' position, verification of the pleading is optional with plaintiff in this action (see CPLR 3020).

Defendants' assertions under the Fair Debt Collection Practices Act also lack merit. Defendants argue that the September 16, 2011 Fair Debt Collection Notice does not comply with the Fair Debt Collection Practices Act (15 USC 1692), allowing Tenant 30 days to dispute the debt, since plaintiff filed the Complaint on September 20, 2011. However, the 30-day notice validation provision of the Fair Debt Collection Practices

Act applies to attorneys who regularly engage in consumer debt collection activities and sign rent demand notices on behalf of landlords, not to rent demand notices issued by landlords on their own behalf (see *Elina Realty v Calixte*, 178 Misc 2d 80 [Sup Ct, Kings County 1998]). As to the latter, RPAPL 711(2) permits litigation within three days of the service of the rent demand notices (*id.*). Stated differently, the Fair Debt Collection Practices Act does not apply where the creditor, rather than a debt collector, directly attempts to collect the debt (*id.*). Thus, where, as here, the landlord sends the demand for rent, then the landlord, as the creditor trying to collect a debt, would not have to wait the 30-days before commencing an action since the action would be regulated by RPAPL 711(2) (*id.*).

Furthermore, Tenant's assertion that it was locked out of the demised premises by Landlord does not alter the Court's determination that the facts alleged in the Complaint, when viewed in the light most favorable to plaintiff, assert viable claims under the September 1, 2009 Lease. The assertion that Landlord wrongfully misrepresented the viability of a restaurant in demised premises also does not warrant a contrary determination, especially in light of Article 15 of the Lease. Thus, the branch of the Complaint that seeks to dismiss the Complaint as to the corporate defendant is denied.

Accordingly it is

ORDERED that the motion is granted to the extent that the

Complaint is dismissed as to defendant Ian Cheng, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that defendant 711 Second Avenue, Inc. s/h/a 711 Second Ave. Corp. is directed to serve an answer to the Complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 5/11/12

ENTER:



J. S. C.

DONNA M. MILLS, J.S.C.

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