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SHORT FORM ORDER

INDEX NUMBER: 41852-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 03-03-2012
Motion Submit Date: 04-17-2012
Motion Sequence No.: 003 MOTD
004 MOTD

[ ] FINAL
[x] NON FINAL

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MEDICAL ARTS-HUNTINGTON, LLC,

Plaintiff,

-against-

MELTZER ROSENBERG DEVELOPMENT, LLC., LEWIS S. MELTZER, ROBERT ROSENBERG, DR. BERNARD ROSOF, BETTE GANZ, FR. THOMAS PALMIERI, S & J ENTERPRISES, L.P., CAROL REICHERS, GARY METLZER, DR. PAUL DERMANSKI, SHELDON GOLDSTEIN, CHAD CASCADDEN, DML CONSULTANTS, LLC., D/B/A DML CONSULTING LLC., KEITH SAMAROO, SHARON METLZER, DAVID WEISS, GARY MELTZER as Trustee of the CARLI PEARL MELTZER TRUST and GARY METLZER as Trustee of THE REMI DYLAN MELTZER TRUST,

Defendants.
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Attorney for Plaintiff
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Donald Carbone, Esq.
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Attorney for Defendant
Lewis Meltzer, Esq.
Meltzer Lippe, Goldstein, PC
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Defendants Meltzer Rosenberg Development LLC, Lewis S. Meltzer, Dr. Bernard Rosof, Bette Ganz, Dr. Thomas Palmieri, S&J Enterprises LP, Carol Reichers, Gary Meltzer, Dr. Paul Bermanski, Sheldon Goldstein, DML Consultants LLC d/b/a DML

7/6/12

Consulting, LLC, Sharon Meltzer, David Weiss, Gary Meltzer as Trustee of the Carli Pearl Meltzer Trust and Gary Meltzer as Trustee of the Remi Dylan Meltzer Trust ("moving Defendants") move, by Notice of Motion (motion sequence #003) for an order dismissing Plaintiff's Complaint pursuant to CPLR §§ 3211 (a) (1) and (7) and for sanctions against Plaintiff's counsel pursuant to 22 NYCRR § 130-1.1. Defendant Medical Arts-Huntington Realty, LLC, ("Medical Arts") moves, by Notice of Cross-Motion (motion sequence # 004) for and order granting Medical Arts partial Summary Judgment against Defendant Meltzer Rosenberg Development LLC, pursuant to CPLR § 3212, in the amount of $143,358.96, the amount MRD recieived as a distribution (see, infra) as well as the right to prove further damages at a trial of this action. Both Plaintiff and the moving Defendants oppose each others' motion.

According to the moving Defendants, Plaintiff and an entity known as 214 Wall Street Associates, LLC, ("214 Wall") entered into a Survival Agreement on June 21, 2006, following the basic completion of a building that 214 Wall constructed for Medical Arts, as both 214 Wall and Medical Arts wanted to reserve the right to make claims against each other relating to the construction. The individual Defendants in the current action are all members of the 214 Wall LLC. According to Defendant Lewis Meltzer, at the closing, 214 Wall used the monies it had been paid up to that point to pay its construction lender and contractors, as well as to return the investment and a profit to the 214 Wall members.

In the Survival Agreement, according to the moving Defendants, paragraph 1(E)(2) required that in order to receive their distributions, the members of 214 Wall were required to guaranty their respective shares of the amount of any judgment which might be subsequently secured by Medical Arts. It is the moving Defendants' interpretation of such Agreement that every member of 214 Wall executed and delivered a personal guaranty and then was entitled to take its distribution, thereby precluding any claims under the Debtor and Creditor law for fraudulent conveyances. According to Paragraph 9 of the Guaranty, which was executed as per the Survival Agreement, each

guarantor's liability was set forth as several and not joint and was based upon a what is referred to as Schedule A.

Following the trial before this Court of the action between 214 Wall and Medical Arts, Medical Arts was awarded a Judgment in the amount of $133,204.34, with interest from December 13, 2010; and attorneys' fees in the amount of $179,251.42, with interest from August 8, 2011. According to Plaintiff, $73,060.34 of the Judgment and $104,336.02 of the attorneys' fee awards remain unpaid as of this date, along with interest from the dates set forth. It is the moving Defendants' assertion that they have paid their respective shares of the Judgment and attorneys' fees and, therefore, any claim against them should be dismissed. They assert further that a review of the Guaranty demonstrates that the first named Defendant herein, Meltzer-Rosenberg Development LLC ("MRD"), bears no responsibility to pay on any Guaranty as it is not listed on Schedule A, which sets forth the respective percentages of potential liability of each prospective Guarantor.

According to Medical Arts, Lewis Meltzer, as the managing member of Defendant MRD, which was the managing member of 214 Wall, took actions to ensure that 214 Wall would have no assets to satisfy its obligations to Medical Arts by directing and overseeing the distribution of all of the sales proceeds from the sale of the underlying real estate immediately after the sale proceeds were received by 214 Wall from Medical Arts. In opposition to the moving Defendants' motion to dismiss, Plaintiff asserts that these Defendants have fraudulently rendered 214 Wall judgment proof, thereby violating the Debtor and Creditor law, and subjecting the individual members of 214 Wall to liability for the entire amount remaining. In addition, it is Plaintiff's assertion that the first named moving Defendant, Meltzer Rosenberg Development LLC, accepted its position as guarantor of the entire potential debt arising from a judgment against 214 Wall, as, unlike the other named Defendants, it did not set forth its position as being only "severally" liable for a proportion of a prospective judgment in Schedule A, attached to the guaranty.

Medical Arts asserts, in addition, that the position of the moving Defendants is absurd, since it would result in the moving Defendants being permitted to distribute the entire assets of 214 Wall to themselves in return for a Guaranty, which covers only 60% of a potential Judgment, leaving 214 Wall's managing member, MRD, liable for no portion of any potential Judgment, despite the fact that it is the first signatory of the Guaranty. Based on the above, Plaintiff Medical Arts seeks partial Summary Judgment against Defendant MRD for $143,358.96, the amount that particular guarantor received in distributions from 214 Wall. According to Plaintiff, there is nothing in the Guaranty or the Survival Agreement which limited the rights of the Plaintiff herein as a potential Judgment creditor under the Debtor and Creditor law based upon a fraudulent conveyance.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211 (a) such will be granted in those instances where the documents presented establish a defense to the claims as a matter of law. **Leon v Martinez**, 84 NY 2d 83, 614 NYS 2d 972, 638 NE 2d 511 (1994); **Leibowitz v Impressive Homes**, 43 Ad 3d 1003, 843 NYS 2d 120 (2d Dep't 2007). With regard to a motions brought pursuant to CPLR § 3211 (a)(7), the court must afford the pleading a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff with every possible favorable inference. **AG Capital Funding Partners, L P v State Bank & Insurance Trust Co**, 5 NY 3d 582, 8080 NYS 2d 573, 842 NE 2d 471 (2005); **Heckler v Health Ins Plan of Greater New York**, 67 Ad 3d 758, 888 NYS 2d 196 (2d Dep't 2009). In making such determination, the court should "(d)etermine only whether the facts, as alleged, fit within any cognizable legal theory". **Leon v Martinez, supra**; **Micro Technology International v Artech Information Systems, LLC** 62 AD 3d 764, 883 NYS 2d 719 (2d Dep't 2009).

A party moving for Summary Judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate

the absence of any material issues of fact. **Winograd v New York University Medical Center**, 64 NY 2d 85, 487 NYS 2d 316 (1985); **Zuckerman v City of New York**, 49 NY 2d 557, 427 NYS 2d 5905, 404 NE 2d 7189 (1980). While this remedy is not granted where there is any doubt as to the existence of a triable issue of fact, once a prima facie showing of entitlement has been made, the burden shifts to the party opposing the motion to produce proof in admissible form sufficient to establish material issues of fact which require a trial. **State Bank of Albany v McAuliffe**, 97 Ad 2d 607, 467 NYS 2d 964 (3d Dep't 1983). The role of the court in deciding a motion for summary judgment "(i)s not to resolve issues of fact of determine matters of credibility, but merely to determine whether such issues exist. **Dyckman v Barrett**, 187 Ad 2d 553, 590 NYS 2d 224 (2d Dep't 1992).

It is the court's responsibility, in the first instance, to determine whether a written agreement is ambiguous. **1210 Colvin Ave Inc v Tops Markets LLC**, 30 AD 3d 995, 816 NYS 2d 639 2d Dep't 2006). Generally, a contract is unambiguous if on its face it is reasonably susceptible to only one interpretation. **White v Continental Cas Co**, 9 NY 3d 264, 848 NYS 2d 603, 878 NE 2d 1019 (2007); **Greenfield v Philles Records, Inc**, 98 NY 2d 562, 750 NYS 2d 565, 780 NE 2d 166 (2002). On the other hand, a contract is ambiguous if the agreement on its face is reasonably susceptible of more than one meaning. **Brad H v New York**, 17 NY 3d 180, 928 NYS 2d 221, 951 NE 2d 743 (2011). Whether a contract is ambiguous is generally determined by examining the entire instrument and considering the relation of the parties and the circumstances under which the contract was executed, with the wording to be considered in light of the obligation as a whole and the intention of the parties as manifested thereby. **Brad H v New York, supra.** Thus, in interpreting the agreement, primary attention must be given to the purpose of the parties in making the contract. **Greenfield v Philles Records Inc, supra**. In addition, all parts of an agreement must be read in harmony to determine the true meaning. **Bombay Realty Corp v Magna Carta Inc**, 100 NY 2d 124, 760 NYS 2d 734, 790 NE 2d 1163 (2003).

When the agreement to be interpreted is a commercial one, the tests to be applied are common speech and the reasonable expectations of the ordinary business person in the factual context in which certain terms of art and understanding are used, often keyed to the level of sophistication and acumen of the particular parties. **BP Air Conditioning Corp v One Beacon Ins Group**, 8 NY 3d 708,840 NYS 2d 302, 871 NE 2d 1128 (2007).

The relevant provision of the Survival Agreement and Guaranty that form the basis for both motions before the Court are as follows:

SURVIVAL AGREEMENT

This survival Agreement is made and entered into this 21st day of June, 2006, by and among 214 Wall Street Associates, LLC, a New York limited liability company, having an address at 190 Willis Avenue, Mineola, New York, 11501, (herein called "Seller"), and Medical Arts-Huntington Realty, LLC, a New York limited liability company, having an address at 375 E. Main Street, Suite 12, Bayshore, New York 11706 (herein, called "Buyer").

E. Security For The Surviving Claims

2. Seller shall deliver to Buyer by July 20, 2006, guarantees in the form annexed hereto as Exhibit C executed by one or more of Seller's members. Notwithstanding the foregoing, in lieu of delivering any particular guarantee from a member of Seller as provided in this subparagraph. Seller shall deposit, in escrow with its own counsel any and all amount available for distribution by Seller to such member subsequent to the Closing which shall be considered an asset of Seller. Seller shall provide evidence (amount and name of the individual on whose behalf the deposit is made), within five (5) business days, to Buyer of any deposits that are made to the escrow account pursuant to this Paragraph. Seller represents and warrants that the members listed on Exhibit C are all members of Seller.

GUARANTY

Guaranty given by MELTZER ROSENBERG DEVELOPMENT LLC, having an address at 190 Willis Avenue, Mineola, New York, 11501, Lewis S. Meltzer, Robert Rosenberg, Dr. Bernard Rosof, Bette Ganz, Dr. Thomas Palmieri, S&J Enterprises, LP, Carol Reichers, Gary Meltzer, Dr. Paul Bermanski, Sheldon Goldstein, Chad Cascadden, DML Consulting, LLC, Keith Samaroo, Sharon Meltzer, David Weiss, Robert Rosenberg, The Carli Pearl Meltzer Trust and the Remi Dylan Metlzer Trust (collectively referred to as the "Guarantor") in favor of MEDICAL ARTS-HUNTINGTON REALTY, LLC., having an address at 375 East Main Street, Bayshore, New York 11706 ("Buyer", which term shall include its legal representatives, successors and assigns).

1. Guarantee of Obligations.

(a) The Guarantor hereby absolutely, irrevocably and unconditionally guarantees (collectively an "agreement") the payment and performance of all obligations of Seller under the Survival Agreement. This Guaranty is an unconditional and absolute guarantee of payment and

performance and not of collection, and if for any reason any such sum shall not by paid promptly when due or any such agreement is not performed by Seller, the Guarantor will immediately pay such sum or perform such agreement to or for the benefit of the person entitled thereto pursuant to the provisions of the Survival Agreement, as may be applicable, as if such sum or agreement constituted the direct and primary obligation of the guarantor , regardless of any defenses or rights of setoff or counterclaims which Seller may have or assert, and regardless of whether any person shall have taken any steps against Seller or any other person to collect such sum or enforce such agreement, and regardless of any condition or contingency.

2.Term. The liability of the Guarantor shall continue until all Obligations have been paid or complied with in full.

5. No Release. Until such time as all of the Obligations have been paid and fulfilled to the buyer, the Guarantor shall not be released by any act or thing which, might, but for this paragraph, be deemed a legal or equitable discharge of a guarantor or surety . . . .

The agreements, read as a whole as they must be, set forth specifically that each of the signatory guarantors are to be liable for any potential judgment. While the percentage of liability under the guaranty is limited for those guarantors as set forth in Exhibit A thereto, there is no limitation on the liability of the initial guarantor, which signed the guaranty Agreement, and it remains liable for the entire judgment minus those amounts that have already been tendered. The position taken by the moving Defendants herein that the prime signatory of a guaranty is without any liability rendering the guaranty protection for only 60% of a potential debt would make a mockery of the agreement and will not be countenanced by this Court.

With regard to the potential liability of the moving Defendants, the Court agrees that their liability is, as set forth "several" as opposed to joint. However, the guaranty states clearly that their liability as guarantors shall remain until all obligations have been paid. In addition, while moving Defendants' counsel asserts that the agreements contemplate distribution of 214 Wall's assets to the guarantors, the affidavit of a member of Medical Arts, disagrees, stating he was present at the negotiation of the subject agreements and claiming forth that at no time did such agreements ever contemplate that 214 Wall would be able to deplete all of its assets in return for the guaranty.

Based on the above, the subject agreements are clear to the extent that each and every guarantor made itself subject to a certain amount of liability for a potential judgment against 214 Wall, limited only to the extent of a percentage set forth in Schedule A. To the extent that Defendant MRD signed such agreement and did not limit its liability by a percentage, Plaintiff has set forth its entitlement as a matter of law to judgment against that party as requested. With regard to the CPLR § 3211 motion, the documents referred to specifically prohibit any release of the individual guarantors until such time as all of the obligations under the judgment are paid in full. That has not occurred and Plaintiff has raised an issue of fact based on the ground that such agreements do not contemplate waiver of rights under the Debtor and Creditor law for fraudulent conveyances.

Based on the above, the motion by the moving Defendants to dismiss the Complaint pursuant to CPLR § 3211 (a)(1) is denied and the cross-motion by Plaintiff for partial Summary Judgment against Defendant MRD in the amount set forth in its request is granted.

This constitutes the **DECISION** and **ORDER** of the Court. Counsel are directed to appear for a discovery conference on Monday, October 15, 2012 at 9:30 o'clock a.m.. Submit Judgment in accordance with the **DECISION** herein.

Dated: July 5, 2012
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL