

Conkschm 110 Realty LLC v Macanian
2012 NY Slip Op 32892(U)
November 30, 2012
Sup Ct, Suffolk County
Docket Number: 14665-11
Judge: Elizabeth H. Emerson
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NO.: 14665-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 11-14-12

SUBMITTED: 2-2-12

MOTION NO.: 001-MG

 CONKSCHM 110 REALTY LLC, and MCS REALTY,
 LLC,

Plaintiffs,

-against-

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
 Attorneys for Plaintiffs
 900 Stewart Avenue, Suite 300
 Garden City, New York 11530

ALBERT MACANIAN, DESIGN FURNITURE OF
 LONG ISLAND, INC., ALBERT'S FURNITURE
 GALLERY, INC., ALBERT MACANIAN personally and
 d/b/a ALBERT'S DESIGN FURNITURE OUTLET and
 DESIGN FURNITURE GALLERY, DESIGN
 FURNITURE, LTD. ("LTD"); and JOHN DOE, INC.
 NOS. 1-10,

FARRELL FRITZ, PC
 Attorneys for Defendants
 2488 Montauk Highway
 Bridgehampton, New York 11932

Defendants.

x

Upon the following papers numbered 1-36 read on this motion to dismiss; Notice of Motion and supporting papers 1-14; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15-26; Replying Affidavits and supporting papers 27-30; Other Plaintiff's memoranda of law 31-34; Defendants' memorandum of law 35-36; it is,

ORDERED that the motion (001) by the plaintiffs for partial summary judgment on the issue of liability on the first, second, and fourth causes of action, and an order striking the first through eleventh and thirteenth through sixteenth affirmative defenses is granted; and it is further

ORDERED that counsel for movants shall serve a copy of this Order with Notice of Entry upon counsel for the defendants, pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ENTERED
 001
 OK

ORDERED that the parties are directed to appear in Part 46 for a preliminary conference on January 23, 2013 at 9:45 a.m.

In this action, plaintiffs Conkschm 110 Realty LLC and MCS Realty LLC seek to recover the payment of rent and additional rent from the defendants Design Furniture of Long Island, Inc., Albert's Furniture Gallery, Inc., Albert Macanian personally and d/b/a Albert's Design Furniture Outlet, Design Furniture Gallery, and Design Furniture, LTD., and the balance of a loan made to defendant Macanian.

The record reveals that in or about September 2004, the defendant Design Furniture of Long Island, Inc. (hereinafter "Design Furniture of LI") entered into a commercial lease agreement with the plaintiff MCS Realty LLC (hereinafter "MCS") to rent the premises located at 1995 Broadhollow Road, Huntington, New York for a twenty year term. Pursuant to paragraph 80 in the Rider to the Lease, defendant Macanian, as principal of Design Furniture of LI, agreed that he would

"guarantee the payment of all rent and additional rent payment for the demised premises from the date of any nonpayment of any rent until the date the Tenant surrenders possession of the demised premises to the Landlord in broom clean condition. Principal confirms and agrees that he is responsible in full for any such payments of base or net rent or additional rent not made by the Tenant. This limited personal guarantee of rental payments shall cease on the date that the tenant delivers possession of the premises vacant and broom clean to Landlord with all base or net rents and additional rents paid to the date of delivery of possession."

Paragraph 80 also provided that the guarantee would cease on the date that the Landlord consents to an assignment of the lease.

The record reveals that in September 2005, MCS transferred title to the demised premises to the plaintiff Conkschm110 Realty, LLC (hereinafter "Conkschm"), and subsequently, Design Furniture of LI executed an Estoppel Certificate and Subordination and a Non-Disturbance Agreement pursuant to which it acknowledged that Conkschm was the landlord under the lease. Some time in January 2010, Macanian and Design Furniture of LI were unable to pay the additional rent in full. Macanian personally executed a loan agreement with MCS for a loan in the amount of \$48,000 at 5% interest on January 2, 2010 in order to assist Macanian in paying the rent. On January 20, 2010, the parties agreed to settle the additional rent arrears in the amount of \$77,984.48 by the acceptance of the payment of \$22,000. Included in the agreement was the plan for Macanian to pay the loan amount of \$48,000 in twelve equal monthly installments beginning on June 1, 2011 through May, 1, 2012. Design Furniture of LI failed to pay base rent in July 2010. In August and September 2010, Conkschm sent notices of default and demanded the payment of rent and additional rent. On October 4, 2010, Conkschm served Design Furniture of LI with a three day notice of nonpayment. On or about November 10, 2010, Design Furniture of LI surrendered possession of the premises, but allegedly left certain vehicles on the premises. Inasmuch as

Macanian and Design Furniture of LI have failed to pay rent and additional rent, the instant action was commenced. The plaintiff seeks the payment of \$939,292.21 in rent and additional rent as of October 1, 2011.

The complaint alleges eleven causes of action. In the first cause of action, it is alleged that the defendant Macanian breached a guarantee for failing to pay rent and additional rent from July 1, 2010 through January 2011 in the amount of \$419,811. In the second cause of action, it is alleged that Macanian breached the guarantee for failing to pay rent and additional rent to the date that Design Furniture of LI turned over possession of the premises to Conkschm in the amount of \$419,811.42. The third cause of action alleges that Design Furniture of LI and Macanian repudiated the lease for the remainder of the 20 year lease term. The fourth cause of action alleges that Macanian breached the loan agreement with MCS in the amount of \$48,000. In the fifth and sixth causes of action, the complaint alleges that Macanian and Design Furniture of LI breached the lease by failing to pay rent and additional rent. In the seventh cause of action, Conkschm alleges that Macanian ignored corporate formalities and commingled the assets of the defendant Albert's Furniture Design, Ltd, Design Furniture of LI, personal assets and the other Macanian entities. In addition, the complaint alleges that Macanian dissolved Design Furniture of LI in 2006 and did not notify the landlord. After vacating the premises, Macanian opened a new store called Albert's Design Furniture Outlet, which was staffed by the same employees, used the same phone number, signage, inventory, vendors, and customer information as Design Furniture of LI.

In the eighth cause of action, the complaint alleges that defendants Albert's Design Furniture Outlet, Albert's Inc., and Design, Ltd. are liable for Design Furniture of LI's debts inasmuch as these stores sell the same merchandise, have the same owner, officer and director, use the same signage, are located on the same block, use the same equipment and tractor trailers, conduct business under a similar name as the original store, use the original telephone number, employs the same staff and uses the same vendors as Design Furniture of LI. In the ninth cause of action the complaint alleges that Macanian effected a fraudulent conveyance of all Design Furniture of LI's assets to himself, Albert's Inc., Design, Ltd. for no consideration with the intent to hinder, delay or defraud present and future creditors of Design Furniture of LI, including the plaintiffs. In the tenth cause of action the complaint alleges that Macanian is liable for constructive fraud by the transfer of Design Furniture of LI's assets to himself and his companies. In the eleventh cause of action, the complaint alleges that Macanian fraudulently executed the additional rent agreement on behalf of Design Furniture of LI after he dissolved the corporation.

The plaintiffs now move for partial summary judgment on the issue of liability on the first, second, and fourth causes of action, and an order striking the first through eleventh and thirteenth through sixteenth affirmative defenses.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Stewart Title Ins. Co. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]),

but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

The evidence submitted by the plaintiffs was sufficient to meet their burden of establishing, as a matter of law, that the defendant Macanian is liable as guaranty for the rent and additional rent, as well as the personal loan (*Eiseman v State*, *supra*; *McNulty v City of New York*, *supra*). In support of the motion, the plaintiffs submit, *inter alia*, the pleadings, a letter dated August 4, 2010 from Conkschm to Design Furniture of LI, a copy of the three day rent demand dated October 4, 2010, a copy of a letter dated August 4, 2010 from MCS to Macanian stating the Macanian is in default of the loan agreement, a copy of a letter dated December 1, 2010 from Conkschm's attorney to Macanian's counsel regarding surrender of the premises and Conkschm's position that it is reserving all rights with regard to any claims for breach of the lease agreement against Design Furniture of LI, Macanian and their affiliates, a copy of the lease and rider, a copy of payments made by Design Furniture of LI to Conkschm, and a copy of the loan agreement. In addition, the plaintiffs submit the personal affidavit of Steven Serota.

Steven Serota avers in his affidavit that he is a member of Conkschm and MCS. He states that the term of the lease commenced on or about March 1, 2005 and terminates on April 30, 2005. The parties agreed on the base rent, which would gradually increase over time, and the payment of additional rent which included real estate taxes, insurance, water charges, land rent and maintenance and repairs. Serota states that the initial default occurred in January, 2010 by the defendants' failure to pay additional rent totaling \$77,984.48. Although the plaintiffs agreed to accept \$22,000 in full payment of the outstanding additional rent arrears, it was conditioned upon the defendants making full payment of any scheduled rent payment in a timely manner. At the same time, MCS lent Macanian the sum of \$48,000, conditioned upon the payment of all scheduled rent payments. The defendants failed to pay rent and additional rent in October 2011 totaling \$939,929.21. After serving notices of nonpayment upon the defendants, on or about November 31, 2010, Design Furniture of LI vacated the building, however did not remove all property from the premises until January 2011.

As the moving plaintiffs made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the defendants to demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*; *Murray v Hirsch*, 58 AD3d 701, 871 NYS2d 673 [2d Dept 2009], *lv den* 12 NY3d 709, 881 NYS2d 18 [2009]). The defendants failed to meet this burden. In opposition, the defendants submit an affidavit by Macanian, wherein he states that he was formerly the president of Design Furniture of Long Island, Inc., and was also formerly affiliated with Albert's Furniture Gallery, Inc. He does not dispute the existence of the lease, or that MCS transferred title to the premises to Conkschm in 2005. He acknowledged that Design Furniture of LI was having difficulty paying the rent in January 2010. He further stated that he and Design Furniture of LI entered into agreements with Conkschm and MCS without the benefit of legal counsel in order to settle the rent arrears. He disputes the amount of the sum due and avers that he was not credited for the payment of \$22,000. Macanian stated that Design Furniture of LI owes the plaintiffs the sum of \$254,966, and they offered partial payment of \$170,000 in full satisfaction of all past rents and additional rents through October 30, 2010, but the plaintiffs declined to accept partial payment. Macanian stated that he offered to apply the security deposit to pay an additional \$80,000, but again, the plaintiffs refused payment.

Accordingly, the plaintiffs' motion seeking partial summary judgment on the first, second,

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and fourth causes of action is granted. As a result the first through eleventh and thirteenth through sixteenth affirmative defenses which relate to the first, second, and fourth causes of action are hereby stricken.

The parties are directed to appear for a preliminary conference on January 23, 2013 at 9:45 a.m.

DATED: November 30, 2012

HON. ELIZABETH HAZLITT EMERSON
J. S.C.