

Zobe, LLC v Lance Brown Assoc., Inc.

2013 NY Slip Op 30055(U)

January 9, 2013

Sup Ct, New York County

Docket Number: 603865/09

Judge: Eileen A. Rakower

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SCANNED ON 1/15/2013
[* 1]

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

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 603865/2009
ZOBEL, LLC.
vs.
LANCE BROWN ASSOCIATES, INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

FILED

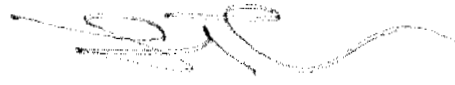
JAN 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

RECORDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/9/13


_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

ZOBE, LLC,

Plaintiff,

Index No. 603865/09

- against -

DECISION and ORDER
Mot Seq. 3

LANCE BROWN ASSOCIATES, INC., THOMAS LAURITA
and LEE PRZYBSZEWSKI,

FILED

Defendants.

JAN 15 2013

-----X
HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

Zobe, LLC ("Plaintiff") commenced this action for rent due and owing under a lease for premises known as Store 908, 908 Wheeler Road, Hauppauge, NY of the Atrium Shopping Plaza ("the Premises"). According to the complaint, Lance Brown Associates Inc is a corporation which entered into a lease for the aforementioned premises commencing January 1, 2005 and terminating December 31, 2009. Further, the complaint alleges that "upon information and belief at some point in time in 2009 Defendants Thomas [Laurita] and Lee [Przybszewski], without obtaining Zobe's written consent, substituted themselves as Tenants in the place and stead of Lance." Thomas Laurita brings this motion for summary judgment pursuant to CPLR §3212 seeking to dismiss all claims as against him. Plaintiff opposes.

In support of his motion, Laurita provides: his own affidavit; his 2008 and 2009 W-2 Wage and Tax Statements; a written lease for the Premises as between Zobe, LLC and Lance Brown Associates, Inc. signed by Mark Lewis Brecker, Manager on behalf of the landlord, and Marvin Solin, President on behalf of the Tenant; the summons and complaint; Mr. Laurita's Verified Answer and Counter-claim; and plaintiff's verified answer to the counter-

claim.

Laurita claims he was merely an employee of Lance Brown Associates, Inc, and never took on the obligations of the corporate tenant. The lease giving rise to the rental obligations clearly binds the corporation and not Laurita, and Laurita was neither a signatory to the lease, nor an officer of the corporation.

Plaintiff, in support of its opposition, provides an attorney affidavit, the affidavit of Isaac Pollak, sole member of Zobe, LLC, and Laurita's Response to Second Set of Interrogatories.

Pollak states that he visited the premises, and that:

During the last third of 2009 on two or three occasions the original person we dealt with for years, Marvin Solin, was no longer present. From the inception of Zobe's ownership and operation of the shopping center, Defendant Thomas Laurita was present [and laboring, and playing with the dog]. However, prior to those two or three visits Defendant Lee Przybyszewski had not been seen by either myself nor my manager. But on those two or three occasions they were both present, operating the business, and "confessed" to us that [words to the effect] "the new guard has taken over".

Plaintiff claims that as the individual defendants were conducting business at the premises, they "substituted themselves as Tenants in the place and stead of Lance."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence

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that a factual issue remains requiring the trier of fact to determine the issue. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The provisions contained in contracts “establish the rights of the parties and prevail over conclusory allegations of the complaint.” (*805 Third Ave. Co. v. M.W. Realty Associates*, 58 N.Y. 2d 447, 451 [1983]). When interpreting contracts, the Courts have “repeatedly applied the familiar and eminently sensible proposition of law [] that, when parties set down their agreement in a clear, complete document, their writing shouldbe enforced according to its terms.” (*Vermont Teddy Bear v. 538 Madison Realty Company*, 1 N.Y. 3d 470, 475 [2004])(citations omitted). The Courts have “also emphasized this rule's special import ‘in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length.’” (*Id.*) (citations omitted).

Laurita provides the lease which demonstrates that the obligation to pay rent belonged to Lance Brown Associates, Inc. Indeed, the lease provides that a failure to pay the rent will result in dispossess proceedings. Further, the lease provides that Tenant shall have the right to assign the lease “only with the Landlord’s prior written consent.” If the lease is assigned, it provides that “the assignee shall assume in writing all the terms, covenants and conditions of this lease; and (3) an executed and acknowledged copy of the assignment and assumption agreement shall be furnished to the Landlord within ten (10) date [sic] from the date thereof.” Finally, the lease provides that “Tenant may not sublet.”

Although the landlord claims the individual defendants took possession of the premises and ran the business therefrom, there is no evidence of an assignment of the obligation to pay rent pursuant to the lease, nor any claimed agreement whereby the individual defendants undertook that obligation. To the extent their possession of the premises, if there was a possession of the premises by the individual defendants (which they deny), constitutes a violation of the terms of the lease, such breach is that of the party to the lease, namely, Lance Brown Associates, Inc.

While plaintiff opposes the motion for summary judgment by claiming there exist issues of fact, the issues plaintiff points to go to the question of whether Lance Brown Associates, Inc. assigned or sublet or gave possession of the premises to the individual defendants. There is no evidence demonstrating that the individual defendants agreed to or accepted obligations under the lease.

Wherefore, the movant has established a prima facie showing of entitlement to summary judgment, and plaintiff has failed to present evidence in admissible form to raise issues of fact rebutting that showing.

Wherefore, it is hereby

ORDERED that the defendant Thomas Laurita's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against Thomas Laurita, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action will continue.

This constitutes the decision and order of the court.

DATED: January 9, 2013

FILED

JAN 15 2013

EILEEN A. RAKOWER, J.S.C.

NEW YORK

COUNTY CLERK'S OFFICE