

Noto v Northeastern Fuel NY Inc.

2013 NY Slip Op 31538(U)

July 15, 2013

Sup Ct, Richmond County

Docket Number: 103984/2011

Judge: Joseph J. Maltese

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

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JOSEPH NOTO,

Plaintiff,

Present:

HON. JOSEPH J. MALTESE

- against-

DECISION AND ORDER

**NORTHEASTERN FUEL NY INC., and RICHARD
D'AURIA,**

**Index No. 103984/2011
Motions Nos. 001
002**

Defendants.

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**The following papers numbered 1 to 5 were fully submitted on the 17th day of May,
2013.**

	Papers Numbered
Defendants' Notice of Motion for Summary Judgment (Affirmation and Memorandum of Law in Support) -----	1
Plaintiff's Memorandum of Law in Opposition to Motion -----	2
Plaintiff's Notice of Cross Motion for Summary Judgment (Affirmation in Support)	3
Defendants' Reply Memorandum of Law in Support of Defendant's Motion and in Opposition to Plaintiff's Motion -----	4
Plaintiff's Memorandum of Law in Reply (Affirmation in Support) -----	5

Upon the foregoing papers, defendants' motion for summary judgment is denied; plaintiff's cross motion for summary judgment is granted, in part, and denied, in part, as herein provided.

This action arises out of a commercial lease for the property located at 79 Storer Avenue, Staten Island, New York (hereinafter the "premises"), which is owned by plaintiff. In the action, which was commenced in October of 2011, plaintiff seeks the recovery of unpaid rent and compensation for alleged damages to the leased premises. Following the joinder of issue,

defendants filed this motion for summary judgment and dismissal of the complaint, whereupon plaintiff cross-moved for like relief. This Decision and Order disposes of the two opposing motions.

On January 25, 2007, plaintiff, as landlord, and Northeastern Fuel Corp., (hereinafter “NFC”) as tenant, executed a written lease for a portion of the subject premises. The lease called for the payment of rent in the amount of \$18,000 annually, to be paid in monthly installments of \$1,500. The term of the lease was one year, commencing on February 1, 2007 and ending on January 31, 2008. However, it contained an option allowing the tenant to renew for an additional year at the rate of \$21,600 per annum. The lease further provided that if the option to renew was not exercised but the tenant remained on the premises after the lease expired, the holdover situation would be deemed to be a month-to-month tenancy. Plaintiff executed the lease personally, and defendant D’Auria executed the lease in his capacity as the president of NFC. Additionally, D’Auria signed the last page of the lease, entitled “Guaranty”, which reads as follows:

In consideration of the execution of the within lease by the landlord, at the request of the undersigned and in reliance of this guaranty, the undersigned hereby guarantees unto the Landlord, its successors and assigns, the prompt payment of all rent and the performance of all of the terms, covenants and conditions provided in said lease.

The legend beneath the line to which D’Auria affixed his signature reads “RICHARD D’AURIA, Personally” and bears the same date, January 25, 2007, as does the lease.

To the extent relevant, the lease also contains (1) a prohibition against subletting, (2) a requirement that the tenant obtain insurance and (3) the tenant’s promise to maintain the premises “in good condition”. The lease further provided for the payment of a security deposit in the amount of \$3,000 which apparently was paid. Insofar as it appears, the tenant (NFC) never exercised its renewal rights and continued to occupy the premises as a month-to-month tenant after the lease expired. Subsequent rent increases were purportedly negotiated such that the monthly rent had increased to \$3,500 by 2010.

Although NFC was the tenant identified in the lease, it is undisputed that numerous rent checks signed by defendant D'Auria were tendered from the account of Northeast Fuel Group Inc. (hereinafter "NFG"). Moreover, it appears that insurance for the premises was obtained in the name of defendant Northeast Fuel NY Inc. (hereinafter "NFNY"), the sole corporate defendant. While a detailed explanation is lacking, it is apparent from the moving papers that all of the above entities are or were owned and / or managed by defendant D'Auria and engaged in the oil delivery business. NFC has apparently been dissolved.

The complaint alleges that plaintiff received no rent for the months of February, March and April 2011 and that the premises were vacated sometime that Spring. The complaint further alleges that following defendants' departure, plaintiff was required to spend over \$30,000 on contractors to repair damage to the building and repave areas affected by an oil spill.

It is well settled that summary judgment can be granted only if there are no "material and triable issue[s] of fact", and that the moving party bears the burden of demonstrating its prima facie right to judgment as a matter of law.¹

In seeking dismissal of the complaint against him, defendant D'Auria asserts that since he was not a party to the lease in his individual capacity, he is not a proper party to this action. The Court disagrees.

Although he signed the lease in a representative capacity, defendant D'Auria does not dispute that he signed the accompanying guaranty in his individual capacity. Moreover, that document expressly provides that it was given "in consideration of the [landlord's] execution of the . . . lease", and unconditionally obligates the signor (D'Auria) to "guarantee" the "prompt payment of all rent" and "the performance of all of the terms, covenants and conditions provided in said lease." As noted earlier, this includes a duty to maintain the premises "in good condition". As a result, D'Auria is a proper party in any cause of action that relates to the purported breach of the lease and the complaint against him is not subject to dismissal.

With regard to the claim for unpaid rent, D'Auria does not dispute the lessee's failure to pay rent for the months of February, March and April 2011. In fact, at his examination before

¹see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

trial, D'Auria testified that he attempted to pay plaintiff for the months at issue, at the rate of \$3,500 per month, but that plaintiff refused to accept payment as he was then in the process of seeking an increase. Accordingly, it seems clear that plaintiff is due at least \$10,500 under the term of the guaranty. However, there is no indication in the moving papers as to the disposition of the \$3,000 security deposit. Moreover, plaintiff's claim for property damages remains to be adjudicated. Therefore, a question of fact plainly exists as to the total amount of any money judgment to which plaintiff may be entitled against D'Auria.

As to the corporate defendant, it is not open to question that NFNy was neither a party to the lease or the guaranty. Nevertheless, plaintiff argues that this defendant was the "alter ego" of the "nominal tenant", NFC, and that its corporate veil should be "pierced" to impute the tenant's obligations onto this defendant.

At law a party seeking to pierce the corporate veil bears the burden of proving a basis to disregard the corporate form.² Moreover, it has been held that even in the absence of fraud, "piercing the veil requires a showing that the corporation in question "has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego".³

Here, while plaintiff argues that there was a commonality of ownership among the D'Auria companies, the moving papers do not contain undisputed evidence of this claim of unity of ownership and / or control. Neither do they contain evidence that the "nominal" tenant's rent was paid by this defendant (NFNy) as opposed to a third entity, NFG, which is not a party to this action. In fact, the only undisputed evidence of defendant NFNy's involvement with the "nominal tenant" is its ownership of the relevant insurance policy. Such evidence, while possibly indicative of this defendant's presence at the premises, is, at best, equivocal and therefore

² See *Maggio v. Becca Constr Co., Inc.*, 229 AD2d 426, 427 (2nd Dept 1996); *Marino v. Dwyer-Berry Constr Corp.*, 146 AD2d 750 (2nd Dept 1989).

³ *John John, LLC v. Exit 63 Dev, LLC*, 35 AD3d 540, 541 (2nd Dept 2006) quoting *Austin Powder Co. v. McCullough*, 216 AD2d 825, 827 (3rd Dept 1995); see *Last Time Beverage Corp. v. F & V Distribution Company, LLC*, 98 AD3d 947, 950-951 (2nd Dept 2012).

insufficient to demonstrate, as a matter of law, that NFNY is or was the alter ego of NFC.

On the other hand, it is clear that the named defendant procured insurance for the premises in its own name, and since it also appears that the nominal tenant (NFC) was dissolved prior to the vacatur of the premises at the end of the holdover period, a question of fact arguably exists as to whether this defendant was responsible for, e.g., any of the damages for which plaintiff seeks recompense. Therefore, dismissal of the complaint as against it is also inappropriate.⁴

Accordingly, it is hereby:

ORDERED, that defendants' motion for judgment is denied, and it is further

ORDERED, that plaintiff's motion for summary judgment is granted on the issue of liability against defendant Richard D'Auria, individually; and it is further

ORDERED, that the remainder of plaintiff's motion is denied; and it is further

ORDERED that an assessment of damages against defendant Richard D'Auria be stayed pending the further order of the Court; and it is further

ORDERED, that the Clerk enter judgment accordingly.

ENTER,

Dated: July 15, 2013

Joseph J. Maltese
Justice of the Supreme Court

⁴see *Dykeman v. Heht*, 52AD3d 767, 769 (Dept 2008).