

Associates v Helal

2013 NY Slip Op 32462(U)

October 11, 2013

Sup Ct, Richmond County

Docket Number: 104236/11

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 104236/11
Motion No.: 002, 003**

LILLIAN H. ASSOCIATES,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

MOHAMMAD HELAL,

*Defendant/Third-Party
Plaintiff*

against

**AHMED ELSOURY and
NEW DORP MEDICAL, P.C.,**

Third-Party Defendant

The following items were considered in the review of the following motion for summary judgment and cross-motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>	
Notice of Motion and Affidavits Annexed	1	
Notice of Cross-Motion and Affidavits Annexed	2	
Affirmation in Opposition to Motion	3	
Affirmation in Reply	4, 5	
Exhibits		Attached to Papers
Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:		

The third party defendants, Ahmed Elsoury and New Dorp Medical, P.C., move for summary judgment dismissing the third party plaintiff's complaint. The motion is granted. The plaintiff cross-moves for summary judgment granting plaintiff summary judgment against defendant Mohamed A. Helal in the amount of \$82,745; and to set this matter down for a hearing to determine reasonable attorneys fees and costs pursuant to the lease agreement. The cross-motion is granted.

The plaintiff's complaint seeks recovery for a breach of a commercial lease agreement. The plaintiff, Lillian H. Associates, executed a lease agreement for the premises located at 27 New Dorp Lane, Staten Island New York 10306 on May 30, 2007 with Dr. Mohamed Helal, the defendant in

his individual capacity. The lease term was of five years commencing on June 1, 2007 and continuing until May 30, 2012. The complaint alleges that in or around November 2010 the defendant vacated the premises and therefore breached the lease agreement. Moreover, the complaint further alleges that the defendant failed to make any monthly rent payment from December 2010 through the termination of the lease term. The plaintiff also seeks legal fees and costs pursuant to the terms of the lease agreement.

The Mohamed Helal then commenced a separate third party action against the third party defendants, Ahmed Elsoury and New Dorp Medical, P.C. The third party plaintiff alleges that on May 27, 2008 he and the third party defendant, Ahmed Elsoury terminated their business relationship pursuant to a bulk sale contract. Helal alleges that pursuant to the terms of the bulk sale contract, Helal sold his 50% interest in New Dorp Medical P.C. to Elsoury and that the office located at 27 New Dorp Lane, Staten Island, New York was assigned to Elsoury. At paragraph 3 of the bulk sale contract it states:

Lease Assignment. Seller, upon the closing and the receipt of payment, shall assign the office's lease to buyer after acquiring the necessary approval from the Landlord.

Article 52 of the lease agreement between the plaintiff and Mohammed Helal states in pertinent part:

Tenant expressly covenants that Tenant shall not voluntarily or involuntarily assign, encumber, mortgage or otherwise transfer this lease, or sublet the demised premises or any part thereof, or suffer or permit the demised premises or any part thereof to be used or occupied by others, by operation of law or otherwise, without the prior written consent of Landlord in each instance. Absent such consent, any act or instrument purporting to do any of the foregoing shall be null and void.

Moreover, the lease agreement provides that if the tenant desires to assign the lease, such a request must be made in writing to the landlord providing the landlord with information

concerning the proposed assignee or subtenant.

Here it is uncontested that Mohammed Helal executed the lease in his individual capacity, and not as a corporate officer.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is to issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

Third Party Defendants Motion for Summary Judgment Dismissing the Third Party Plaintiff's Complaint

New York State law requires that an assignment of a leasehold be in writing.⁶ There is no indication that the assignment that was anticipated in the bulk sale contract was ever completed. Consequently, Elsoury and New Dorp Medical, P.C. never assumed Helal's individual responsibility under the lease. Therefore, Elsoury and New Dorp Medical, P.C. met their prima facie burden on this motion for summary judgment.

In opposition to this summary judgment motion Helal submits only an attorney's affirmation. However, a party cannot rely solely upon his or her attorney's affidavit, where the attorney does not have personal knowledge of the facts and circumstances of the case.⁷ Consequently, the third party plaintiff's opposition is procedurally defective. Even had the Helal submitted an affidavit in admissible form, an oral assignment of the leasehold would be without any effect. Therefore, the motion for summary made by Elsoury and New Dorp Medical, P.C. is granted.

Plaintiff's cross-motion for Summary Judgment against Defendant

The defendant offers no opposition to the plaintiff's cross-motion for summary judgment. The attorney affirmation submitted in opposition references only the summary judgment motion submitted by the third party defendants Ahmed Elsoury and New Dorp Medical, P.C. The law is clear that lease at issue here was not subject to any oral modification, and that the terms of the lease forbade any subletting or assignment without the consent of the landlord.⁸ Moreover, there is no statement in admissible form disputing the amount of rent claimed to be due to the plaintiff.

⁶ GOL §5-703(1); *See also, Dadich v. Ilana Knitting Inc.*, 208 AD2d 792 [2d Dept. 1994].

⁷ *See, Dempsey v. Intercontinental Hotel Corp.*, 126 AD2d 477 [1st Dept. 1987].

⁸ *See, Excel Graphics Tech, Inc. v. CFG/ABSCB 75 Ninth Ave., L.L.C.*, 1 AD3d 65 [1st Dept. 2003].

Consequently, the plaintiff's motion for summary judgment is granted.

Accordingly, it is hereby:

ORDERED, that the summary judgment motion made by third party defendants Ahmed Elsoury and New Dorp Medical, P.C. is granted and the third party complaint is dismissed against them; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the plaintiff's motion for summary judgment against the defendant Mohamed A. Helal in the amount of \$85,745 is granted; and it is further

ORDERED, that the plaintiff shall settle judgment on notice; and it is further

ORDERED, that pursuant to the terms of the lease agreement a hearing shall be held to determine the amount of reasonable attorneys fees and costs; and it is further

ORDERED, that within twenty (20) days from the date thereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk and shall pay the proper fees, if any, and said Clerk shall place this action on the Inquest/Trial Calendar; and it is further

ORDERED, that this matter is referred to a Court Attorney Referee or Judicial Hearing Officer to hear and determine the issue of reasonable attorneys fees and costs.

ENTER,

DATED: October 11, 2013

Joseph J. Maltese
Justice of the Supreme Court