347 Xpress, Inc. v Chaban
2014 NY Slip Op 30152(U)
January 17, 2014
Supreme Court, New York County
Docket Number: 150506/2012
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 150506/2012
347 XPRESS INC.
vs.
CHABAN, BOHDAN
SEQUENCE NUMBER : 001
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

decided in accordance with the accompanying memorandum decision.

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

Dated: 1/17/14

SALIANN SCARPULLA, J.S.C.

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 19

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347 XPRESS, INC.,

Plaintiff,

Index Number: 150506/12
Submission Date: 10/2/13

- against -

DECISION AND ORDER

BOHDAN CHABAN,

Defendant.

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For Plaintiff:	For Defendants:
Erik J. McKenna, Esq.	Anton J, Mikofsky, Esq.
393 Bartlett Avenue	236 West 26th Street, Ste. 303
Staten Island, NY 10312	New York, NY 10001

Papers considered in review of this motion to for summary judgment:

Notice of Motion 1
Affs. in Supp. 2
Affs. Opp. 3
Reply Aff. 4

HON SALIANN SCARPULLA, J.:

In this action stemming from a commercial lease, defendant landlord Bohdan Chaban ("Chaban" or "defendant") moves for summary judgment against plaintiff former tenant 347 Xpress, Inc. ("Xpress" or "plaintiff"), dismissing Xpress' complaint.

Xpress and Chaban entered into a lease agreement for the space located at 347 East 14th Street, New York, NY 10003, pursuant to which Xpress occupied the space as a tenant. Xpress alleges in the amended complaint that on or about March 8, 2009, Chaban locked Xpress out of the premises and removed Xpress's personal property consisting of equipment needed for restaurant operations, including but not limited to "pizza ovens, fryers, portable walk-in boxes, display cases, coffee/espresso machines, stainless steal

[sic] slicers, central air-condition units and Ansul fire suppression systems." Xpress further alleges that without its consent, and without any notice to Xpress, Chaban sold, destroyed and/or made personal use of this personal property.

Xpress further alleges that on March 16, 2009 it demanded the return of its property, and Chaban refused. Xpress alleges that Chaban's actions constitute conversion of Xpress' property, and as a result Xpress seeks compensatory damages in the amount of $150,000 and punitive damages of $25,000.00. Chaban answered the complaint, denying all material allegations, and asserting affirmative defenses.

Chaban now moves for summary judgment, asserting lack of standing, res judicata and/or collateral estoppel, failure to state a cause of action for conversion and gross inflation of the valuation of the alleged converted property. In opposition, Xpress argues that summary judgment should be denied on all grounds asserted by Chaban. In addition, Xpress argues that as there has been only limited discovery and there have been no depositions taken, summary judgment is premature.

In support of its motion, Chaban submits an attorney affirmation and his own affidavit. In Chaban's affidavit, he states that in April 2008, non-parties Roland G. Pepin and Bernadette Pepin (the "Pepins") came to him to rent the street-level storefront space at 347 East 14th Street. The Pepins informed him that they had a New York State corporation named "347 Xpress, Inc.," and that they were buying out the spaces' outgoing business. Chaban and the Pepins then entered into a twelve (12) year commercial lease (the "lease"), with Xpress as Tenant and the Pepins personally as Guarantors. Chaban

annexed a copy of the Standard Form of Store Lease entered into between himself and Xpress. The lease, paragraph 3, provides in part that "[a]ll property permitted or required to be removed by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of the Owner, either be retained as Owner's property, or may be removed from the premises by Owner at Tenant's expense."

Chaban further states that when the tenant got behind on the rent, the Pepins told him that the business was failing and asked to break the lease after only eight (8) months. Chaban states that the Pepins came to him with a typed document titled "Release and Satisfaction of Lease Obligations," which the parties edited with handwritten amendments, and then signed, dated December 18, 2008 (the "release"). The release, as edited, states:

1. Tenant has surrendered possession of the Premises to the Landlord;
2. Landlord accepts possession of the Premises from Tenant;
3. Landlord and Tenant hereby release one another from any and all obligations respecting the Lease as of the date of this agreement (12/18/08) [initialed];
4. Landlord hereby releases the individual guarantors, Rowland [sic] Pepin and Bernadette Pepin from any and all obligations under the Lease, including but not limited to, the payment of any future rent and/or additional rent after the date of this agreement on 12/18/08. [initialed].

Subsequently, Chaban demanded that the tenant pay rent arrears and metered water charges. He states that he credited them for their deposit, and made a demand of $11,817. Chaban states that after the Pepins failed to pay him, he brought a case against them in

Civil Court, *Bodhan Chaban and Askold S. Lozynsky v. Roland G. Pepin and Bernadette Pepin*, CV-0012329-09/NY, to recover the back rent and water, and also legal fees for a total of $12,787. There was motion practice in Civil Court as to the precise meaning of the release – whether the document, as edited by hand, released tenants from past as well as future rent, or only future rent. In a decision and order (J. Jaffe), the Court found that the "handwritten change clearly and unambiguously demonstrates that the parties intended to release defendants [the Pepins] from paying future rent and additional rent as of December 2008 but not from paying past due rent, notwithstanding the breadth of the printed portion purporting to release them from 'any and all obligations.'"

Chaban then moved for summary judgment on his complaint. The Pepins filed a notice of appeal, and cross moved in opposition to the motion for summary judgment, seeking to amend their answer to add a counterclaim for conversion. As a part of the cross motion, Roland Pepin submitted an affidavit, dated October 7, 2009, (the "2009 Pepin affidavit"), in which he states that "347 Xpress leased various restaurant equipment and fixtures at the Premises (the "Equipment"). My wife [Bernadette Pepin] and I were co-obligors on all leases regarding the Equipment. After we signed the Release I had a discussion with the landlord [Chaban] regarding the Equipment leased by 347 Xpress and utilized at the Premises. Once 347 Xpress went out of business and vacated the Premises, it assigned its rights to the Equipment to me and my wife as we were the ones responsible for paying for the Equipment under the Equipment lease."

Chaban states that the Pepin's appeal and Civil Court action were resolved by a Stipulation of Settlement, entered into by the parties and So Ordered by the Court (J. Singh). The Stipulation of Settlement provides that the Pepins will pay Chaban $115.50 per month for 70 months, and that "[u]pon payment in full, all parties shall be released from liability to each other concerning all the matters in dispute between plaintiff(s) and defendants hereto . . . ." Chaban states in his affidavit that the Pepins have been making the installment payments called for under the Stipulation of Settlement.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Chaban's first argument for summary judgment is that Xpress lacks standing to bring this action because Xpress assigned its rights in the equipment to its individual owners Bernadette Pepin and Roland G. Pepin. This argument is based on the statements made in the 2009 Pepin affidavit that once Xpress went out of business, it assigned its rights to the leased equipment to the Pepins, as they were the ones responsible for paying the amounts owed on the equipment leases. Accordingly, Chaban argues, Xpress has no standing to bring this action for conversion, as Xpress assigned away its rights to the

equipment when it went out of business and vacated the premises, approximately December 2008 – January 2009.

"[I]n order to assert a cause of action for conversion, which is the unauthorized assumption and exercise of the right of ownership of goods belonging to another, to the exclusion of the owner's rights, a plaintiff must have exercised ownership, possession or control of the property in the first place." *Soviero v. Carroll Group Intl., Inc.*, 27 A.D.3d 276, 277 (1st Dep't 2006) (citations omitted). Here, Chaban makes a prima facie showing that Xpress has no ownership interest in the equipment, as Mr. Pepin stated in his 2009 affidavit that Xpress assigned its rights to the leased property to the Pepins upon the demise of the business.

In opposition, the Pepins submit two affidavits, one by Roland Pepin and one by Bernadette Pepin. Roland Pepin, in his affidavit, states that he is not, nor has he ever been, an officer or shareholder of Xpress. He also states: "my prior statement made on October 7, 2009, concerning ownership of the equipment at issue in this case was false and misguided." Roland Pepin further states that "Xpress did not assign its ownership rights in the equipment to me nor was the equipment leased. At the time, I did not understand the significance of the requirement of a legal assignment and I mistakenly believed that my wife and I owned the equipment individually. In reality, we were simply individual guarantors of the lease between the plaintiff and defendant. As I was not an officer or owner of 347 Xpress, I was not familiar with all of the corporation's assets."

Roland Pepin also discusses an oral agreement his wife entered into with Chaban regarding the equipment. He states that on or about February 16, 2009, he met with Chaban and discussed the removal of the equipment from the premises. Mr. Pepin states that he "specifically recall[s] Mr. Chaban offering to keep 347 Xpress' equipment on his premises for an additional thirty (30) days. Using my cellular phone, I communicated Mr. Chaban's terms to my wife, Bernadette Pepin. On behalf of 347 Xpress, my wife agreed to pay the costs associated with the removal of the equipment thought a public auction."

Xpress also submits the affidavit of Bernadette Pepin. Mrs. Pepin states that she is the sole officer and shareholder of Xpress, and is the only person with the authority to make business decisions on behalf of Xpress. Mrs. Pepin states that Xpress never assigned its ownership rights in the equipment, and that her husband never had the right to unilaterally assign ownership of the equipment to the Pepins. Mrs. Pepin further states that Xpress is, and has always been the owner of the equipment since it was purchased in April 2008. In addition, she states that Chaban verbally agreed to keep the equipment in the store space for an additional thirty days until an auction could take place. Both Pepins states that Chaban was aware of the planned auction. Mrs. Pepin states that before the auction took place, Chaban wrongfully disposed of or sold most of the equipment. Mrs. Pepin makes no mention of an equipment lease.

Xpress establishes that there is a question of fact about the ownership of the equipment. Mr. Pepin's affidavit is at odds with the statements made in the 2009 Pepin affidavit. That, along with the statements made by Mrs. Pepin in her affidavit submitted

in opposition to this motion, are sufficient to create an issue of fact to prevent granting summary judgment. *See Pesa v. Yoma Dev. Group, Inc.*, 18 N.Y.3d 527, 533 (2012) (in light of "later affidavit by the same affiant, which may be read as retracting, or attempting to explain away, his earlier statement" Court concludes that "the credibility of this explanation presents an issue of fact sufficient to defeat summary judgment").

Chaban next argues that Xpress's claims were released, compromised and settled, and are therefore barred by res judicata and/or collateral estoppel. As to the Release, Chaban notes that it states that the parties "hereby release one another from any and all obligations respecting the Lease . . . as of the date of this agreement." Chaban argues that under these terms, Xpress is barred from seeking recovery in this action as it is based on an obligation respecting the lease, specifically the return of the equipment.

However, in Chaban's own submission he provides evidence that the parties entered into another agreement outside the lease, subsequent to its terminations regarding the removal of the furniture and fixtures. The release is dated December 18, 2008. Chaban submits a letter he sent to Xpress regrading removal of the furniture and fixtures dated January 22, 2009, which is after the release ended the lease. The letter, addressed to Xpress, the Pepins, and two others, states that the "furniture and fixtures appurtenant to the Store at 347 East 14th Street . . . will be stored for thirty days from the date of mailing this notice to you." Chaban's letter further states that Xpress should contact him to "repossess" the items, and that if they failed to contact him within thirty days, Chaban

would dispose of the fixtures. Chaban further states in his affidavit that he received no response from the Pepins, and then met with Mr. Pepin on February 9, 2009, handed him a copy of the January 22, 2009 letter, and extended the time to remove the furniture and fixtures another thirty days to March 11, 2009.

However, there are questions of fact about the oral agreement. The affidavits of Mr. and Mrs. Pepin both detail an oral agreement entered into with Chaban, whereby he agreed to allow them to store their equipment for thirty (30) days at the premisses, allowing them time to hold an auction and sell the equipment. The Pepins state, however, that this agreement was entered into on or about February 16, 2009, and that Chaban was aware of the auction scheduled for March 15, 2009, within the thirty day window. These two differing accounts of the alleged oral agreement regarding the storage and retention of the furniture and fixtures create a question of fact which prevents granting summary judgment.

Chaban also argues that the Stipulation of Settlement is res judicata and/or has collateral estoppel effect on Xpress, barring it from relitigating the prior action. In addition, Chaban argues that the "pleadings, affidavits and the Civil Court Order "are all res judicata and/or have collateral estoppel effectiveness in the instant matter, sustaining the effect of the Release and Satisfaction (12/18/08) as well as the Stipulation of Settlement (November 2009).

As the Civil Court action was resolved by a stipulation of settlement, collateral estoppel is inapplicable. *Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368, 371 (1st Dep't 2007) ("collateral estoppel is inapplicable if an issue has not been fully litigated, e.g., if there has been a stipulation"); *Robinson v. Crawford*, 46 A.D.3d 252 (1st Dep't 2007) ("Contrary to defendants' arguments, plaintiff's claims are not barred by the doctrine of collateral estoppel since the Civil Court proceedings in which she previously raised them were disposed of by stipulation").

This action is also not barred by res judicata. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347 (1999). *See also In re Hunter*, 4 N.Y.3d 260 (2005). Here, Chaban fails to establish the existence of a final judgment.

The Stipulation of Settlement provides that "[u]pon payment in full, all parties shall be released from liability to each other concerning all the matters in dispute between plaintiff(s) and defendants hereto . . . and plaintiff(s) or their attorney will issue a Stipulation or Notice of Discontinuance to defendants and in due course file a copy thereof with Clerk of this Court within 30 days." It is not in dispute that the Pepins are still making payments under the stipulation, and that the Notice of Discontinuance has not been filed.

Therefore, "the stipulation of settlement does not serve as a bar to this action. Because no order or final judgment was ever entered dismissing the prior action, the doctrines of collateral estoppel and res judicata are inapplicable." *Gallo v. Teplitz Tri-State Recycling,* 254 A.D.2d 253 (2d Dep't 1998). *But see Rossi v. Twinbogo Co.,* 193 A.D.2d 481, 483 (1st Dep't 1993) ("A stipulation to discontinue with prejudice does carry res judicata authority").

Accordingly, neither collateral estoppel nor res judicata bars the present action.

Next, Chaban argues that Xpress fails to establish any of the elements for a cause of action for conversion. "'In order to establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights.'" *Schulz v. Dattero*, 104 A.D.3d 831, 833 (2d Dep't 2013) (quoting *Scott v. Fields*, 85 A.D.3d 756, 757 (2d Dep't 2011)).

Chaban argues that by virtue of the release and the assignment referred to in the 2009 Pepin affidavit, Xpress did not have ownership, control or dominion of any alleged chattel after the date of the release. Chaban also asserts that the amended complaint fails to allege that Xpress has a contractual right to occupy and control the premises and it contents after December 18, 20087, the date of the release, therefore failing to state a cause of action for conversion. Chaban argues that Xpress failed to remove its trade

fixtures from the leased premises during the term or at the expiration of the lease, and that Xpress failed to properly identify the property allegedly converted.

Chaban argues that the terms of the release constitute authorization for Chaban to take and exercise the rights of possession. However, Chaban also discusses his letter to Xpress dated January 22, 2009 regarding the time with which Chaban would store the furniture and fixtures, as well as his subsequent oral agreement regarding the same. Chaban also relies on the 2009 Pepin affidavit for support that Xpress did not have ownership or control of the equipment. As discussed above, there are questions of fact regarding the ownership of the equipment, as well as the oral agreement entered into after the release concerning the time for recovering the furniture and fixtures. As such, there exist questions of fact which prevent entry of summary judgment.

Lastly, Chaban argues that Xpress grossly inflated the alleged damages. Chaban puts forth no evidence, or first hand knowledge, but rather makes conclusory allegations about the value of the equipment. Chaban acknowledges that he disposed of a few items in preparation for a new tenant, and states that they "were a few small, portable items having a total sale realization of maybe $3,500.00." Chaban does not specify what these small items were, or how he came to their valuation. He further states that he "find[s] Plaintiff's present Complaint with allegations of $100,00.00 to $150,000.00 total [sic] incredible and not based on any facts." Chaban states that he consulted with "knowledgeable people" to determine that the equipment was of "low value." He also

mentions there were different valuations put forth by the Pepins in the prior Civil Court action, and in the affidavits submitted in this action. Therefore, even were I to accept Chaban's conclusory allegations as to the value of the equipment, there are clearly questions of fact as to the value, which preclude granting summary judgment.

In accordance with the foregoing, it is

ORDERED that defendant Bohdan Chaban's motion for summary judgment dismissing plaintiff 347 Xpress, Inc.'s complaint is denied; and it is further

ORDERED that the parties are directed to appear for a status conference on April 9, 2014 at 2:15 p.m. at 60 Centre Street, Room 335.

This constitutes the decision and order of the court.

Dated: New York, New York
January 16, 2014

ENTER:

Saliann Scarpulla, J.S.C.