

ALP Realty Co. v Ben's Pharmacy, LLC

2014 NY Slip Op 31823(U)

July 10, 2014

Supreme Court, New York County

Docket Number: 101848/10

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

For the following reasons, plaintiff's motion for summary judgment is denied and defendant Mark Fard's cross-motion for summary judgment of dismissal is granted in his favor.

FACTS

Ben's Pharmacy was formed at Mark Fard's request for the purposes of engaging in business as a registered pharmacy. Mark Fard is the sole member of Ben's Pharmacy. Ben's Pharmacy LLC and ALP Realty Company entered into a 10-year commercial lease agreement, under which Ben's Pharmacy would rent space in which to operate its pharmacy. Under advice of counsel, Ben's Pharmacy negotiated with ALP Realty regarding terms and conditions of the lease, including corrections regarding the name of the tenant, to include only Ben's Pharmacy and not the individual Mark Fard. Upon reaching agreement regarding such terms and conditions, Mark Fard signed the lease with ALP Realty, in his capacity as sole member of the limited liability company of Ben's Pharmacy. Plaintiff ALP Realty claims that defendant Ben's Pharmacy breached the contract by failing to make payments associated with its contractual obligations for the months of October 2008 through July 2009, allegedly owing a total amount of \$31,417.50.

According to plaintiff, defendant Mark Fard should be held personally liable for the debts of Ben's Pharmacy, based on paragraph 61 in the executed lease agreement, which states: "Mark Fard hereby personally guarantees the payment and performance of all of the Tenant's [Ben's Pharmacy's] obligations set forth in this Lease." Plaintiff's exhibit 2. In opposition, defendant Mark Fard contends that paragraph 61 was included neither in the initial proposed lease agreement, nor in the later approved version of the lease, but that it was surreptitiously inserted by plaintiff into the final draft of the lease agreement that was provided to him for signature,

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unbeknownst to him. Defendant Mark Fard further maintains that, at no point, was the newly inserted provision ever discussed between the attorneys for either plaintiff or defendant Ben's Pharmacy, nor was such change brought to defendant Ben's Pharmacy's attorney.

Significantly, the subject lease agreement contained only one signature line for the tenant/defendant Ben's Pharmacy, LLC, and no separate signature line for defendant Mark Fard, to sign in his personal and individual capacity. As stated, the named tenant in the lease is defendant Ben's Pharmacy, on whose behalf Mark Fard signed, in his capacity as the sole member of the LLC. Specifically, the lease is signed as follows: "Ben's Pharmacy LLC, Tenant" and is signed "By: Mark Fard".

DISCUSSION

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (e.g., *Masucci v Feder*, 196 AD2d 416, 419 [1st Dept 1993]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Generally, commercial business is transacted between corporations, and it is understood that individual stockholders or officers are not liable for their corporate engagements unless they sign individually (*American Media Concepts, Inc. v Atkins Pictures, Inc.*, 179 AD2d 446, 448 [1st Dept 1992], citing *Salzman Sign Co., Inc. v Beck*, 10 NY2d 63, 67 [1961]). Therefore, signing officers are not bound individually, without some direct and explicit evidence of intent

(*id.*).

Here, the lease agreement was executed between plaintiff and defendant Ben's Pharmacy. Defendant Mark Fard was not specified as a party to the lease. As detailed below, defendant Mark Fard's signature did not constitute a personal guarantee enforceable against him and individual liability cannot be predicated upon paragraph 61 of the lease agreement, since he signed the lease in his capacity as the sole member of the LLC, not as an individual. To the extent that the alleged obligation of defendant Mark Fard, as indicated in ¶61 of the lease, was a special promise to answer for the debt of another, it was void, it did not comply with the Statute of Frauds, as explained below. Thus, defendant Mark Fard is not liable for the debts of defendant Ben's Pharmacy LLC.

The Statute of Frauds specifically provides that a special promise to answer for the debt of another "is void, unless . . . subscribed by the party to be charged" (General Obligations Law § 5-701(a)(2) [2014]), and thus "the signature of the party to be bound is . . . indispensable" (*Salzman Sign Co.*, 10 NY2d at 66, citing *Warren-Connolly Co. v Saphin*, 283 AD 391 [1st Dept 1954]). Like the contracts in *Warren-Connolly Co.* and *Salzman Sign Co.*, here, the contract was between two business entities and the individual, Mark Fard, was neither a named party in the contract, nor did he sign in his individual capacity (*see Salzman Sign Co.*, 10 NY2d at 66; *Warren-Connolly Co.*, 283 AD at 393). As there was only one signature line, which was denoted "Ben's Pharmacy LLC, Tenant, By: Mark Fard", Mark Fard was signing on behalf of the LLC. There was no separate signature line for Mark Fard to sign as an individual, answering for the debt of another, Ben's Pharmacy LLC.

DECISION

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied and defendant Mark Fard's cross-motion for summary judgment of dismissal is granted; and it is further

ORDERED that within 30 days of entry of this order, defendant Mark Fard shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of this Court; and it is further

ORDERED that, upon proof of service of a copy of this order with notice of entry, the Clerk is directed to enter judgment dismissing the complaint as against defendant Mark Fard only, with costs and disbursements; and it is further

ORDERED that the action with respect to the remaining defendant, Ben's Pharmacy LLC, shall continue.

This is the decision and order of the court.

Dated: 7/10/14

FILED
JUL 15 2014
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.S.C.

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