560 Lexco L.P. v Broadsmoore Group, LLC
2014 NY Slip Op 32153(U)
August 11, 2014
Supreme Court, New York County
Docket Number: 650754/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15
--X
560 LEXCO L.P.,

Plaintiff,

- v -

THE BROADSMOORE GROUP, LLC,
ABRAXAS DISCALA a/k/a A.J. DISCALA
and OMNIVIEW CAPITAL ADVISORS LLC,

Defendants.
--X

Index No. 650754/2014

DECISION and ORDER

Mot. Seq. 001

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

This is an action for breach of a commercial lease agreement (the "Lease") between plaintiff, 560 Lexco L.P. ("Plaintiff"), as landlord, and defendant, The Broadsmoore Group, LLC ("Broadsmoore"), as tenant, for a portion of the sixteenth floor of the building located at 560 Lexington Avenue, New York, New York (the "Premises"). Plaintiff's complaint alleges that, pursuant to the Lease, Plaintiff leased the Premises to Broadsmoore for a term of approximately ten years and three months, commencing November 1, 2010, and ending January 31, 2021. Plaintiff's Complaint alleges that Broadsmoore breached the Lease in November 2011, by failing to pay rent and additional rent, and again on April 2, 2012, by vacating the Premises and defaulting under the terms of the Lease, causing all rent, additional rent and other payments to be due and owing.

Plaintiff's Complaint alleges that defendant Omniview Capital Advisors, LLC ("Omniview") is the successor to Broadsmoore and that Omniview expressly or impliedly assumed Broadsmoore's liabilities under the "successor liability" doctrine, including but not limited to "de facto" merger. Plaintiff's complaint further alleges that individual defendant Abraxas Discala a/k/a A.J. Discala ("DiScala") exercised complete domination and control over Broadsmoore and Omniview.

Plaintiff's complaint states that Plaintiff previously brought a summary nonpayment proceeding against Broadmoore following Broadmoore's November 2011, breach of the Lease, in which Plaintiff received a money judgment for $99,352.96. Plaintiff's complaint also states that Plaintiff brought another action against Broadsmoore for breach of the Lease, seeking rent payments from the date of Broadsmoore's vacatur, and that, "in the context of this action, Plaintiff obtained two (2) money judgments totaling $780,227.27, one for $153,316.94 and one for $626,910.33. Thus, the total money judgments obtained against Defendant Broadsmoore totals $879,580.23 (the 'Total Money Judgments to Date')." Plaintiff's complaint alleges that Plaintiff suffered $1,125,269.95 in damages resulting from Broadsmoore's vacatur, and that, after application of the Total Judgments to Date, Broadsmoore continues to owe Plaintiff $245,689.70.

Plaintiff now seeks to recover $1,125,269.95 from defendants Omniview and DiScala. Plaintiff's complaint asserts causes of action for: (i) breach of the Lease against Omniview, as successor tenant, under the "successor liability" doctrine, including but not limited to the "de facto" merger doctrine; (ii) the imposition of a trust and for liability against DiScala, individually, as trustee of the assets of Broadsmoore; (iii) liability against DiScala individually, as an insider, director, officer and controlling party for having stripped assets from Broadsmoore for his personal gain; (iv) for liability against DiScala, individually, for withdrawing from Broadsmoore prior to both dissolution and "wind up" including making suitable provisions to pay Plaintiff, in violation of Limited Liability Company Act § 606a; (v) "piercing the veil" of Broadsmoore and Omniview imposing liability on DiScala individually, for breach of the Lease; (vi) to compel an accounting for violation of fiduciary duties, specifically for the neglect, failure to perform, or other violation of duties in the management and disposition of assets of Broadsmoore, and for the acquisition by any or all of Omniview and DiScala of those assets, and for loss or waste of assets due to neglect, failure to perform, or other violations of duties; and (vii) for violation of Debtor and Creditor Law §§ 273-276(a).

Plaintiff commenced the instant action on March 10, 2014. Plaintiff now moves for an Order, pursuant to CPLR § 3215, directing the entry of a default judgment as against defendants, the Broadsmoore Group, LLC, Abraxas Discala a/k/a A.J. Discala, and Omniview Capital Advisors LLC; and, setting this matter down for a hearing as to damages and attorneys' fees.

In support, Plaintiff submits the attorney affirmation of Andrew T. Miltenberg, Esq.; a copy of Plaintiff's summons and verified complaint; the affidavit of service of Plaintiff's summons and verified complaint upon Broadsmoore, dated

March 19, 2014, via the Secretary of State; the affidavit of service upon Omniview Capital Advisors, LLC, dated March 19, 2014, by personal delivery to Omnivew's managing agent at Omnview's business address and certified mail to that address; the affidavit of service upon Abraxas Discala a/k/a A.J. Discala c/o Omniview, dated March 19, 2014, , by personal delivery to Omnivew's managing agent at Omnview's business address and certified mail to that address; the affidavit of attempted service upon Discala c/o Broadsmoore, dated April 7, 2014; a copy of the Lease;

No opposition is submitted.

As an initial matter, CPLR § 3215(f) provides, in relevant part, "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter." (CPLR § 3215[f]).

CPLR§ 3215(g) further provides:

> When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence.

(CPLR § 3215[g][3][i]).

Plaintiff fails to submit proof of additional service upon DiScala, pursuant to CPLR § 3215(g)(3)(i). Accordingly, Plaintiff's motion for a default judgment as against DiScala is deficient.

"While a default judgment constitutes an admission of the factual allegations of the complaint and the reasonable inferences which may be made therefrom, plaintiff must present some proof of liability so that the reviewing court can determine that the 'prima facie validity' of the uncontested cause of action has been established because the granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default." *See generally Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 845-46 [2001].

A corporation may be held liable for a breach of contract of its predecessor if: (1) it expressly or impliedly assumed such liability; (2) there was a consolidation or merger of the two corporations; (3) the successor corporation was a mere continuation of the predecessor; or (4) the transaction was entered into fraudulently to escape such obligations (*Schumacher v Richards Shear Co.,* 59 NY2d 239, 244-45, 451 N.E.2d 195, 464 N.Y.S.2d 437 [1983]; *Fitzgerald v Fahnestock & Co.,* 286 AD2d 573, 575, 730 N.Y.S.2d 70 [1st Dept 2001]).

The de facto merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation. (*Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 [1st Dep't 2001]). This doctrine applies "when there is a transaction, while not in the form of a merger, which is in substance a consolidation or a merger of two companies, one being the successor to the other." (*BT Americas, Inc. v. ProntoCom Marketing, Inc.*, 18 Misc. 3d 1141(A), 1141A (N.Y. Sup. Ct. 2008). The "hallmarks" of a de facto merger include: (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the predecessor as soon as possible; (3) the successor's assumption of liabilities necessary for the uninterrupted continuation of the predecessor's business; and, (4) continuity of management, personnel, assets, physical location and general business operation. (*Id.*). This doctrine is not limited to tort liability, and extends to breach of contract actions. (*see Fitzgerald v Fahnestock & Co.,* 286 AD2d at 575).

Here, Plaintiff's complaint alleges that Broadsmoore effectively merged with Omniveiw, that Omniview is the successor to Broadsmoore, and that as such, Omniview is therefore liable for its predecessor, Broadsmoore's, breach of the Lease. However, even assuming that Plaintiff's complaint is not barred by res judicata, Plaintiff's complaint does not provide sufficient allegations to establish the

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prima facie validity of its claim that Omniview is liable for $1,125,269.95 in damages resulting from Broadsmoore's breach of the Lease, while Broadsmoore allegedly "continues to owe Plaintiff $245,689.70", for the same breach. Additionally, insofar as Plaintiff's complaint appears to allege damages to Omniview or Broadsmoore resulting from DiScala's alleged misconduct, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only." (*Abrams v. Donati*, 66 N.Y.2d 951, 953 [1985]). Plaintiff's complaint does not provide the reviewing Court with any allegations that establish a basis for Plaintiff to bring such claims.

Wherefore it is hereby

ORDERED that plaintiff 560 Lexco L.P.'s motion for leave to enter a default judgment against defendants The Broadsmoore Group, LLC, Omniview Capital Advisors, LLC, and Abraxas Discala a/k/a A.J. Discala is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 11, 2014

EILEEN A. RAKOWER, J.S.C.