Reiss Family Trust-Exemption Trust v A & A Servs., Inc.
2015 NY Slip Op 31443(U)
July 28, 2015
Supreme Court, Queens County
Docket Number: 24458 2012
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

REISS FAMILY TRUST-EXEMPTION TRUST,
Plaintiff(s),

- against -

A&A SERVICES, INC., et al.,
Defendant(s).

Index
No. 24458 2012

Motion
Date June 15, 2015

Motion
Cal. No. 112

Motion
Seq. No. 2

The following papers numbered 1 to 16 read on this motion by defendants for an order granting them summary judgment dismissing the complaint and granting costs, disbursements, and attorneys' fees pursuant to 22 NYCRR 130-1.1; and on this cross motion by plaintiff for an order striking defendants' answer for their failure to provide discovery and granting an order of preclusion.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-6
Notice of Cross Motion - Affirmation - Exhibits.....	7-11
Answering Affirmation - Exhibits.....	12-14
Reply.....	15-16

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to recover damages against defendants, a corporation and two licenced physicians, for what appears to be a breach of a certain rental agreement covering premises known as 112-08 Liberty Avenue, Richmond Hill, New York (subject

premises). According to the complaint, verified by counsel, Bella Reiss was the fee title record owner of the subject premises. On or about May 1999 Bella Reiss, as landlord, entered into a written rental agreement with defendant A&A Services, Inc. (A&A), as tenant, with respect to the subject premises. On or about June 7, 2005, Bella Reiss conveyed the subject premises to her husband, Sheldon Reiss, as trustee of the Reiss Family Trust-Exemption Trust, plaintiff herein.

It would appear that plaintiff does not specifically allege the existence of any agreement – written or otherwise – between plaintiff (or plaintiff's predecessor- in-interest) and defendants Drs. Giovanni Marciano and Glenn Muraca. Rather, plaintiff alleges that "defendants and each of them continued in possession of [the subject premises]," that "defendants wrongfully claim they have vacated the premises at issue" and that "in fact defendants, and each of them, failed to vacate the premises in issue and have left the individual defendants' patients' records in the demised premises and is still currently utilizing the said premises for storage of same," and that defendants, and each of them, owe – and continue to owe – plaintiff certain payments of rent, real estate taxes, water and sewer charges, arrears, and late charges. Finally, plaintiff asserts that – if the court determines that defendants have lawfully vacated the premises with proper notice – then each are further indebted to plaintiff.

Annexed to the summons and verified complaint is a Standard Form of Store Lease, dated March 1999, between Bella Reiss and A&A, whereby the former leased to the latter the subject premises, together with the basement therein, for a period of 20 years commencing on April 1, 1999, and ending on March 31, 2019. The lease is executed by the two parties to the lease. Though the form lease contains a guaranty provision, same is not signed by any guarantor. There is a Rider to Lease Agreement, also signed by the parties to the lease.

Defendants have answered the verified complaint, denying the material allegations thereof, and asserting various affirmative defenses, including lack of privity of contract, lack of a written guaranty, and plaintiff's failure to allege a basis to pierce the corporate veil. Defendants have now moved for an order, *inter alia*, granting them summary judgment dismissing the verified complaint. Plaintiff opposes the motion and cross-moves for discovery sanctions.

As to the cross motion, same is denied without prejudice and with leave to renew, if applicable, upon the submission of proper papers. Plaintiff's counsel has failed to submit an affirmation of good faith per the mandates of 22 NYCRR 202.7 (c), which requires that counsel set forth what attempts were made to resolve the issues herein, including the time, place, and nature of the consultation, and the issues discussed between the parties that would

show a diligent effort by plaintiff to resolve the present discovery dispute (22 NYCRR 202.7 [c]; *see Hoi Wah Lai v Mack*, 89 AD3d 990 [2011]; *Natoli v Milazzo*, 65 AD3d 1309 [2009]).

Turning to defendants' motion for summary judgment, defendants bear the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle them to judgment in their favor, without the need for a trial (CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if they meet this burden will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v City of New York, supra*). If defendants fail to make out a prima facie case for summary judgment, however, then the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

In support of their motion, defendants submit, *inter alia*, the respective affidavits of defendants Marciano and Muraca. Dr. Muraca states that he is the president of A&A. He avers that, though the complaint alleges that he – along with Dr. Marciano and A&A – entered into a lease agreement with plaintiff, it is undisputed that no lease agreement was signed between defendants and plaintiff. Further, the lease agreement which was provided is undated and not an original. Dr. Muraca further indicates that defendants "vacated the subject premises on or about June, 2012 and never returned," and any and all property belonging to them was taken from or cleaned out of the subject premises, after which plaintiff eventually locked defendants out. Dr. Muraca states that he never personally guaranteed any lease agreement regarding the subject premises and, further, that neither he nor Dr. Marciano entered into a written lease. Rather, after A&A was sold to the two doctors in 2003, A&A and Bella Reiss entered into a month-to-month tenancy which was orally agreed upon between the parties, and never reduced to writing, for the payment of monthly rent in the amount of $3,200.00, plus certain set amounts per month for real estate taxes, for a total of $4,105.23 per month. All rental payments, from 2003 until June 12, 2012 – the latter date being the date defendants vacated the premises – were made by A&A and not the individual doctors.

Dr. Marciano, secretary of A&A, also submits his affidavit in which he attests to essentially the same facts as Dr. Muraca has in his affidavit, the details of which are outlined above.

Defendants also submit Dr. Muraca's deposition transcript, in which he testifies to the following, in pertinent part: that A&A was incorporated in 1994 or 1995 at which time he was the president; that A&A was formed to provide medical management services for a

physician group, namely Dr. Giovanni Marciano and Dr. Glenn Muraca, Physicians, P.C. (the group); that the subject premises was one of the locations wherein which the group practiced; that, in connection with the practice, patient records, which were the property of the group, were kept at the subject premises; that the group was sold to a Dr. Raymond Damadian, at which point said records became the property of the new owner; that A&A was sold to Health Care Management (HCM) in 1998, at which time the group stopped practicing out of the subject premises; that he and Dr. Marciano repurchased A&A in 2003 from HCM, and there has been no change in ownership since that purchase; that the group resumed its practice at the subject premises that year; that when they vacated after his counsel having given written notice to plaintiff of same, he does not recall whether they took patient charts with them but he believes that certain charts were kept in the basement; that "little by little," on a weekly basis, they took essential patient records out; that a few months thereafter, though, they sent an employee of the group thereto to "make sure we had any patient notes or folders and storage documents to transfer them to the other office," but the employee was denied reentry, so they were unable to ascertain whether other items were left behind and, if so, what items they were; that he does not recall ever personally entering into a written or oral lease with respect to the subject premises; and that he did identify the signature of the representative on behalf of A&A who signed the lease agreement as Timothy Damadian (Dr. Damadian's son).

Defendants also submit the deposition transcript of Ronnie Lustig, Sheldon Reiss' daughter and one of the heirs of the plaintiff trust, who testified, in relevant part: that plaintiff had a written lease with A&A; that she does not have the original of the lease and rider, nor was she involved in the execution of same; that there is no written or personal guaranty from Drs. Marciano or Muraca with respect to the lease; that there are no documents assigning the lease to the doctors; that Sheldon Reiss was collecting rent from A&A on behalf of plaintiff and produced a check reflecting same; that she has no involvement with respect to the management of the premises; that she does not know the basis for the subject lawsuit; and that there was no damage to the subject premises after the "tenants" vacated.

As to the individual defendants, Drs. Marciano and Muraca, they have met their prima facie burden of establishing their entitlement to judgment as a matter of law. They have clearly demonstrated, through the above submissions – including the admission by Ronnie Lustig – that the subject lease agreement involves A&A as the tenant of the subject premises, and that there is neither a written lease agreement between themselves as individuals and plaintiff (or plaintiff's predecessor, for that matter), nor a separate written agreement which would evidence their intent to be personally responsible for the alleged debts of A&A (*see Dulik v Amante*, 173 AD2d 674 [1991]; *Cavalla v Ernest F. Elliot, Inc.*, 86 AD2d 884 [1982]). Even assuming, *arguendo*, there was an oral monthly tenancy, as averred by

defendants – though such a fact is not alleged in the complaint – the evidence indicates that the tenant pursuant to such oral agreement was A&A.

Plaintiff does not rebut this showing. Instead, plaintiff appears to ignore the distinctions between the corporate defendant and the individual doctors in order to attempt to render the latter liable under the subject lease agreement.[1] Plaintiff cannot attempt to end-run the well-settled statutory framework that provides that a corporation is a separate legal entity, having an independent legal existence, which ordinarily cannot be disregarded (*see e.g. Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652 [1976]; *Matter of Total Care Health Indus. v Department of Social Servs.*, 144 AD2d 678 [1988]). As far as exceptions to this general rule, plaintiff has alleged no fact which would substantiate a basis to disregard the corporate entity that is A&A and hold Drs. Marciano and Muraca personally liable for any patient records which may or may not have been left at the premises.

Finally, there is no basis for which to find, contrary to plaintiff's contention, that the patient records are property of the individual doctors. As Dr. Muraca testified, those records were property of the group, the group being managed by A&A. Plaintiff's counsel, without citing to any legal authority, states that the doctors are personally liable for these records as this circumstance "is no different than when a patient seeks to sue a physician who may be incorporated" and "[i]n such an instance both the individual physician as well as his corporation are proper defendants and both are accountable." Presumably, plaintiff refers to an action sounding in tort in which an individual doctor may be sued for medical malpractice, which is a far different situation from a cause of action to recover for breach under a written lease agreement involving a corporate tenant.

Finally, plaintiff has not demonstrated that any further discovery may lead to relevant evidence or that there are facts which may exist which are essential to oppose the motion such that summary judgment in favor of Drs. Marciano and Muraca should not otherwise be awarded (CPLR 3212 [f]; *see e.g. Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946 [2013]; *Orange County-Poughkeepsie Ltd. Partnership v Bonte*, 37 AD3d 684 [2007]).

Turning to the corporate defendant, it would appear that the central basis for which A&A seeks dismissal is that A&A purportedly entered into the subject lease agreement when Drs. Marciano and Muraca were not owners of A&A and there is no evidence that the

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1. Plaintiff's counsel, in opposition to defendants' motion, states that the individual defendants, among other things, "failed to provide proper termination notices" as per the rider to the lease agreement. Yet, as indicated, *supra*, the lease agreement to which counsel refers is not signed by either of the doctors in their individual capacities, and no argument is articulated as to how the doctors are subject to the terms of the lease or rider.

doctors accepted an assignment of said lease when they did eventually purchase A&A in 2003. A&A provides no legal authority for the premise that the acquisition of A&A by Drs. Marciano and Muraca affected its responsibilities under the lease agreement. Indeed, "[a] corporation has an existence separate and distinct from that of its individual members and stockholders who are merged in the corporate identity, and such entity remains unchanged and unaffected in its identity notwithstanding changes in its membership" (14 NY Jur 2d Business Relationships § 33), a point that Drs. Maciano and Muraca acknowledge in support of their argument, noted above, as to why they are not to be held personally liable for the debts, if any, of their corporation. Thus, Drs. Marciano and Muraca need not have assumed the lease since there is no indication that A&A ceased to remain a tenant between the relevant time period.

Defendants' reliance on *185 Madison Assoc. v Ryan* (174 AD2d 461 [1991]) is inapposite, as that case involved a tenant remaining legally responsible to a landlord under the parties' lease agreement for the tenant's sublessee's performance of the lease in the absence of an agreement whereby the landlord both accepts the assignment and accepts the assignee in place of the tenant, releasing the tenant from liability under the lease. The tenant herein, A&A, has remained the same throughout the relevant time period; there is no "new tenant" as suggested by defendants.

To the extent defendants assert that the lease agreement contains the month and year in which it was entered, but no date, same does not affect the validity of same (74 NY Jur 2d Landlord and Tenant § 23; *see also Matter of Dodgertown Homeowners Assn. v City of New York*, 235 AD2d 538 [1997] [lease must have all "essential terms" to be agreed upon in order to be enforceable, one of which does not include the particular date on which the agreement was signed]). Moreover, though only a copy of the lease was produced, the court does not see this as a basis for dismissing this action. Rather, this would appear to be an evidentiary issue which may be explored at trial if sought to be admitted for the truth of its contents. It is noted, however, that: (1) Dr. Muraca authenticated the signature thereon by indicating that it was that of Timothy Damadian, who was also involved with HCM, the entity – according to Dr. Muraca – which purchased A&A in 1998; (2) Dr. Muraca acknowledged that A&A was making rental payments from the time it repurchased A&A until 2012; (3) plaintiff was accepting rental checks from A&A; and (4) Dr. Muraca testified that both doctors were aware that A&A was going to deal with plaintiff when the group reoccupied the subject premises in 2003.

Finally, to the extent defendants state that dismissal is warranted since Ronnie Lustig testified that "there is no basis for the lawsuit against defendants," a reading of her testimony reveals, contrary to defendants' representation of what she stated in her testimony, that she

indicated that she did not know the basis for the lawsuit.[2] Moreover, the fact that there was no damage *to* the subject premises[3] does not speak as to whether plaintiff suffered money damages as a result of defendants' having failed to pay rent and taxes for their alleged continued use thereof, as is alleged in the complaint. It is noted that Dr. Muraca's testimony reveals that, even after A&A is alleged to have "vacated" the subject premises, there was still property thereat which was being removed "little by little." It is further noted, that, though mention was made of a written notice of intent to vacate, same was not produced.

As to that branch of the motion for an award of sanctions, same must be denied, as it cannot be said that plaintiff's suit or conduct in this matter is frivolous as defined in 22 NYCRR 130-1.1 (c).

Accordingly, defendants' motion is granted only to the extent that the complaint against defendants Giovanni Marciano and Glenn Muraca is dismissed. The motion is otherwise denied. The cross motion is denied without prejudice.

Dated: July 28, 2015

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J.S.C.

2. This response would appear to be consistent with her testimony as a whole, especially considering that she stated that she had no involvement with the day-to-day management of the premises and that it was her father, Sheldon Reiss, who collected rent from the tenant.

3. Specifically, defense counsel asked the witness "[w]hat, if any, damages was [sic] there to the premises after the tenant left?"