

J.T. Tai & Co. Inc. v Alger 46 Inc.

2018 NY Slip Op 31520(U)

February 6, 2018

Supreme Court, New York County

Docket Number: 158610/2016

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

J.T. TAI & CO. INC.,
Plaintiff,
-against-
ALGER 46 INC. and DIANA LALEH,
Defendants,

INDEX NO. 158610/2016
MOTION DATE 01/24/2018
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion and cross-motion for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3 ; 4 - 6</u>
Answering Affidavits — Exhibits _____	<u>4- 6</u>
Replying Affidavits _____	<u>7 - 8</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for summary judgment on it's First, Second, Third, and Fourth causes of action against Defendant Alger 46 Inc. ("Alger") pursuant to CPLR §3212, is granted. Defendant Diana Laleh's cross-motion for summary judgment to dismiss the First and Second Causes of Action against her pursuant to CPLR §3212, is granted.

Pursuant to a Commercial Lease agreement ("Lease," Moving Papers Ex. E) between Plaintiff-landlord and Defendant-Alger, Alger agreed to operate a clothing store as a tenant in the basement of the building located at 246 East 46th Street, New York, New York ("Store") from March 1, 2015 to February 28, 2021 (Moving Papers Ex. E). Alger was a domestic corporation solely owned and operated by Nasser Lalehzarzadeh, the father of Defendant Ms. Laleh. In or around May 2015 Mr. Lalehzarzadeh was diagnosed with brain cancer and immediately stopped showing up to Alger to keep it operational. In or around October 2015 Alger began to default on rent payments. In or around December 2015 when his condition deteriorated, Ms. Laleh's mother requested Ms. Laleh assist with the store to keep it operational. Ms. Laleh testified that her responsibilities included opening and closing the store, and paying the two employees when funds were available as she herself did not collect a salary (Moving Papers Ex. K). Mr. Lalehzarzadeh passed away on February 17, 2016 (Opposition Papers Ex. E).

In April 2016 Plaintiff commenced a separate nonpayment proceeding in New York County, Index No.: L&T 62596/2016 (Moving Papers Ex. H). Judge Debra Rose Samuels issued a decision awarding a judgment of possession due to Alger's failure to answer and severed any claims for money damages. Judge Samuels granted

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

possession of the Store on default because she held that Kambiz Lalehzarzadeh, the son of Nasser Lalehzarzadeh, by “insisting upon asserting the position that his father was the sole owner of the corporation, successfully convinced the Court that he, as decedent’s son only, was not an employee or corporate officer, nor executor or fiduciary, [and therefore] lack[ed] any authority to act for the corporation, including opposing the [Plaintiff’s] application” (*Id* at Ex. H).

Alger operated until October 2016 when a Marshal came to the Store and changed the locks. On October 13, 2016 Plaintiff commenced this action asserting seven separate causes of action; Four against Defendant Alger for: (1) unpaid rent, (2) additional rent, (3) accelerated rent, and (4) reasonable attorneys’ fees; and three against Ms. Laleh for: (1) conversion of corporate assets, (2) fraudulent conveyance, and (3) preliminary and permanent Injunction.

The Plaintiff now moves for summary judgment on it’s First, Second, Third, and Fourth Causes of Action against Alger pursuant to CPLR §3212. Ms. Laleh cross-moves for summary judgment to dismiss the First and Second Causes of Action against her pursuant to CPLR §3212. Defendants do not oppose Plaintiff’s summary judgment motion against Alger.

To prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that *prima facie* showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff’d* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

“When parties set down their agreement in a clear, complete document, their writing should...be enforced according to its terms” (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 860 NYS2d 433, 890 NE2d 195 [2008]).

Plaintiff is entitled to summary judgment for unpaid rent and accelerated rent pursuant to the Lease. Paragraph 17 and 18 of the Lease, state:

17 (2). ...[O]r if Tenant shall make default in the payment of rent reserved herein, or any item of additional rent herein mentioned, or any part of either, or in making any other payment herein required; then, and in any of such events, Owner may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of the demised premises, and remove their effects and hold the demised premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end.

18. In case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent, and additional rent, shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration, (c) Tenant or the legal representatives

of Tenant shall also pay Owner, as liquidated damages, for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have been constituted the balance of the term of this lease. The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect Tenant's liability for damages (Moving Papers Ex. E).

The Lease unambiguously and clearly states in case of default, Alger would remain liable for unpaid rent and the remainder of the rent due for the duration of the Lease. Plaintiff had no obligation to re-let the Store to another tenant to mitigate damages.

Pursuant to the Lease, Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law for reasonable attorneys' fees for the original eviction process and this action. The Plaintiff prevailed in the eviction process as the L&T Court granted summary judgment for possession of the Store (Moving Papers Ex. H). Paragraph 19 of the Lease states:

19. If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under...Owner may immediately, or at any time thereafter, and without notice, perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligatory for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefore, and if Tenant's lease term shall have expired, at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages (Moving Papers Ex. E).

Plaintiff is also entitled to unpaid electricity bills classified as additional rent. Paragraphs 38 and 47 of the Lease states:

38. All payments hereinafter stated, other then the Fixed Rent set forth at the head of this lease agreement, shall be deemed additional rent and, in the event of any non-payment thereof, Landlord shall have the rights and remedies provided for herein or by law for non-payment of rent.

47. It is understood and agreed that the Landlord is not to supply gas or electricity to the Tenant for any janitorial services. Tenant shall, at its own cost and expense, supply such utilities and services (*id*).

Pursuant to the Lease and Defendant Alger's default on the rent, Plaintiff is entitled to summary judgment on it's First, Second, Third, and Fourth Causes of Action against Alger.

Conversion is an unauthorized exercise of the right of ownership over property belonging to another to the exclusion of the rights of the true owner (Vigilant Ins. Co. of Am. v Hous. Auth., 87 NY2d 36, 660 NE2d 1121, 637 NYS2d 342 [1995]).

Ms. Laleh makes a prima facie showing that Plaintiff's conversion of corporate assets claim must be dismissed. Plaintiff's theory that Ms. Laleh converted company assets because she sold Alger's merchandise without authorization, and that after Alger was evicted she took the remaining merchandise from the Store for her own personal gain, are unavailing. As a preliminary matter, Plaintiff has no standing to assert this cause of action against Ms. Laleh as it was not the true owner of the property at the time. The judgment Plaintiff received in the Landlord and Tenant action Index No.: L&T 62596/2016 was for possession of the Store only, as any causes of action for money damages was severed. Moreover, the record before this Court establishes that Ms. Laleh was authorized to sell Alger's assets and that she did not receive any personal benefits from the sale of Alger's assets. She testified that she went to the store for the first time because: "there was a store , [her] father was not there to run it, [her] mother [was] hysterical and [needed] someone to help and get things moving, so [Ms. Laleh] went" (Moving Papers Ex. K, Pg. 16). Furthermore, she testified that she never received a salary for her time at Alger and the bank records submitted supports her argument (Opposition Papers Ex. G). Ms. Laleh testified that when the Marshal evicted Alger, she took the remaining "rack-full" of suits and shirts and left them in her/mother's basement (Moving Papers Ex. K, Pg. 42). Any claim for conversion would belong to Alger, the owner of the assets at the time they were allegedly converted and thus, Plaintiff's First Cause of Action against Ms. Laleh is dismissed.

To establish fraudulent conveyance under Debtor and Creditor Law §273-a, the plaintiff must establish that the conveyance was "made without fair consideration, by a debtor, who is defending an action for money damages or against whom a judgment has been rendered, where the debtor ultimately fails to satisfy the judgment" (Fed. Deposit Ins. Corp. v Porco, 75 NY2d 840, 552 NYS2d 910, 552 NE2d 158 [1990]).

Ms. Laleh makes a prima facie showing that Plaintiff's fraudulent conveyance cause of action must be dismissed. Plaintiff fails to establish any of the three prongs to hold Ms. Laleh liable under a theory of fraudulent conveyance. At the time of the alleged sales or transfers, Ms. Laleh was not a defendant in any money action or had any final judgment been rendered against Ms. Laleh at the time of the alleged conveyance.

Plaintiff fails to rebut Ms. Laleh's prima facie showing by raising any triable issues of fact. Plaintiff's contention that Ms. Laleh should be held liable under conversion of corporate assets or fraudulent conveyance theory by piercing the corporate veil, is unavailing. "Generally, however, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury " (Morris State Dep't of Taxation & Fin., 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 [1993]). It is undisputed that Ms. Laleh was not an employee of Alger, let alone an "owner" of the corporation. Alger's sole member was Mr. Lalehzarzadeh. Ms. Laleh never signed the Lease or signed as a guarantor. The Court finds it troubling and legally unsound that the corporate veil should be pierced to hold a non-employee fully liable for Alger's

