SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ASNAT INC.,

Plaintiff, Decision and order

- against - Index No. 509293/18

mS #1

DIMARIS CORP., and KELVIN R. SUERO-RUBIO and CLASE A. COSME,

Defendants, August 12, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212. The defendants oppose the motion. Papers were submitted by the parties and reviewing all the papers this court now makes the following determination.

On February 28, 2017 the defendant Dimaris Corp. executed a promissory note in the amount of $550,000 payable to Best BM Food Corp. Further, defendants Suero-Rubio and Cosme executed guarantees. On March 20, 2017 the note was assigned to the plaintiff Asnat Inc. Moreover, during December 2015 the plaintiff as landlord and the defendant Dimaris as tenant entered into a lease concerning property located at 273-275 east 169th Street in the Bronx. Again defendants Suero-Rubio and Cosme executed guarantees concerning the rental payments.

The plaintiff has instituted the within lawsuit and has asserted six causes of action. The first is that the defendant Dimaris Corp., owes the full amount of the note, namely $550,000 plus interest since no portion of the note has ever been paid. The second cause of action alleges the defendants owe

approximately $88,055 in back rent and real estate taxes. The third cause of action is that the defendants have breached the lease. The fourth cause of action seeks attorney's fees pursuant to the terms of the lease agreement. The fifth cause of action is that defendants breached the guarantees regarding the lease and the last cause of action is that the defendants breached the guarantees regarding the promissory note. The plaintiff has now moved seeking summary judgement arguing there are no questions of fact none of the payments have been made and that consequently they are entitled to summary determinations regarding all the causes of action. The defendants oppose the motion.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgement it is necessary for the movant to make a prima facie showing of an

entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

It is well settled that an assignee stands in the shoes of an assignor and may pursue all defenses to which the assignor could have pursued (Warberg Opportunistic Trading Fund L.P., v. GeoResources Inc., 151 AD3d 465, 58 NYS3d 1 [1st Dept., 2017]). The defendants argue the plaintiff failed to make the defendants aware of a foreclosure action concerning the property and that consequently the lease and the subsequent note were therefore fraudulently induced. However, a Notice of Pendency was filed in the foreclosure action on November 21, 2014. Thus, the defendants had a duty to exercise due diligence to discover the existence of this and any other encumbrance (Del Pozo v. Impressive Homes Inc., 95 AD3d 1263, 944 NYS2d 768 [2d Dept., 2012]). As the court noted in In re Sakow, 97 NY2d 436, 741 NYS2d 175 [2002], it is well settled that the filing of a notice of pendency "puts the world on notice of the plaintiff's potential rights in the action and thereby warn[s] all comers

that if they then buy the realty or land on the strength of it or otherwise rely on the defendant's right, they do so subject to whatever the action may establish as the plaintiff's right" (id). The defendants have not presented any evidence why they failed to discover the notice of pendency and why that failure should be excused. The defendants argue that "the failure to notify the Defendants herein that the property was foreclosed upon and the lease would be a nullity constitutes negligent misrepresentation, at the very least, and fraud at worst" (Affirmation in Opposition, ¶ 21). However, considering the fact a notice of pendency was filed the defendants maintained the requisite due diligence to discover the existence of any encumbrance. Therefore, the defendants have not presented any questions of fact and consequently, the motion seeking summary judgement is granted as to all defendants.

So Ordered.

ENTER:

DATED: August 12, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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CLERK