

Powerline Dev. LLC v Cold Spring Habitats, LLC

2019 NY Slip Op 33031(U)

October 9, 2019

Supreme Court, New York County

Docket Number: 653523/2016

Judge: Anthony Cannataro

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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INDEX NO. 653523/2016

POWERLINE DEVELOPMENT LLC,

Plaintiff,

MOTION DATE 07/31/2019

MOTION SEQ. NO. 002

- v -

COLD SPRING HABITATS, LLC, JESSE MOSS, JEFF
GRODINSKY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for MODIFY ORDER/JUDGMENT.

Plaintiff Powerline Development, LLC moves for an order modifying this Court's November 29, 2018 order by vacating the stay as against defendant Jesse Moss ("Moss"). Upon vacatur of the stay, plaintiff moves pursuant to CPLR 3212 for partial summary judgment on its third cause of action to collect on a guaranty by Moss and for judgment to be entered against Moss based on said guaranty in the amount of \$112,711.64. Plaintiff also moves pursuant to CPLR 603 to sever and preserve all remaining causes of action.

On or around March 2014, plaintiff began having discussions with Moss and co-defendant Grodinsky about their interest in leasing and purchasing certain property. From March 2014 through July 2014, the parties communicated about the details of a lease and purchase agreement. In a letter dated July 23, 2014, Moss' counsel mailed two original purchase agreements and a copy of the lease dated "__ day of July, 2014" that were all executed by co-defendant Cold Spring Habitats LLC ("Cold Spring") and requested that plaintiff countersign the agreements. In another letter dated July 29, 2014, Moss' counsel mailed an original written guaranty for all of Cold Spring's

obligations to plaintiff under the lease which was executed by Moss and dated July 23, 2014. Once the deposit check cleared on August 14, 2014, plaintiff countersigned the lease and replaced the first two pages of the lease to reflect the new date of signing.

When the lease expired, Cold Spring failed to surrender possession of the premises, and as a result, plaintiff commenced a holdover proceeding against Cold Spring in Suffolk County District Court (LT-000673-15/HU). The District Court gave plaintiff a money judgment against Cold Spring in the sum of \$87,744 on December 17, 2015.

Plaintiff commenced the instant action on or about July 6, 2016. Moss is the only party that timely answered the complaint, a default was entered against all co-defendants. Co-defendant Grodinsky commenced a voluntary bankruptcy proceeding before the Federal District Court for the Eastern District (8-17-71522-ast), staying this action.

“Appellate Courts in this State have repeatedly held that a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankrupt defendants, which do not involve the bankrupt’s property” (*Centrust Services, Inc. v Guterman*, 160 AD2d 416, 418 [1st Dept 1990] [internal citations omitted]). Here, the bankruptcy stay was put in place because co-defendant Grodinsky has filed for bankruptcy. Proceeding against Moss will have no bearing on Grodinsky or his property. Further, no defendants have put in opposition against lifting the bankruptcy stay as against Moss. Accordingly, the stay will be vacated as against Moss.

“The 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 demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has met this showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*). To defeat a motion for summary judgment, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff argues that it is entitled to partial summary judgment on its third cause of action to enforce the guaranty because Moss admits the existence and enforceability of the guaranty. Plaintiff asserts that there was only ever one lease; the only reason the date on the lease changed from July 23, 2014 as contemplated under the guaranty agreement to August 14, 2014 was because of unilateral delays by defendants.

Moss argues that while he signed a guaranty of a lease, it is not clear and unambiguous as the guaranty was for a "certain Lease, dated as of July 23, 2014" which he alleges was never signed by plaintiff and therefore, neither the lease nor his guaranty ever came into effect.

A defendant is bound by the facts alleged in its answer as they constitute formal judicial admissions (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [1st Dept 2007]; *see also Moncreiffe Corp. v Heung*, 293 AD2d 324, 324 [1st Dept 2002]). Under paragraph 14 of Moss' answer, he alleges "[t]hat the Purchase Agreement provided for a simultaneous Lease Agreement for the Premises to be executed between Plaintiff and COLD SPRING, said Lease including a Guaranty from MOSS." There is no allegation in Moss' answer that there were two leases or that he did not guaranty the lease at issue in this action. In addition, Moss' answer does not deny portions of the complaint that refer directly to the existence of a guaranty for the August 14, 2014 lease. Submission of incomplete portions of lease documents, that only differ in that one has a filled in lease date, are insufficient to create an issue of fact as to the existence of two leases. Further, Moss' affidavit is contradicted by documentary evidence showing that he was actively involved in negotiating the lease. As such, these allegations are "not

genuine, but feigned" (*Bank of New York v 125-127 Allen St. Assoc.*, 59 AD3d 220 [1st Dept 2009], quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 331 [1968]). Accordingly, plaintiff is entitled to partial summary judgment on its third cause of action against Moss.

It has been held that severance of separate claims against parties who have filed for bankruptcy and are subject to an automatic stay is appropriate to avoid prejudice to plaintiff by further delay (*Dorador v Trump Palace Condominium*, 126 AD3d 603, 604 [1st Dept 2015], citing CPLR 603). Here, the remaining causes of action which seek judgment for property damages and attorneys fees are subject to the bankruptcy stay and may require additional discovery. As such, the remaining causes of action are severed.

Accordingly, it is

ORDERED that plaintiff Powerline Development, LLC's motion to modify this Court's November 29, 2018 to the extent of vacating the stay on plaintiff's third cause of action as against defendant Jesse Moss is granted; and it is further

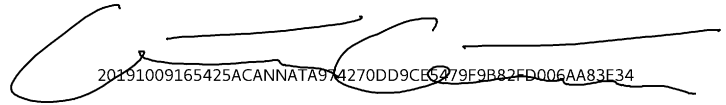
ORDERED that plaintiff's motion for partial summary judgment on its third cause of action against defendant Jesse Moss is granted; and it is further

ORDERED that the Clerk shall enter judgment in the favor of plaintiff and against defendant Jesse Moss in the amount of \$87,744, together with post-judgment statutory interest of 9% per annum from the date of December 18, 2015; and it is further

ORDERED that plaintiff's the third cause of action is severed and the balance of the claims are preserved; and it is further

ORDERED that the action shall continue as to the first, second, and forth causes of action; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 490, 111 Centre Street on January 8, 2020 at 2:00PM.



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10/9/19

DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE