

268 SH Realty Corp. v Fisher

2021 NY Slip Op 30428(U)

February 11, 2021

Supreme Court, New York County

Docket Number: 151043/2018

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

268 SH REALTY CORP.

INDEX NO. 151043/2018

- v -

MOT. DATE

RANDI FISHER et al.

MOT. SEQ. NO. 1-3

The following papers were read on this motion to/for <u>dismiss and/or sj, x-motion for sj</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS Doc. No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS Doc. No(s). _____
Replying Affidavits	ECFS Doc. No(s). _____

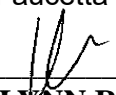
Presently before the court are three motions pursuant to CPLR §§ 3211(a)(1)(7) and 3212 by defendants Randi Fisher (“Fisher”), Egidiana Maccioni (“E. Maccioni”) and Ewing King (“King”) seeking dismissal of plaintiff’s complaint against them. Plaintiff opposes the motions and cross-moves for summary judgment against the movants. None of the remaining defendants have appeared in this action. Issue was joined as to the movants and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. Motion sequences 1-3 are hereby consolidated for the court’s consideration and disposition in this single decision/order.

Since issue has been joined, the court will consider the motions under the more exacting standard of CPLR § 3212 in the interest of judicial economy. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its 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]). If the proponent fails to make out its prima facie case for summary judgment, however, then its 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]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court’s function on these motions is limited to “issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The following facts are asserted in the complaint. Plaintiff 268 SH Realty Corp. owns the property located at 268 Elm Street, Southampton, New York (the “premises”). On or about May 4, 2015, plaintiff entered into a lease with non-party MaMaMa, LLC (“MaMaMa”) whereby the latter would operate a restaurant at the premises. M. Maccioni and defendant Daneil Faucetta (“Faucetta”) personally guaranteed

Dated: 2/11/21



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFERENCE

MaMaMa's obligations under the lease, including the obligation to pay rent.

Along with the Lease, plaintiff sold MaMaMa a variety of furniture and kitchen fixtures (hereinafter "assets") for \$100,000.00 in an Asset Purchase Agreement, signed by defendant Mario Maccioni ("M. Maccioni") as MaMaMa's managing member.

Article 5 of the Asset Purchase Agreement, which is entitled "Post-Closing Agreements", states in pertinent part:

5.2 Early Termination of Lease. In the event that Purchaser vacates the Premises before the expiration of two years from the Commencement Date of the Lease, as defined therein, the ownership of the Purchased Assets will be immediately transferred to 268 SH Realty Corp. as liquidated damages under the lease agreement and all of the Purchased Assets shall remain at the Premises, except as otherwise set forth in the Lease.

MaMaMa paid rent from May 2015 through August 2015, and failed to pay rent thereafter, vacating the Premises in November 2015.

In March 2016, plaintiff re-let the premises to a third party. Plaintiff asserts that it was unable to sell the assets to the third party due to a UCC-1 lien filed by movants Fisher, E. Maccioni and King (sometimes the "alleged secured parties"). By way of this action, plaintiff seeks an order directing the movants to file a UCC-3 terminating the UCC-1 or authorizing plaintiff to file the UCC-3 as well as damages.

It is undisputed that the movants entered into a Security Agreement with MaMaMa, signed by M. Maccioni as managing member, whereby MaMaMa provided security for loans of \$200,000, \$25,000 and \$100,000 from Fisher, King and E. Maccioni, respectively. Collateral under the Security Agreement is defined as:

each of the following types or items of personal property of the Grantor, whether now owned or hereafter acquired, wherever located: (i) all Accounts, (ii) all the assets of the Grantor enumerated in Schedule A, (iii) the rights and interest of the Grantor in goods, the sale and delivery of which gave rise to Accounts and (iv) all products and Proceeds of the property described in clauses (i) through (iii) above.

Schedule A contains four categories of personal property: [1] Main Dining Room & Bar; [2] Kitchen & Basement; [3] Barn & Outside; and [4] Apartment. The types of personal property includes, *inter alia*, refrigerators and freezers, coffee machines, stoves and other fixtures, kitchen utensils, pots and pans, furniture, lights, computer and phone systems, air conditioners, a safe, tvs, direct tv boxes, etc.

Plaintiff claims that the Security Agreement is "highly unusual" because "neither Faucetta nor [M.] Maccioni signed personal guarantees-only a corporate guarantee was sought, and given. Plaintiff asserts that when M. Maccioni and Faucetta realized that their business had failed, they "aided and abetted" Fisher, King and E. Maccioni to file a Fraudulent UCC-1 "against the assets set forth in the Asset Purchase Agreement, thus depriving Plaintiff from controlling the assets." Plaintiff maintains that "[t]he scheme was clear: the Alleged Secured Parties would claim that they financed Tenant's purchase of the assets, and that Tenant owed them \$100,000.00 for the assets." There is no dispute that the UCC-1 was filed September 30, 2015, five months after the security agreement was allegedly signed on April 30, 2015, and also two months after MaMaMa stopped paying rent to Plaintiff.

In January 2017, plaintiff commenced an action against Faucetta and M. Maccioni entitled 268 SH Realty Corp. v. Faucetta et al, Index No. 650319/2017, wherein Plaintiff made a Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR § 3213 on the personal guarantee of the lease. Plaintiff claims that Fisher, through an attorney, sent a letter dated February 22, 2017 to plaintiff "[i]n further-

ance of the fraud” which threatened to foreclose on Fisher’s lien of the personal property located at the premises. The letter further provides:

This letter is a good faith attempt to resolve the matter prior to the institution of litigation if terms of settlement can be reached in the immediate future. As time is of the essence, this offer to discuss and resolve this matter remains open until the close of business on Monday, February 27, 2017. Please advise. Thank you.

Plaintiff maintains that Fisher was merely trying to protect Faucetta, her live-in boyfriend, by “intimidating Plaintiff into either dismissing or settling the personal guarantee case against Defendants Maccioni and Faucetta by threatening to file a lawsuit against Plaintiff vis-à-vis a fraudulently filed UCC-1.”

Plaintiff asserts two causes of action sounding in fraud against the defendants, the first cause of action arising from the allegedly fraudulent UCC-1 and the second alleging that M. Maccioni and King enabled Fisher, King and E. Maccioni to commit fraud by informing them that MaMaMa “would and did vacate the Premises before the end of the two year period.” Both claims seek damages of \$95,000 representing the value of the assets and further seek punitive damages.

Movants’ answers contain general denials and assert various affirmative defenses. Further, Fisher and King have asserted crossclaims against M. Maccioni and E. Maccioni. Both Fisher and King further assert that they agreed to execute a UCC-3 Termination Statement which plaintiff has refused to accept.

Parties’ arguments

In their motions, movants deny that any fraud took place in sworn affidavits. Fisher claims that in April 2015, her boyfriend, Faucetta, asked her to invest in a restaurant venture. In turn, Fisher agreed to invest and/or loan \$200,000. Fisher admits that she “knew there to be a substantial risk to the loan/investment, but the amount of money was not enough for me to be concerned about.” Fisher further admits that she signed several documents “associated with the venture which [she] did not read nor [is] familiar with content. However, [she] had the documents reviewed by [her] attorney and signed as instructed by [her] attorney.”

Fisher denies having any real involvement with MaMaMa or the management of the restaurant, although she admits to visiting the restaurant “a number of times to dine”. Fisher claims that “[o]n or about February 22, 2017, [she] learned for the first time that a UCC-1 had been filed on behalf of the lender (the three named Defendants) in connection with certain [MaMaMa] assets” and “[a]t no time did [she] instruct [her] attorney or anyone to file a UCC-1 and was unaware of its existence until that date.”

Fisher claims that she was advised that the UCC-1 gave her a security interest in the assets and she asked her attorney to send plaintiff a letter in regards thereto. However, “[s]hortly thereafter, [Fisher] was advised that [she] could not pursue any action nor did [she] have any remedy because the UCC-1 filing was pre-empted by an agreement between Plaintiff and MaMaMa whereby the assets reverted back to Plaintiff pursuant to a prior agreement between Plaintiff and MaMaMa.” Otherwise, Fisher maintains that “[a]t no time did Plaintiff’s attorney request that [she] provide a UCC termination which [she] would have provided.”

Fisher further states:

Despite Plaintiff's allegations that I "schemed to defraud Plaintiff" with the other defendants, I rarely spoke to Defendant Mario Maccioni except when I was at the restaurant nor have I ever communicated with Egidiana Maccioni, in person, by telephone, by e-mail or otherwise. In addition, although I know/knew Defendant Ewing King, he is Daniel Faucetta's brother-in-law, I never discussed with him anything about this restaurant venture. I would expect that a "scheme" would re-

quire at least some form of communication with the coconspirators, but here I have had none.

Otherwise, Fisher maintains that she has never made any attempt to collect the money she gave MaMaMa nor has she received any return on the principal. King echoes Fisher's factual assertions. E. Maccioni's assertions are similarly consistent to those of the codefendants. She maintains that she loaned her son \$100,000 to assist him in his new restaurant endeavor, that she does not personally know Fisher or King and that she does not know what a UCC-1 is nor did she authorize anyone to file it on her behalf.

Plaintiff, through counsel, asserts that E. Maccioni and Fisher's motions are improperly noticed and that otherwise the movants have failed to meet their burden under either CPLR § 3211[a][1] or CPLR § 3212. As to its cross-motion, plaintiff's counsel argues that "[p]laintiff had shouldered its prima facie burden and demonstrated by Defendants own sworn testimony that they have no defense to the allegations set forth in the Verified Complaint, and will be unable to raise a triable issue of material fact in response."

DISCUSSION

At the outset, the court rejects plaintiff's procedural argument. Indeed, each of the movants filed their own separate motion, which was each separately sequenced. Rather, it is plaintiff who has technically failed to submit opposition papers to two out of three of the motions, and therefore has made a procedural error. In any event, there is no confusion on this record as to the parties' positions or the relief they've requested, which is evidenced by the fact that each party has had a full and fair opportunity to put in papers and is otherwise on proper notice. The court now turns to the parties' substantive arguments.

"The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury'" (*New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995], quoting *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 NY2d 403 [1958]). On this record, the court finds that the movants have established that there was no false representation of material fact when the UCC-1 was filed and that there was no common scheme or conspiracy connecting the defendants together thereby causing plaintiff injuries.

Plaintiff's counsel argues that the defendants' lack of knowledge of a fraudulent scheme mandates denial of their motions. However, this argument misses the point. The fact that none of the defendants know much about MaMaMa nor were they involved in its operation underscores their point that they were not involved in a fraudulent scheme. Plaintiff's counsel pins the opposition to the fact that Faucetta and M. Maccioni did not sign a personal guaranty, but this fact standing alone does not raise a triable issue of fact. Nor is it of any moment that Fisher's counsel sent a letter to plaintiff regarding the UCC-1 and her security interest in the assets. That letter does not contain any indicia of fraud and the threats and motives which plaintiff's counsel attributes to it are speculative and unsubstantiated. Indeed, on this record, no reasonable factfinder would find that the movants engaged in fraud vis-à-vis the Security Agreement or by filing the UCC-1.

However, each of the movants have stated under oath that the UCC-1 was filed without their authorization, none of them have foreclosed on the security interest in the assets and Fisher and King have offered to file a UCC-3 termination statement. Therefore, the court decides the motions and cross-motion as follows: movants are directed to file a UCC-3 termination statement and the balance of plaintiff's claims against them are severed and dismissed.

In light of this result, the court declines to consider the parties' remaining arguments and rejects the requests by Fisher and E. Maccioni for costs and disbursements. No arguments were raised in support of the latter request for relief.

Conclusion

In accordance herewith, it is hereby

ORDERED motions and cross-motion under motion sequence numbers 1-3 are granted in part as follows: defendants Fisher, King and E. Maccioni are directed to file a UCC-3 termination statement and the balance of plaintiff's claims against them are severed and dismissed; and it is further


ORDERED that the motions and cross-motion are otherwise denied; and it is further

ORDERED that the Clerk is directed to mark this action disposed and enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 2/11/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.