

Innerworkings, Inc. v Arik Eshel CPA, & Assoc., P.C.
2022 NY Slip Op 32146(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 150759/2012
Judge: Laurence Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X	INDEX NO.	<u>150759/2012</u>
INNERWORKINGS, INC.,		03/08/2022,
		03/08/2022,
Plaintiff,		03/08/2022,
	MOTION DATE	<u>03/08/2022</u>
- v -		
ARIK ESHEL CPA, & ASSOC., P.C., ARIK ESHEL CORP.,		006 007 008
ESHEL, AMINOV & PARTNERS, LLP CERTIFIED PUBLIC	MOTION SEQ. NO.	<u>009</u>
ACCOUNTANTS, AE & MG HOLDINGS INC., MG & AE		
CORP, ARIK ESHEL, B.M.Y. GROUP, INC., MOSHE		
GREENWALD		

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 347, 348, 349, 353, 357, 361, 365, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 405, 407, 409

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 007) 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 350, 354, 358, 362, 366, 406, 408, 410

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 280, 281, 282, 283, 284, 285, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 351, 355, 359, 363, 367, 369, 370, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 415

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 009) 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 352, 356, 360, 364, 368, 371, 372, 411, 412, 413, 414

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents,

The following read on Defendant’s – Moshe Greenwald, motion (mot. seq. no. 006) for “summary judgment” to dismiss, CPLR 3212, all claims against Moshe Greenwald in the second

amended complaint, and to dismiss all cross – claims against Moshe Greenwald, and enter judgment in favor of Moshe Greenwald’s cross – claims for indemnification against Defendants – Arik Eshel, Arik Eshel Corp., Arik Eshel CPA & Associates, and Aminov & Partners LLP Certified Public Accountants; and

Defendants’ – Arik Eshel, Arik Eshel CPA & Associates PC, Arik Eshel Corp., and Eshel Aminov & Partners LLP Certified Public Accountants, motion (mot. seq. no. 007) for summary judgment, CPLR 3212(e), on all plaintiff’s claims against Eshel Aminov & Partners, and against Arik Eshel individually (counts 2, 5, 8 – 10), and plaintiff’s claims (counts 2 – 4, 10) against Arik Eshel CPA & Associates PC, and Arik Eshel Corp; and

Plaintiff’s – Innerworkings, Inc. motion (mot. seq. no. 008) for summary judgment; and

Defendants’ – Arik Eshel, Arik Eshel CPA & Associates PC, Arik Eshel Corp., and Eshel Aminov & Partners LLP Certified Public Accountants, motion (mot. seq. no. 009) for summary judgment and dismissing Defendant Moshe Greenwald’s cross – claims.

A complaint states causes of action for i) breach of contract, ii) unjust enrichment, and iii) quantum meruit, “for defendant’s failure to pay rent due under the Agreement of Sublease between Innerworkings and BMY Group, Inc. for the premises at 462 Seventh Avenue, NY, NY 10018 (“Premises”)” (see NYSCEF Doc. No. 1).

A first amended complaint has causes of action for i) breach of contract against BMY Group, Inc., ii) breach of contract against “Arik Eshel CPA, Arik Eshel Corp., Eshel Aminov, AEMG Holdings, MGAE Corp., Eshel, and Greenwald,” iii) “oral assignment of sublease and breach of contract against Arik Eshel CPA,” iv) “oral assignment of sublease and breach of contract against Arik Eshel Corp.,” v) “oral assignment of sublease and breach of contract against Eshel Aminov,” vi) oral assignment of sublease and breach of contract against AEMG

Holdings,” vii) “oral assignment of sublease and breach of contract against MGAE Corp.,” viii) quantum meruit against “Arik Eshel CPA, Arik Eshel Corp., Eshel Aminov, AEMG Holdings, MGAE Corp., Eshel, and Greenwald,” and ix) unjust enrichment against “Arik Eshel CPA, Arik Eshel Corp., Eshel Aminov, AEMG Holdings, MGAE Corp., Eshel, and Greenwald.” “Plaintiff respectfully prays for a judgment ... no less than \$700,000” (see NYSCEF Doc. No. 68).

Answers with cross claims were submitted by Eshel, Aminov & Partners, LLP Certified Public Accountants; Arik Eshel; Arik Eshel Corp.; Arik Eshel CPA & Assoc., PC; (see NYSCEF Doc. Nos. 78 – 81).

An answer was submitted by Moshe Greenwald with cross - claims (see NYSCEF Doc. No. 110). Defendants Arik Eshel, Arik Eshel CPA & Assoc. PC, Arik Eshel Corp., and Eshel Aminov & Partners LLP Certified Public Accountants answered the cross – claims of defendant Moshe Greenwald (see NYSCEF Doc. No. 128).

CPLR § 3212 (b) states that, “the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.” *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party.” *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012).

MOSHE GREENWALD – MOT. NO. 6 – SUMMARY JUDGMENT

Moshe Greenwald’s memorandum of law in support of summary judgment states, “[p]laintiff Innerworkings, Inc. seeks to pierce the corporate veil and hold Greenwald personally liable under a sublease for office space on Seventh Avenue that contains Greenwald’s signature

in his capacity as President of Defendant BMY Group, Inc. Greenwald was the sole member of BMY Group [Inc.], which was formed in 2005 and dissolved in 2016.

ESHELS' – MOT. NO. 7 – SUMMARY JUDGMENT

Eshels' memorandum of law in support for partial summary judgment states, “[p]laintiff Innerworkings presents this Court with a lease contract for commercial office space, complaining of amounts of unpaid rent and related charges. The contract is between Plaintiff and BMY, an entity wholly owned and controlled by defendant Moshe Greenwald. [P]laintiff tries to contort New York law to hold the Eshel Defendants liable on a lease that they never signed, or assumed, simply because (with Plaintiff’s permission) they used a small portion of the space under an informal agreement with BMY. Indeed, the lease itself expressly forbids any assignment without Plaintiff’s prior written consent, which there is no question Plaintiff never provided here. Plaintiff’s argument that the Eshel Defendants somehow orally assumed the lease flies in the face of the plain language of the contract, expressly forbidding such assignments. It is not enough that the Eshel Defendants made a handful of partial and belated payments to Plaintiff” (see NYSCEF Doc. No. 266 P. 7 – 8).

INNERWORKINGS – MOT. NO. 8 – SUMMARY JUDGMENT

Innerworkings submits the affidavit of Michael Wagner, Chief Operations Officer at Innerworkings, Inc.

“I am familiar with the subject matter of this action. I am a qualified witness of the business records of Innerworkings ... make this affidavit on the basis of my review of the business records maintained in the ordinary course of business. On or about August 6, 2020, non-parties S.I.K. Associates and Newtek Business Services, Inc. entered into a Lease Agreement, Whereas S.I.K. Associates, as landlord, leased to Newtek, as tenant, the premises. On or about November 1, 2006, Newtek and Innerworkings entered into a Sublease Agreement, whereas Newtek, as sublandlord, leased to Innerworkings, as subtenant, the Premises. On or about January

22, 2010, Innerworkings and BMY executed the Agreement of Sublease, whereas Innerworkings, as Sublandlord, leased to BMY, as Subtenant, the Premises. On or about January 26, 2010, Innerworkings received check number 1199 from AEMG Holdings, 350 Motor Vanderbilt, Suite 300, Hauppauge, NY 11788 in the amount of \$48,750.00. The memo line of check 1199 said ‘security deposit.’ On or about November 30, 2010, Innerworkings received check number 1277 from Arik Eshel, CPA & Assoc., PC, 350 Motor Vanderbilt, Suite 404, Hauppauge, NY 11788 in the amount of \$40,854.21. The memo line of check 1277 said ‘Feb, March, Apr, May RENT – 462 7th Ave., New York, NY.’ On or about June 7, 2011, Innerworkings received check number 6662 from Arik Eshel Corp., 350 Motor Vanderbilt, Suite 300, Hauppauge, NY 11788 in the amount of \$49,500.00. The memo line of check 6662 said ‘Rent – June, July, Aug. – Arik Eshel, CPA & Assoc.’ On or about September 14, 2011, Innerworkings received check number 6901 from Arik Eshel Corp., 350 Motor Vanderbilt, Suite 300, Hauppauge, NY 11788 in the amount of \$19,527.67. The memo line of check 6901 said ‘Rent – Sept. – Arik Eshel, CPA & Assoc. Inv. # 946301-1.’ Innerworkings was unable to re-let the Premises after Eshel and Greenwald vacated the Premises for the remainder of the term of the Sublease (February 2012 to November 29, 2012)” (see NYSCEF Doc. No. 282 Pars. 1 4 5 13 14 16 20 22 23).

An affirmation in opposition states, “The New York Statute of Frauds prohibits the assignment of interest in real property in the absence of a writing subscribed by the person assigning the interest. N.Y. Gen. Oblig. Law 5-703(1). And here, it is undisputed that there is no such writing” (see NYSCEF Doc. No. 391 P. 17 – 18). “Purported assignment of the lease to it by Ilana was not in writing and therefore was void under the Statute of Frauds” (see *Dadich v. Ilana Knitting, Inc.*, 208 A.D.2d 792, 793 [2d Dept. 1994]).

Plaintiff’s Reply states, “[e]ven if the Eshel Defendants and Greenwald are not liable for breach of the Sublease by piercing the corporate veil or by assumption of the Sublease, the Eshel Defendants and Greenwald are still liable to Innerworkings for the use and occupancy of the Premises. The fact that the Eshel Defendants and Greenwald did not sign the Sublease is not a bar to recovering damages for use and occupancy. *Eighteen Assocs., LLC v. Nanjim Leasing*

Corp., 257 A.D.2d 559 [2d Dept. 1999]). The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant. *Id.* The occupant's duty to pay the landlord 'for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is 'imposed by law for the purpose of bringing about justice without reference to the intention of the parties.' If the Eshel Defendants and Greenwald are able to use and occupy the Premises from February 2010 until January 2012 without paying the full amount of the rent, utilities, and share of real estate taxes, they will be enriched at Innerworkings' expense." (see NYSCEF Doc. No. 415 P. 16 – 17).

ESHEL'S – MOT. NO. 9 – SUMMARY JUDGMENT AGAINST GREENWALD

Defendant Eshel's memorandum of law in support states, "Greenwald alleges that he did not sign the Sublease and that in fact, Mr. Eshel and AE CPA 'arranged to have BMY serve as the tenant' without Greenwald's knowledge, and 'forged Greenwald's name' on the BMY Sublease. (Ex. B at Pars. 3-7)" (see NYSCEF Doc. No. 287 P. 10 – 11).

Greenwald's memorandum of law in opposition states, "[h]aving assumed the Sublease, Eshel CPA (along with successor, [Eshel, Aminov & partners LLP Certified Public Accountants]), therefore is liable to Plaintiff under the Sublease. These undisputed facts create a presumption that the Sublease was assigned to Eshel CPA" (see NYSCEF Doc. No. 371 P. 5, 14).

"Where a party other than the lessee is shown to be in possession of the leased premises and is paying rent, a presumption arises that the lease has been assigned to that party" (see *Bush v. Mechanicville Warehouse Corp.*, 79 A.D.3d 1327, 1330 [3d Dept. 2010]).

CONCLUSION

“To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.” *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

In this matter the Court has received Summary judgment motions from plaintiff and defendants which always leads to the kneejerk finding that, if both parties seek summary judgment there must be a question of fact. Here, plaintiff has put forward significant evidence indicating that the defendant Eshel entities essential were the tenants despite not being listed on the lease along with the fact that defendant Greenwald and his corporate entity were the leaseholder. Additionally, plaintiff is the only party to submit an affidavit with someone who is familiar with the subject matter of this action. In response defendant Greenwald pleads ignorance and alleges forgery of his signature. Defendant Eshel goes through hoops and doubletalk explaining away paying rents from their various accounts, explaining away comingling funds and ignoring their own tax records but also screaming from the rafters that they were never on the lease. Plaintiff clearly was aware or should have been that Eshel was utilizing most of the space for some time period but apparently failed to take any action at the time. It is indeed a close issue in this matter where the court very much finds the Plaintiffs arguments substantially more persuasive than those of Defendants, yet there remain questions of facts, no matter how unlikely a trier of fact may find in favor of defendants.

Thus, as stated above, a reading of all the documents submitted and exhibits shown, there exist a question of fact pertaining to the subject office lease and where responsibility ultimately exists. As the facts submitted warrant denying summary judgment and dismissal at this stage.

It is now,

ORDERED that Defendant’s – Moshe Greenwald, motion (mot. seq. no. 006) for “summary judgment” to dismiss, CPLR 3212, all claims against Moshe Greenwald in the second amended complaint, and to dismiss all cross – claims against Moshe Greenwald, and enter judgment in favor of Moshe Greenwald’s cross – claims for indemnification against Defendants – Arik Eshel, Arik Eshel Corp., Arik Eshel CPA & Associates, and Aminov & Partners LLP Certified Public Accountants is DENIED; and it is further

ORDERED that Defendants’ – Arik Eshel, Arik Eshel CPA & Associates PC, Arik Eshel Corp., and Eshel Aminov & Partners LLP Certified Public Accountants, motion (mot. seq. no. 007) for summary judgment, CPLR 3212(e), on all plaintiff’s claims against Eshel Aminov & Partners, and against Arik Eshel individually (counts 2, 5, 8 – 10), and plaintiff’s claims (counts 2 – 4, 10) against Arik Eshel CPA & Associates PC, and Arik Eshel Corp is DENIED; and it is further

ORDERED that Plaintiff’s – Innerworkings, Inc. motion (mot. seq. no. 008) for summary judgment is DENIED; and it is further

ORDERED that Defendants’ – Arik Eshel, Arik Eshel CPA & Associates PC, Arik Eshel Corp., and Eshel Aminov & Partners LLP Certified Public Accountants, motion (mot. seq. no. 009) for summary judgment and dismissing Defendant Moshe Greenwald’s cross – claims is DENIED.



 LAURENCE LOVE, J.S.C.

	7/7/2022 _____ DATE		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE