

MacArthur Props. I, LLC v Turbo Hair Inc.

2023 NY Slip Op 31840(U)

May 19, 2023

Supreme Court, New York County

Docket Number: Index No. 650822/2022

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

MACARTHUR PROPERTIES I, LLC, and
MACARTHUR PROPERTIES 305, LLC,

Index No. 650822/2022

Plaintiffs

- against -

DECISION AND ORDER

TURBO HAIR INC. d/b/a KOLOR BAR NYC,
KOSTA THANASI, and MAX RAN TAN,

Defendants

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

According to the complaint, plaintiff MacArthur Properties I, LLC, owned the commercial condominium unit at 1398B Second Avenue, also known as 305 East 72nd Street, in New York County in 2017. MacArthur Properties I transferred ownership of the premises to plaintiff MacArthur Properties 305, LLC, July 31, 2020. Defendant Turbo Hair Inc. occupied the premises through June 30, 2020, pursuant to a lease that was to run from September 15, 2015, through September 14, 2025. Plaintiffs claim that Turbo Hair abandoned the premises and mailed the keys to plaintiffs June 29, 2020, without plaintiffs' consent.

Plaintiffs sue Turbo Hair for breach of the lease and defendants Thanasi and Tan for breach of a guaranty. Plaintiffs also allege a third claim against all defendants for attorneys' fees pursuant

to the lease. At oral argument, on the appearing parties' consent, plaintiffs discontinued their action by MacArthur Properties I, LLC, since it assigned its claims to MacArthur Properties 305 when it transferred the premises. C.P.L.R. § 3217(a)(2).

Thanasi moves to dismiss the complaint against him based on plaintiff's failure to attach either a lease or a guaranty to the complaint and to allege plaintiff's performance of the alleged lease. C.P.L.R. § 3211(a)(7). Thanasi claims he never signed any such documents. Plaintiff cross-moves for summary judgment against all three defendants. C.P.L.R. § 3212(b). Tan also cross-moves for summary judgment dismissing the complaint against him. Id.

II. THASANI'S MOTION TO DISMISS CLAIMS

Upon a motion to dismiss claims, the court considers plaintiff's factual allegations as true. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d 538, 538 (1st Dep't 2019). In Thasani's motion pursuant to C.P.L.R. § 3211(a)(7), based on failure to state a claim for which relief may be granted, Thasani bears the burden to establish that the complaint "fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728

(2018). Dismissal is warranted if the complaint fails to allege facts that "fit within any cognizable legal theory." Sassi v. Mobile Life Support Servs., Inc., 37 N.Y.3d 236, 239 (2021).

The court denies Thanasi's motion based both on his nonappearance, either personally or through an attorney, for his motion January 12, 2023, and on its merits. To establish breach of a guaranty, plaintiff must demonstrate the guaranty and the obligations guaranteed, here under a lease, plaintiff's performance of the lease, Thasani's breach of the guaranty, and damages from Thasani's breach. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021). Although plaintiff did not attach the lease or the guaranty to the complaint, plaintiff alleges Turbo Hair's execution of a lease and Thasani's execution of a guaranty, which defendants breached by failing to make the payments promised by the two contracts. Thanasi cites no authority requiring plaintiff to attach the lease and guaranty to the complaint to satisfy C.P.L.R. § 3013's pleading requirements. Plaintiff also alleges its own performance under the lease by allowing Turbo Hair's possession of the leased premises: "Kolor Bar occupied a portion of the Building consisting of the ground floor retail store and a portion of the basement designated as 1398B Second Avenue, New York, New York." Aff. of Ronald D. Weiss Ex. A (Compl.), NYSCEF Doc. No. 21, ¶ 11.

Finally, Thanasi emphasizes that he did not sign a lease or guaranty and that his attestation to a forgery warrants dismissal. In a motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), however, the court may not consider affidavits controverting the alleged claims, Serao v. Bench-Serao, 149 A.D.3d 645, 646 (1st Dep't 2017); Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016); Asmar v. 20th & Seventh Assoc., LLC, 125 A.D.3d 563, 564 (1st Dep't 2015); City of New York v. VJHC Dev. Corp., 125 A.D.3d 425, 426 (1st Dep't 2015), as the courts did in the decisions considering motions for summary judgment on which Thanasi relies. By alleging the lease and Thanasi's guaranty of the lease, as well as plaintiff's own performance of the lease, plaintiff survives dismissal.

Thanasi may claim forgery in support of a motion for summary judgment, but his motion to dismiss the claims against him fails. Moreover, when confronted with the guaranty that plaintiff presents bearing his notarized signature, he must do more than simply deny his signature, by demonstrating that he never had any relationship with plaintiff or the notary public or was outside the jurisdiction where the guaranty was notarized, for example. Banco Popular N. Am. v. Victory Taxi Mgt., Inc., 1 N.Y.3d 381, 384 (2004); Ulm I Holding Corp. v. Antell, 155 A.D.3d 585, 585 (1st Dep't 2017); CIT Tech. Fin. Servs. I LLC v. Bronx Westchester Med. Group, P.C., 117 A.D.3d 567, 567 (1st Dep't

2014); Genger v. Arie Genger 1995 Life Ins. Trust, 84 A.D.3d 471, 471-72 (1st Dep't 2011). He also must explain his acknowledgment of his guaranty in a prior nonpayment proceeding. Banco Popular N. Am. v. Victory Taxi Mgt., Inc., 1 N.Y.3d at 384.

III. THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

C.P.L.R. § 2215's provision that a "party may serve upon the moving party a notice of cross-motion demanding relief" refers to relief against the moving party. It does not allow a cross-motion as a vehicle for relief against a non-moving party. See Puello v. Georges Units, LLC, 146 A.D.3d 561, 561 (1st Dep't 2017); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014). Although C.P.L.R. § 2215(b) provides that the "relief need not be responsive to that demanded by the moving party" and thus may relate to distinct claims or defenses, a cross-motion still must demand relief against the moving party. Since Turbo Hair and Tan are not moving parties, plaintiff's cross-motion for summary judgment against them fails.

Similarly, since Thasani's motion did not seek relief against Tan, he may not seek relief against plaintiff in a cross-motion. Therefore Tan's cross-motion for summary judgment against plaintiff likewise fails.

Finally, plaintiff's cross-motion for summary judgment

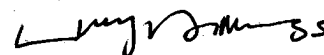
against Thasani is premature. C.P.L.R. § 3212(a); City of Rochester v. Chiarella, 65 N.Y.2d 92, 101 (1985); SHO Resources, LLC v. SYTR Real Estate Holdings LLC, 201 A.D.3d 610, 611 (1st Dep't 2022); Stone Column Trading House Ltd. v. Beogradska Banka A.D., 139 A.D.3d 577, 578 (1st Dep't 2016). Turbo Hair and Tan have answered the complaint, but Thasani has not. Therefore the court denies plaintiff's cross-motion for summary judgment against Thasani as well as against Turbo Hair and Tan.

IV. CONCLUSION

For the reasons explained above, the court denies defendant Thanasi's motion to dismiss the claims by plaintiff MacArthur Properties 305, LLC, against Thasani, C.P.L.R. § 3211(a)(7); the cross-motion by plaintiff MacArthur Properties 305, LLC, for summary judgment, C.P.L.R. §§ 2215, 3212(a); and defendant Tan's cross-motion for summary judgment dismissing the claims against Tan. C.P.L.R. § 2215. Plaintiff MacArthur Properties I, LLC, discontinues its claims. C.P.L.R. § 3217(b).

Thasani shall file his answer to the remaining plaintiff's complaint within 10 days after service of notice of entry of this order. C.P.L.R. § 3211(f). The parties shall appear for a Preliminary Conference via Microsoft Teams June 13, 2023, at 12:00 noon and will receive a link to the videoconference from the court.

DATED: May 19, 2023



LUCY BILLINGS, J.S.C.