White Plains Plaza Realty, LLC v Cappelli Enter., Inc.
2012 NY Slip Op 33216(U)
March 13, 2012
Sup Ct, Westchester County
Docket Number: 57039/2011
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED
3/13/12

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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APPLICATION OF
WHITE PLAINS PLAZA REALTY, LLC,

Petitioner,

MOTION DATE: 3/2/12
INDEX NO.: 57039/11

For a Judgment Pursuant to CPLR 5227 to Compel Payment to Petitioner of Debt Owed to Judgment Debtor

-against-

CAPPELLI ENTERPRISES, INC.,

Respondent.
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The following papers numbered 1 to 13 were read on this motion for an Order pursuant to CPLR 3211, subdivision (a), paragraphs 1 and 7 dismissing this special proceeding.

Papers Numbered

Notice of Motion - Affirmation (Benowich) - Exhs. (1-2) - Memorandum of Law 1-4
Answering Affidavit (Shapiro) - Exhs. (A-L) - Memorandum of Law 5-7
Replying Affirmation (Benowich) - Memorandum of Law 8-9
Sur-Replying Affidavit (Shapiro) - Exhs. (A-F) 10-11
Letters 12, 13

Upon the foregoing papers, it is Ordered that respondent's dispositive motion is disposed of as follows:

A judgment, dated July 31, 2009, had been entered against non-party TSI White Plains, Inc. ("TSI") in favor of plaintiff White Plains Plaza Realty, LLC ("WPP") and others[1] in the sum of $683,239.56. This liability had arisen from and in connection with a 2003 MetLife Lease between non-party MetLife as landlord and TSI as tenant. TSI, which is a wholly-owned subsidiary of Town Sports International LLC ("Town Sports"), had operated a sports club at the premises and the subject Lease was to expire in 2018. In connection with the execution of said Lease, Town Sports had executed, on April 1, 2003, a "Guaranty" wherein, up to a maximum liability not exceeding $400,000, it had agreed to guarantee for the term of the Lease full performance thereunder to MetLife, without the requirement of notice of non-payment or non-performance, and that its obligations would not be terminated or in any way affected by landlord MetLife's asserting against TSI any of the rights and remedies reserved to MetLife pursuant to the Lease.

In 2004, plaintiff White Plains Plaza Realty, LLC ("WPPR"), had purchased the subject building from MetLife, and thereupon various leases were assigned to WPPR, including TSI's Lease.

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[1]The other named defendants are Town Sports International, LLC, TSI White Plains City Center, LLC and TSI White Plains, LLC.

Sometime in 2004, TSI had been induced by respondent to relocate its sports club to the then newly developed City Center, and thereupon a new subsidiary, TSI White Plains City Center, LLC ("TSIWP")(f/k/a TSI White Plains City Center, Inc.), had been created. It is alleged that, at this time, TSI had been left inactive, insolvent and unable to pay its debts.

In connection with this relocation and TSIWP's ensuing operation of a sports club at the City Center, respondent and Town Sports had entered into a "Lease and Guaranty Indemnification Agreement" ("Lease Agreement"). Respondent had agreed in said Lease Agreement to "indemnify, defend and hold [Town Sports] harmless against ... any losses and/or liabilities of [TSI] under, pursuant to, or in connection with the MetLife Lease (including any losses and/or liabilities of Tenant under, pursuant to or in connection with the MetLife lease; but not arising out of or in connection with the MetLife Guaranty) from and after the date Tenant vacates the Demised Premises ..." Further, respondent as indemnitor thereunder, had agreed that the guaranty "constitutes a guaranty of payment, and not merely a guaranty of collection."

In 2006, TSI had failed to make the required rent payments to plaintiff pursuant to the MetLife Lease, resulting in plaintiff's formal termination of the Lease, on October 25, 2006. In February, 2007, petitioner commenced the underlying action against TSI and

the other related defendants for damages arising from the breach. As previously noted, a judgment, dated July 31, 2009, in favor of petitioner/plaintiff against respondents/defendants had been entered (Hon. Scheinkman presiding).

Thereafter, by 5-page Letter Agreement, dated January 25, 2010, respondent and three other affiliated entities, and TSI, TSIWP and a related TSI entity, each had acknowledged the July 31, 2009 judgment, and that thereunder TSI has liability to plaintiff in the sum of $683,239.56, plus interest, and that Town Sports had liability to plaintiff on a joint and several liability basis in the sum of $488,767, plus interest, that TSI and Town Sports had "satisfied the Judgment in full by a payment to the plaintiff in the amount of $683,576.50," and that respondent, "without admitting any liability under the Indemnity, ... agrees to hold [TSI] harmless from the Judgment" and "agrees to hold [Town Sports] harmless from a portion of Judgment equal to $400,00 plus interest." The express terms of respondent's payment agreement are thereafter detailed.

Petitioner/plaintiff thereafter had appealed Justice Scheinkman's judgment, and the Appellate Division, on or about December 21, 2010, had granted same to the extent that petitioner/plaintiff had been awarded additional damages and costs against TSI. A judgment in accordance therewith had been entered

by the Clerk of Westchester County, on August 29, 2011. This judgment has remained unsatisfied.

Petitioner since has commenced the instant special proceeding pursuant to CPLR 5227, seeking to have respondent pay the 2011 judgment in the total sum of $900,561.53, together with interest at the statutory rate from August 29, 2011.

Respondent presently is moving to dismiss the petition based upon the documentary evidence and petitioner's having failed to state a viable cause of action. Specifically, respondent argues that it itself owes no debt to petitioner, that the judgment-debtor is TSI, which is not a party to the Indemnification Agreement, that the only "indemnitee" in the Indemnification Agreement is Town Sport, and finally that, even if TSI had been an indemnitee, under the express terms of the Indemnity Agreement, any such obligation by respondent had terminated in 2006 upon petitioner's termination of the underlying Lease with TSI.

Petitioner vigorously opposes the motion, arguing that respondent's arguments are "after-the-fact fabrications belied by the provisions of the Indemnity and [respondent's] undisputed conduct over the course of the nearly eight years since the Indemnity was executed." Petitioner claims that TSI had been an intended beneficiary of the Indemnity, that respondent has explicitly acknowledged and ratified in writings its agreement to

indemnify TSI and, indeed, that respondent actually has partially fulfilled its indemnification obligation by having previously paid the first judgment in the sum of $683,239.56. According to petitioner, respondent's reliance on the termination provision in the Indemnity is misplaced because same had been contingent upon respondent's "timely compliance" with its obligation to "pay promptly when due" all of TSI's rents, tax increase payments, operating increase payments and any and all charges of any nature" due under the MetLife Lease, and that respondent consistently had failed to timely pay in accordance therewith.

It is well-settled that on a motion to dismiss for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3rd Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2nd Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action

can be implied by fair and reasonable intendment. See Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 868 (2nd Dept. 1980); Penato v. George, 52 A.D.2d 939 (2nd Dept. 1976). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claim, is irrelevant to the determination of a pre-disclosure motion to dismiss." Porcelli v. Key Food Stores Co-op., Inc., 44 A.D.3d 1020 (2nd Dept. 2007).

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one. See Guggenheimer v. Ginzburg, supra at 275; Kaufman v. International Business Machines Corp., 97 A.D.2d 925 (3rd Dept. 1983), affd. 61 N.Y.2d 930 (1984); Rappaport v. International Playtex Corporation, 43 A.D.2d 393, 395 (3rd Dept. 1974). Thus where it has been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. See CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2nd Dept. 2009); Biondi v.

Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999), affd. 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1st Dept. 2003).

In order to prevail upon a defense founded upon documentary evidence, the documents relied upon must resolve all of the factual issues as a matter of law and conclusively establish a defense. See Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303 (2000); Ofman v. Katz, 89 A.D.3d 909 (2nd Dept. 2011); Scott v. Bell Atlantic Corp., 282 A.D.2d 180, 183 (1st Dept. 2001); Weiss v. Cuddy & Feder, 200 A.D.2d 665 (2nd Dept. 1994). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity (citation omitted)." See Springer v. Almontaser, 75 A.D.3d 539, 540 (2nd Dept. 2010); see, also Fontanetta v. Doe, 73 A.D.3d 78, 86 (2nd Dept. 2010). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" within the intendment of CPLR 3211 (a)(1)." Granada Condominium III Ass'n. v. Palomino, 78 A.D.3d 996 (2nd Dept. 2010).

CPLR 5227 permits a judgment creditor to commence a special proceeding "against any person who it is shown is or will become indebted to the judgment debtor."

Manifestly, TSI had not been a party to the Indemnification

Agreement between respondent and Town Sports, but that fact alone does not mandate the finding that respondent is not obligated to indemnify TSI. Notwithstanding that indemnity agreements must be "strictly construed to avoid reading into it a duty which the parties did not intend to be assumed," Miranda v. Norstar Building Corp., 79 A.D.3d 42, 50 (3rd Dept. 2010), here, multiple provisions set forth in the Lease and Guaranty Indemnification Agreement, as well as respondent's unrefuted actions, support petitioner's claim that TSI had been an intended direct beneficiary under said Indemnification Agreement, see Edge Mgmt. Consulting, Inc. v. Blank, 25 A.d.3d 364, 368 1st Dept. 2006), lv. to app. dsmd. 7 N.Y.3d 864 (2006), and that respondent is obligated to indemnify TSI with respect to the 2011 judgment in petitioner's favor, and that it therefore properly is named as a respondent in this CPLR 5227 special proceeding.

The best support for finding that TSI had been an intended beneficiary under the Guaranty Indemnification Agreement includes the following provisions of said Agreement, see Polsuk v. CBR Systems, Inc., 2006 WL 2796789 (S.D.N.Y. 2006), none of which, this Court agrees, would have been necessary or otherwise can be viewed as making any sense if TSI had not been an intended direct beneficiary under the Indemnification Agreement: that provision which requires respondent to pay promptly and directly to Town

Sports, for the entirety of the duration of the Indemnification Agreement, all of the rents and other expenses due from TSI under the Lease, that provision which specifically excludes therefrom respondent's obligation to pay for claims against TSI relating to the excessive wear of or damage to the demised premises, that provision which expressly includes respondent's "exclusive right" to exercise all of TSI's rights as tenant under the MetLife Lease, and to use, assign, sublet, terminate and amend the MetLife Lease, and that provision which requires TSI to send respondent copies of every notice, statement and other communication received from petitioner Landlord. Further, the record establishes that respondent, upon execution of the Indemnification Agreement, in fact had paid TSI's rent obligations to Town Sports,[2] that respondent had paid directly to TSI $750,000 for the acquisition of TSI's rights with respect to its obtaining the rights to the demised premises and the improvements located therein, and that respondent in fact had hired and paid for counsel to represent TSI in the underlying litigation and had retained all decision-making with respect thereto,[3] which litigation ultimately had resulted in

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[2]It appears that respondent had paid ½ of the October, 2006 rent through June, 2006, rent.

[3]It is notable that the, April, 2007, Retainer Agreement executed by respondent states that respondents' defenses to the underlying lawsuit "are governed by the Lease and guaranty Agreement, dated as of August 2, 2004," and that "pursuant to the

the 2009 and 2011 judgments in petitioner's favor.

Moreover, the Court further finds that respondent's reliance upon the formal termination of the Lease by petitioner, on October 25, 2006, and the termination language in the Guaranty Indemnification Agreement as a defense herein to be misplaced, as some does not constitute a defense as a matter of law. The Guaranty Indemnification Agreement provides that:

> in the event Tenant and/or indemnitee shall be declared by MetLife to be in monetary default under the MetLife lease, beyond any applicable cure period, then any and all of the [respondent's] CEI Indemnitor's and/or the Cappelli Indemnitor's guarantees, obligations, and responsibilities under and pursuant to this Indemnification Agreement shall thereupon, and without separate action, be terminated, null and void.

However, as petitioner correctly argues, the Guaranty Indemnification Agreement also expressly states that the terms set forth therein are based upon consideration of the "mutual promises and covenants" set forth therein, and that respondent had been obligated to "pay promptly when due and directly to Indemnitee [Town Sports] all the rents ..., and that termination of respondent's indemnification is "conditioned upon [respondent's]

Indemnity, [respondent and others] have agreed to indemnify TSI (as defined below) against the claims asserted in this lawsuit, and to pay the legal fees and related expenses ..."

timely compliance with the foregoing provisions ..." Since respondent has failed to even assert, let alone establish, that it timely had paid its obligation for TSI's rent to Town Sports, it cannot rely upon the termination provision.

Accordingly, respondent has not sustained its burden of establishing entitlement to dismissal of the petition based either upon the documentary evidence or upon petitioner's alleged failure to have stated a viable claim, and respondent's dispositive motion concomitantly is hereby denied.[4]

Within thirty (30) days after the date hereof, respondent shall serve its answer to the petition. Petitioner shall thereafter promptly contact the PLC Part with respect to the scheduling of a conference.

Dated: March , 2012
White Plains, New York

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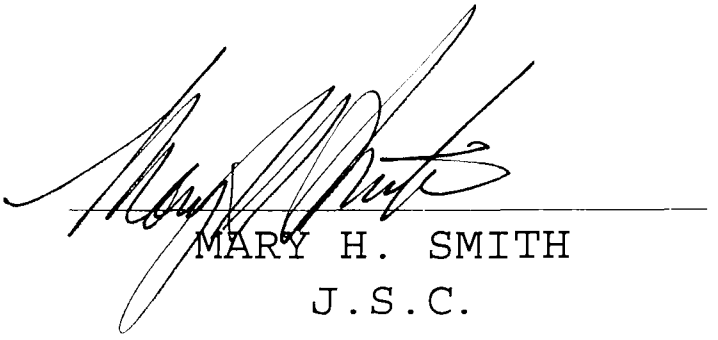
[4]The Court notes respondent's objection to petitioner's use of and reliance upon the deposition transcript of Gerard Buckley which had been obtained in supplementary proceedings conducted by petitioner with respect to the enforcement of the underlying judgment. The Court declines to decide the issue of the propriety of petitioner's reliance upon same since same has not been relied upon by this Court in reaching its Decision denying respondent's motion, which instead is founded upon the factual references and analyses set forth above.



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