

Wing Yip Realty Corp. v Chun Er Pan

2012 NY Slip Op 33528(U)

October 12, 2012

Supreme Court, New York County

Docket Number: 600203/2009

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 600203/2009
WING YIP REALTY CORP.
vs.
PAN, CHUN ER
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 8/31/12
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by Wing Yip Realty Inc. for summary judgment against Chun Er Pan a/k/a Susanna Pan is denied; and it is further

ORDERED that the branch of the motion by Wing Yip Realty Inc. for summary judgment against defendant Red Blue International Art Framing Corp. is granted solely as to the second cause of action, in part, the sixth cause of action, in part, and the ninth cause of action, and the fifth cause of action against defendant Red Blue International Art Framing Corp. is severed and dismissed as moot; and it is further

ORDERED and DECLARED that Red Blue International Art Framing Corp.'s tenancy and occupancy rights were terminated by the termination notice dated December 12, 2008, and that pursuant to such termination notice, Wing Yip Realty Inc. properly terminated any tenancy or occupancy rights of defendant Red Blue International Art Framing Corp. (second cause of action); and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff Wing Yip Realty Inc., and against defendant Red Blue International Art Framing Corp., in the sum of \$9,600.00, plus interest at the statutory rate from and after May 2008 in the sum of to be calculated by the Clerk (sixth cause of action); and it is further

ORDERED that attorneys' fees (ninth cause of action) be assessed against defendant Red Blue International Art Framing Corp. at the time of the trial of the action or disposition of the action; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that Wing Yip Realty Inc. shall serve a copy of this order with notice of entry upon defendants within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/12/12

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
WING YIP REALTY CORP.,

Index No. 600203/2009
Motion Seq. 005

Plaintiff,

-against-

CHUN ER PAN a/k/a SUSANNA PAN and RED BLUE
INTERNATIONAL ART FRAMING CORP.,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover possession of a certain premises, plaintiff Wing Yip Realty Corp. (“Wing Yip Realty”) moves for summary judgment on its first through seventh, and ninth causes of action, and a hearing on damages on the seventh and ninth causes of action.

*Factual Background*¹

It is alleged that on April 21, 1992, Wing Yip Realty purchased a building located at 65 Mott Street, New York, New York (the “Building”). The President of Wing Yip Realty and one of its shareholders, Harry Lew (“Lew”), and his wife Kay, operated a pharmacy on the first floor (“premises”) of the Building.

As to the pharmacy, Lew owned 40% of the shares of the pharmacy, and his daughters Carol, Mary and Karen owned the remaining 60% of the shares.

Defendant Chun Er Pan a/k/a Susanna Pan (“Pan” or “defendant”) married Lew in November 2000 after Kay passed away, and began working in the pharmacy in October 2005.

Thereafter, on May 18, 2008, a special shareholders meeting was held, in which Wing

¹ The Factual Background is taken from the Complaint.

Yip Realty elected Carol as President, March as Vice-President, and Karen secretary-treasurer. By shareholder agreement dated May 27, 2008, Lew transferred 22% of his shares in the Wing Yip Realty, as well as his shares in the pharmacy, to his three daughters.

Between May and June 2008, Wing Yip Realty engaged in negotiations with Pan for a six-year lease for the first floor premises to operate a gift shop, at the rental rate of \$6,000.00 per month, 20% payment of the Building's real estate taxes, and \$100.00 per month for water and sewer charges (the "Proposed Lease"). The proposed lease was never executed.

Due to Lew's declining health, and at Lew's request, his daughters closed the pharmacy and removed its inventory by June 18, 2008, and on June 20, 2008, Pan began operating the gift shop in the absence of any executed lease. Two days later, Lew died.

After Lew died, Wing Yip Realty ceased negotiating the proposed lease with Pan and did not accept rent from Pan for the gift shop.

Thereafter, in September 2008, Pan (through her counsel) presented a purported 20-year lease, dated January 2008, for the ground floor and basement of the Building, to commence on September 2008 at the rental rate of \$2,400 per month (the "Purported January Lease"). Plaintiff alleges that Lew was not considering closing the pharmacy back in January 2008, and Lew's purported signature on behalf of Wing Yip Realty does not appear to be his. Also, it is unlikely that Lew would have leased the basement to Pan, since the basement was already leased to Pan's brother's company, defendant Red Blue International Art Framing Corp. ("Red Blue").² Pan then advised that she would sign the Proposed Lease, but with a shorter lease term and for a higher

² Pan's brother Chun Hua Pan is the President and sole shareholder of Red Bull. Red Bull's lease, dated December 30, 2004, is for a term ending December 31, 2010 at the monthly rental rate of \$1,200.00. Thus, Red Bull's lease expired by its terms during the pendency of this action.

rent amount, if the real-estate taxes provision was removed.

On November 21, 2008, Wing Yip Realty served a 30-day notice upon Pan to terminate her tenancy and occupancy. Wing Yip Realty also served a notice of default upon Red Blue (the "Notice of Default") for failure to pay rent in the amount of \$56,400. Based on Red Blue failure to cure, Wing Yip Realty served a termination notice upon Red Blue, effective December 27, 2008.

As a result, Wing Yip Realty alleges causes of action for declaratory relief, ejectment, and use and occupancy against Pan and Red Blue, rent and attorneys' fees against Red Blue, and fraud and trespassing against Pan.

In support of summary judgment, Wing Yip Realty argues that Pan's self-serving, unsupported, and contradictory deposition testimony (even contradicted by her nephew, Roy Pan), fails to show that the Purported January Lease, on which Pan relies was signed by Lew. Although Pan claims that she had in her possession a fully executed copy of the Purported January Lease since May 2008, it is undisputed that she engaged in protracted negotiations with Wing Yip Realty and was willing to enter into a less favorable lease in September 2008, and waited three months to present the Purported January Lease. Even after presenting the Purported January Lease, Pan continued to offer to execute the Proposed Lease (which had a shorter term and higher monthly rent). Wing Yip Realty argues that it strains credulity that defendant would undertake negotiations with Lew's daughters over the Proposed June Lease, if she already had a fully executed lease for the same premises.

Given that Lew asked his daughters to enter into the Proposed Lease with Pan, who hired counsel to draft the Proposed Lease, and Pan even testified that Lew intended for her to sign the

Proposed Lease, it is implausible that Lew signed the Purported January Lease. And, since the basement referred to the Purported January Lease was already occupied by Red Blue, and Red Blue was entitled to occupy the basement until December 2010, it would have been illogical for Lew to contemporaneously demise such space that was already occupied to the defendant. The Proposed Lease was dated in January 2008, at a time when the premises was occupied by the pharmacy, and Lew was not even considering closing the pharmacy that defendant testified Lew loved. Pan testified that Lew had no intention of closing the pharmacy until May 2008. And, the signature on the Purported January Lease does not look anything like Lew's signature on checks he wrote in January through April 2008. Even Roy denied Pan's testimony that in the hospital in May, Lew told Roy to take her back to the pharmacy to pick up the Purported January Lease. Roy testified that he never saw the Purported January Lease. Defendant also testified that she forged Lew's signature on a check made out to him and received from Citibank after he passed away. Defendant's testimony is also internally inconsistent and should be disregarded.

Caselaw permits the Court to award summary judgment in Wing Yip Realty's favor because the defense is based on claims that are implausible, incredible, conclusory and/or self-serving. Therefore, Wing Yip Realty is entitled to a judgment declaring that (1) Wing Yip Realty never consented to the term of, and did not execute, the Purported January Lease, (2) the Purported January Lease is a fraud, and (3) Wing Yip Realty terminated Pan's occupancy rights, if any, for the premises (first cause of action). Wing Yip Realty is also entitled to summary judgment on its (1) fourth cause of action for \$63,000 plus interest based on defendant's failure to pay use and occupancy from June 2008 through December 2008, pursuant to this Court's August 3, 2009 order setting the rate at \$9,000 per month; (2) seventh cause of action for fraud,

based on defendant's presentment of the fraudulent Purported January Lease; (3) the second, fifth, sixth and ninth causes of action (*i.e.*, money judgment and possession) against Red Blue based on Red Blue's failure to pay rent or use and occupancy since January 1, 2005, refusal to vacate the basement pursuant to the termination notice, and termination of its lease by its own terms.

In opposition, defendant attests that in early 2008, Lew became very ill, which was the first time he considered the future of the pharmacy should he die. He then intended to give his daughters ownership of Wing Yip Realty and for defendant to receive use of the premises to operate the gift shop. However, Lew recovered and the unsigned Purported January Lease was filed away. Then when Lew became ill again in April 2008, he executed a will bequeathing his shares in Wing Yip Realty to his daughters. However, as he became more ill, he changed his mind and gave in to his daughters demand to transfer ownership of Wing Yip Realty to them immediately. Lew asked her to bring the Purported January Lease to the hospital, and they each signed it in May 2008. However, because he was concerned about his daughters' reaction to it (as they did not like her), he told defendant that he would instruct them to sign a lease to her for six years at \$6,000 per month.

After Lew passed away, the Proposed Lease was presented to her, but because it contained an additional requirement that she pay a portion of the real estate taxes, she refused to sign it as contrary to what she believed to be Lew's intent. Therefore, although it is true that defendant would have signed the Proposed Lease, Wing Yip Realty ignores defendant's testimony that she and Lew signed the Purported January Lease in May 2008, when his health deteriorated sharply, and that the Purported January Lease is indeed a valid lease.

Defendant points out that although Lew's daughters later challenged Lew's will on the ground that he was of unsound mind in April 2008, they are "perfectly happy" with their father's *inter vivos* transfer of the stock in May 2008.

And while it is true that in May 2008, Red Blue occupied the basement, Wing Yip Realty should not have issue with the fact that the Purported January Lease signed in May 2008 was intended to supercede Red Bull's lease just like the Proposed Lease was intended to do when presented by Lew's daughters in June 2008.

Lew's hand shook when he signed the Purported January Lease in May 2008, as also reflected in corporate documents, *i.e.*, waiver of notice of meeting and stock transfer to his daughters, that he signed in the hospital May 2008. Wing Yip Realty should utilize a hand-writing expert to challenge Lew's signature.

And, Roy's inability to recall certain events does not necessarily mean he contradicted defendant's testimony.

Further, Lew's daughter Carol took over the management of Wing Yip Realty in April 2008, and had she asked Lew about Red Bull's nonpayment of rent, she would have discovered that Lew waived such rent since Red Bull was purchasing merchandise for defendant's gift shop. And, there is no rent statement, invoice, or rent demand from Wing Yip Realty to Red Blue prior to his death. The November notice signed by Lew's daughter is based on her belief that Red Blue owes four years of rent, but there is no record of such amount ever having been invoiced or demanded.

As to use and occupancy, the court order only required defendant to pay beginning in January 2009, and not from June 2008 as alleged in the fourth cause of action. If the court

declares the Purported January Lease invalid, then plaintiff is entitled to use and occupancy from June 2008 through December 2008 at the court-determined rate. However, if after trial, said lease is deemed valid, defendant would be entitled to a refund.

In reply, Wing Yip Realty argues that this action was necessitated because defendant attempted to enforce a “sweetheart” lease that appeared to predate the lease that the parties had been attempting to negotiate for months. Defendant was evasive during her deposition, and failed to rehabilitate the plausibility of her position.

Defendant does not explain why Lew did not prepare a new lease when she and Lew agreed for her to have a “shorter lease with a higher rent” and when Lew told her he would instruct his daughters to give her a six-year lease for \$6,000.00. It would have been easier for Lew to simply strike and amend the terms of the Purported January Lease. Thus, by defendant’s concession, there was no meeting of the minds regarding the Purported January Lease. Further, defendant’s version of event prove that the Purported January Lease was collusive, in that they agreed to deprive Wing Yip Realty the right to lease the premises at a prevailing rate. It seems the sole purpose of the Purported January Lease was to penalize Wing Yip Realty and Lew’s daughters if they did not enter into a six-year, \$6,000.00 per month lease with defendant, and thus, such lease cannot be enforced.

Even accepting the two terms of the lease defendant claims Lew desired (*i.e.*, six-year term and \$6,000.00), such terms were satisfied since Wing Yip Realty offered these terms to defendant.

Defendant cannot establish that the Purported January Lease was prepared in January 2008 or signed in May 2008. And, contrary to defendant’s argument, the Proposed Lease would

have only affected the first floor premises, and not have superceded Red Bull's lease for the basement. Roy did not fail to recall, but denied defendant's version of events. Further, her forgery of Lew's signature on the check from Citibank further discredits her claim.

Defendant also failed to address the seventh cause of action for fraud.

And, defendant cannot now claim that Wing Yip Realty waived the rent due from Red Blue, when she testified that she had not personal knowledge of the circumstances of Red Blue's lease. In any case, Red Blue's lease contained a "no waiver" clause and defendant testified that she observed her brother pay rent "each time." Therefore, Red Blue remained in possession since its lease term expired, plaintiff is entitled to a declaratory and money judgment against it.

Discussion

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Here, Wing Yip Realty’s motion is premised primarily on the notion that this Court may assess and weigh the testimony of defendant and find that she failed to show that the Purported January Lease was a valid, enforceable lease signed by Lew. However, as the movant on a

motion for summary judgment, Wing Yip Realty bears the burden of establishing that such lease was forged. Wing Yip Realty failed to submit any expert affidavit in this regard, and the affidavit of Lew's daughter concerning the alleged forgery is insufficient (*Abrons v 149 Fifth Ave. Corp.*, 45 AD3d 384, 845 NYS2d 299 [1st Dept 2007] (noting that "self-serving statements that the signature does not appear to be genuine are insufficient to raise a forgery issue"); *Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 786 NYS2d 458 [1st Dept 2004] ("the affidavit of the decedent's mother, stating that the signature on the rider was not that of the decedent must be viewed as conclusory, self-serving and wholly insufficient . . .")). In any event, in opposition, defendant submitted documentation supporting her claim that Lew's signature on the Purported January Lease is similar to documents he signed around the same time the Purported January Lease was signed. Further, defendant's explanation in her affidavit, supported in part by her testimony at her deposition, raise an issue of fact as to whether Lew in fact signed the Purported January Lease, thereby entitling her to occupy the subject premises. The issue of whether the Purported January Lease was forged, and thus a fraud, must be assessed by a trier of fact based on the credibility of the witnesses and expert witnesses.

Further, Wing Yip Realty's claim that Lew was not even considering closing the pharmacy at the time the Purported January Lease is dated speaks to his intent, which is another issue to be resolved by a trier of fact. Both Lew's daughters and defendant have conflicting accounts of what Lew's intent was during the relevant time periods, thereby presenting various issues to be resolved at trial.

And, that defendant's brother's testimony is at odds with defendant's is no basis for this Court to make a credibility finding. Discrepancies, if any, in this regard must be resolved by a

trier of fact.

Further, Wing Yip Realty failed to establish, as a matter of law, its claim, raised for the first time in reply, that the Purported January Lease was collusive and thus warrants judgment in its favor. As the First Department explained in *Dannasch v Bifulco* (184 AD2d 415, 417 [1st Dept 1992]): “The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion.”

And, although defendant did not address the fraud cause of action, to the extent the fraud claim is premised on the claim that the Purported January Lease was a fraud, summary judgment is unwarranted.

Therefore, summary judgment in favor of Wing Yip Realty against defendant on the first, second, third, fourth and seventh causes of action is unwarranted.

As to Red Bull, Wing Yip Realty's Realty established its entitlement to a declaratory judgment (second cause of action), in part, and an ejectment (fifth cause of action), which are premised on the termination notice as well as claims that Red Blue failed to make payments during the course of its tenancy commencing in 2005. The record indicates that Carol, Lew's daughter, began helping with the management of Wing Yip Realty in April 2008, including handling the books and records and collecting rent (Aff. In Opp. ¶41; Lew EBT, p. 15), and Lew transferred 22% of his shares in the Wing Yip Realty to his three daughters on May 27, 2008.

However, there is no indication that any of his three daughter has *personal knowledge* of whether Red Bull tendered payments prior until April 2008. Further, Wing Yip Realty failed to provide any documentation in support of its claims that Red Bull failed to pay rent during the

period prior to until April 2008.

Therefore, to the extent Wing Yip Realty, *via* Lew's daughter Carol, states that Red Bull failed to tender rent from May 2008 through December 2008, summary judgment is warranted. And, the defense based on waiver of rent is unsupported by the express terms of the "No Waiver, illegality" provision of Red Bull's lease, and the testimony by defendant that she observed Red Bull tender rent (Defendant EBT, p. 182-186). Given that Wing Yip Realty made a *prima facie* showing solely in regard to Red Bull's failure to pay rent from May 2008 through December 2008,³ Wing Yip Realty is also entitled to attorneys' fees (ninth cause of action) stemming from Red Bull's alleged failure to pay such rent, to be assessed after disposition of the remaining claims in this action.

Further, given that Red Bull's lease expired by terms in December 2008, Wing Yip Realty is entitled to a declaration that Red Blue's tenancy is terminated and expired.⁴

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by Wing Yip Realty Inc. for summary judgment against Chun Er Pan a/k/a Susanna Pan is denied; and it is further

ORDERED that the branch of the motion by Wing Yip Realty Inc. for summary judgment against defendant Red Blue International Art Framing Corp. is granted solely as to the second cause of action, in part, the sixth cause of action, in part, and the ninth cause of action, and the

³ It is noted that Wing Yip Realty acknowledges its receipt of use and occupancy payments from Red Bull from January 2009.

⁴ Since Red Bull's tenancy expired by its terms, and there is no indication that Red Bull is occupying the basement, the request for an award ejecting Red Bull is denied, as moot.

fifth cause of action against defendant Red Blue International Art Framing Corp. is severed and dismissed as moot; and it is further

ORDERED and DECLARED that Red Blue International Art Framing Corp.'s tenancy and occupancy rights were terminated by the termination notice dated December 12, 2008, and that pursuant to such termination notice, Wing Yip Realty Inc. properly terminated any tenancy or occupancy rights of defendant Red Blue International Art Framing Corp. (second cause of action); and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff Wing Yip Realty Inc., and against defendant Red Blue International Art Framing Corp., in the sum of \$9,600.00, plus interest at the statutory rate from and after May 2008 in the sum of _____ to be calculated by the Clerk (sixth cause of action); and it is further


ORDERED that attorneys' fees (ninth cause of action) be assessed against defendant Red Blue International Art Framing Corp. at the time of the trial of the action or disposition of the action; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that Wing Yip Realty Inc. shall serve a copy of this order with notice of entry upon defendants within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 12, 2012



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD