

**Metro NY Dealer Stations, LLC v Second Ave. Mgt.
Ltd.**

2015 NY Slip Op 30362(U)

March 16, 2015

Supreme Court, New York County

Docket Number: 150796/14

Judge: Donna M. Mills

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----- X
METRO NY DEALER STATIONS, LLC,

Plaintiff,

Index No. 150796/14

- against-

SECOND AVENUE MANAGEMENT LTD, and
ALI CEYLON,

Defendants.

----- X

DONNA MILLS, J.:

Plaintiff Metro NY Dealer Stations, LLC (plaintiff) moves, pursuant to CPLR 3212, for an order granting summary judgment on the causes of action for conversion and breach of contract.

Defendants Second Avenue Management Ltd and Ali Ceylon (defendants) cross-move, pursuant to CPLR 3212, for an order granting summary judgment on their claims against plaintiff.

Pursuant to a 10 year retail facility lease agreement, plaintiff leased a gasoline station to Second Avenue Management Ltd as tenant. Ali Ceylon personally guaranteed the financial obligations of Second Avenue Management Ltd. This action seeks to recover damages for breach of contract (first and third causes of action) and conversion (second cause of action).

Defendants' answer alleges that they leased the premises with the intent of converting the said premises to a 7-Eleven franchise, and that plaintiff was aware of defendant's intent. It is alleged that defendants waited three years for plaintiff to convert into a 7-Eleven, and that

plaintiff did not make a good-faith effort to procure the franchise, forcing a constructive eviction of defendants from the premises. Defendants have counterclaimed for: a rent overcharge (first counterclaim); the security deposit (second counterclaim); unjust enrichment (third and fifth counterclaims); unpaid commissions (fourth counterclaim); lost future profits (sixth counterclaim); and promissory estoppel (seventh counterclaim).

In support of its motion for summary judgment, plaintiff's counsel makes the following allegations. By withholding monies due to plaintiff, defendants were guilty of conversion. Defendants are liable to plaintiff for breach of contract to deposit daily sum due from the sale of gasoline and products provided by plaintiff into an account designated by plaintiff. Defendants are liable to plaintiff for breach of the contract to make repairs.

In opposition to plaintiff's motion, and in support of their cross motion for summary judgment, defendants' counsel makes the following allegations. Plaintiff violated the agreement by unilaterally and maliciously raising both the rent, and the construction costs, in order to evict defendants and prevent establishing a 7-Eleven. Defendants are entitled to return of their security deposit because there was a walk-through establishing that defendants did not cause any physical damage to the property. Defendants argue that plaintiff's motion is premature because there has been no preliminary conference and no discovery.

In reply, plaintiff argues that the cross motion must be denied because it is only supported by an attorney's affirmation. Plaintiff attaches an affidavit from its employee, Nadeem Shiekh, alleging that there was no walk-through, and that his visit to the premises was for the sole purpose of picking up the key.

"[T]he proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Both the motion and the cross motion must be denied for failure to make a prima facie showing of entitlement to judgment as a matter of law. Neither the motion, nor the cross motion is supported by an affidavit from someone with personal knowledge of the facts. While an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment (*Olan v Farrell Lines*, 64 NY2d 1092 [1985]), an attorney's assertions, unsupported by any factual proof whatsoever, are of no probative value (*Zuckerman*, 49 NY2d at 563).

When one looks through the motion papers for factual proof, one finds that there is no deposition testimony, the complaint is not verified by plaintiff (*A & J Concrete Corp. v Arker*, 54 NY2d 870, 872 [1981]), and the documents submitted in the form of the contracts have no

bearing on whether or not there was either a breach of contract or conversion by defendants. The court cannot simply accept as true the factual recitations from counsel. The parties should have made more effective presentations and devoted less attention to each other's shortcomings.

Moreover, the papers present numerous sharply contested versions of the facts. For example was there a walk-through, did plaintiff interfere with the obtaining of the 7-Eleven franchise, and did defendants exercise dominion over plaintiff's property in derogation of plaintiff's rights?

Obviously, there should be a preliminary conference and discovery.

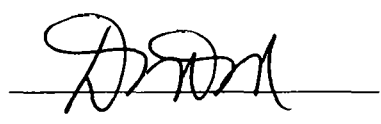
Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are both denied, and it is further

ORDERED that the parties appear in Room 574, 111 Centre Street, for a preliminary conference on April 10, 2015 at 10:00 a.m. p.m.

Dated: 3/16/15

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.