

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SPICY LADIES BOUTIQUE &	§
JEWELRY, INC., and MOSHE NIV,	§ No. 17, 2009
jointly and severally,	§
	§
Defendants Below-	§ Court Below—Superior Court
Appellants,	§ of the State of Delaware
	§ in and for New Castle County
v.	§ C.A. No. 07C-12-015
	§
627 MARKET LLC, a Delaware	§
Limited Liability Company,	§
	§
Plaintiff Below-	§
Appellee.	§

Submitted: November 13, 2009

Decided: December 14, 2009

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

**ORDER**

This 14<sup>th</sup> day of December 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Moshe Niv, filed an appeal from the Superior Court's December 18, 2008 order granting the motion of the plaintiff-appellee, 627 Market LLC, for summary judgment. 627 Market has moved to

affirm the Superior Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

(2) The record before us reflects that, in December 2007, 627 Market filed an action in the Superior Court against Niv and Spicy Ladies Boutique & Jewelry, Inc., jointly and severally, alleging that they were in breach of their lease agreement. In February 2008, a default judgment was entered against Spicy Ladies. In November 2008, 627 Market filed a motion pursuant to Superior Court Civil Rule 56 requesting that summary judgment be entered against Niv individually because he signed the lease under the line "tenant/guarantor".

(3) The summary judgment motion was scheduled for a hearing on December 18, 2008. The attorney for 627 Market appeared at the hearing. Niv, whose counsel had withdrawn from representing him several months earlier, did not file a response to the motion or appear at the hearing. Noting that Niv had approximately four months to obtain new counsel and that he had been properly served with notice of the motion and hearing, the Superior Court granted 627 Market's motion for summary judgment. Niv's "motion for adjournment," which was filed two days prior to the hearing and which was, in essence, a motion for a continuance, was denied as moot.

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<sup>1</sup> Supr. Ct. R. 25(a).

(4) We review the Superior Court's entry of summary judgment *de novo*, applying the same standard as the Superior Court.<sup>2</sup> As such, we must determine whether the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>3</sup> Once the moving party has carried his burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, the burden is then on the non-moving party to demonstrate the existence of a dispute of material fact.<sup>4</sup>

(5) Niv argues in his opening brief that the Superior Court abused its discretion in granting the motion for summary judgment because, as a substantive legal matter, he is not individually responsible for any monies due under the lease agreement. However, that argument was never presented to the Superior Court in the first instance because Niv failed to either file a response to the summary judgment motion or appear for the scheduled hearing on the motion. We have carefully reviewed the record before us, including the transcript of the December 18, 2008 hearing. We conclude that, in light of Niv's dilatory conduct, there was no error or abuse of discretion on the part of the Superior Court in granting 627 Market's motion for summary judgment in Niv's absence.<sup>5</sup>

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<sup>2</sup> *Berns v. Doan*, 961 A.2d 506, 510 (Del. 2008).

<sup>3</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>4</sup> *Id.* at 681.

<sup>5</sup> We note that the Superior Court docket reflects that, in June 2009, several months after filing the instant appeal, Niv filed a motion to vacate the Superior Court's judgment, which the Superior Court will hear after the mandate issues in the instant appeal.

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice