Sovereign Bank v American Elite Props. Inc.
2011 NY Slip Op 32248(U)
August 12, 2011
Sup Ct, NY County
Docket Number: 100100/2010
Judge: Paul Wooten
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SCANNED ON 8/18/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

SOVEREIGN BANK,

Plaintiff,

- against-

AMERICAN ELITE PROPERTIES INC.; ALEX SHPIGEL; RACHEL L. ARFA; ROTOT REALTY SERVICES LLC; OCELOT CAPITAL GROUP, LLC; and AMELITE MANAGEMENT SERVICES, INC.,

Defendants.

INDEX NO. 100100/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

FILED

AUG 17 2011

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 8, were read on this motion for summary judgment by plaintiff, pursuant to CPLR 3212; and cross-motion for summary judgment by defendants American Elite Properties Inc., Rachel Arfa, and Alex Sphigel, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3
Answering Affidavits — Exhibits (Memo)	4,5
Replying Affidavits (Reply Memo)	6,7,8

Cross-Motion: ☒ Yes ☐ No

This is a breach of contract action by plaintiff Sovereign Bank ("Sovereign" or "plaintiff") against defendants American Elite Properties Inc. ("AEP"); Alex Shpigel ("Shpigel"); Rachel L. Arfa ("Arfa"); Rotot Realty Services LLC ("Rotot"); Ocelot Capital Group, LLC ("Ocelot"); and Amelite Management Services, Inc. ("Amelite") (collectively "defendants"), to recover sums that are allegedly owed under various agreements and guaranties pertaining to the lease of office equipment and furniture. The agreements were executed between AEP and Sovereign's predecessor-in-interest, Parimist Funding Corp. ("Parimist"), in 2002 and 2005. Defendants are AEP and various guarantors that executed personal and corporate guaranties in connection with the agreements. Discovery is not complete and the Note of Issue has not been filed.

Before the Court is Sovereign's motion for summary judgment, pursuant to CPLR 3212, seeking judgment in its favor and against defendants in the sum of $86,318.40, plus interest. Defendants AEP, Arfa, and Sphigel (collectively "the AEP defendants") oppose the motion and cross-move for summary judgment dismissing all claims against them, pursuant to CPLR 3212, on the basis that Parimist released them from liability under a General Release in 2006. The AEP defendants also seek leave to file an amended answer, pursuant to CPLR 3025(b), to raise the affirmative defense of release. Defendants Rotot, Ocelot, and Amelite have not responded. Sovereign has filed a reply and opposition to the cross-motion.

BACKGROUND

In support of its summary judgment motion, Sovereign submits, *inter alia*, an affidavit of Maureen Fitzgerald, a Vice-President for Sovereign; and copies of the relevant agreements and guaranties. In opposition and in support of their cross-motion, the AEP defendants submit, *inter alia*, Arfa's affidavit; the General Release; a Bill of Sale; and a proposed amended answer. In opposition to the cross-motion, Sovereign submits an affidavit of Howard Lebowitz, the Vice-President of Parimist. The following facts are undisputed.

A. The Agreements and Guaranties

Sovereign is a bank authorized to do business in the State of New York. Shpigel and Arfa are individuals who are husband and wife. Arfa is the President of AEP, a corporation owned wholly by Arfa. Rotot and Ocelot are limited liability companies owned wholly by Arfa and Shpigel. Arfa and Sphigel are also the 60% beneficial owners of Amelite, a corporation that is currently being managed by a court-appointed Temporary Receiver.

On November 22, 2002, AEP executed and delivered to Parimist a Master Equipment Lease ("2002 Master Equipment Lease") establishing the terms of an equipment lease for various office equipment and furniture. The terms of the 2002 Master Equipment Lease required AEP to make monthly payments to Parimist as set forth in a related schedule. The

2002 Master Equipment Lease indicated, on its face, that it pertained to "Master Equipment Lease No. 728-177."

On the same date, November 22, 2002, Arfa and Shpigel each executed a personal Guaranty (collectively "the 2002 Guaranties") in favor of Parimist. Under the 2002 Guaranties, Arfa and Shpigel unconditionally guaranteed payment of AEP's obligations to Parimist under the 2002 Master Equipment Lease.

In addition to the 2002 Master Equipment Lease, on December 21, 2005, AEP executed a Lease Schedule ("2005 Schedule") with Parimist, which was attached to and made a part of the 2002 Master Equipment Lease. Under the terms of the 2005 Schedule, AEP was required to make monthly payments to Parimist in the amount of $3,071.11 for a term of 48 months. The face of the document indicated that it pertained to "Lease Schedule No. 728-177-102."

Also on December 21, 2005, AEP executed a Note & Security Agreement ("2005 Note") with Parimist, pursuant to which Parimist advanced $121,199.00 to AEP and obtained a security interest in certain property. AEP agreed to make monthly payments to Parimist in the amount of $3,094.49 for a term of 48 months. Schedule C to the 2005 Note indicated that it pertained to "Note & Security Agreement Number NS728-178-100."

Additionally, on December 21, 2005, Arfa, Shpigel, Rotot, Ocelot, and Amelite each executed a Guaranty (collectively "the 2005 Guaranties"), each of which unconditionally guaranteed payment to Parimist of the obligations under the 2002 Master Equipment Lease and 2005 Note. The 2005 Guaranties indicated that they pertained to "Master Equipment Lease Number 727-177" and to "Note and Security Agreement Number NS728-178-100."

Parimist has assigned all of its rights and obligations under these agreements and guarantees to Sovereign.

B. The Alleged Default

In her affidavit in support of Sovereign's summary judgment motion, Fitzgerald alleges

that AEP has defaulted under the 2002 Master Equipment Lease, 2005 Schedule, and 2005 Note by failing to make monthly payments as of October 2008. As a result of AEP's alleged default, Sovereign has elected to accelerate and demand payment of all amounts due and owing, which it claims total $86,318.40.

Arfa asserts in her opposing affidavit that AEP and Amelite stopped making payments under the 2005 Schedule and the 2005 Note towards the end of 2008 "with about one year's worth of payments remaining" (Arfa Affidavit, at ¶ 10). She claims that the unpaid balance owed to Parimist is about $77,000, not $86,318.40 as alleged in the complaint.

Arfa further alleges that in January 2009, pursuant to section 17 of the 2005 Note, AEP tendered the equipment that was the subject of the 2005 Schedule and 2005 Note to Parimist.[1] Parimist accepted the tender and reclaimed possession of the equipment. AEP has repeatedly demanded that Parimist and/or Sovereign account for what happened to the equipment, but they have purportedly not responded to the demands.

C. The General Release

The AEP defendants allege that the 2002 Master Equipment Lease expired in December 2005 and was not renewed or replaced with another Master Equipment Lease. In February 2006, AEP allegedly exercised an option to purchase equipment that Parimist leased

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[1]Section 17 of the 2005 Note provided that in the event of AEP's default, at Paramist's option:

"the entire unpaid sum payable for the balance of the term hereof shall be at once due and payable and [Paramist] may, without demand or legal process, terminate this agreement and enter upon the premises where the Equipment is located, take possession of and remove same, and exercise any one of the following rights and remedies, without liability to [AEP] therefore and without affecting [AEP's] obligations hereunder: (i) sell, lease or otherwise dispose of the Equipment or any part thereof at one or more public or private sales, leases or other dispositions, at wholesale or retail, for such consideration, on such terms for cash or on credit as [Parimist] may deem advisable. . . ; or (ii) retain the Equipment or any part thereof, crediting [AEP] with the reasonable value thereof; or (iii) pursue any other remedy granted by any existing or future document executed by [AEP] or by law. . . . Any amount due [Parimist] under this paragraph shall be deemed liquidated damages for the breach hereof and not a penalty. All rights and remedies of [Paramist] shall be cumulative and not alternative. [Parimist's] failure to exercise or delay in exercising any right or remedy shall not be construed as a waiver thereof, nor shall a waiver on one occasion be construed to bar the exercise of any right or remedy on a future occasion."

to AEP between November 2002 and December 2005. They negotiated a purchase price of $5,000, and a Bill of Sale between AEP and Parimist was signed by Lebowitz on May 3, 2006. On the same date, May 3, 2006, Lebowitz signed a General Release with respect to the AEP defendants, which provided in full:

> "TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN KNOW THAT PARIMIST FUNDING CORP., a corporation organized under the laws of the State of New York, as RELEASOR, in consideration of the sum of $5,000.00 received from AMERICAN ELITE PROPERTIES INC. receipt whereof is hereby acknowledged, releases and discharges AMERICAN ELITE PROPERTIES INC., RACHEL ARFA and ALEX SHPIGEL as RELEASEE, RELEASEE'S heirs, executors, administrators, successors and assigns from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR'S successors and assigns ever had, now have or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE.
>
> REFERENCE TO LEASE NUMBER 728-177-101, DATED NOVEMBER 22, 2002" (Arfa Affidavit, Ex. 2).

According to Arfa's affidavit, the AEP defendants were released from all of their obligations to Parimist by the General Release because Parimist was satisfied that the assets of Ocelot, Rotot, and Amelite were significant enough to guarantee AEP's obligations, and additional guarantees from Arfa and Sphigel were no longer necessary.

Sovereign, however, submits Lebowitz's affidavit wherein Lebowitz states that he signed the General Release on behalf of Parimist because all business under lease number 728-177-101 was concluded. Lebowitz notes that the General Release specifically referenced number 728-177-101, and he claims that it was the intention of all involved that the General Release would be limited to that lease number. Lebowitz also asserts that he did not intend to release the AEP defendants from other leases or agreements held with Parimist, and specifically, that

he did not intend for the General Release to relieve the AEP defendants from "any obligations under schedule nos. 728-177-100 and 728-177-102, which are separate transactions from lease no. 728-177-101" (Lebowitz Affidavit, at ¶ 3).

DISCUSSION

Sovereign contends that it is entitled to judgment as a matter of law based on its submissions of the respective agreements and guaranties, coupled with proof of nonpayment. It argues that there are no material factual disputes regarding whether the 2002 Master Equipment Lease, 2005 Schedule, and 2005 Note obligated AEP to make monthly payments in the amounts of $3,071.11 and $3,094.49, or whether Shpigel, Arfa, Rotot, Ocelot, and Amelite unconditionally guaranteed the payments pursuant to the 2002 Guaranties and 2005 Guaranties. Sovereign also argues that Fitzgerald's affidavit establishes that defendants have failed to make payments as of October 2008.

The AEP defendants argue that Sovereign's motion should be denied because there are triable issues of fact with respect to the issues of both liability and damages. As to liability, they argue that there are questions of fact concerning whether the 2002 Master Equipment Lease was extinguished in 2006 when AEP allegedly purchased the equipment that was subject to the 2002 Master Equipment Lease, and factual questions as to whether Parimist failed to sufficiently document the parties' respective obligations with respect to the equipment that was the subject of the 2005 Schedule and the 2005 Note. With regard to damages, they challenge the amount that is allegedly owed, as well as claim that there are factual disputes concerning whether Parimist and/or Sovereign satisfied their duty to mitigate damages.

The AEP defendants also cross-move for summary judgment dismissing the complaint on the ground that the General Release released them from liability as a matter of law, and they seek leave to amend their answer to raise the affirmative defense of release. Sovereign opposes amendment of the pleadings on the basis that it would be futile because the General

Release does not pertain to any of the agreements at issue here since Lebowitz's affidavit and the General Release itself indicate that the General Release pertains only to lease number 728-177-101.

As a threshold matter, the Court grants the AEP defendants' request for leave to amend their answer to include the affirmative defense of release. The decision whether to permit amendment of the pleadings is committed to the discretion of the Court, and leave to amend shall be freely granted absent a showing of prejudice or unfair surprise (*see McCaskey, Davies & Assoc., Inc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]). Here, amendment would result in no significant prejudice or undue surprise, as discovery has not yet commenced nor has a preliminary conference been held (*see id.*; *Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]; *Muhlstock v Cole*, 245 AD2d 55, 59 [1st Dept 1997]; *A.J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1st Dept 1983]). The proposed amended answer submitted by the AEP defendants will, accordingly, be deemed served.

Turning to the merits, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution"

(*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Court finds that Sovereign has established its entitlement to judgment as a matter of law against defendants with respect to the issue of liability only. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Similarly, a plaintiff establishes a prima facie claim on a guaranty by demonstrating the existence of the guaranty, a default on the underlying obligation secured by the guaranty, and the defendant's failure to honor the guaranty (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]).

Here, the execution and validity of the 2002 Master Equipment Lease, 2005 Schedule, 2005 Note, 2002 Guaranties, and 2005 Guaranties is undisputed. Sovereign has also submitted Fitzgerald's affidavit establishing nonpayment of the respective obligations under these agreements, and indeed, the AEP defendants have expressly conceded that they stopped making payments towards the end of 2008 with about a year's worth of payments still due. This evidence is sufficient to establish Sovereign's prima facie entitlement to judgment as a matter of law on the issue of liability (*see Bank of America, N.A. v Solow*, 59 AD3d 304, 304 [1st Dept 2009]; *Raven Elevator Corp. v Finkelstein*, 223 AD2d 378, 378 [1st Dept 1996]; *Castle*

Oil Corp. v Bokhari, 52 AD3d 762, 762 [2d Dept 2008]).

The burden therefore shifts to defendants to establish the existence of a triable issue of fact (*see SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). The AEP defendants do not dispute the fact of their default by nonpayment. Rather, they argue that there are triable issues of fact regarding whether the 2002 Master Equipment Lease was extinguished in 2006 when AEP purportedly exercised an option to purchase the equipment that was subject to the lease. However, the schedule attached to the 2006 Bill of Sale indicates that the equipment that was sold pertained to "Master Lease Schedule No. 728-177-101," whereas it remains undisputed that the agreements at issue here identify entirely different lease numbers. Further, the AEP defendants' argument that Parimist failed to document the parties' respective obligations with respect to the equipment fails to raise triable issues of fact regarding the validity of the agreements themselves. Therefore, since the AEP defendants have failed to present any evidentiary materials sufficient to raise a genuine issue of fact warranting a trial, Sovereign is entitled to summary judgment as to liability (*see Pennie & Edmonds v F.E.I., Ltd.*, 161 AD2d 475, 475 [1st Dept 1990]).

Sovereign has not, however, established its entitlement to judgment as a matter of law on the issue of damages (*see Florida Infusion Serv., Inc. v Alden Surgical Co.*, 23 AD3d 614, 614 [2d Dept 2005]). It has presented insufficient evidence for the Court to determine, as a matter of law, the amount that is still owed under the subject agreements and guaranties. Moreover, there is a clear dispute between the parties as to the amount that is due, and whether Sovereign has mitigated its damages so as to avoid a windfall (*see Mitchell v Fidelity Borrowing LLC*, 40 AD3d 557, 558 [1st Dept 2007]). Accordingly, Sovereign's motion for summary judgment is granted on the issue of liability only, and this matter shall forthwith be referred to a Special Referee for an inquest to determine the amount of damages to be awarded to Sovereign, if any (*see* CPLR 3212 [c]).

As to the cross-motion premised upon the General Release, it is well established that a general release is a contract, arising out of a settlement and is thus governed by principles of contract law (*see Mangini v McClury*, 24 NY2d 556, 562 [1969]). "The meaning and coverage of a general release depends on the controversy being settled and upon the purpose for which the release was actually given. A release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Lefrak SBN Assoc. v Kennedy Galleries, Inc.*, 203 AD2d 256, 257 [2d Dept 1994] [citation omitted]; *see also Enock v National Westminster Bankcorp, Inc.*, 226 AD2d 235, 235-36 [1st Dept 1996]; *Matter of Brown*, 65 AD3d 1140, 1141 [2d Dept 2009]; *Ofman v Campos*, 12 AD3d 581, 581 [2d Dept 2004]).

The Court finds that the AEP defendants have failed to establish, prima facie, their entitlement to judgment as a matter of law based on the defense of release. The General Release, on its face, plainly indicates that it applies only to lease number 718-177-101. The undisputed evidence demonstrates that this is a different lease number from the agreements at issue in the present action, and the Court finds no ambiguity in the General Release requiring a contrary finding (*see Zichron Acheinu Levy, Inc. v Ilowitz*, 31 AD3d 756, 756 [2d Dept 2006] [affirming denial of insurer's motion to dismiss and ruling that the trial court "correctly concluded that the release executed by the plaintiff, which was specifically limited to the plaintiff's claim with respect to policy number UY002344NL, was not intended to preclude this action, which concerns policy number UH00788NL"]; *Ofman*, 12 AD3d at 581-82). The AEP defendants' failure to make a prima facie showing requires denial of the cross-motion regardless of the sufficiency of the opposing papers (*see Smalls*, 10 NY3d at 735 [2008]). Accordingly, the AEP defendants' cross-motion for summary judgment is denied.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment is granted on the issue of

liability only; and it is further,

ORDERED that this matter is set down for an inquest before a Special Referee to hear and determine all issues relating to damages; and it is further,

ORDERED that not later than August 31, 2011, plaintiff shall serve a copy of this Order with Notice of Entry and Notice of Inquest on all defendants and on the Special Referee Clerk in the Motion Support Office at 60 Centre Street, Room 119, to arrange a date for the reference to a Special Referee.

This constitutes the Decision and Order of the Court.

Dated: August 12, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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