

Nugent v Hubbard
2013 NY Slip Op 32155(U)
September 3, 2013
Supreme Court, Suffolk County
Docket Number: 027731-2012
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 06-04-2013
Submit Date: 06-04-2013
Motion No.: 003 MOTD

MICHAEL T. NUGENT, FRANK BUSTAMANTE, and
52 PHOENIX MGMT. CORP.,

Plaintiffs,

- against -

JOSEPH HUBBARD, ASHLEIGH SASSER, THOMAS
B. LICARDI, DANIEL O'DONNELL, BABYLON
POINT INC., GOLDLIC LLC., and JODI GIRL
ENTERPRISES, INC.,

Defendants.
_____X

DANIEL O'DONNELL,

Third Party Plaintiff,
Third Party Index 32-303

- against -

LAURIE L. NUGENT, DOREEN TURNBULL and
FRANCIS TURNBULL,

Third Party Defendants.
_____X

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CORRECTED ORDER

Plaintiffs Michael T. Nugent (“Nugent”), Frank Bustamante (“Bustamante”) and 52 Phoenix Corp. (“Phoenix”) (collectively “Plaintiffs”) commenced this action against defendants Joseph C. Hubbard (“Hubbard”), Ashleigh Sasser (“Sasser”), Thomas

B. Licari (“Licari”), Daniel O’Donnell (“O’Donnell”), Babylon Point Inc. (“Babylon Point”), Goldlic LLC and Jodi Girl Enterprises, Inc. (“Jodi Girl”) for breach of contract, conversion, unjust enrichment, an equitable lien, and declaratory relief. Currently before the Court is a motion (Mot. Seq. 003) by O’Donnell and Jodi Girl pursuant to CPLR 3211(a)(1) to dismiss the Plaintiffs’ complaint as asserted against them. O’Donnell also seeks summary judgment on his counterclaim against 52 Phoenix and Nugent, and his third-party claim against Laurie L. Nugent, to recover on a promissory note and guaranty. O’Donnell also seeks a default judgment against third-party defendants Doreen Turnbull and Francis Turnbull on his third-party claims to recover on a guaranty of a note. The Complaint alleges, among other things, that O’Donnell and Jodi Girl interfered with and converted Plaintiffs’ interest in tangible property.

Factual and Procedural Background

Lease/Sublease

In May 2010, Goldlic, LLC purchased real property located at 16 East Court, Babylon, New York (“Premises”). At that time, the Premises was leased to non-party Hi-Hook, Inc. From 2004-2008, Hi-Hook had subleased the Premises to plaintiff 52 Phoenix, which had operated a restaurant on the premises. Pursuant to an Amended and Restated Sublease dated May 1, 2008, Hi-Hook sublet the Premises to Babylon Point, which operated a restaurant on the premises. In 2008, Babylon Point was owned by Bustmante. The Amended and Restated Sublease recites that 52 Phoenix had surrendered its sublease. The Amended and Restated Sublease was assigned to Goldlic in 2010, when it purchased the Premises. The Amended and Restated Sublease provides, in relevant part:

34. REPAIRS AND MAINTENANCE

* * *

Notwithstanding anything to the contrary set forth above, the heating, ventilating, air-conditioning, electrical and

plumbing systems, shall, at all times, remain the property of Sublandlord, including all additions and replacements made thereby by Subtenant.

* * *

Exhibit B

Alterations:

* * *

All fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of the Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Owner's right thereto and to have them removed by Tenant, in which event the same shall be removed from the demised premises by Tenant prior to the expiration of the lease, at tenant's expense. Nothing in this Article shall be construed to give Owner title to or to prevent Tenant's removal of trade fixtures, moveable office furniture and equipment . . . All property permitted or required to be removed by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or removed from the premises by Owner, at Tenant's expense.

* * *

End of Term: 22. Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, broom clean, in good order and

condition . . . and Tenant shall remove all its property from the demised premises.

Note

On March 28, 2012, O'Donnell entered into an Assignment Agreement with non-parties Timothy Kelly and Karen Kelly, pursuant to which the Kellys assigned to O'Donnell all their rights, title and interest in the following: (1) Note and Security Agreement dated April 13, 2004, executed by 52 Phoenix in the principal amount of \$275,000 ("Note"), (2) Modification of Note and Security Agreement dated April 14, 2006, executed by 52 Phoenix, and (3) Unconditional Guaranty dated April 14, 2006, by Michael Nugent, Laurie L. Nugent, Francis Turnbull, and Doreen Turnbull in connection with the Note, Security Agreement, and Modification ("Guaranty").

Pursuant to an Assumption Agreement dated May 27, 2010, (1) Babylon Point became a co-obligor, together with 52 Phoenix, on the Note and Security Agreement and Modification of Note and Security Agreement, and (2) Michael Nugent and Laurie L. Nugent agreed to guaranty the obligations assumed by Babylon Point.

Babylon Point surrendered the Premises to Goldlic in February 2012. In April 2012, Goldlic entered into a lease for the Premises with Jodi Girl and O'Donnell. According to Plaintiffs, Jodi Girl and O'Donnell then began operating a restaurant using tangible property in which the Plaintiffs had an ownership interest, which had been left at the Premises after Babylon Point surrendered the Premises in February 2012. Plaintiffs claim that they never authorized Jodi Girl or O'Donnell to utilize the tangible property in any way and that they have not been compensated for it by Goldlic, Licari (Goldlic's principal), Jodi Girl or O'Donnell.

Relevant Pleadings

The second cause of action alleges that Goldlic, Licari, Jodi Girl and O'Donnell converted the tangible property left at the Premises. The third cause of action alleges that Goldlic, Licari, Jodi Girl and O'Donnell have been unjustly enriched, at the expense of the Plaintiffs, by their taking and use of Plaintiffs' tangible property. The fourth cause

of action seeks the imposition of an equitable lien on the tangible property and an injunction prohibiting its sale, transfer, encumbrance, assignment, removal or disposition.

O'Donnell interposed counterclaims against Plaintiffs and cross-claims against Babylon Point. The first counterclaim/cross-claim is for breach of the Note and Guaranty. The second counterclaim/cross-claim is for unjust enrichment. The third counterclaim is for malicious prosecution and abuse of process. The fourth counterclaim alleges breach of contract and tortious interference with contract by plaintiff Bustamante.

Additionally, O'Donnell commenced a third-party action against Laurie L. Nugent, Doreen Turnbull and Francis Turnbull for breach of the Guaranty and unjust enrichment.

Plaintiffs served a reply to O'Donnell's counterclaims. Third-party defendant Laurie L. Nugent served an answer to the third-party complaint.

Prior Motion and Order

By Order dated April 8, 2013, this Court (Pines, J.) granted the motion by defendants Licari and Goldlic to dismiss the Complaint as asserted against them. The Order states, in relevant part:

Here, it is undisputed that Babylon Point, and not 52 Phoenix or the individual plaintiffs, was the tenant pursuant to the Amended and Restated Sublease with Goldlic. 52 Phoenix was a tenant pursuant to the prior sublease with Hi-Hook, which is not a party to this action. Thus, it is clear that 52 Phoenix does not have a valid claim against Goldlic as there was never a landlord-tenant relationship between 52 Phoenix and Goldlic. It is also undisputed that Babylon Point surrendered the Amended and Restated Sublease to Goldlic in February 2012. Pursuant to paragraph 22 of Exhibit B to the Amended and Restated Sublease, Babylon Point had the right/obligation to remove its property from the demised premises prior to surrender. Pursuant to paragraph 3 of

Exhibit B to the Amended and Restated Sublease, all property remaining in the premises was deemed abandoned and could be retained by the owner. Thus, Goldlic had the right to retain all property remaining at the premises at the time of surrender by Babylon Point. The Plaintiffs' attempt to remove property from the premises, assuming the Plaintiffs had any rights under the Amended and Restated Sublease, was ineffectual as the premises had already been surrendered. Notably, Goldlic provides copies of certifications by Gold Coast Abstract in December 2011 and September 2012 which reflect that neither 52 Phoenix nor Babylon Point had filed any UCC financing statements with regard to any of the property in which Plaintiffs claim an interest. Thus, the documentary evidence utterly refutes the Plaintiffs' allegations that they had rights with regard to the property remaining at the premises.

Discussion

For the reasons sets forth in the prior Order of this Court dated April 8, 2013, that branch of the motion which seeks dismissal of the complaint insofar as asserted against O'Donnell and Jodi Girl is granted. The documentary evidence demonstrates that the Plaintiffs have no rights as against O'Donnell and Jodi Girl, subsequent lessees of the Premises, to the tangible property left thereat at the time Babylon Point surrendered its sublease to Goldlic in February 2012. Pursuant to the express terms of the Amended and Restated Sublease, all property remaining in the Premises in February 2012, when Babylon Point surrendered the premises to Goldlic, was deemed abandoned and Goldlic, at its election, had the right to either retain the property or remove it. Thus, the documentary evidence utterly refutes Plaintiffs' allegations against O'Donnell and Jodi Girl and the Complaint is dismissed insofar as asserted against them.

That branch of the motion which seeks summary judgment on O'Donnell's counterclaim against Michael T. Nugent and 52 Phoenix to recover on the Note and Guaranty, and on his third-party claim against Laurie L. Nugent to recover of the

Guaranty, is also granted. “To make a prima facie showing of entitlement to judgment as a matter of law in an action to recover on a note, and on a guaranty thereof, a plaintiff must establish ‘the existence of a note and guaranty and the defendants’ failure to make payments according to their terms’” (*JPMorgan Chase Bank, N.A. v Galt Group, Inc.*, 1028, 1029 [2d Dept 2013], quoting *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 575 [2d Dept 2008]).

Here, O’Donnell submits the loan documents, including the Promissory Note, Modification of Note and Security Agreement, Unconditional Guaranty, and Assignment Agreement, and evidence of the default, which establishes his prima facie entitlement to judgment as a matter of law. Thus, the burden shifts to 52 Phoenix, Michael Nugent, and Laurie Nugent “to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense” (*Gullery v Imburgio*, 74 AD3d 1022 [2d Dept 2010]). In opposition, Michael Nugent submits an affidavit stating, among other things, that defendants Joseph C. Hubbard and Ashleigh Sasser assumed the obligations of 52 Phoenix and the Nugents under the loan documents in 2011 when they purchased Babylon Point and executed a Purchase Agreement. However, Nugent’s allegation is unsubstantiated as the Purchase Agreement, pursuant to which Hubbard and Sasser allegedly assumed the Note, has not been provided to the Court. Additionally, the claim that summary judgment should be denied because O’Donnell wrongfully and without notice disposed of the items of collateral (restaurant goods and equipment) securing the Note pursuant to a Security Agreement, is without merit. As set forth above, all property left at the Premises in February 2012 when Babylon Point surrendered its lease was abandoned and became the property of Goldlic. O’Donnell did not dispose of the property remaining at the Premises until after he and Jodi Girl entered into a lease with Goldlic in April 2012, and he did so with Goldlic’s consent. Moreover, O’Donnell did not become the holder of the Note until March 28, 2012.

The unopposed branch of O’Donnell’s motion seeking a default judgment pursuant to CPLR 3215 on the third-party claims asserted against Doreen Turnbull and Frances Turnbull is granted. O’Donnell has demonstrated that the Third-Party Summons and Verified Third-Party Complaint was served upon the Turnbuls pursuant to CPLR 308(4)

and that neither appeared in the third-party action.

Finally, the Note provides for the recovery of reasonable attorneys' fees incurred in enforcement. However, even though O'Donnell appears to have an agreement with counsel to pay counsel one-third of the amount due and owing on the Note, he is not entitled to an award of attorneys' fees in that amount. Therefore, O'Donnell's request for an award of attorneys' fees is denied with leave to renew upon the submission of proper papers, including records showing the amount of time spent by counsel in enforcing the Note.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: 9/3/13
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[] Final
[X] Non Final