

Reade v El Mundo of Kickerbocker Inc.

2013 NY Slip Op 32383(U)

September 23, 2013

Sup Ct, New York County

Docket Number: 652351/2011

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Charles E. Ramos
Justice

PART 53

Index Number : 652351/2011
DUANE READE
vs
EL MUNDO OF KNICKERBOCKER INC.
Sequence Number : 005
REARGUE/RECONSIDER

INDEX NO. _____
MOTION DATE _____
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

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



is decided in accordance with accompanying memorandum decision and order.

Dated: 9/23/13

Charles E. Ramos, J.S.C.
CHARLES E. RAMOS

- 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: COMMERCIAL DIVISION

-----X
DUANE READE and DUANE READE REALTY, INC.,

Plaintiff,

-against-

Index No. 652351/11

EL MUNDO OF KNICKERBOCKER INC., AMERICAN
PLACE AT NOSTRAND INC., AMERICAN PLACE
AT FOURTH AVENUE INC., 158 ST DISCOUNT
CENTER CO. INC d/b/a EL MUNDO STORES,
and RAYMOND SROUR,

Defendants.

-----X

Hon. Charles E. Ramos, J.S.C.:

Plaintiffs Duane Reade and Duane Reade Realty, Inc.
(together DR) move, pursuant to CPLR 2221 (d), for leave to
reargue those portions of this Court's February 14, 2013 decision
and order (Order) which denied their motion for partial summary
judgment as to liability against: (a) defendants El Mundo of
Knickerbocker, Inc. (El Mundo) and Raymond Srouer (as guarantor);
and (b) defendants American Place at Nostrand Inc. (Am Place) and
Srouer (as guarantor).

With regard to El Mundo (and Srouer), DR argues that this
Court overlooked paragraphs 31 and 49 of the affidavit of Chris
Darrow, plaintiffs' vice president and comptroller, and paragraph
25 of the reply affidavit of Michael M. Yi, Esq., DR's counsel in
this action.

Paragraph 49 of Darrow's affidavit states that "[a]s a
result of [El Mundo's] default under [its lease assignment. DR]
was required to pay to the landlord a total of \$550,000." As an

exhibit to the affidavit, Darrow appended a calculation of rent due that DR's counsel had received from the landlord's attorney.

Paragraph 25 of Yi's reply affidavit repeats Darrow's statement and adds that the sum paid to the landlord was in settlement of a civil action that Nathan Cheney, as trustee of the landlord, brought against DR and El Mundo. Paragraph 31 of Darrow's affidavit states that the landlord claimed that he was owed certain sums in rent and additional rent, and certain sums for the seven months after El Mundo vacated its space.

DR also argues that this Court overlooked certain documents that were in the record, to wit, a copy of Cheney's complaint against DR and El Mundo, a copy of Cheney's calculation of the rent alleged to be due (referred to above), a copy of the settlement agreement between Cheney and DR, and a copy of the settlement check in the amount of \$550,000.

It is elementary that a motion for summary judgment must be supported by the submission of evidentiary proof in admissible form (*Mirvish v Mott*, 75 AD3d 269 [1st Dept 2010]; *revd on other grounds* 18 NY3d 510 [2012]). None of the documents that DR adduces in support of its motion is admissible evidence of how much rent, if any, was due and owing from El Mundo at the time that DR entered into its settlement with Cheney. A complaint is not probative of the facts alleged therein, a settlement agreement is not probative of such facts as may be stated therein, and an unsworn calculation of a debt allegedly due is not evidence of any such debt.

As the Order notes, Darrow testified at his deposition that: (a) the \$550,000 that DR paid to Cheney constituted payment for the then-remaining term of DR's lease; (b) he had not known that El Mundo had assigned its assignment of lease to an entity that is not a party to this action; and (c) he did not know how much (and, therefore, whether any) of the \$550,000 settlement payment was for rent then due and owing. Nowhere in his deposition, or in his affidavit, does Darrow state, either on the basis of his own knowledge, or on the basis of any admissible evidence, that, at the time of the settlement, El Mundo owed the landlord a sum certain in rent.

With regard to Am Place (and Srour), DR contends that the Order overlooked paragraph 50 of Darrow's affidavit, which states that Am Place entered into a sublease with DR, rather than an assignment of lease, and which references: an invoice that DR issued to Am Place; payments that DR made to its landlord under the prime lease; and unsworn letters from an attorney to Am Place and Srour stating that they had defaulted under the sublease, and demanding payment.

The Order notes that Am Place had entered into a sublease. It does not follow from that fact that an invoice, attorney's letters, or certain payments made by DR under the prime lease entitle DR to judgment as a matter of law that Am Place defaulted under its sublease.

In sum, DR appears to believe that it is entitled to partial summary judgment against El Mundo, Am Place, and Srour as a


matter of law, because it submitted documents that, if introduced in evidence at trial, might persuade a jury that DR should prevail on its claims against those defendants. That is not the law.

Accordingly, it is hereby

ORDERED that the motion for leave to reargue is granted and that, upon reargument, this Court adheres to its prior decision.

Dated: September 23, 2013

Enter:



J.S.C.

CHARLES E. RAMOS