260-261 Madison Ave. LLC v Bower Monte & Greene, P.C.
2013 NY Slip Op 32675(U)
October 21, 2013
Sup Ct, New York County
Docket Number: 650187/2012
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN PART 63
Justice

Index Number : 650187/2012
260-261 MADISON AVENUE, LLC
vs
BOWER MONTE & GREENE, P.C.
Sequence Number : 004
SUMMARY JUDGEMENT

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). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3, 4, 5

Upon the foregoing papers, it is ordered that this motion is

MOTION AND CROSS-MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court

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

Dated: 10/24/13

_____, J.S.C.
HON. ELLEN M. COIN

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: IAS PART 63

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260-261 MADISON AVENUE LLC,

Plaintiff,

- against -

BOWER MONTE & GREENE, P.C., PETER R. BOWER, and GUY A. LAWRENCE,

Defendants.

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Index No. 650187/2012
Subm. Date: July 31, 2013
Motion Seq.: 004
DECISION AND ORDER

For Plaintiff :
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For Defendant Guy A. Lawrence
Pro Se

Papers considered in review of these motion and cross-motion:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
BM&G's Notice of Cross-Mot.and Affidavits in Supp	2
Lawrence's Notice of Cross-Mot.and Affidavit in Supp	3
Pl.'s Memo. of Law in Opp. to Cross-Mot	4
Affidavits and Memos. in Opp to Cross-Mot	5
Reply Affirmations	6

ELLEN M. COIN, J.:

Plaintiff 260-261 Madison Avenue, LLC, landlord, commenced this action to recover rent from the alleged assignee of the lease and payment from the guarantors of the lease. Plaintiff moves for summary judgment. Defendant Bower Monte & Greene, P.C. (BMG), the purported assignee, cross-moves for summary judgment dismissing the complaint. Defendant Guy A. Lawrence, one of the guarantors, cross-moves for summary judgment dismissing the

complaint as against him and in favor of his cross-claim for indemnification against BMG. Defendant Peter R. Bower has appeared in this action but has not responded to plaintiff's motion.

The facts recited here are taken from the parties' affirmations and pleadings, and a December 15, 2011 decision by Justice Kornreich in *Sanger v Bower, Sanger & Lawrence, P.C., et al*, index No. 600862/08, Supreme Court of the State of New York, New York County (the Sanger decision).

Non-party law firm Bower, Sanger & Lawrence, P.C. (BSL) leased the entire 12th floor of a building from plaintiff. The three shareholders in BSL, defendants Lawrence and Peter R. Bower, and non-party Warren J. Sanger executed a "Good Guy" guaranty, personally guaranteeing BSL's obligations under the lease.[1] The term of the lease was from December 24, 2001 to June 23, 2012. In February 2008, Sanger departed BSL, and in March 2008, BSL's name was changed to Bower & Lawrence, P.C. (B&L), also not a party to this action. On August 5, 2009, plaintiff, B&L, Bower, and Lawrence entered into the "Partial Surrender and Lease Modification Agreement" (Lease Modification) in which B&L surrendered a portion of the leased premises in exchange for reduced rent. The Lease Modification noted that the surrendered portion was leased to another law firm, and Bower and Lawrence each reaffirmed and ratified their guaranty.

In or about August 2010, Lawrence voluntarily departed from B&L, and Bower remained as the firm's sole owner. On September 3, 2010, Bower incorporated BMG together with attorneys Mitchell Greene and Anina Monte. Greene and Monte were non-owning, non-voting

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[1]"Good Guy" guaranties are commonly understood to apply to obligations that accrue prior to surrender of the leased premises. (*Russo v Heller*, 80 AD3d 531, 531-32 [1st Dept 2011]).

members of the firm. BMG stayed at the premises and left in July 2012. Plaintiff states that BMG held itself out as the tenant of the premises to plaintiff and to the public, and paid rent to plaintiff beginning in 2010. The payments were made by check from the account of "Bower Monte & Greene, P.C." Around May 2011, BMG fell into rent arrears. Its last payment was in November 2011. Plaintiff alleges that until it began this action, it did not know that BMG was a new entity. Plaintiff states that it was notified that Lawrence left the firm, but was not notified that BMG was anything but B&L under a different name, and that BMG never disclaimed its liability for rent until this litigation began. Plaintiff seeks to recover rent dating from May 2011 through July 2012 in the amount of $817,964.83. That amount includes interest, taxes, fees for electricity and cleaning services, and late fees.

Plaintiff seeks relief against BMG based on two alternative theories: lease assignment and unjust enrichment. BMG contends that it was not an assignee, but a subtenant. Greene and Monte worked at BSL, B&L, and BMG. Monte is still at BMG, while Greene has left that firm. In their separate affirmations, they state that trouble among Bower, Lawrence, and Sanger, the owners of B&L, began in January 2008, leading to Sanger's departure. All of B&L's attorneys, except for defendant Bower, left and BMG was incorporated thereafter. Greene and Monte claim that when B&L's attorneys left, they took "many" case files with them. They also allege that when BMG was formed, B&L was still an active professional corporation, enmeshed in litigation with its former attorneys. While BMG looked for new space, it commenced operations at the premises and subleased the premises on a month-to-month basis from B&L. Greene and Monte further allege that they had no intention of taking on B&L's debts and agreed to become BMG partners on the express condition that BMG would not assume any of the liabilities of B&L.

Around March 2011, BMG contemplated purchasing B&L's assets and assuming its lease and a draft agreement was drawn up. Greene was no longer at BMG at that time. Monte alleges that the draft agreement was not finalized because she did not want BMG to assume the lease. Both attorneys attest that BMG had no intention of becoming an assignee of the lease.

Further relevant information is provided in the Sanger decision. Sanger sued BSL, Bower, and Lawrence. Justice Kornreich held a bench trial, at which she determined that Sanger had been terminated from BSL for cause. The court made factual findings as follows: after Sanger left in February 2008, the firm name was changed to B&L in March 2008. Lawrence resigned in September 2010. In that month, the firm "discontinued its operations and transferred its assets to a new firm, [BMG], which occupies the Firm's former office space and employs many of the same attorneys, including Bower." (Decision at 12). At trial, Bower testified that BMG occupies the same space as B&L, because he is personally liable and he and the firm cannot get out of the lease. Evidence showed that BMG paid B&L $225,000. It was claimed that the payment was for B&L's assets only, and that B&L was paid nothing for its cases. However, the court declined to credit "Bower's explanation" that none of the cases transferred to BMG had intrinsic value. (*Id.*). Justice Kornreich further stated that, according to B&L's shareholder agreement, "because the Firm had ceased doing business, it was required to liquidate in September 2010." (*Id.*). No liquidation took place. The court ordered dissolution of B&L, effective as of the date that Sanger was terminated, February 19, 2008.

Discussion

A motion for summary judgment is appropriate when there are no issues of fact for a factfinder to decide. (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept], *affd* 62

NY2d 938 [1984]). The moving party must provide sufficient evidence to show that no material issues of fact exist. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party cannot do so, the motion will be denied, regardless of the sufficiency of the opposing papers. (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). If the moving party suceeds in the required showing, the opposing party must show the existence of factual issues that must be determined at trial. (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]).

An assignment is a transfer of the tenant's entire interest in its premises for the entire time remaining on the lease; the assignor does not retain a reversionary interest. (*Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 202 AD2d 251, 252 [1st Dept 1994]; *Bostonian Shoe Co. of N.Y. v Wulwick Assoc.*, 119 AD2d 717, 718-719 [2d Dept 1986]). The tenant can assign its entire interest in all of the premises or it can assign its entire interest in part of the premises. (*Bostonian Shoe Co.*, 119 AD2d at 718-719). A sublease is a transfer of possession for less than the entire term remaining on the lease; the tenant/sublessor retains a reversionary interest . (*Id.*; *see also 520 E. 81st St. Assoc. v Roughton-Hester*, 157 AD2d 199, 201 [1st Dept 1990]). The sublessor is considered to keep some interest in the premises. A sublease need not be for the entire demised premises; the tenant can transfer its interest in part of the demised premises. (*Lomax Holding Co. v Calitri*, 117 Misc 2d 941, 942 [App Term, 1st Dept 1983]). The retained reversionary interest need not be for a substantial period of time in order for an agreement to be considered a sublease. The reversionary interest may consist of one day or even 12 hours less the expiration of the lease. (*Bostonian Shoe*, 119 AD2d at 719; *WMCA, Inc. v Blockfront Realty Corp.*, 194 Misc 932, 933 [Sup Ct, NY County 1946], *affd* 272 AD 800 [1st

Dept 1947]). A purported sublease that terminates on the same day as the overlease is not a sublease but an assignment. (*Chez Nous, Inc. v Denamiel,* 176 AD2d 545, 546 [1st Dept 1991]).

When a tenant assigns a lease, the assignee becomes directly liable to the original landlord. (*Seventy-eighth St. & Broadway Co. v Purssell Mfg. Co.*, 166 AD 684, 685 [1st Dept 1915]). A sublessee, on the other hand, is not liable to the landlord for the rent. (*Decker v Chuang,* 185 AD2d 613, 614 [4th Dept 1992]). Thus, plaintiff argues that BMG was an assignee and BMG argues that it was a subtenant.

The presence of a party in possession who is not the tenant and who is paying rent gives rise to a presumption of assignment. (*Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 147 [2d Dept 2009]; *Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP,* 22 AD3d 936, 936-937 [3d Dept 2005]). The presumption may be rebutted by showing that there was a reversionary interest. (*See Trustees of Columbia Univ. in City of N.Y. v Schlick*, 188 Misc 571, 573 [App Term, 1st Dept 1947]).

After BMG was incorporated, it occupied the premises, as did B&L, which stopped operating as a law firm. BMG operated its business there and assumed the payment of rent. The records of the New York Department of State show that BMG's address was at the leased premises. The presumption arises that BMG was an assignee. The strongest evidence against that presumption is B&L's continued presence on the premises. The existence of a reversionary interest, be it ever so small, is the distinguishing feature of a sublease. However, under these circumstances, B&L's presence does not indicate that it had a reversion in the premises. Indeed, its occupation ended on the same day as BMG's. Although B&L was involved in litigation and retained the powers of a defunct corporation, it was not otherwise engaged in business. Bower

owned both B&L and BMG, and it is undisputed that BMG was created because of B&L's legal troubles and loss of attorneys. BMG replaced B&L. BMG does not rebut the presumption of an assignment, despite the fact that B&L did not totally relinquish the premises. Because of B&L's attenuated existence, the court will not deem that B&L's continued occupation created a reversion and that BMG was thus a subtenant. This determination does not depend upon the label that the parties give their relationship or actions; nor are their intentions controlling in determining the nature of BMG's occupation. (*See Damaro Rest. Group, LLC v Gazette Realty Holdings, LLC,* 21 Misc 3d 1131[A], 2008 NY Slip Op 52290[U], *9 [Sup Ct, Westchester County 2008]; *see also Women's Interart Ctr., Inc. v New York City Economic Dev. Corp.*, 97 AD3d 17, 21 [1st Dept 2012]).

BMG claims that section 12.2 of the lease shows that there was no assignment. Under that section, if the premises or any part of it "are sublet to, or occupied by, or used by" anyone other than the tenant, the landlord, after a default by the tenant, may collect rent or other sums paid by the subtenant, user or occupant as a fee for use and occupancy. "No such . . . use . . . nor any such collection of . . . Rental or fee . . . shall be deemed a waiver by Landlord of a term . . . of this Lease or the acceptance by Landlord of such . . . occupant or user as tenant hereunder" (Lease, ¶ 12.2). BMG argues that this section means that it could not become plaintiff's tenant. However, the purpose of this provision is to protect the landlord from entering into an involuntary waiver that would place it under further obligations. (*See e.g., Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave., LLC*, 1 AD3d 65, 69-70 [1st Dept 2003]). A tenancy cannot be forced upon the landlord, at least not under the facts of this case. This provision has no effect on BMG's status as an assignee.

As against BMG, plaintiff is granted summary judgment on the first cause of action for rent. The amount of rent is governed by the lease; therefore, the third cause of action for unjust enrichment is dismissed (*see Pappas v Tzolis,* 20 NY3d 228, 234 [2012]). BMG's cross-motion seeking dismissal of the entire complaint is granted to the extent of dismissing the third cause of action and is otherwise denied.

Lawrence's Cross-Motion

Lawrence argues that as of the time of alleged default, he was no longer bound by the "Good Guy" guaranty. The last paragraph of the guaranty states that when a guarantor "retires or withdraws from . . . Tenant (including due to death or disability)," that guarantor "shall have the right to be released from this Guaranty (except for liabilities that have previously been incurred hereunder) conditioned on the provision to Landlord of this form of Guaranty executed by a replacement Guarantor . . . (provided that no such replacement Guarantor shall be required with respect to the release of the first such Guarantor who retires or withdraws)" (guaranty at 4).

The Lease Modification states that the guaranty no longer extends to the surrendered space, and "[I]n all other respects, the terms of the Guaranty shall remain the same" (Lease Modification at 6). The guaranty was made in 2001, when the lease was made. Sanger left the firm in February 2008. The Lease Modification was made in August 2009.

As the first person to have withdrawn from the firm, Lawrence argues that he is no longer liable on the guaranty. Lawrence further argues that Sanger's firing for cause before Lawrence's departure does not qualify as first withdrawal under the terms of the guaranty. In opposition, plaintiff contends that Sanger was the first one to withdraw from the firm. Plaintiff does not dispute that Sanger was terminated from the firm by letter from Bower and Lawrence dated

February19, 2008. According to plaintiff, however, "withdraw" refers both to Lawrence's voluntarily leaving the firm and Sanger's termination from the firm.

The purpose of the guaranty was to ensure that the members of BSL jointly and severally were liable for any unpaid rent BSL might accrue. The guaranty allowed the first guarantor to retire or withdraw to be discharged from these obligations. To "withdraw" is to leave or retire (Black's Law Dictionary [9th Ed. 2009]). "Terminate" means to end. (*Id.*). Plaintiff's interpretation of the guaranty language would contort it to include BSL's dismissal of Sanger, as opposed to Sanger's own voluntary action in leaving the firm.

There is a second reason for rejection of plaintiff's contentions. Bower and Lawrence expressly figure in the Lease Modification. It recites that it was entered into by plaintiff and B&L, and Bower and Lawrence, "principals of Tenant (collectively 'Bower and Lawrence') solely as to the Guaranty as herein defined" (Lease Modification at 1). The Lease Modification does not only refer generally to "guarantors," but specifically identifies Bower and Lawrence as the guarantors.: "WHEREAS Bower and Lawrence provided a limited Guaranty of the lease, a true copy of which is annexed to the Lease . . . "; Landlord, tenant, and "Bower and Lawrence hereby agree as follows: . . . ." Bower signed the modification as president of B&L, with Bower and Lawrence each signing under the phrase "As to modification of the Guaranty." Nothing is said about Sanger. While the original guaranty refers to three guarantors, the modification refers to two. The parties who entered into the Lease Modification did not forget Sanger's departure. Rather, they decided that the modification would not harken back to the time that Sanger left. Therefore, the guaranty, as modified by the Lease Modification, can only be interpreted to mean that if one of the guarantors in the firm (as of the date of the Lease Modification) were to

withdraw before the other, he would be entitled to be released from the guaranty. As of the date of the Lease Modification, Bower and Lawrence were the guarantors. Since Lawrence left before Bower, Lawrence must be deemed released. This is a fair and reasonable construction of the guaranty and the Lease Modification. (*See Abiele Contr., Inc. v New York City School Constr. Auth.*, 91 NY2d 1, 9-10 [1997]). In addition, a guaranty should be strictly interpreted (*White Rose Food v Saleh,* 99 NY2d 589, 591 [2003]), particularly in favor of a private guarantor. (*665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1st Dept 1999]). Therefore, Lawrence's cross-motion to dismiss is granted. His cross-motion in regard to his cross- claim for implied or common-law indemnification is denied as moot.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as follows:

(i) as against defendant Bower, Monte & Greene, P.C., plaintiff is granted judgment on the first cause of action for rent in the amount of $817,964.83, together with interest at the rate of 9% per annum from the date of August 1, 2012, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly;

(ii) as against defendant Peter R. Bower, plaintiff is granted judgment on the second cause of action in the amount of $817,964.83, together with interest at the rate of 9% per annum from the date of August 1, 2012, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and defendant shall pay to plaintiff

reasonable attorney's fees incurred in enforcing the guaranty; and the Clerk is directed to enter judgment accordingly;

(iii) as against defendant Guy A. Lawrence, plaintiff's motion is denied; and it is further

ORDERED that the cross-motion of defendant Guy A. Lawrence is granted, and the complaint is dismissed with prejudice as against defendant Guy A. Lawrence, with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the cross-motion is otherwise denied; and it is further

ORDERED that the cross-motion of defendant Bower, Monte & Greene, P.C. is granted to the extent that the third cause of action as against said defendant is dismissed; and the cross-motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the First through Fifth and Seventh through Ninth Cross-Claims of defendant Guy A. Lawrence; and it is further

ORDERED that, upon search of the record, the First and Second Third-Party Claims are hereby dismissed as moot, and the remainder of the third-party complaint shall continue.

Dated: 10/21/13

ENTER:

Ellen M. Coin, A.J.S.C.