

**Ocean Pacific Interiors, Inc. v Farber**

2014 NY Slip Op 30387(U)

February 7, 2014

Sup Ct, New York County

Docket Number: 113911/2011

Judge: Lucy Billings

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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: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

Index Number : 113911/2011  
OCEAN PACIFIC INTERIORS, INC.  
vs.  
FARBER, M.D., PLLC, LEONARD A.  
SEQUENCE NUMBER : 002  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion ~~for~~ for partial summary judgment

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1-3

Answering Affidavits – Exhibits \_\_\_\_\_

4

Replying Affidavits \_\_\_\_\_

5

Cross-Motion:  Yes  No

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

*The court denies plaintiffs' motion for summary judgment against all defendants except 100 Church Fee Owner, LLC, pursuant to the accompanying decision. C.P.L.R. § 3212(b).*

**FILED**

FEB 13 2014

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/7/14

Lucy Billings  
J.S.C.

LUCY BILLINGS

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

OCEAN PACIFIC INTERIORS, INC., and  
PRISTINE MAINTENANCE, INC.,

Index No. 113911/2011

Plaintiffs

- against -

DECISION AND ORDER

LEONARD A. FARBER, M.D., PLLC, LEONARD  
A. FARBER, M.D., TANYA TOHILL FARBER,  
MARNEE SPIERER, M.D., and 100 CHURCH  
FEE OWNER, LLC,

**FILED**

Defendants

-----x

FEB 13 2014

LUCY BILLINGS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

I. BACKGROUND

Plaintiffs sue defendants for nonpayment of the agreed costs of construction and renovations plaintiffs performed pursuant to contract for Leonard A. Farber, M.D., PLLC (the Farber Center), on its premises, which were leased from defendant 100 Church Fee Owner, LLC. The Farber Center executed a promissory note to cover the costs, which defendants Leonard A. Farber, M.D., his wife Tanya Tohill Farber, and Marnee Spierer, M.D., personally guaranteed. Plaintiffs move for summary judgment on their claim against the Farber Center for breach of the promissory note and their claim against the Farber defendants and Spierer for breach of the guaranty. C.P.L.R. § 3212(b). For the reasons explained below, the court denies plaintiffs' motion.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, plaintiffs must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiffs satisfy this standard, the burden shifts to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the plaintiffs' motion, the court construes the evidence in the light most favorable to defendants. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If plaintiffs fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in defendants' opposition. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

III. PLAINTIFFS' CLAIMS

A. The Stay Imposed by Defendants' Bankruptcy Petitions

Since the Farber Center filed a petition for bankruptcy March 15, 2013, and Spierer filed a petition for bankruptcy

[\* 4]

January 10, 2014, those proceedings automatically stay this action against those two defendants. 11 U.S.C. § 362(a)(1); Education Resources Inst., Inc. v. Concannon, 69 A.D.3d 539, 540 (1st Dep't 2010); Levant v. National Car Rental, Inc., 33 A.D.3d 367, 368 (1st Dep't 2006). Since the stay does not extend to the Farbers, as nondebtor guarantors, the court decides plaintiffs' motion only against these defendants. Empire Erectors & Elec. Co., Inc. v. Unlimited Locations LLC, 102 A.D.3d 419 (1st Dep't 2013); Milliken & Co. v. Stewart, 182 A.D.2d 385, 386 (1st Dep't 1992).

B. Breach of the Guaranty

To demonstrate entitlement to recover on a personal guaranty, plaintiffs must present evidence of the guaranty, the amount of the debt guaranteed, and defendants' default. Carrera Casting Corp. v. Cord, 106 A.D.3d 422 (1st Dep't 2013); Acadia Woods Partners, LLC v. Signal Lake Fund LP, 102 A.D.3d 522, 523 (1st Dep't 2013); Gard Entertainment, Inc. v. Country in N.Y., LLC, 96 A.D.3d 683 (1st Dep't 2012). See Traders Co. v. AST Sportswear, Inc., 31 A.D.3d 276, 277 (1st Dep't 2006).

Plaintiffs support their motion with the affidavit of Oliver Papraniku, the president of both Ocean Pacific Interiors and Pristine Maintenance, who attests that Pristine Maintenance's subcontractor, Ocean Pacific Interiors, performed construction work at the Farber Center. When the Farber Center needed more time to pay for the construction work, the Farber Center executed a promissory note November 1, 2010, which the Farbers and Spierer

guaranteed by executing a personal guaranty. Although the Farber Center paid the first three \$50,000.00 installments, it failed to remit the payment due October 1, 2011.

Papraniku does not authenticate the personal guaranty that the Farbers signed. While the signature of Vivian Colon, designated as a witness, appears on the guaranty, plaintiffs do not present her or any other witness' affidavit attesting to the Farbers' signatures on the guaranty or any other evidence authenticating the guaranty. Plaintiffs therefore fail to establish a prima facie breach of the guaranty. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992). See Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); People v. Bryant, 12 A.D.3d 1077, 1079 (4th Dep't 2004); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003). Plaintiffs' failure to support their summary judgment motion with admissible evidence requires denial of the motion. Suppiah v. Kalish, 76 A.D.3d 829, 832-33 (1st Dep't 2010); Galindo v. Dorchester Tower Condominium, 56 A.D.3d 285, 286 (1st Dep't 2008); Dorsey v. Les Sans Culottes, 43 A.D.3d 261 (1st Dep't 2007). See IRB-Brasil Resseguros S.A. v. Eldorado Trading Corp. Ltd., 68 A.D.3d 576, 577 (1st Dep't 2009).

IV. CONCLUSION

In light of the automatic stay, the court denies plaintiffs' motion for summary judgment against defendants Leonard A. Farber, M.D., PLLC, and Spierer, without prejudice to a future timely motion after the bankruptcy court lifts the stay. C.P.L.R. § 3212(a). See Jackson v. Rockefeller Ctr. Props., 290 A.D.2d 315 (1st Dep't 2002); Capital One, N.A. v. Waterfront Realty II, LLC, 94 A.D.3d 683, 684 (2d Dep't 2012). On the merits of plaintiffs' motion for summary judgment on their claim of breach of a guaranty against defendants Leonard A. Farber, M.D., and Tanya Tohill Farber, the court denies the motion. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: February 7, 2014



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LUCY BILLINGS, J.S.C.

**FILED**

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