Cinfiors, Ltd. v Ancient Weave, Inc.

2015 NY Slip Op 32325(U)

December 8, 2015

Supreme Court, New York County

Docket Number: 650112/2012

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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CINFIORS, LTD.,

Plaintiff,

DECISION/ORDER
Index No. 650112/2012

-against-

ANCIENT WEAVE, INC., ROYAL INTERCONTINENTAL, INC., GYURME SHERPA,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action for breach of a commercial lease, plaintiff Cinfiors, Ltd. ("Cinfiors" or "plaintiff")[1] moves pursuant to CPLR §2221(d), for an Order granting plaintiff leave to reargue so much of this Court's decision and order dated March 13, 2015, to the extent that I: (1) dismissed Cinfiors' claims against defendant Royal Intercontinental, Inc. ("Royal") for use and occupancy for the period September and October 2010, arguing that I overlooked controlling appellate authority, *Hudson-Spring P'ship, L.P. v. P+M Design Consultants, Inc.*, 112 A.D.3d 419 (1st Dep't 2013); and (2) failed to address Cinfiors' request that the Court schedule a hearing to determine the amount of attorneys'

[1] The attorney affirmation submitted in support of this motion states that attorney Robert A. Sternbach represents Passaic Industrial Center Associates, and his familiarity with the facts set forth in his affirmation stem from that representation. Passaic Industrial Center Associates is not a party to this action. As Mr. Sternbach appears to also represent plaintiff Cinfiors, this will be treated as a typographical error.

fees for which defendants are liable to Cinfiors, on the grounds that in the underlying decision, the Court granted summary judgment in favor of Cinfiors on its claims against defendant Gyurme Sherpa ("Sherpa") under the guaranty, and against defendant Ancient Weave, Inc. ("Ancient Weave") under the original lease and lease extension (the "lease"), but "overlooked Cinfiors' entitlement, under the Guaranty and the Lease, to its attorneys' fees incurred against Sherpa and Ancient Weave in this Action."

A motion to reargue is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72 (1st Dept. 1994). Here, plaintiff failed to submit the moving and opposition papers for the underlying motion, rendering the motion procedurally defective.[2]

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[2] Failure to include the underlying motion papers on a motion to reargue may be a sufficient ground to deny plaintiff leave to reargue. "Some trial courts, in deciding motions for leave to renew and/or reargue, have concluded that the moving party's failure to submit the papers relied upon in connection with the initial motion renders the motion for leave to renew and/or reargue defective." *Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 178 (2d Dep't 2012) (collecting cases)). *See also J.D.M. Import Co., Inc. v Hartstein*, 2008 N.Y. Misc. LEXIS 8488, 6-7, 2008 NY Slip Op 30668(U) (Sup. Ct. N.Y. Co. 2008) (citing C.P.L.R. 2214(c)) ("At the outset, the moving papers are insufficient because they fail to include a copy of the initial moving and opposing papers and the order for which reargument or renewal is being sought").

This standard is equally applicable to e-filed cases such as this one. "[J]ust as a court 'should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions,' a court should likewise not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions." *Biscone,* 103 A.D.3d at 179 (quoting *Sheedy v. Pataki*, 236 A.D.2d 92, 97 (3d Dep't 1997); *citing Loeb v. Tanenbaum*, 124 A.D.2d 941, 942 (3d Dep't 1986)).

Notwithstanding that the moving papers are defective, I address the motion to reargue. In its moving papers on the underlying motion, plaintiff argued that it was entitled to summary judgment against Royal, a separate corporation owned by Sherpa, even though Royal was not a signatory to the lease or guarantee. Plaintiff nevertheless asserted that "documentary and other evidence proves that Royal used the Premises as its showroom, without compensating Plaintiff therefor."[3]

The only "documentary or other evidence" submitted by plaintiff in support of its claim against Royal for use and occupancy were (1) a letter dated April 7, 2009 on Royal letterhead, which states the address of the Premises as Royal's showroom; (2) a signature block in an email message dated August 10, 2010, including the same address; and (3) a printout of Royal's website dated April 24, 2013, which shows a picture of a building with a sign for Ancient Weave.

These unauthenticated documents, one of which is inadmissible hearsay, were and still are facially insufficient to meet the burden on a motion for summary judgment to establish liability against Royal. In addition to their lack of evidentiary competence, none of the documents are dated September, 2010 or October, 2010, the time period in which plaintiff claims that Royal was in actual possession of the premises at issue. *See, e.g., Towne Partners, LLC v. RJZM, LLC*, 79 A.D.3d 489, 490 (1st Dep't 2010)

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[3] On this reargument motion plaintiff does not seek to reargue my dismissal of plaintiff's claim for piercing the corporate veil of Royal to hold it liable for Ancient Weave's lease obligations. Therefore, I only address plaintiff's argument that I mistakenly dismissed its claim against Royal for use and occupancy as an actual occupant of the premises at issue.

(defendant "liable for use and occupancy for only that portion of the month where it was in possession of the premises").

In opposition to the motion, defendants submitted a sworn affidavit of Sherpa, in which he averred that Royal did not occupy the premises in September and October of 2010. Upon re-examining the evidence submitted, I find that, while plaintiff did not meet its summary judgment burden, it did sufficiently raise an issue of fact requiring a trial as to whether Royal should be held liable for use and occupancy for September and October of 2010.

In addition, I grant plaintiff's motion to reargue on the issue of attorneys fees, and on reargument, grant plaintiff's request for a hearing to determine its attorneys' fees incurred against Sherpa and Ancient Weave in this action. As I stated in the decision and order, in this action, unlike the earlier summary proceeding, plaintiff sought to recover Cinfiors' expenses. In granting summary judgment to plaintiff against Ancient Weave and Sherpa, I intended to grant all relief requested in the complaint, including imposition of appropriate legal fees.

In accordance with the foregoing it is

ORDERED that the motion by plaintiff Cinfiors, Ltd. for leave to reargue this Court's decision and order dated March 13, 2015, is granted to the extent that, upon reargument, the plaintiff's cause of action for use and occupancy against Royal for the period of September and October 2010 is restored and shall be tried, and its request for a hearing to determine plaintiff's its attorneys' fees incurred against defendants Gyurme Sherpa and Ancient Weave, Inc. is granted, and a hearing will be held on January 25,

2016 at 2:15 p.m., or such other and later date as the parties agree (in consultation with the Clerk of Part 39); and it is further

ORDERED that, in all other respects, plaintiff's motion for leave to reargue this Court's decision and order dated March 13, 2015 is denied.

This constitutes the decision and order of the Court.

DATE : 12/8/15

SCARPULLA, SALIANN, JSC