

2402 E. 69th St., LLC v Corbel Installations Inc.

2018 NY Slip Op 34259(U)

June 25, 2018

Supreme Court, Kings County

Docket Number: Index No. 505523/2014

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of June, 2018.

PRESENT:

HON. WAVNY TOUSSAINT,

Justice.

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2402 EAST 69TH STREET, LLC

Plaintiff,

- against -

Index No. 505523/2014

CORBEL INSTALLATIONS INC., ROBERT CIPPOLA,
PAUL MUCCI AND ANGELO PINO

Defendant.

----- X

CORBEL INSTALLATIONS INC., ROBERT CIPPOLA AND
PAUL MUCCI

Third-party Plaintiffs,

- AGAINST -

CITICONNECT LLC AND ANGELO PINO

Third-Party Defendants.

----- X

This action marked disposed in the Court's computer records is herewith restored to the court's active calendar. This is an action alleging breach of a commercial lease agreement between the plaintiff 2420 East 69th Street, LLC and the

defendant Corbel Installations Inc., (Corbel) The individual defendants, Robert Cipolla, Paul Mucci and Angelo Pino were equal shareholders in defendant Corbel.¹

Plaintiff commenced the instant action in 2014, alleging that Corbel failed to pay inter alia rent and late charges from March 2014 through September 2014. Plaintiff also asserted separate claims for recovery against the individual defendants based on personal guarantees. In or about February 2017, plaintiff moved for summary judgment. Defendants Corbel, Cippola and Mucci collectively opposed the motion.

Defendant Pino, by a separate cross-motion, moved to deny plaintiff's motion for summary judgment, to vacate the Note of Issue and to preclude the co-defendants, for failure to comply with discovery demands. Within his motion defendant Pino asserted that he did not sign the lease or the guaranty, and did not authorize anyone to sign his name to a personal guaranty. Defendant Pino sought to vacate the Note of Issue and to preclude, as to the co-defendants for their failure to provide discovery.

Plaintiff and the co-defendants opposed the cross-motion, to the extent that it seeks to strike the Note of Issue and for additional discovery. Neither co-defendant submitted opposition to defendant Pino's argument that he neither signed nor authorized any individual/entity to sign his name, or otherwise bind him

¹ The initial lease and guaranties had an incorrect address which was corrected by email correspondence of the parties.

to any lease or guaranty.

By an order dated June 22, 2017, this Court granted plaintiff's motion for summary judgment as to defendants Corbel, Cipolla and Mucci. Additionally, the Court granted defendant Pino's cross motion, to the extent of conducting a hearing to determine whether defendant Pino signed the guaranty or authorized its execution. A separate hearing to determine the attorney fees owed to plaintiff is also to be held. The hearing as to defendant Pino was held on August 9, 2017. The Court found the testimony of Pino, the only witness, to be credible.

Finding of Facts

Pursuant to a November 1, 2014 Shareholder Agreement, the individual defendants Cipolla, Mucci and Pino were each designated holders of 33 1/3% of the shares of the defendant corporation Corbel. Pino was the president and Mucci and Cipolla were both Executive Vice-Presidents. The three defendants served as the Board of Directors. Pino testified that Cipollo and Mucci ran all the day-to-day operations of the company and he provided the financial funding. All decisions were to be made only upon unanimous consent, including day-to-day management decisions, establishment of policies and procedures, hiring of managers and other employees, establishment of salary rates, terms of employment of all company employees, and purchase of equipment. All three shareholders were to be employees of Corbel, with Pino receiving 50% of the individual salary received by Cipolla and Mucci. Cipollo took care of checkbooks, payroll and bills and Mucci took care of

operational matters.

Pino loaned \$177,133 to the new company, and arrangements for repayment were spelled out in the Shareholder Agreement. Loans made to the company by Pino as of 11/3/04 were to be repaid within 12 months and in no event later than 18 months of the date of delivery. If the loan was not repaid salaries and other benefits were to be reduced to fund the payoff.

Pino learned of the subject lease through an email stating "we got the lease." He had previously been aware that the company was looking for a Brooklyn facility to rent. Pino was not provided with a copy of the lease before or after it was signed and was unaware that it required a guarantee by each officer. Although Cipolla was able to sign a lease, without obtaining Pino's consent, he had no authority to sign a personal guaranty on Pino's behalf.

Pino never gave a personal guaranty or gave authorization for same and the signature on the Brooklyn lease guaranty is not his. No one was allowed to sign his name with a personal guarantee and signing a guarantee would not be consistent with day to day management of the company. Indeed, previously in 2010 when Pino learned that without his knowledge his name had been signed to a personal guaranty on a New Jersey lease for the company, he requested and had his name removed as a guarantor.

Generally the shareholders "would discuss the lease and look over terms," but in this particular case, all Pino knew was that Cippola was looking for a facility.

When a location was found, Pino paid out, and Cipollo signed the lease and got the keys. Pino did not rescind the lease nor did he ratify it, because he never saw it. Although Pino talked maybe once a day with his fellow shareholders, he was unaware of the guaranty until the instant 2014 lawsuit, after the company closed.

Discussion

Summary judgment is a drastic remedy which will not be granted in the presence of any doubt as to the existence of a triable issue. (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Winegrad v New York University Medical Center*, 64 NY 2d 851[1985]). In deciding whether it should grant summary judgment, the court must view the parties' competing contentions in a light most favorable to the party opposing the motion. (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]; citing *Lakeside Constr. v Depew & Schetter Agency*, 154 AD2d 513 [2d Dept. 1989]). On opposing a motion for summary judgment, one must produce evidentiary proof in admissible form, sufficient to require a trial of material questions of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]).

"A guaranty is a promise to fulfill the obligations of another party and is subject "to the ordinary principles of contract construction" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. v Navarro*, 25 NY 3d 485, 492 [2015] citations

omitted). Generally, principals are liable for the acts of their agents performing within the scope of their apparent authority (*News America Marketing, Inc v Lepage Bakeries, Inc*, 16 AD 3d 146, 148 [1st Dept 2005]). “A principal must answer to an innocent party for the misconduct of its agent acting within the scope of its actual or apparent authority” (*Standard Funding Corp v Lewitt*, 225 AD2d 608, 610 [2d Dept 1996; reversed on other grounds, 89 NY 2d 546 [1997]]). “Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possess authority to enter into a transaction” (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]; see also *Greene v Hellman*, 51 NY2d 197[1980]).

The facts in this record do not support the position that Pino, through his words or conduct, mislead the plaintiff into believing that either of the other shareholders had authority to sign his name to a personal guaranty (*Ford v Unity Hospital*, 32 NY2d 464, 473 [1973]). Defendant Pino’s testimony and his submissions in opposition to plaintiff’s motion for summary judgment raise a question of fact as to whether his former partners had actual or apparent authority to sign his name to the personal guaranty in question (*New York Fireproof Tenement Association v Stanley* 105 AD 432 [1st Dept 1905]).

Accordingly, it is

ORDERED, that portion of defendant Pino’s cross motion which seeks denial of plaintiff’s motion for summary judgment is granted; and it is further

ORDERED, that defendant Pino's request to vacate the Note of Issue is denied.; and it is further

ORDERED, that defendant Pino's request for preclusion as to the codefendants is granted, to the extent that within thirty (30) days of the date of this Order, defendant Pino is to serve a demand for outstanding discovery. Codefendants Cippola and Mucci are to provide responses within thirty (30) days thereafter; and it is further

ORDERED, that the parties are directed to appear for a conference in the Non-Jury Trial Readiness Part on October 17, 2018.

This constitutes the decision and order of the Court.

ENTER

J.S.C.

**HON. WAVNY TOUSSAINT
J.S.C.**

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