Yang Tze River Realty Corp. v Kings Day Care, LLC.
2019 NY Slip Op 30248(U)
January 28, 2019
Supreme Court, New York County
Docket Number: 650219/2018
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

YANG TZE RIVER REALTY CORP.,

Plaintiff,

-against-

KINGS DAY CARE, LLC.;
EVOLUTION ENRICHMENT CENTER;
SEMYON PRITSKER;
DMITRY TSEPENYUK; and
YAKOV MOYN,

Defendants.

Index No.: 650219/2018
DECISION/ORDER
Motion Seq. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss and plaintiff's cross-motion for partial summary judgment.

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Defendants' Notice of Motion to Dismiss	1
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Braunstein Turkish LLP, New York (William J. Turkish of counsel), for plaintiff.
Rosenberg Feldman Smith LLP, New York (Richard B. Feldman of counsel), for defendants.

Gerald Lebovits, J.

Defendants, Semyon Pritsker and Evolution Enrichment Center (collectively referred to herein as the Pritsker Defendants) and Dmitry Tsepenyuk and Yakov Moyn (collectively the Guarantor Defendants), move under CPLR 3211 (a) (1) and (7) pre-answer to dismiss plaintiff Yang Tze River Realty Corporation's claim for breach of contract against the Pritsker Defendants and the Guarantor Defendants based upon documentary evidence and for failure to

state a cause of action. Plaintiff cross-moves for partial summary judgment under CPLR 3212 on the second cause of action against Tsepenyuk and on the third cause of action against Moyn for a judgment for plaintiff for $157,163.21.

On August 1, 2012, plaintiff (owner) and defendant Kings Day Care, LLC (tenant) entered into a 10-year Lease (the Lease) for the property located at 38 Delancey Street, entire third floor, in New York County. Plaintiff and Tsepenyuk entered into a limited guaranty dated July 19, 2012, in which Tsepenyuk unconditionally guaranteed full and timely to perform and observe all the terms and covenants of the Lease for "Kings Daye, LLC," including but not limited to rent and additional rent. Plaintiff entered into an identical limited guarantee dated July 19, 2012, with defendant Moyn.

According to the complaint, on January 3, 2018, Pritsker, individually and on behalf of Kings Day Care, LLC, and Evolution Enrichment Center, notified plaintiff that defendants surrendered their right, title, and interest in the Lease and abandoned and vacated the premises. On January 5, 2018, plaintiff responded that it accepted the surrender. Plaintiff notified defendants that they remain liable for base rent and additional rent for the balance of the Lease term until July 31, 2022. Moreover, plaintiff notified the Guarantors of their alleged obligation under the Limited Guaranty to pay base rent and additional rent for a period of three months from the Surrender Date. Defendants did not respond or object.

Plaintiff commenced this action seeking damages from the defendants. In the first cause of action for breach of lease, plaintiff sued Kings Day Care, LLC, Pritsker individually, and Evolution Enrichment Center for an amount no less than $1,500,000. In the second cause of action, plaintiff sued defendant Tsepenyuk for $157,163.51 as guarantor. In the third cause of action, plaintiff sued defendant Moyn for $157,163.51 as guarantor.

All defendants, except for Kings Day Care, move to dismiss the complaint. Defendants argue that the Pritsker defendants were not parties to the Lease or successors of the tenant. Defendants also argue that section 10.17 (B) of the Lease insulates them from liability as Tenant's "members, managers, partners, limited partners, shareholders, directors, officers, principals, employees and agents." Defendants argue that the complaint must be dismissed against the Guarantor Defendants. Defendants argue that the guarantees (dated July 19, 2012) pre-date the Lease and thus that their obligations were extinguished by virtue of the later, August 1, 2012, Lease. Section 10.09 (A) of the Lease provides that it is the "entire agreement of the parties." The Lease does not refer to any limited guarantees. Also, defendants argue that the limited guarantees were not supported by consideration.

Defendants acknowledge a dispute between plaintiff and defendant Kings Day Care.

I. Defendants' Motion to Dismiss

Defendants' motion to dismiss is in granted in part and denied in part.

A. First Cause of Action

A motion to dismiss a complaint based on CPLR 3211 (a) (1) may be granted "only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314,

326 [2002].) For evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable. (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996, 997 [2d Dept 2010].) A valid lease qualifies as documentary evidence under CPLR 3211 (a) (1). (*Midorimatsu, Inc. v Hui Fat Co.*, 99 AD3d 680, 682 [2d Dept 2012].) In this case, the Lease is documentary evidence that supports dismissing the complaint against the Pritsker Defendants for breach of contract.

A person not a party to a contract may not be bound by that contract. (*Pacific Carlton Dev. Corp. v 752 Pacific, LLC*, 62 AD3d 677, 679 [2d Dept 2009]; *HDR, Inc. v. Intl. Aircraft Parts*, 257 AD2d 603, 604 [2d Dept 1999]; *Natl. Survival Game of N.Y. v NSG of LI Corp.*, 169 AD2d 760, 761 [2d Dept 1991]). The Lease was not signed by either of the Pritsker Defendants; they are not parties to the Lease. The tenant under the Lease is Kings Day Care. Kings Day Care remains an active limited-liability company and has no successors pursuant to Section 10.14 of the Lease. Also, there has been no written assignment under Section 4.01 (B) of the Lease. The Pritsker Defendants are insulated from any liability to plaintiff pursuant to Section 10.17 (B). The Pritsker Defendants are not liable for the payment or performance of the tenant's obligations. Therefore, plaintiff's claim against Semyon Pritsker and Evolution Enrichment Center is dismissed.

Plaintiff's counsel alleges that Pritsker and Evolution Enrichment Center assumed the rights and obligations under the Lease from Kings Day Care without a written assignment. Plaintiff's counsel alleges that Pritsker personally paid rent to plaintiff. As proof, he submits two checks dated January 3, 2018, payable to plaintiff, one for $49,019.08, the other for $600, from Semyon Pritsker's personal Chase bank account.[1] January 3, 2018, is the same date the defendants surrendered possession of the premises. Plaintiff implies that two checks from Pritsker's account means that Pritsker and Evolution Enrichment Center assumed their rights and obligations under the lease.

Plaintiff argues that the lessee in possession of the leased premises, who paid rent, should be liable for Kings Day Care's debts. Plaintiff's counsel argues that a presumption arises that the lease was assigned. The cases plaintiff cites are inapposite to this case. In *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, the

> "plaintiff alleged that the corporate appellants took possession of certain suites within the subject property, paid rent, placed their names on the directory, referred to the lease as their lease in letters to the plaintiff, maintained liability insurance on the subject property, and listed the subject suites as their principal place of business with the New York State Department of State. Many of these allegations were supported by documentary evidence." (62 AD3d 141, 147-148 [2d Dept 2009].)

Plaintiff does not allege similar facts here.

[1] Plaintiff asserts that on January 3, 2018, defendants notified plaintiff that they surrendered their right, title, and interest in the lease. (Complaint at ¶ 15.)

Despite plaintiff's assertions, the complaint alleges only that plaintiff notified Kings Day Care and its successor entity-in-interest that they remain liable for the base rent and additional rent for the remainder of the lease term until July 31, 2022. The complaint does not allege sufficient facts to apply the exception to the general proposition that a corporation that acquires the assets of another is not liable for the its predecessor's torts. (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983].) In *Schumacher*, the Court of Appeals held that

> "[i]t is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. There are exceptions and we stated those generally recognized in *Hartford Acc. & Ind. Co. v. Canron, Inc.* A corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations. Nothing in the record suggests liability under any of these theories." (*Id.* [citations omitted].)

Plaintiff has not sufficiently alleged facts to hold Pritsker and Evolution Enrichment Center liable.

Plaintiff has leave to replead this cause of action.

Defendants' motion to dismiss the first cause of action is granted in part and denied in part: the claims against defendants Semyon Pritsker and Evolution Enrichment Center are dismissed, and the claim against Kings Day Care survives.

B. Second and Third Causes of Action

The Limited Guaranty is a personal-guaranty contract that qualifies as documentary evidence under CPLR 3211 (a) (1). Defendants signed the Limited Guaranty as the Guarantors, who have agreed to execute and deliver this Guaranty, knowing that plaintiff would not have entered into the Lease without the execution and delivery of the Guaranty.

That the guarantees pre-date the lease is of no consequence. A lease (or any other contract) and a guarantee for a lease (or other contract) need not be executed simultaneously. (GOL § 5-1105; *Arthur at the Westchester, Inc. v Westchester Mall*, LLC, 104 AD3d 471, 471 [1st Dept 2013] ["The guaranty, which recited that it was made to induce execution of a lease, was supported by consideration notwithstanding that it was signed before the lease"].)

Given that Tsepenyuk and Moyn were guarantors, they do not qualify as "Tenant Exculpated Party" under section 10.17(B)[2] of the Lease.

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[2] The Lease provides the following: "[T]he members, managers, partners, limited partners, shareholders, directors, officers, principals, employees and agents, direct and indirect, of or compromising Tent (each a "Tenant Exculpated Party") shall not be liable for the payment or performance of Tenant's obligations under this Lease or any liabilities of Tenant arising under this Lease. . . . Landlord shall not have recourse or otherwise look to any Tenant Exculpated Party or the individual or personal assets of any Tenant

Also, the absence of the name or signature of the Guarantor Defendants in the Lease does not extinguish the Guarantor Defendants' liability to the plaintiff. The guarantees provide that "concurrently with the execution and delivery of this Guaranty, Owner is entering into a lease agreement (the 'Lease') with KINGS DAYE (sic) LLC, an Limited Liability Company, as Tenant, (hereinafter the 'Tenant') for the rental of premises known as 2nd FLOOR, 38 DELANCEY STREET, NEW YORK, NY (the Premises)."

Defendants' motion to dismiss the second and third causes of action against the Guarantor Defendants is denied.

II. Plaintiff's Cross-Motion

Plaintiff's cross-motion is denied.

A party seeking summary judgment must affirmatively establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. (*See Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]; *Vega v Restani Construction Corp.*, 18 NY3d 499 [2012].) The party seeking summary judgment must establish, through evidence in admissible form, the merits of its position. For a court to grant summary judgment, no material and triable issue of fact must exist.

A motion for summary judgment must be supported by an affidavit of a person with personal knowledge. CPLR 3212 (b) provides that "[t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action has not merit."

Defendants argue, among other things, that plaintiff has failed to annex a copy of the pleadings to their moving papers as required by CPLR 3212 (b) and that plaintiff has not submitted an affidavit from someone with personal knowledge of the facts in this matter. But a copy of the complaint is attached as Exhibit A to defendant's motion to dismiss.

Plaintiff's proof is insufficient to warrant summary judgment on the second and third causes of action. In support of plaintiff's cross-motion, plaintiff relies on its counsel affirmation and the verified complaint. The verified complaint alleges in conclusory fashion that the Guarantor Defendants are liable for paying $146,793.21 with costs of $10,370, for a total of $157.163.11. Plaintiff has not met its burden on summary judgment.

Based on the foregoing, plaintiff has not made out a prima facie case for partial summary judgment against the Guarantor Defendants. Therefore, the cross-motion is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in part and denied in part: the first cause of action is dismissed as to the claims against defendant Semyon Pritsker and Evolution Enrichment Center, and the claim against Kings Day Care LLC survives, and the motion is otherwise denied;

Exculpated Party, . . . all such liability being expressly waived and released by Landlord." (Emphasis in original.)

ORDERED that plaintiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendants and on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that the remaining defendants have 20 days from service of this decision and order to file their answer; and it is further

ORDERED that the parties appear for a preliminary conference on March 20, 2019, at 11:00 a.m., in part 7, room 345, at 60 Centre Street.

1/28/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE