SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 152106/2012
SUNBELT RENTALS, INC.
vs.
NEW YORK RENAISSANCE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff for summary judgment against defendants New York Renaissance, Joshua Dolan, and Dan Pirvulescu is denied, without prejudice; and it is further

ORDERED that the parties shall proceed with discovery and filing of the note of issue as directed in the Preliminary Conference Order; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 12 16 2013

_____, J.S.C.

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: PART 35

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SUNBELT RENTALS, INC.,

Index No.: 152106/2012

Plaintiff,

-against-

DECISION AND ORDER

NEW YORK RENAISSANCE, GOLDMAN SACHS HEADQUARTERS LLC, BATTERY PARK CITY AUTHORITY, JOSHUA DOLAN, DAN PIRVULESCU and "JOHN DOE NO. 1" THROUGH JOHN DOE NO. 5",

Defendants.

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CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff, Sunbelt Rentals, Inc. ("plaintiff") moves for summary judgment in the amount of $36,148.78, plus interest and costs, against defendant New York Renaissance ("NYR") for breach of contract, *quantum meruit*, and account stated,[1] and against defendants Joshua Dolan ("Dolan") and Dan Pirvulescu ("Pirvulescu") (collectively, the "guarantors") for breach of their personal guaranty.

Factual Background

According to plaintiff, Battery Park City owns the property and improvements thereon located at 102 North End Avenue, New York, New York (the "Premises"). With Battery Park's consent and approval, Goldman Sachs entered into an agreement with F.J. Schiame Construction Co., Inc. ("Schiame") for a construction project at the Premises (the "Project").

Plaintiff contends that Schiame then entered into a subcontract with NYR for NYR to

[1] The portion of plaintiff's motion against defendants Goldman Sachs Headquarters, LLC 9 ("Goldman Sachs") and Battery Park City Authority ("Battery Park City") to foreclose on the mechanic's lien was withdrawn without prejudice per stipulation dated October 16, 2013. Counsel for plaintiff represents that the branch of the motion to foreclose on the mechanic's lien is likewise withdrawn as against NYR, without prejudice.

provide labor and materials at the Project. NYR, in turn, entered into an agreement with plaintiff, in which plaintiff agreed to rent construction equipment and provide supplies and services to NYR for use at the Project (the "Rental Contract"). Plaintiff further contends that the Rental Contract provides that NYR shall be liable for all service charges at 1.5% per month, costs, including attorneys' fees,[2] incurred in connection with actions undertaken by plaintiff to enforce its rights thereunder.

Plaintiff argues that as shown on several invoices billed to NYR, it performed under its Rental Contract, as agreed and as requested by NYR, and that NYR accepted and received the benefit of plaintiff's performance. Plaintiff claims it regularly billed NYR, which received, accepted and retained plaintiff's bills, without objection. Plaintiff further argues that a balance of $36,148.78 is due and remains unpaid although duly demanded. Therefore, NYR breached the Rental Contract, and is also liable under theories of *quantum meruit* and account stated.

As against the guarantors, plaintiff cites to an "Application for Credit," (Exh. G) as proof that they each signed a guaranty on April 18, 2008, personally and unconditionally guaranteeing payment to plaintiff of all NYR's liabilities arising from the rental equipment, supplies and services (the "Dolan guaranty" and "Pirvulescu guaranty," respectively). Plaintiff points out that in his answer, Pirvulescu admitted that he personally guaranteed the rental contract.

In opposition, Dolan argues that questions of fact exist as to the enforcability of the Dolan guaranty. From July 2007 to December 2007, he met with NYR's owner, Pirvulescu, concerning a Project Manager position with NYR. Dolan accompanied Pirvulescu on several occasions to

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[2] Plaintiff contends that its law firm is prosecuting this action on a 25% contingency basis, plus costs and expenses.

active construction sites to gauge Dolan's field experience. Dolan was asked to complete a New Employee Packet during his interview at Pirvulescu's home office, and Dolan signed the Dolan guaranty without understanding the legal implications thereof. Dolan states that he never intended for the documents he signed to become effective unless and until he got the job. Dolan never got the position. Further, the Dolan guaranty is not dated, and was not intended to be delivered to plaintiff or to bind Dolan. Arguably, said document was "really intended to be more like a 'letter of intent.'" Parol evidence is necessary to determine the circumstances surrounding Dolan's execution of the Dolan guaranty, including when he signed it as well as his intent with regard to any of his actions or failure to act. Dolan also argues that no consideration was given to him in exchange for the Dolan guaranty, which incorrectly states that he has a financial interest in NYR.

Pirvulescu, as an officer of NYR, also opposes the motion, arguing that NYR was never involved with the Project. Instead, American Renaissance ("AR"), a completely separate company of which he is also an officer, was hired by one of Schiame's subcontractors' affiliates (Alumicor Corp.), to provide labor and materials at the subject Project. When AR was awarded the subcontract from Alumicor Corp., Pirvulescu, on behalf of AR, contacted "Adam" of the plaintiff about renting equipment and its work at the Project, and they orally agreed that an account would be opened for AR and that any rental equipment would be invoiced to AR for payment. Pirvulescu argues that as further proof that AR had an account and separate agreement with plaintiff, is the fact that plaintiff filed a separate mechanic's lien against AR (dated January 2012) (the "January 2012 lien"). AR filed for bankruptcy protection, listing plaintiff as one of its creditors, after it was terminated from the project and not fully paid for its work. The bankruptcy

proceeding is still pending. Unlike AR, NYR never received any benefit of the rented equipment or accepted plaintiff's services because NYR was never a subcontractor at the Project to support a *quantum meruit* claim. Therefore, NYR is not a proper defendant in this action.

In addition, when Pirvulescu received the subject invoices, he objected to them because they were addressed to NYR. Plaintiff agreed to invoice AR, but never corrected the invoices. Therefore, an account stated claim does not lie against NYR.

With respect to the Pirvulescu guaranty, Pirvulescu attests that plaintiff never asked him to be personally responsible for the equipment rented by AR. Pirvulescu denies ever agreeing to be personally responsible for AR's equipment rentals and did not sign any such guaranty. And, since NYR has no indebtedness to plaintiff, Pirvulescu cannot be personally liable for any debt of NYR.

In reply, plaintiff argues that Pirvulescu's self-serving affidavit is insufficient to raise an issue of fact. Plaintiff points out that the Application for Credit (which contains the guaranty language) clearly states the customer name as "New York Renaissance" and the email address is to josh@nyrenaissance.com. And, the application was signed in 2008, two years before AR was even formed on April 6, 2010. NYR, on the other hand, was in existence at the relevant time period. And, plaintiff does not have an account with AR and NYR never advised plaintiff that it was operating under an assumed name or business entity other than NYR. NYR does not submit any documentation demonstrating that AR, not NYR, was the subcontractor on the Project. Thus, AR could not have been the entity that rented the subject equipment.

Further, the notice of lien shows equipment rented to NYR in connection with a completely separate project in Brooklyn. And, the personal guaranties stated that the guaranties

are given in consideration for the extension of credit to rent the subject equipment. It is uncontested that the guarantors signed their respective guaranties.

Discussion

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1st Dept 2012]). Thus, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]), and must set forth evidentiary proof in admissible form in support of his or her claim

that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367 [1st Dept 2007] ["(a) party's affidavit that contradicts (his or) her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v City of New York*, 86 AD3d 452, 928 NYS2d 1 [1st Dept 2011] *citing Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

Here, plaintiff failed to sufficiently establish its entitlement to summary judgment against NYR.

As to its breach of contract claim against NYR, such a claim requires a showing of "the existence of a valid contract, performance by the plaintiff, breach of the contract by defendant and resulting damages" (*Harris v Seward Park Housing Corp.* 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]; *Flomenbaum v New York Univ.*, 71 AD3d 80, 890 NYS2d 493 [1st Dept 2009]; *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 850 NYS2d 6 [1st Dept 2007]).

A *quantum meruit* claim requires a showing of "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of

compensation therefor, and the reasonable value of the services" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 926 NYS2d 494 [1st Dept 2011] *citing Freedman v Pearlman*, 271 AD2d 301, 304 [2000]).

And, an account stated claim requires a showing of defendant's receipt and retention of the subject statement of account without proper objection within a reasonable time (*Loheac v. Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 A.D.2d 294, 295 [1st Dept 1996]). Where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 A.D.2d 165 [1st Dept 1991]).

Here, plaintiff's Senior Credit Manager attests to the existence of an equipment rental contract between plaintiff and NYR, and that the "Rental Contract" provides for monthly service charges and costs for collection, including attorneys' fees. However, plaintiff does not expressly identify any of its exhibits as constituting the Rental Contract between plaintiff and NYR. And, while language concerning the service charges and attorneys' fees is found in Exhibit G-the 2008 Application for Credit-this exhibit is cited to only, and for the first time, in support of plaintiff's claims as against the guarantors (Affidavit in Support, Paragraph 35) since it contains a personal guaranty. Nor does plaintiff expressly state that Exhibit G, the Application for Credit, constitutes the "Rental Contract."[3] Indeed, upon further review, said Application for Credit makes reference

[3] The Application for Credit, however, was executed by "Josh Dolan" on April 18, 2008, and Dolan is identified in the application as the "Authorized Agent" for NYR, with an email address of "Josh@nyrenaissance.com."

to a separate, documented "Rental Contract," as follows:

> "The undersigned ("Customer") in consideration of Lessor extending commercial credit . . . .warrants and agrees that by executing this Agreement below: . . . (b) Customer has, received, read, understands and accepts all of the terms and conditions of Lessor's rental contract, *which terms and conditions are on the reverse side of each and every rental contract, including the Release and Indemnification Provision in Section 8 and the Insurance Provision in Section 9*; (c) such terms and conditions are deemed incorporated into and made a part of this Agreement . . . ."

The Application for Credit does not contain any "Section 8" or "Section 9," thereby giving rise to the possibility of the existence of a separate document constituting the rental agreement. Nor does plaintiff provide any documentary evidence that NYR was engaged by Schiame for the subject Project (as it alleges).

Thus, although the terms of the rental contract are incorporated into the Application for Credit, plaintiff failed to establish the existence of a valid rental contract between it and NYR, as a matter of law.

And, notably, while plaintiff attests that it rented equipment to NYR for four months starting from May 3, 2011 (through September 28, 2011), the invoices from plaintiff to NYR show that plaintiff rented equipment to NYR from June 2011.

However, even assuming that Exhibit G (the Application for Credit) coupled with the invoices, constitutes the Rental Contract, further discovery is necessary in order to determine whether plaintiff's rental equipment was provided to AR, instead of NYR, under an oral agreement.[4] In opposition, NYR asserts that contrary to plaintiff's unsupported and undocumented allegation that NYR was hired by Schiame as a subcontractor at the Project, NYR

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[4] The Preliminary Conference Order states that any party may move for summary judgment at any time, and the papers do not indicate that discovery, including depositions, is complete.

had no involvement with the Project, and that AR, instead, was a subcontractor on the Project that rented the equipment which is the subject of this action. NYR does not deny executing the Application for Credit in 2008 for the rental of plaintiff's equipment. However, it is claimed that when AR was awarded the subcontract at the Project, Pirvulescu spoke to "Adam" about establishing an account to rent equipment at AR's expense. In reply, plaintiff does not address this allegation concerning "Adam," and plaintiff's claim that it has no account in the name of AR is consistent with Pirvulescu's assertion that the invoices were erroneously sent to NYR, when they should have been billed to AR.

Further, the 2012 Lien submitted in opposition shows that AR was a general contractor and that NYR rented equipment from plaintiff regarding a different project location in Brooklyn. Although AR was not in existence in 2008 when the Application for Credit was signed, the rentals occurred in 2011, a year after AR was incorporated. Thus, an issue of fact exists as to whether AR, as opposed to NYR, rented the subject equipment.

Therefore, as discovery is needed in order to establish whether the subject rentals were made by plaintiff to NYR, summary judgment against NYR for breach of contract, *quantum meruit*, and account stated is unwarranted, at this juncture, and is denied, without prejudice (*Davidoff Malito & Hutcher, LLP v Scheiner*, 38 Misc 3d 1201(A), 966 NYS2d 345 (Table) [Supreme Court, New York County 2012] (denying summary judgment on account stated claim where defendant claimed that all services rendered by plaintiff to defendant were not performed to the benefit of defendant, but to another party, *i.e.*, his business entities)).

As against the guarantors, on a motion for summary judgment to enforce a written guaranty, "the creditor needs to prove an absolute and unconditional guaranty, the underlying

debt, and the guarantor's failure to perform under the guaranty" (*Davimos v Halle*, 35 AD3d 270, 826 NYS2d 61[1st Dept 2006], *citing City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 681 NYS2d 251 [1st Dept 1998]). "[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement" (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 948 NYS2d 275 [1st Dept 2012]).

Here, it is uncontested that both guarantors executed an unconditional personal guaranty, which provides that the guaranty is given in consideration for the extension of credit (*Movado Group, Inc. v. Presberg*, 259 AD2d 371, 687 NYS2d 116 [1st Dept 1999] *citing Sun Oil Co. v Heller*, 248 NY 28, 161 NE 319 ("An extension of credit is ample consideration for the execution of a guaranty")).

As to the guarantors, it is uncontested that Pirvulescu and Dolan executed a guaranty of NYR's rental equipment payment obligations. However, as explained above, plaintiff failed to establish, at this juncture, the underlying debt, *i.e.*, that NYR is the party obligated for the rental equipment services at issue, for which the guarantors may be held liable under their personal guaranties.[5]

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[5] Dolan's claim that the Dolan guaranty is undated is insufficient to raise an issue of fact, as he does not deny that said guaranty "bears his signature" (*see Gettinger Associates v One Move Upward, Inc.*, 19 Misc 3d 1118(A), 862 NYS2d 814 (Table) [Supreme Court, New York County 2008] (rejecting claim that guaranty was merely an unwitnessed, undated document that did not refer to the underlying lease where it was uncontested that the guaranty bore his signature)). And, Dolan's remaining claims, including the claim that he signed the Dolan guaranty without understanding its legal implications is insufficient (*Chemical Bank v Masters*, 176 AD2d 591, 591–592, 574 NYS2d 754 [1991] ("defendant's conclusory allegations that he was unaware that it was a personal guaranty [and] that he advised the bank that he was unwilling to personally guarantee the loan" do not raise an issue of fact as to whether the signer was fraudulently induced into signing the documents")).

Conclusion

Based on the foregoing, it is hereby

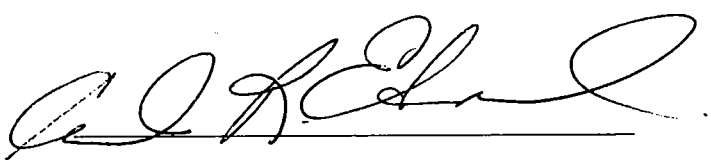
ORDERED that the motion by plaintiff for summary judgment against defendants New York Renaissance, Joshua Dolan, and Dan Pirvulescu is denied, without prejudice; and it is further

ORDERED that the parties shall proceed with discovery and filing of the note of issue as directed in the Preliminary Conference Order; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 16, 2013



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD