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No. 008825/05

SUPREME COURT – STATE OF NEW YORK
IAS TERM PART 16 Nassau County

Present:
Honorable LEONARD B. AUSTIN
Justice

Motion R/D: 11-29-05
Submission Date: 12-22-05
Motion Sequence No.: 001,002/ MOT D

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CITICORP VENDOR FINANCE, INC.,

Plaintiff,

-against-

COUNSEL FOR PLAINTIFF
Moritt Hock Hamroff & Horowitz LLP
400 Garden City Plaza
Garden City, New York 11530

BARRY THIERNO d/b/a THE DELUCA ORGANIZATION,

COUNSEL FOR DEFENDANT
Peter E. Torres, Esq.
112 East 23rd Street, Suite 500
New York, New York 10010

Defendant.

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ORDER

The following papers were read on Plaintiff's motion to dismiss Defendant's affirmative defenses, pursuant to CPLR 3211(b); Defendant's cross-motion to dismiss the complaint; and for summary judgment, pursuant to CPLR 3212:

Notice of Motion dated November 7, 2005;
Affirmation of Shannon Anne Scott, Esq. dated November 7, 2005;
Affidavit of Carrie Smith, sworn to on November 2, 2005;
Affirmation in Opposition of Peter E. Torres, Esq. dated November 17, 2005;
Affidavit of Barry Thierno, sworn to on November 17, 2005;
Notice of Cross-Motion dated November 17, 2005;
Affirmation in Support of Peter E. Torres, Esq. dated November 17, 2005;
Reply Affirmation of Shannon Anne Scott, Esq. dated December 8, 2005.

Plaintiff moves, pursuant to CPLR 3211(b), to dismiss Defendant's affirmative defenses and, pursuant to 3212, for summary judgment against Defendant. Defendant cross-moves to dismiss this action.

BACKGROUND

This action arises out of two separate equipment lease agreements entered into by and between Konica Minolta Business Solutions, Inc. ("Konica Minolta") and The Deluca Organization ("Deluca"), located at the time of this action at 971B East New York Avenue, Brooklyn, New York. Deluca is alleged to be the assumed name of Defendant Barry Thierno ("Thierno"). Citicorp Vendor Finance, Inc. ("CVF") is a domestic corporation. CVF brings this action as assignee of the lease agreements from Konica Minolta.

On December 30, 2003, Deluca, as lessee, entered into a lease agreement with Konica Minolta for a copier and controller for the copier ("Lease 1"). Under Lease 1, Deluca agreed to pay sixty (60) monthly payments of $1,190.00 commencing on February 4, 2004, for a total amount of $71,400. Thierno executed Lease 1 on behalf of Deluca, and indicated that he was signing Lease 1 as "Controller" of Deluca. Thereafter, Konica Minolta assigned its interest in Lease 1 to CVF.

On June 21, 2004, Deluca entered into a second lease agreement with Konica Minolta for two color copiers ("Lease 2"). Under Lease 2, Deluca was obligated to pay CVF sixty (60) monthly payments of $1,500 commencing August 10, 2004, for a total amount of $90,000. Thierno executed Lease 2 on behalf of Deluca in the same manner as Lease 1. Thereafter, Konica Minolta assigned its interest in Lease 2 to CVF.

Both Lease 1 and Lease 2 contain a clause which addresses both consent to jurisdiction and choice of law in the event of litigation between the parties. Paragraph 12 of each lease agreement provides:

> **CONSENT TO JURISDICTION AND GOVERNING LAW:** YOU [DELUCA] CONSENT TO PERSONAL JURISDICTION OF THE COURTS OF THE STATE OF NEW JERSEY WITH RESPECT TO ANY ACTION ARISING OUT OF THIS AGREEMENT OR THIS EQUIPMENT. THIS MEANS THAT ANY LEGAL ACTION FILED AGAINST YOU MAY BE FILED AGAINST YOU IN NEW JERSEY AND THAT YOU MAY BE REQUIRED TO DEFEND AND LITIGATE ANY SUCH ACTION IN NEW JERSEY.
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> * * * *
>
> However, nothing in this paragraph shall be construed to limit the jurisdictions in which suit may be filed by any party to this Agreement . . . . This Agreement shall be governed by and construed according to the laws of the State of New Jersey.

CVF, as assignee of Lease 1 and Lease 2, claims that both leases have been breached for failure to make payments due. As a result, CVF seeks to accelerate the payments due under Lease 1 and Lease 2 pursuant to the acceleration clauses in each lease agreement. (Lease Agreement ¶ 10[ii].)

CVF claims that only $14,280 has been paid on Lease 1. Thus, CVF seeks to recover the remaining $57,120 in lease payments due under Lease 1, together with interest and $127.23 in late charges. CVF further claims that no payments have been made on Lease 2. CVF seeks to recover $90,000 in lease payments due under Lease 2, together with interest and $1,008.75 in late charges. Additionally, CVF claims that it is entitled to expenses, costs and reasonable attorney's fees incurred in connection with

this action pursuant to the remedies provisions in both leases. (Lease Agreement ¶ 10[v].)

CVF seeks to hold Thierno personally liable for the amounts due under Lease 1 and Lease 2. Based on its search of the Department of State Division of Corporations database, CVF asserts that the corporate entity known as Deluca has never been incorporated in New York. Thierno asserts that he was hired by an individual named Alpha Barry ("Barry") who is the President of Deluca, to handle the organization's books, perform general administrative tasks and purchase and lease office equipment for Deluca's office located at 971B East New York Avenue, Brooklyn, New York.

Thierno denies the essential allegations of the complaint, and raises four affirmative defenses challenging CVF's action, including an affirmative defense to the allegation that Thierno is personally liable for the defaults under Lease 1 and Lease 2. CVF argues that all of Thierno's affirmative defenses are without merit, and moves to dismiss Thierno's four affirmative defenses pursuant to CPLR 3211(b), and for summary judgment pursuant to CPLR 3212. Thierno opposes CVF's motion, and cross-moves to dismiss on the grounds that Defendant is an improper party, and that pursuant to the provisions in both leases, the proper jurisdiction of this action is New Jersey.

DISCUSSION

A. Plaintiff's Motion to Dismiss the Affirmative Defenses

CPLR 3211(b) permits the court to dismiss defenses on the grounds that a defense is not adequately stated or has no merit. When considering a 3211(b) motion, the court must give the defendant "the benefit of every reasonable intendment of the

pleading, which is to be liberally construed." Abney v. Lunsford, 254 A.D.2d 318 (2nd Dept. 1998). If there is any doubt as to the availability of a defense, it should not be dismissed. Warwick v. Cruz, 170 A.D.2d 255 (2nd Dept. 2000); and Abney v. Lunsford, *supra*.

In this matter, Defendant asserts four affirmative defenses; to wit: (1) the Court lacks jurisdiction of this action; (2) the complaint fails to state a cause of action; (3) improper venue; and (4) Thierno is an improper party to this action.

1. *Jurisdiction*

Defendant's first affirmative defense alleging that the Court lacks jurisdiction of this action must be dismissed.

Affirmative defenses pled as conclusions of law which are not supported by factual allegations are insufficient and should be dismissed. Petracca v. Petracca, 305 A.D.2d 566 (2nd Dept. 2003); and Bentivegna v. Meenan Oil Co., 126 A.D.2d 506 (2nd Dept. 1987). Defendant's affirmative defense is pled as a single sentence conclusion of law absent any factual allegations to support those defenses. The deficiency in the pleading is not remedied by the affidavit submitted in opposition to the motion. Therefore, the first affirmative defense must be dismissed. USA Auto Funding, LLC v. Capital City Coach Lines, Inc., 8 Misc.3d 1009(A) (Sup. Ct. Nassau Co. 2005).

Assuming, *arguendo*, that the deficiency in the pleading is remedied by the affidavit submitted in opposition to the motion, Defendant's first affirmative defense still must be dismissed. Although Defendant does not adequately specify the grounds on

which this Court lacks jurisdiction, this Court clearly has jurisdiction over the present matter.

a. *Subject Matter Jurisdiction*

This Court has subject matter jurisdiction over the action. The Supreme Court has broad jurisdiction that is generally unlimited and unqualified. Kagen v. Kagen, 21 N.Y.2d 532 (1968). The Supreme Court is permitted to decide all causes of action unless its jurisdiction has been specifically proscribed. Thrasher v. United States Liability Ins. Co., 19 N.Y.2d 159 (1967); and Condon v. Associated Hospital Service, 287 N.Y. 411 (1942). Furthermore, there must be an actual case or controversy presented before the court to adjudicate. In re David C., 69 N.Y.2d 796 (1987).

There is no question that this Court, as a court of general jurisdiction, has subject matter jurisdiction over cases involving breach of lease agreements and the respective legal rights of parties under said agreements. This jurisdiction has never been specifically proscribed by the laws of New York State. Additionally, an actual case or controversy exists in the present matter in that Plaintiff is suing for damages resulting from the default under each lease agreement.

b. *In Personam* Jurisdiction

The Court also has personal jurisdiction over Thierno. A New York domiciliary is subject to the personal jurisdiction of the New York courts even when the defendant is served by some substituted method. CPLR 308. See, Siegel, *New York Practice* §§ 80, 81 (4th Ed. 2005). In his affidavit, Defendant declares that he resides at 170 Parkside Avenue, Brooklyn, New York, 11226. There is no indication that Defendant was not

domiciled in New York at the commencement of the action, or that Defendant merely maintained a residence in New York while domiciled elsewhere. Either way, Thierno is subject to the personal jurisdiction of this Court.

Furthermore, substituted service of process upon Thierno was properly effectuated pursuant to CPLR 308(2). The affidavit of service submitted by Plaintiff, which sets forth the person served, the date, time and place at which service was made, and that the person who made service was authorized to serve process, constitutes *prima facie* proof of service. Remington Investments, Inc. v. Seiden, 240 A.D.2d 647 (2nd Dept. 1997); and Maldonado v. County of Suffolk, 229 A.D.2d 376 (2nd Dept. 1996). Defendant has not submitted any evidence which controverts the assertions made in the affidavit of service. As such, Plaintiff has met its burden of establishing that Defendant has been served in such a way so as to confer the court with jurisdiction over him. Kanner v. Gerber, 197 A.D.2d 673 (2nd Dept. 1993); and Frankel v. Schilling, 149 A.D.2d 657 (2nd Dept. 1989).[1]

2. *Failure to State a Cause of Action*

Defendant's second affirmative defense asserting that Plaintiff fails to state a cause of action must be stricken. In the Second Department, the failure to state a claim upon which relief can be granted cannot be raised as an affirmative defense in an answer. Bentivegna v. Meenan Oil Co., *supra*. More properly, it should be raised by

[1] Plaintiff also argues that Defendant waived his right to challenge personal jurisdiction. However, Defendant served his answer on September 26, 2005, alleging lack of jurisdiction, and thereafter served his cross-motion to dismiss based in part on lack of jurisdiction on or about November 19, 2005. Defendant therefore did not waive his affirmative defense of lack of jurisdiction under CPLR 3211(e). Because Defendant cross-moved to dismiss based on lack of jurisdiction within sixty (60) days after serving his answer, it is timely. See, CPLR 3211(e).

motion pursuant to CPLR 3211(a)(7). Petracca v. Petracca, *supra*; Iannarone v. Gramer, 256 A.D.2d 443 (2nd Dept. 1998); Procopo, Inc. v. Birnbaum, 157 A.D.2d 774 (2nd Dept. 1990); and Bentivegna v. Meenan Oil Co., *supra*. Thus, Defendant's second affirmative defense cannot be sustained. USA Auto Funding, LLC v. Capital City Coach Lines, Inc., *supra*.

3. *Improper Venue*

Defendant's third affirmative defense alleges improper venue. Improper venue is not a proper subject of an affirmative defense. D. Graham v. Sylvan Lawrence Co., Inc., 82 A.D.2d 980 (3rd Dept. 1981); and Koppell v. Long Island Society for Prevention of Cruelty to Children, 163 Misc.2d 654 (Sup. Ct. N.Y. Co. 1994). The proper procedure to remedy an incorrect designation of venue is a motion to change venue. Koppell v. Long Island Society for Prevention of Cruelty to Children, *supra*. No such motion has been made. Thus, venue of this matter before this Court stands.

Moreover, as a prerequisite to a motion to change venue, the defendant must serve a written demand that the action be tried in the county he/she specifies as proper with the answer or before the answer is served. CPLR 511(a) and (b). Defendant did not even take this preliminary step. Thus, this affirmative defense must be dismissed.

4. *Improper Party*

Thierno claims that he is an improper party to the action. Again, this affirmative defense is pled as a single sentence conclusion of law absent any factual allegations to support the defense. However, the deficiency in the pleading is cured by the papers submitted on this motion.

CVF claims that Thierno is personally liable for the default under the leases since he executed the leases as an officer for a non-existent corporation. To support this argument, Plaintiff has submitted search results from the New York State Department of State Division of Corporations database showing that the alleged corporate entity Deluca is not incorporated in New York State.

In his affidavit, however, Thierno claims that he was not a principal of Deluca, he was not "doing business as" Deluca, and he possessed no managerial control over Deluca. Thierno does not explain the nature of the business in which Deluca was engaged. Instead, he explains that he was hired by Barry, who was known to him as the President of Deluca, to handle administrative tasks, including leasing office equipment for Deluca's Brooklyn office. Defendant also avers that Barry has ceased to do business under the name Deluca and no longer rents office space at 971B East New York Avenue, Brooklyn, New York.

Thierno states that he entered into Lease 1 with Konica Minolta on behalf of Deluca. Defendant claims that Konica Minolta's sales representative understood that Deluca – not Thierno – was leasing the equipment, that Defendant would not be personally liable for Lease 1 and that Defendant identified himself as the "Controller" for Deluca in Lease 1 to demonstrate his agency relationship to Deluca. Defendant does not state that a similar relationship was understood in the execution of Lease 2. In fact, Defendant makes no mention of Lease 2 in his affidavit.

When a corporate officer signs an agreement in his or her corporate capacity, the corporate officer will not be held personally liable on the contract unless he or she

personally binds him or herself. Metropolitan Switch Board Co., Inc. v. Amici Assocs., Inc., 20 A.D.3d 455 (2nd Dept. 2005); Gordon v. Teramo & Co., Inc., 308 A.D.2d 432 (2nd Dept. 2004); and Maranga v. McDonald & T. Corp., 8 A.D.2d 351 (2nd Dept. 2004). See also, Matter of Gifford, 144 A.D.2d 742 (3rd Dept. 1988) ("an individual who signs a corporate contract and indicates the name of the corporation and the nature of his representative capacity on the contract is generally not subject to personal liability.") *citing*, Gold v. Royal Cigar Co., 105 A.D.2d 831 (2nd Dept. 1984). However, courts also have the authority to look beyond the corporate form to prevent fraud or achieve equity. See, Gottehrer v. Viet-Hoa Co., 170 A.D.2d 648 (2nd Dept. 1991). This exception is limited. Only when a natural person uses control of the corporation to further his own, rather than the corporation's, business will the court hold the individual liable for the corporation's acts. Walkovszky v. Carlton, 18 N.Y.2d 414 (1966). See also, Cooperstein v. Patrician Estates, Inc., 97 A.D.2d 426 (2nd Dept. 1983).

Questions of fact exist as to the nature of Deluca's business, whether Deluca was a corporation, partnership or merely an assumed name, and, if so, whose, the nature of Thierno's relationship and involvement with Deluca and his true capacity and authority under which he executed Lease 1 and Lease 2. These questions of fact must be resolved before the Court can address the merits of Plaintiff's claim that Thierno is personally liable for the defaults under Lease 1 and Lease 2.

Thus, Defendant's fourth affirmative defense should not be dismissed. See, Warwick v. Cruz, *surpa*.

B. Defendant's Cross-Motion to Dismiss

Thierno cross-moves to dismiss on the grounds that the proper jurisdiction of this action is New Jersey and that Defendant is an improper party to this action. However, Defendant fails to specify the statutory basis for the dismissal. This Court will, therefore, evaluate Defendant's cross-motion based on CPLR 3211(a)(2), (7) and (8).

1. *CPLR 3211(a)(2) and (8)*

CPLR 3211(a)(2) and (8) permit the court to dismiss a cause of action on the grounds that the court lacks subject matter jurisdiction over the cause of action, or lacks personal jurisdiction over the defendant, respectively.

a. Subject Matter Jurisdiction

Thierno argues, in his cross-motion to dismiss, that New Jersey is contractually the proper forum for the present action based on the consent to jurisdiction clauses in Lease 1 and Lease 2. Forum selection clauses are generally addressed in motions to dismiss for improper venue as opposed to motions to dismiss for lack of subject matter jurisdiction.

A New York court may be precluded from exercising jurisdiction over a defendant when a valid forum selection clause designates another jurisdiction as the only competent court to adjudicate controversies arising from a particular agreement. Gio. Buton & C., S.p.A. v. Mediterranean Importing Co., 125 A.D.2d 638 (2nd Dept. 1986). New Jersey courts will also enforce forum selection clauses unless the clause is the result of fraud or overweening bargaining power; enforcement would violate the strong public policy of New Jersey; or enforcement would be seriously inconvenient for the

trial. Wilfred MacDonald, Inc. v. Cushman, Inc., 256 N.J. Super. 58, 63 (App. Div.), *certif. den.*, 130 N.J. 17 (1992).

The forum selection clauses in Lease 1 and Lease 2, however, were not stipulations that the New Jersey State courts were to have exclusive jurisdiction over the dispute. They were merely agreements that a suit brought in New Jersey was permissible and Thierno consented to such jurisdiction. See, Parksville Mobile Modular, Inc. v. Fabricant, 73 A.D.2d 595 (2nd Dept. 1979). A "forum selection clause which merely specifies that the parties consent to jurisdiction in the chosen forum 'will generally not be enforced without some further language indicating the parties' intent to make the jurisdiction exclusive.'" Computer Express International, Ltd. v. MicronPC, LLC, 2001 WL 1776162 * 5 (E.D.N.Y.) *quoting*, John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs., Inc., 22 F.3d 51, 52 (2nd Cir. 1994).

The consent to jurisdiction clauses in both lease agreements declare that "any legal action filed against you **may** be filed in New Jersey and that you **may** be required to defend and litigate any such action in New Jersey." (Emphasis added) (Lease Agreement ¶ 12.) The clauses go on to state that "nothing in this paragraph shall be construed to limit the jurisdictions in which suit may be filed by any party to this Agreement or the means of obtaining service of process in any such suit." (Lease Agreement ¶ 12.) Defendant concedes that the consent to jurisdiction clauses in both leases declare that they are not to be construed as limiting the jurisdiction in which suit may be filed. Thus, the consent to jurisdiction clauses clearly do not preclude adjudication of this action in this Court.

b. *In Personam* Jurisdiction

Thierno has presented no evidence to even suggest that he was not properly served with process. Thus, his personal jurisdiction claim must be rejeted.

2. *CPLR(a)(7)*

A dismissal motion pursuant to CPLR 3211(a)(7) permits the court to dismiss a cause of action on the grounds that it fails to state a cause of action. When deciding a motion to dismiss, the court must accept as true all of the facts alleged in the complaint and any factual submission made in opposition to the motion. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); and Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001). The allegations in the complaint must be liberally construed, and the plaintiff must be given the benefit of every favorable inference which can be drawn from the facts as pled. Leon v. Martinez, 84 N.Y.2d 83 (1994); and Paterno v. CYC, LLC, 8 A.D.2d 544 (2nd Dept. 2004).

It is unclear whether Thierno can be held personally liable for the defaults under Lease 1 and Lease 2. Questions of fact exist as to the nature of Deluca's business, Defendant's involvement with Deluca and the capacity in which Defendant executed Lease 1 and Lease 2. However, accepting Plaintiff's allegations as true, Plaintiff has a cognizable cause of action. Therefore, Defendants' cross-motion to dismiss for failure to state a cause of action should be denied. See, Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

C. Plaintiff's Motion for Summary Judgment

Summary judgment is a drastic remedy which will be granted only when it is clear that there are no triable issues of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Andre v. Pomeroy, 35 N.Y.2d 361 (1974). The party seeking summary judgment must establish a *prima facie* entitlement to judgment as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, *supra*; and Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001).

Summary judgment must be denied if the court has any doubt regarding the existence of a triable issue of fact. Kovilas v. Kirchoff, 14 A.D.3d 493 (2nd Dept. 2005). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must also give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Erikson v. J.I.B. Realty Corp., 12 A.D.3d 344 (2nd Dept. 2004).

Plaintiff has met its initial burden of establishing its entitlement to judgment as a matter of law for breach of the equipment leases by submitting copies of the equipment leases, copies of the assignments of said leases to Plaintiff and an affidavit in support demonstrating nonpayment. See, Advanta Leasing Services v. Laurel Way Spur

Petroleum Corp., 11 A.D.3d 571 (2nd Dept. 2004); and Canon Financial Services v. Medico Stationery Service, 300 A.D.2d 66 (2nd Dept. 2002).

However, since Defendant has established the existence of a triable issue of fact, Plaintiff's motion for summary judgment must be denied. Cuttitto v. Fanara, 10 A.D.3d 656 (2nd Dept. 2004).

Accordingly, it is,

ORDERED, that Plaintiff's motion to dismiss Defendant's affirmative defenses is **granted** to the extent of dismissing Defendant's first, second and third affirmative defenses, and is otherwise **denied**; and it is further,

ORDERED, that Defendant's cross-motion to dismiss Plaintiff's complaint is **denied**; and it is further,

ORDERED, that Plaintiff's motion for summary judgment is **denied**; and it is further,

ORDERED, that counsel for the parties are directed to appear for a preliminary conference on May 18, 2006 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
April 21, 2006

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
APR 26 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE