

77-4092 - ILG - MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED ARTISTS THEATRE CIRCUIT, INC.

Plaintiff,

-against-

MEMORANDUM AND ORDER
97-CV-4092 (ILG)

SUN PLAZA ENTERPRISE CORP., and
EFRAIM SHURKA,

Defendants.
-----X

GLASSER, United States District Judge

The defendants have filed this motion pursuant to Rule 56 Fed. R. Civ. P. seeking an order that would dismiss this action. The asserted basis for the relief they seek is that the action has been rendered moot and that there no longer is, therefore, a justiciable controversy between the parties.

Background

This action was commenced on July 18, 1997, alleging breach of an agreement by Sun Plaza Enterprise Corp. ("SPEC") to give a long-term lease to the plaintiff of an underdeveloped parcel of land upon which the plaintiff would operate a movie theatre. The action also alleged misappropriation (against SPEC and Shurka); fraud (against SPEC and Shurka); conversion (against SPEC and Shurka); breach of fiduciary duty (against SPEC and Shurka); copyright infringement (against SPEC and Shurka); and unjust enrichment (against SPEC). The plaintiff also seeks specific performance of that agreement. The events leading up to this action are described in some detail in the court's Memorandum and Order ("M & O") dated November 19,

1997, familiarity with which is assumed. For purposes of this motion, the salient event prompting the commencement of this action was that after lengthy negotiations extending over a period of approximately 2 ½ years, the parties were on the brink of an executed document. Anticipating its execution, the plaintiff in July, 1997, sent a lease which it had signed to SPEC, but which SPEC did not then sign. Shurka thereafter revealed that he entered into a lease agreement with Crowne Theatres, a competitor of the plaintiff, for the same site which was the subject of their negotiations.

The defendants moved pursuant to Rule 12(b)(6), Fed. R. Civ. P. for an order that would dismiss the complaint relying upon the absence of a fully executed lease and upon the statute of frauds which, they urged, made the agreement unenforceable. Accepting the truth of the allegations of the complaint as it was required to do, the Court denied the motion addressed to the breach of contract holding that the doctrine of part performance formulated by Judge Cardozo with his customary felicity in Burns v. McCormack, 233 N.Y. 230 (1922) rescued the agreement from the demands of the statute of frauds. The court also denied the motion addressed to the fraud and copyright infringement claims and granted it as to the others. (Memorandum and Order of November 19, 1997).

This motion, filed on May 21, 1998, was unaccompanied by a statement of material facts required by Local Rule 56.1(a) to be annexed to the notice of motion, nor was it accompanied by a memorandum of law as required by Local Rule 7.1. The failure to annex the required statement of material facts would constitute grounds for denying this motion for summary judgment. SPEC attempted to cure these deficiencies by filing a "Statement of Undisputed Material Facts" nearly two months later, on July 9, 1998, together with its Memorandum of Law. Although that

belated attempt to comply with the Rule would not preclude the court from denying this motion, see Kinstler v. First Reliance Standard Life Ins. Co., 1997 WL 401813 *4 (S.D.N.Y. July 16, 1997) and Grant v. City of New York, 1992 WL 77562 *4 (S.D.N.Y. March 25, 1992) the court will not deny it for that reason, preferring to do so on a substantive rather than procedural ground.

In its belated 56.1 statement, SPEC acknowledges that it entered into a lease with Crowne Theatres on or about July 3, 1997, for the subject site. It states that it terminated that lease in November, 1997, without Crowne ever having occupied the site. (It is unclear as to what the consequences were, if any, to which that event gave rise). Thereafter, on March 26, 1998, SPEC executed the proposed lease tendered to it by the plaintiff in July, 1997. It is that event which SPEC contends renders this action moot and warrants the relief it seeks. SPEC also seeks an order vacating a lis pendens filed by the plaintiff in the Kings County Clerk's Office claiming that since the plaintiff seeks only money damages the lis pendens was improperly filed. SPEC is mistaken. Paragraph 3 and the "Wherefore" clause of the complaint clearly seek specific performance which the defendant acknowledges at page 5 of its Memorandum of Law in Support of its Motion.

Shortly after SPEC moved for summary judgment, the plaintiff wrote to Mr. Shurka advising him to apply to ORIX - a third party, for financing. Arden Rep. Aff. Ex. A. On the same day, June 22, 1998, Shurka, responding as President of SPEC (but who describes himself in his affidavit in support of this motion as "a consultant" to SPEC) advised that SPEC was terminating the lease in accordance with paragraph 63 of Article XXXV thereof. That paragraph, in part, provides as follows:

If the Tenant will not be considered as a bankable Tenant by any lending institution and/or the Landlord will not be able to secure a construction loan based on this Lease, and, in that event, the Landlord shall have the right, only within the period of 90 days after the execution of this Lease, to cancel this Lease, provided the Landlord used his best efforts to secure financing.

That provision continued to provide, in essence, that if the Landlord thus terminates the lease, the parties shall be relieved of all obligations under it.

Following oral argument on the motion, the court met with the parties on several occasions in an effort to assist them in arriving at an amicable resolution of their differences. Such a resolution appeared to be the proper end to be achieved given the solemn representations by each that they desired to consummate the deal. Those efforts were, sadly, unsuccessful. A recitation of recriminations leveled by each against the other would serve no useful purpose. Suffice it to say that the essence of those recriminations may fairly be said to center upon whether SPEC used its best efforts to obtain the necessary financing and also, although not always clearly articulated, whether the plaintiff is a bankable tenant. Those issues having surfaced well after the motion was submitted and argued are not properly to be considered in deciding it.

Discussion

To attempt to review the voluminous treatise, law review and judicial literature on summary judgment would be as foolhardy as it would be superfluous. Suffice it to be cognizant of the observation made by the Court in Celotex corp. v. Catrett. 477 U.S. 317, 327 (1986):

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action Rule 56

must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rules prior to trial, that the claims and defenses have no factual basis.

In Matsushita Electric Industrial Co. v. Zenith Radion Corp., 475 U.S. 574, at 586-7

(1986), the Court said:

When the moving party has carried its burden under Rule 56(c) its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

In Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987), the author, commenting upon that statement in Matsushita writes, at p. 186:

This language makes clear that summary judgment acts in a parallel fashion to the trial motion for directed verdict, allowing a grant if the nonmovant plaintiff fails on substantive proof even before trial. This strengthens the perception that summary judgment allows weak factual claims to be weeded out, not just facts that have no legal import; "genuine" allows some quantitative determination of sufficiency of the evidence.

And finally, in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) the court again emphasized that granting a motion for summary judgment requires that there be no genuine issue of material fact. "Only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable

jury could return a verdict for the nonmoving party." 477 U.S. at 248. The Court went on to instruct that "If the evidence is merely colorable, . . . or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50.

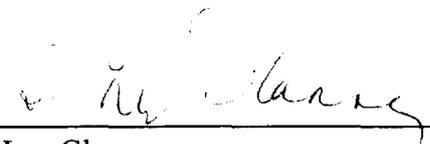
The material fact in issue here is whether the execution of the lease by SPEC on March 26, 1998 constitutes performance on its part of all of its obligations under it which, without more, would preclude the granting of this motion.

That aside, the motion, insofar as it is bottomed upon a claim of mootness must be denied as a matter of law for several reasons. Harkening back to the Memorandum and Order of November 19, 1997, as has been indicated, the court decided that three of the seven causes of action asserted in the complaint survived the defendant's motion to dismiss. Those were the breach of contract, fraud, and copyright infringement actions for which the plaintiff sought specific performance and monetary damages. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome Where one of several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." Powell v. McCormack, 395 U.S. 486, 496 (1969); Video Tutorial Services, Inc. v. MCI Telecommunications Corp., 79 F.3d 3, 10-11 (2d Cir. 1996). Without suggesting or deciding that any cause of action has become moot, the claims for damages are still "live" and require the denial of this motion. See also, Stokes v. Village of Wurtsboro, 818 F.2d 4, 6 (2d Cir. 1987); C. Wright, A Miller and E. Cooper, 13A Federal Practice and Procedure § 3533.3 at 262 (1984 ed.).

For the foregoing reasons, the motion for summary judgment is denied.

SO ORDERED.

Dated: Brooklyn, New York
November 17, 1998



I. Leo Glasser

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