

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONTARIO

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ROUTE 96 PROPERTIES, LLC,

Plaintiff,

Index No. 127226-2020

vs

ADVENTURES IN MOVEMENT AND  
SENSATION, INC., AND MARK KLYCZEK,

Defendants.

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**REPLY  
AFFIRMATION**

Michael Wegman, an attorney licensed to practice law in the State of New York, states under penalties of perjury:

1. I am associated with the law firm of Lacy Katzen LLP, attorneys for Plaintiff, and I am fully familiar with the papers, pleadings and proceedings of the instant action. I make this affirmation in further support of Plaintiff's Motion for Summary Judgment. The capitalized terms used in this affirmation have the same meaning as the terms capitalized in Plaintiff's motion for summary judgment.

2. Plaintiff moved for summary judgment by Notice of Motion dated October 12, 2020, submitting in support of its motion the sworn affidavit of Mark DiFelice and my attorney affirmation. In opposition, Defendants submit an affidavit from their attorney.

3. It is well settled that a party moving for summary judgment must establish its entitlement to judgment as a matter of law by tender of evidentiary proof in admissible form. To defeat the motion, the nonmoving party must demonstrate a genuine issue of material fact, and also must do so by tender of evidentiary proof in admissible form. See generally Zuckerman v City of New York, 49 NY2d 557, 562 (1980). While courts have described summary judgment

as a drastic remedy, summary judgment should nonetheless be granted where there are no genuine issues of material fact to be resolved at trial. See Pomietlasz v Smith, 31 AD3d 1173, 1174 (4th Dept 2006).

4. Here, Plaintiff established its prima facie entitlement to judgment as a matter of law. Through Mr. DiFelice's affidavit, Plaintiff demonstrated the Tenant entered into a Lease with Plaintiff for a portion of commercial real property; the terms of the Lease; the Tenant's default for failure to pay; Defendant Klyczek's failure to pay the Tenant's obligations as required under the Guaranty; and Plaintiff's contractual damages. My affirmation dated October 12, 2020 (the "Wegman Aff.") stated that Defendants were properly served under New York Business Corporation Law and the Civil Practice Law and Rules, respectively. I attached to my affirmation the affidavits of service, which are prima facie proof of service. See Matter of Anna B., 105 AD3d 1399, 1401 (4th Dept 2013).

5. The burden thus shifted to Defendants to tender proof in admissible form demonstrating the existence of an issue of material fact. See Mortillaro v Rochester General Hosp., 94 AD3d 1497, 1499 (4th Dept 2012).

6. Defendants failed to offer proof in admissible form in opposition to Plaintiff's motion, submitting an affidavit from their attorney only. An attorney affidavit alone is generally without probative value and insufficient to defeat a motion for summary judgment. See Cooper v Cooper & Clement, Inc., 198 AD2d 812, 813 (4th Dept 1993); Gomes v Revere Sugar Corp., 140 AD2d 582, 582-583 (2d Dept 1988); see also Siegel, *New York Practice*, 5th ed., § 281.

7. Even if Defendant's attorney had first-hand knowledge of the underlying facts, he fails to make any specific factual averments demonstrating an issue of fact exists. Defendants had a duty to "lay bare" their proof in opposition to Plaintiff's motion for summary judgment.

See Oot v Home Ins. Co. of Indiana, 244 AD2d 62, 71 (4th Dept 1998). Defendants' vague allegations with respect to unspecified actions of the parties and unnamed third parties are insufficient.

8. Further, Defendants have failed to raise any issues of fact as to whether this Court has personal jurisdiction over them.

9. The Tenant was properly served under the Business Corporation Law. It is immaterial whether an officer, director or shareholder of the Tenant currently resides in New York. See Kenyon Affidavit ¶ 4. Defendants admit that the Tenant is a New York corporation. See Kenyon Aff. ¶ 3; see also Answer ¶ 1 (admitting the allegations in Complaint ¶ 2). Plaintiff has demonstrated that the Tenant is registered with the New York Department of State. See Wegman Aff. ¶ 10. The Tenant was properly served by delivering a copy of the Summons and Complaint to a person authorized by the Secretary of State to accept service. See id. at ¶¶ 9-12.

10. Defendant Klyczek was properly served under CPLR 308(2) and 313. Defendant Klyczek was a domiciliary of the State of New York on the date this action was commenced. According to public record, the address identified in the Lease and Guaranty – 1804 Saddle Horn Drive, Canandaigua, New York – is a single family residence owned by Defendant Klyczek and his wife. The property was conveyed to a third party by deed filed June 16, 2020, twelve days after this action was filed.

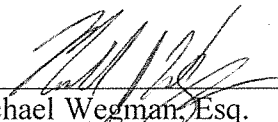
11. Regardless of whether Defendant Klyczek was a domiciliary as of the date this action was commenced, this Court has jurisdiction over him pursuant to CPLR 302(a)(4). That subsection allows a New York court to exercise personal jurisdiction over a non-domiciliary who “owns, uses or possesses any real property situated within the state,” provided that the cause of action arose out of the defendant’s ownership, use or possession of the real property.

12. Here, Plaintiff's cause of action arises out of the use of real property, specifically, monies due based on the Tenant's breach of a Lease and Defendant Klyczek's failure to pay the Tenant's obligations as required under the Guaranty. See Alexander, McKinney's Official Commentary to CPLR 302, C302:14 "Real Property Actions, In General" (the statute should support "monetary claims for nonpayment against those who have leased property"). Subsection 302(a)(4) does not require the defendant to own, use or possess the real property as of the date the action was commenced. "The defendant's prior relationship to the property will suffice, assuming the claim arose out of that relationship." Id.

13. Subsection 302(a)(4) supplies a jurisdictional predicate for the Court to exercise personal jurisdiction over Defendant Klyczek independent of his domicile. Under CPLR 313, Plaintiff was permitted to serve Defendant Klyczek outside of the State of New York in the same manner he may be served within the State of New York. The affidavit of service annexed as Exhibit C to my affirmation dated October 12, 2020 is prima facie proof Defendant Klyczek was properly served pursuant to CPLR 308(2). Plaintiff was not required to hand-deliver the pleadings to Defendant Klyczek personally. See Wegman Aff. ¶¶ 14-20.

14. Still further, Defendants failed to move to dismiss the action based on alleged improper service within 60 days of serving their Answer. Defendants have therefore waived any objection to service as a matter of law. See Ziverts v Wunderlich, 169 AD3d 1435, 1436 (4th Dept 2019).

WHEREFORE, I respectfully request that the Court enter an Order granting Plaintiff's motion for summary judgment against Defendants.

  
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