

**Walgreen Co. v Kassover**

2024 NY Slip Op 32318(U)

June 27, 2024

Supreme Court, New York County

Docket Number: Index No. 653071/2021

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY BANNON PART 42**

*Justice*

-----X

WALGREEN CO.,  
Plaintiff,

- v -

PHILIP KASSOVER, ALLERAND REALTY HOLDINGS, LLC  
and GCC-RA LEBANON, LLC

Defendants.

-----X

INDEX NO. 653071/2021

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for DISMISSAL.

INTRODUCTION

In this interpleader action pursuant to CPLR 1006, the plaintiff, Walgreen's Co. (Walgreens), seeks an adjudication of the rights of the parties with respect to certain rent and other monies due under a commercial lease for premises located in Virginia.

Defendant Philip Kassover (Kassover) is a competing creditor of his co-defendant Allerand Realty Holdings, LLC (Allerand), as against a non-party debtor entity known as GCC Realty Company, LLC (GCC Realty) ["GCC" referring to "The Garden City Company"]. Kassover moves, pre-answer to dismiss the claims against him and for injunctive relief against both co-defendants. Kassover and Allerand each claim a superior right to collect Walgreen's rent payments and dispute the scope of Kassover's authority to sign documents on behalf of GCC Realty as an "attorney-in-fact" as per an appointment by the court in a prior action. Allerand and co-defendant GCC-RA Lebanon LLC (GCC-RA), which is an entity owned by Allerand, jointly oppose Kassover's motion and cross-move for declaratory relief against him as per their cross-claims, essentially declaring that Kassover lacked authority to sign a lease agreement on GCC's behalf, rendering it null and void.

The motion is denied and the cross-motion is granted in part.

### BACKGROUND

#### A. Subject Property - Initial Transfers

In December 1998, an entity known as RA3 Lebanon LLC (RA3 Lebanon), as landlord, leased the subject commercial premises at 1094 Main Street in Lebanon, Virginia, to Rite Aid of Virginia, Inc. (Rite Aid), pursuant to a Deed of Lease. In July 1999, RA3 Lebanon assigned its interest in the lease to an entity known as Joanne Fox & Cheryl Stone I, LLC (Joanne Fox). In 2003, GCC Realty purchased 100% of the interest in Joanne Fox and, on March 36, 2003, changed the name of the LLC to GCC-RA Lebanon LLC (GCC-RA Lebanon).

#### B. Kassovers' 2005 Breach of Contract Action

In 2005, Phillip Kassover and his mother, Ruth Kassover, acting in her capacity as co-executor of the estate of her late husband, Nathan Kassover, brought an action in this court seeking damages arising from a 2002 merger involving The Garden City Company, Inc., a real estate company in which the Kassover family had a large interest. *Ruth Kassover as Co-Executor of the Estate of Nathan Kassover, and Philip Kassover v PVP-GCC Holdingco II, LLC, The Garden City Company, Inc., R. Peyton Gibson, Richard Sabella and Prism Venture Partners, LLC et al*, (Sup Ct, NY County, Index No. 602434/2005, Scarpulla, J.). In their complaint, the Kassovers argued, inter alia, that they were not fully paid for their shares as required under the merger agreement.

By an order dated July 2, 2008, the court (Freedman, J.) granted the Kassovers' motion for summary judgment in part on their claim for payment of \$2000 per share as against defendants PVP-GCC Holdingco II LLC, R. Peyton Gibson, and the Garden City Company, Inc. A judgment in the aggregate sum of \$2,146,878.30 was entered on October 27, 2009. The Appellate Division, First Department, by an order dated May 25, 2010, reduced the award to Kassover to \$293,253.17 and reduced the award to Ruth Kassover, as Executor of the Estate, to \$1,181,564.97. Extensive post-judgment proceedings ensued. In October 2017, the Kassovers moved pursuant to CPLR 5234(c) to extend a priority period for its lien until satisfaction of the judgment entered in their favor on September 30, 2009, to appoint Phillip Kassover "as attorney-in-fact for defendant/judgment debtor GCC Realty Company LLC (successor by merger of defendants/judgment debtors PVP-GCC Holdingco II, LLC for the

limited purpose of executing any and all documents on GCC behalf to aid in plaintiffs' efforts to enforce the judgment."

By an order dated November 1, 2017, the court (Scarpulla, J.) granted the Kassovers' motion to the extent of extending the priority period, not until the judgment was satisfied but only "for 180 days, without prejudice to further extension" and appointed Phillip Kassover "as attorney-in-fact for the purpose of executing and all documents on GSS's behalf to effectuate the turnover, transfer, delivery, payment, sale and/or liquidation of any of GCC's assets and/or personal property pursuant to the September 2017 Order and in aid of plaintiffs' efforts to enforce the judgment." By an order dated April 26, 2018, the court, *inter alia*, extended the priority period 120 days from April 30, 2018. By an order dated August 22, 2018, the court again extended the priority period another 120 days, until December 20, 2018. No further order of extension was issued. That matter was marked disposed in 2018.

In December 2018, Kassover's counsel delivered to the New York County Sheriff a copy of the judgment for execution against GCC Realty in the sum of \$1,475,171.00. However, no auction has taken place. Allerand contends that Kassover's counsel told the Sheriff not to move forward and thus lost his priority as a creditor over GCC Realty's assets. Kassover's judgment remains unsatisfied.

### C. Additional Transfers of Subject Property

In the meantime, in December 2017, Rite Aid assigned the subject lease to plaintiff Walgreens pursuant to a document entitled "Subsequent Closing Bill of Sale, Assignment and Assumption Agreement. In August 2020, RA3 Lebanon and Walgreens entered into an agreement entitled "First Amendment to the Lease." This lease amendment was executed by defendant Kassover as "attorney-in-fact" for RA3 Lebanon. He disputes that his appointment was then expired. Kassover's authority to sign that document is a central issue in this case.

Defendant GCC-RA, as landlord, was one of several LLCs previously owned by non-party GCC Realty and purchased by Allerand in a foreclosure sale in Florida on January 19, 2021. Based on representations made by Kassover to Walgreens that GCC Realty had purchased 100% interest of RA3 Lebanon and renamed it GCC-RA Lebanon, Walgreens paid rent to him for the first three months of 2021, a total of approximately \$61,000.00. A few months later, in May 2021, GCC-RA Lebanon, as the new landlord, and Walgreen's, as tenant, who had

a working relationship, executed a second “First Amendment to the Lease” which extended the lease to July 31, 2021. This document was executed by Richard Sabella rather than Kassover, and changes the name of the landlord, but is otherwise the same as the first “First Amendment to the Lease.”

D. The Instant Action

In May 2021, now unsure of where to send its rent payments, Walgreens commenced this interpleader action alleging that it paid monthly rent on the subject premises to Kassover for the months January, February and March of 2021, upon his representation that he was the proper party to receive rents. In its complaint, Walgreens seeks, in effect, a declaration as to the rights of the parties in regard to rents paid, a mandatory injunction directing Walgreens to pay all future rents into court pending resolution of the action and enjoining the defendants from commencing any litigation to collect rents pending resolution of the action. Defendants Allerand and GCC-RA Lebanon answered the complaint and asserted two cross-claims against co-defendant Kassover.

The *first* cross-claim against Kassover sought money damages of \$36,675.00 for his “wrongful retention” of rents payable to Allerand and also included a counterclaim against Walgreens \$61,125.00 for “failure to pay rents” to the defendants. The *second* cross-claim sought a judgment declaring that Kassover’s authority to sign as “attorney-in-fact” on behalf of GCC Realty Company LLC (GCC Realty) was narrowly limited to effectuating the turnover of GCC Realty’s assets to the New York County Sheriff for auction and has expired, that Kassover lacked legal authority and/or capacity to sign the First Amendment of the Lease on behalf of RA3 Lebanon rendering the lease void, and that Allerand now owns 100% of the member interests in GCC and all other Allerand entities, entitling it to all rents due.

Kassover did not serve an answer but filed the instant motion for an order (1) dismissing the complaint and cross-claims against him pursuant to CPLR 3211(a)(1), (5) and (7); (2) enjoining co-defendants Allerand and GCC-RA Lebanon from interfering with his rights to collect the rent pursuant to a purported lease assignment; and (3) modifying an order dated September 1, 2017, issued in the prior action so as to permit him to receive any monies held in court or by the New York County Sheriff for auction. In that action, Kassover had obtained a judgment against GCC in the sum of \$1,475,171.00, and in an order dated November 1, 2017, the court granted a motion to extend the plaintiff’s priority period and directed that “Phillip

Kassover is hereby appointed attorney-in-fact for GCC for the purpose of executing any and all documents on GCC's behalf to effectuate the turnover, transfer, delivery, payment, sale and/or liquidation of any of GCC's assets and/or personal property pursuant to the September 2017 order and in aid of plaintiff's efforts to enforce the judgment."

Defendants Allerand and GCC-RA Lebanon oppose Kassover's motion and cross-move for a judgment declaring, on their *first* cross-claim, that Allerand is entitled to all rents paid by Walgreens to defendant GCC-RA Lebanon and all rents previously paid to defendant Kassoff and, on the *second* cross-claim, that Kossoff's authority to sign as "attorney-in-fact" on behalf of GCC Realty was narrowly limited to effectuating the turnover of GCC Realty's assets to the New York County Sheriff for auction and has expired, that Kassover lacked legal authority and/or capacity to sign the First Amendment of the Lease on behalf of RA3 Lebanon rendering the lease void, and that Allerand now owns 100% of the member interests in GCC and all other Allerand entities, entitling it to all rents due from Walgreens. Upon the granting of that relief, Allerand and GCC-RA Lebanon then seek dismissal of the interpleader action as moot. Defendant Kassover opposes the cross-motion.

While the motion and cross-motion were pending, Rite-Aid of Virginia, Inc. made, and withdrew, a motion to intervene (MOT SEQ 002). In October 2022, Kassover filed, but withdrew, a motion to hold nonparties Allerand Realty and its managing Richard Sabella in contempt for failing to comply with an order issued in the disposed matter (Index. No. 602434/2005) (MOT SEQ 003). In April 2024, defendants Allerand and GCC-RA Lebanon moved to serve an amended answer, with additional cross-claims against Kassover (MOT SEQ 004). The parties thereafter entered into a stipulation by which the defendants withdrew the motion to amend and all other parties agreed to accept service of the amended answer with cross-claims (NYSCEF Doc. Nos. 160, 161). In eight separate cross-claims against Kassover, the defendants recount the above facts and arguments and add six additional claims, for a total of eight, sounding in tortious interference with a contractual relationship, fraud, conversion, money had and received and unjust enrichment, and seeking monetary damages, as well as declaratory and injunctive relief. The claim asserted directly against Walgreens in the original answer seems to have been abandoned and a demand for punitive damages against Kassover added. The amended answer is now the operative pleading. Discovery has commenced but no answer to the cross-claims has yet filed by Kassover.

## DISCUSSION

### (1) Defendant Kassover's Motion

Defendant Kassover fails to establish entitlement to the relief requested. First, there is no basis to dismiss this complaint. The action is governed by CPLR 1006(f), "Interpleader - Discharge of Stakeholder," which provides that a "stakeholder may move for an order discharging him from liability in whole or in part to any party," once "the time for all parties to plead has expired." The stakeholder is required to "submit proof by affidavit or otherwise of the allegations in his pleading" and, upon such proof, the court "may grant the motion and require payment into court, delivery to a person designated by the court or retention to the credit of the action, of the subject matter of the action to be disposed of in accordance with further order or the judgment." Plaintiff Walgreen's has sufficiently pleaded entitlement to relief under CPLR 1006(f), *i.e.* that it is a neutral stakeholder which "face[d] conflicting demands made upon it for payment" of rent (Lincoln Life and Annuity Co. of New York v Caswell, 31 AD3d 1, 8-9 (1<sup>st</sup> Dept. 2006), subjecting it to "multiple liabilities." Greenway Mews Realty LLC v Liberty Ins. Underwriters, Inc., 180 AD3d 412, 413 (1<sup>st</sup> Dept. 2020); see Fischbein, Badillo, Wagner v Tova Realty Co., 193 AD2d 442 (1<sup>st</sup> Dept. 199). Plaintiff Walgreens may move to be discharged once all pleading are filed. Contrary to Kassover's contention, under the circumstances presented, Walgreens has a sound basis for questioning which party should be collecting the rent payments. The fact that Kassover takes the view that it should be him is of no moment as the co-defendants have a colorable claim to the payments.

Nor are the co-defendants' cross-claims subject to dismissal. Initially, the court notes that while Kassover purports to move pursuant to CPLR 3211(a)(1), (5) and (7), none of those grounds or any applicable standard for dismissal is discussed in any meaningful manner the memorandum of law. He merely asserts the same argument as does for dismissal of the complaint, *ie*, that the "Allerand defendants have no interest in or right to collect or direct the payment of the Virginia Store rent." In any event, as Kassover stipulated to allow the defendants to file an amended answer with additional cross-claims, and that new pleading was filed and yet to be responded to, this branch of Kassover's motion is denied without prejudice to renewal.

Kassover's request that this court modify the September 1, 2017, order issued in a prior action, which is long disposed, can be summary disposed of as it is procedurally improper.

(2) Defendants Allerand and GCC-RA Lebanon's Cross-Motion

The cross-motion of defendants Allerand and GCC-RA Lebanon was made upon the two cross-claims contained in their original answer. As stated, the defendants have since filed an amended answer in which they expand their cross-claims considerably, to eight claims and additional forms of relief. For that reason, the instant cross-motion is denied without prejudice to renewal upon the amended pleading. The court notes, however, that a number of arguments raised on this cross-motion and included in the amended pleading appear to be meritorious – including the argument that Kassover’s authority to act as attorney-in-fact was not intended to continue indefinitely until the judgment was satisfied but was limited in purpose and time such that he lacked legal authority or capacity to sign the First Amendment to the Lease in August 2020 on behalf of judgment debtor GCC Realty Company LLC. To the extent Allerand and GCC-RA Lebanon seek dismissal of the interpleader action as moot upon a declaration in their favor, that application is premature. Any relief not expressly granted herein is denied.

CONCLUSION

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the motion of defendant Philip Kassover is denied without prejudice to renewal to the extent it seeks dismissal of cross-claims of defendants Allerand Realty Holdings, LLC and GCC-RA Lebanon LLC, and as set forth herein, and it is further

ORDERED that the cross-motion of defendants Allerand Realty Holdings, LLC and GCC-RA Lebanon LLC is denied without prejudice to renewal, and it is further

ORDERED that the parties shall appear for a compliance conference on September 12, 2024, at 10:30 a.m., as previously scheduled.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

6/27/24  
DATE

CHECK ONE:

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