

J.S.J.F. Corp. v. Sizzler International, Inc., No. B152360 (Cal.App. Dist.2 05/13/2002)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND
APPELLATE DISTRICT DIVISION SEVEN

[2]

No. B152360

[3]

2002.CA.0004340

[4]

May 13, 2002

[5]

J.S.J.F. CORPORATION, DEFENDANT, CROSS-COMPLAINANT AND
APPELLANT,

v.

SIZZLER INTERNATIONAL, INC., CROSS-DEFENDANT AND RESPONDENT.

[6]

(Los Angeles County Super. Ct. No. LC 046731) APPEAL from a judgment of the
Superior Court of Los Angeles County. James A. Kaddo, Judge. Affirmed.

[7]

Peter M. Appleton for Defendant, Cross-Complainant and Appellant.

[8]

Cohen & Stimpert and Daniel P. Simpert for Cross-Defendant and Respondent.

[9]

The opinion of the court was delivered by: Woods, J.

[10]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[11]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying
on opinions not certified for publication or ordered published, except as specified by rule
977(b). This opinion has not been certified for publication or ordered published for
purposes of rule 977.

[12]

J.S.J.F. Corporation (J.S.J.F.) asks this court to reverse the judgment entered upon the
trial court's order granting summary judgment for Sizzler International, Inc. (Sizzler) on
J.S.J.F.'s cross-complaint alleging breach of implied contractual indemnity and breach of
guarantee in connection with J.S.J.F.'s sublease of commercial property. J.S.J.F., the sub-
lessee, claims Sizzler had guaranteed the performance of Josephina's, Inc. (Josephina's)
the sub-lessor and the lessee on the underlying Master Lease for the property. Therefore,
J.S.J.F. contends Sizzler was liable for the subsequent alleged breach of sublease by
Josephina's and/or breach of the master lease by either Josephina's or the lessor on the
Master Lease, Wall Street Plaza, LLC (Wall Street). The trial court concluded, however,
the uncontroverted evidence demonstrated Sizzler's guarantee had expired well before the
breaches alleged in the cross-complaint and thus, as a matter of law, Sizzler was not
liable for the alleged subsequent failures in performance by Josephina's or Wall Street.
For the reasons set forth below, we agree with the lower court's conclusion, and
accordingly, affirm the judgment.

[13]

FACTUAL AND PROCEDURAL HISTORY *fn1

[14]

The Master Lease and the Guarantee.

[15]

On October 22, 1985, the predecessor in interest to Wall Street entered into a commercial lease (the "Master Lease") with Cross-Defendant Josephina's to rent a restaurant space in a Tarzana shopping center.

[16]

The Master Lease contained the following concerning the term of the lease:

[17]

"The term of this Lease shall be twenty (20) years, commencing on the date called for by the provisions of Article 9 hereof, ("Commencement Date") and shall end twenty (20) years thereafter. After the Commencement Date has been ascertained, Lessee and the Lessor shall set forth in writing the lease commencement and termination dates. The lease term and Tenant's obligation to pay rent and all other charges hereunder shall commence on the Commencement Date."

[18]

Article 9 of the Master Lease provides:

[19]

"9.1. Commencement Date. The commencement date of the term of this Lease (the "Commencement Date) shall be the first to occur of: (i) Tenant's opening for business; or (ii) ninety (90) days after Landlord has completed construction of the rawshell However, if Tenant has diligently pursued the obtaining of all necessary permits and licenses for the operation of its business . . . and the completion of construction of its improvements and is nonetheless unable to open for business within said ninety (90) days, the Commencement Date shall be extended for an additional thirty 30 days. Notwithstanding the foregoing, in no event shall the Commencement Date be earlier than March 1, 1986."

[20]

In a March 1986 letter agreement, Josephina's and Wall Street specified "the initial term commencement and expiration dates are July 1, 1986 and June 30, 2006, respectively" (the March 1986 Agreement).

[21]

Sizzler entered into a written agreement with Wall Street to guarantee Josephina's performance on the Master Lease ("the Guarantee"). *fn2 Sizzler "unconditionally guarantee[d], for the first ten years of the [Master] Lease term, the full performance of each and all of the terms, covenants, and conditions of said Lease to be kept and performed by [Josephina's], including the payment of all rentals"

[22]

The Sublease and Alleged Breaches.

[23]

In January 1996, Josephina's entered into a Sublease agreement with J.S.J.F. for the restaurant space subject of the Master Lease. The term of the Sublease was from January 22, 1996, until the end of the Master Lease term, June 30, 2006. Under the Sublease,

J.S.J.F. was not obligated to pay rent to Josephina's until September 15, 1996. The Sublease expressly incorporated all of the terms and conditions of the Master Lease.

[24]

According to J.S.J.F.'s cross-complaint, when it attempted to pay rent in the Fall of 1996, Josephina's and Wall Street each made a demand for the payment. Thereafter, Wall Street allegedly informed J.S.J.F. Josephina's was in breach of the Master Lease, and that Wall Street planned to terminate both the Master Lease and the Sublease and to evict J.S.J.F. unless J.S.J.F. entered into a new lease for the property. J.S.J.F. refused. Wall Street commenced an unlawful detainer action against Josephina's and J.S.J.F. J.S.J.F. subsequently vacated the premises in February 1997. Wall Street obtained a default judgment against Josephina's and dismissed the action against J.S.J.F.

[25]

The Underlying Complaint and J.S.J.F.'s Cross-Complaint.

[26]

Wall Street took an assignment from Josephina's for its right to collect rent from J.S.J.F. pursuant to the Sublease and filed the underlying complaint against J.S.J.F. for, among other claims, breach of the Sublease.

[27]

J.S.J.F. filed a cross-complaint against Wall Street, Josephina's and Sizzler. The cross-complaint attached (as exhibits), and incorporated by reference the Master Lease, the Guarantee, the Sublease and March 1986 Agreement. The cross-complaint contains two causes of action against Sizzler, namely, the fifth cause of action for "Indemnity" and the sixth cause of action for "Breach of Guarantee (Third Party Beneficiary)." In the indemnity action, J.S.J.F. claimed Sizzler, as the guarantor of Josephina's performance on the Master Lease and Sublease, was obliged to indemnify J.S.J.F. for any damages assessed against it (on the underlying Complaint) caused by Josephina's (or Sizzler's) breaches of the Sublease or Master Lease. On the Breach of Guarantee claim, J.S.J.F. alleged: "[b]y executing the Guarantee of Lease which was contained in the Master Lease, Sizzler guaranteed the full performance of the obligations under the Master Lease Contract and therein assumed primary liability in any right of action which shall accrue against Josephina's and Wall Street. . . ."

[28]

Summary Judgment Motion.

[29]

Sizzler filed a motion for summary judgment, asserting, inter alia both causes of action against it failed as a matter of law because they were based on the Guarantee, which had expired in June 1996 well before the October 1996 conduct giving rise to breaches alleged in the cross-complaint. In opposition, J.S.J.F. asserted, among various arguments, a triable issue of fact existed as to when the Guarantee expired.

[30]

The trial court agreed with Sizzler and concluded the Guarantee expired on June 30, 1996, and that all acts giving rise to any cause of action by J.S.J.F. occurred after the expiration of the Guarantee. Consequently, on July 12, 2001, the court granted the motion and entered judgment for Sizzler.

[31]

On August 3, 2001, J.S.J.F. filed a notice of appeal from the summary judgment.

[32]

DISCUSSION

[33]

I. Standard of Review

[34]

In reviewing a grant of summary judgment motion, this court determines de novo whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) We must determine whether the moving defendant has met its burden to disprove at least one essential element of the plaintiff's cause of action or shown an element of the cause of action cannot be established. (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1465.) If we conclude the moving defendant has met this obligation, then the burden shifts to the opposing plaintiff to demonstrate the existence of a triable issue of material fact as to the element or elements challenged by the defendant. (*Hunter v. Pacific Mech. Corp.* (1995) 37 Cal.App.4th 1282, 1286.) The plaintiff may not rely upon the mere allegations of its pleadings, but instead must show by sufficient and competent evidence the requisite triable issue of material fact. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1594.)

[35]

In conducting our review, we are limited to the facts shown by the evidentiary materials (i.e., declarations and deposition testimony) submitted, as well as those facts admitted or uncontested in the pleadings, and moving and opposing papers. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962.) The evidence presented by the moving party is strictly construed and that of the opposing party is liberally construed; the facts alleged in the evidence of the opposing party and the reasonable inferences therefrom must be accepted as true. (*Savage v. Pacific Gas and Electric Co.*, supra, 21 Cal.App.4th at p. 440.) In addition, in considering a motion for summary judgment neither the trial court, nor this court may weigh the evidence to determine whose version is more likely true. Nor may a summary judgment be based upon the court's evaluation of credibility. (*Binder v. Aetna Life Insurance Company* (1999) 75 Cal.App.4th 832, 840.)

[36]

We affirm an order granting summary judgment where the papers and pleadings show there is no triable issue of material fact in the action, (i.e., where the evidence demonstrates the claims of the opposing party are entirely without merit on any legal theory) thereby entitling the moving party to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36.) Doubts as to the propriety of summary judgment should be resolved against granting the motion. These principles inform our consideration of the issues on appeal.

[37]

II. The Court Properly Granted Summary Judgment

[38]

On appeal, J.S.J.F. asserts the trial court erred in granting summary judgment because: (1) no admissible evidence supported the motion; and (2) a triable issue of fact existed as to when the Guarantee expired. Neither of these contentions has merit.

[39]

Before turning to these specific claims, however, we first note J.S.J.F.'s causes of action against Sizzler are based upon the Guarantee. At the hearing on the summary judgment motion, J.S.J.F. asserted the indemnity cause of action was unrelated to the Guarantee and that Sizzler could be held to account for Josephina's conduct based on an alter ego theory of liability. Notwithstanding this claim, the facts J.S.J.F. presented in opposition to the summary judgment motion were insufficient to make out a prima facie case Josephina's was the alter ego of Sizzler. (See *Brantley v. Pisaro*, supra, 42 Cal.App.4th at p. 1598.)

[40]

A corporation is ordinarily considered as a legal entity distinct from its stockholders, officers, directors, subsidiary or parent corporations, with separate and distinct liabilities and obligations. However, a corporate entity maybe disregarded, and the "corporate veil" pierced, where an abuse of the corporate privilege justifies holding the equitable ownership of the corporation liable for the actions of the corporation. (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892; *Sonora Diamond Corp. v. Superior Court (Sonora Union High School Dist.)* (2000) 83 Cal.App.4th 523, 538.) Under California law, the alter ego doctrine is invoked when (1) a unity of interest and ownership between the individual and corporation is such that the separate personalities of each no longer exist, and (2) an unjust or inequitable result will follow if the acts in question are treated as those of the corporation alone. (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 796; *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358.) Some of the factors indicating the required unity of interest are the commingling of assets, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. Other factors include inadequate capitalization, disregard of corporate formalities, and lack of segregation of corporate records, and identical directors and officers. (*Sonora Diamond Corp. v. Superior Court (Sonora Union High School Dist.)*, supra, 83 Cal.App.4th at pp. 538-539.) No one characteristic governs, but both elements-unity of interest and resulting injustice-must be proved to invoke the remedy. (*Ibid.*)

[41]

In opposition to the motion, J.S.J.F. presented a letter from Sizzler directing J.S.J.F. to make its payments on the Sublease to its subsidiary, Josephina's and the deposition testimony of J.S.J.F. representative who testified Sizzler was involved in the negotiations of the Sublease. In our view this evidence is not sufficient to raise a triable issue of fact as to the unity of interest prong. But, even assuming this evidence presented a question as to the unity of interest between Sizzler and Josephina's, J.S.J.F. has not established its alter ego theory. J.S.J.F. has not presented any evidence of injustice flowing from the recognition of the separate corporate identity of Josephina's and Sizzler. Without such evidence, the alter ego doctrine cannot be invoked.

[42]

In short, J.S.J.F. has not demonstrated the implied contractual indemnity cause of action is based on anything other than the Guarantee. With this thought in mind, we now examine J.S.J.F.'s specific arguments on appeal.

[43]

A. Evidence Supporting the Motion

[44]

Sizzler supported the summary judgment motion with the declaration of Robert Wall, the one time "managing member" of Wall Street. The Wall declaration provides brief background information concerning the Master Lease, the Guarantee, the circumstances concerning the Sublease and the subsequent events, which lead to the unlawful detainer action and the underlying complaint. Wall's declaration does not, however, provide any information concerning the beginning or ending of the Master Lease term, nor does it specify the Guarantee's expiration date.

[45]

Sizzler also attached a "courtesy copy" of J.S.J.F.'s cross-complaint and all of its incorporated exhibits (i.e., Master Lease, the Guarantee, the Sublease and March 1986 Agreement) to the Separate Statement of Undisputed Facts.

[46]

Here, as in the lower court, J.S.J.F. claims the motion for summary judgment failed and should have been denied because neither the Wall declaration nor the courtesy copy of the cross-complaint were admissible. Specifically, J.S.J.F. argues Wall is not a credible witness because: (1) Wall's claim (in the declaration) he is a managing member of Wall Street is contradicted by his deposition testimony; (2) Wall purportedly lied about striking a J.S.J.F. employee; and (3) Wall has allegedly been convicted of a felony. As to the courtesy copy of the cross-complaint, J.S.J.F. asserts it is inadmissible because Sizzler failed to properly authenticate it.

[47]

J.S.J.F.'s evidentiary objections do not warrant a reversal. Preliminarily, we note the court did not expressly rule on J.S.J.F.'s objections. In any event, even if the court had entertained the objections, the court would not have been required as a matter of law to deny the motion.

[48]

With respect to the Wall Declaration, the California Code of Civil Procedure provides a motion for summary judgment shall not be denied solely on the grounds of credibility of a witness who furnishes a declaration in support of the motion, unless the declarant is the only witness to a material fact. (Code Civ. Proc., § 437c, subd. (e).) Wall is not the only witness to a material fact. Most of the relevant facts in the declaration are also included in J.S.J.F.'s complaint and accompanying documents. In fact, Wall's declaration does not contain any evidence on the material fact in dispute, that is, the beginning and ending dates of the term of the Master Lease or the Guarantee's expiration dates. Thus, exclusion of the declaration from evidence would not have changed the result.

[49]

Likewise, exclusion of the courtesy copy of the cross-complaint would not alter the outcome on the motion. First, as Sizzler urged below, the record contained a copy of the cross-complaint and the court may take judicial notice of pleadings in its file. (See Evid Code, § 452, subd. (d)(1).) Second, J.S.J.F. submitted a "true and correct" copy of the cross-complaint with the opposition to the motion. Thus, even if the court sustained the objection and disregarded the "unauthenticated" courtesy copy, the cross-complaint was already properly before the court and available for consideration on the motion for summary judgment.

[50]

B. No Triable Issue of Fact as to The Expiration of the Guarantee

[51]

J.S.J.F. argues there is nothing in any of the documents specifying the date the Master Lease term began. Thus, J.S.J.F. maintains, because the Guarantee expressly expired ten years after the commencement of the term of the Master Lease, a triable issue of fact exists as to when the Guarantee expired. Absent a defined expiration date for the Guarantee, an issue of fact also exists as to whether the Guarantee was still in effect in October 1996 when the breaches occurred. According to J.S.J.F., these issues of fact required a denial of the motion for summary judgment.

[52]

Our review of the cross-complaint and documents incorporated in and attached thereto, lead us to disagree with J.S.J.F.'s assertions. J.S.J.F. is bound by the factual allegations in its cross-complaint as well as the facts disclosed in the documents it incorporated into the cross-complaint. "A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues." (Uram v. Abex Corp. (1990) 217 Cal.App.3d 1425, 1433.) The documents attached to the cross-complaint, including the Master Lease, and the March 1986 Agreement make absolutely clear the Master Lease began on July 1, 1986, and ended on July 30, 2006. Sizzler's ten-year Guarantee, therefore, ended no later than June 30, 1996. As discussed elsewhere herein, the contractual indemnity and breach of guarantee causes of action asserted against Sizzler depend upon the existence of the Guarantee. However, the allegations in the complaint also disclose the events giving rise to these causes of action and any harm suffered by J.S.J.F. occurred in the Fall of 1996, after the Guarantee had expired. Absent the Guarantee, J.S.J.F. has neither alleged nor otherwise shown any legal basis to hold Sizzler liable.

[53]

In view of the foregoing, we conclude the trial court properly ruled Sizzler was entitled to summary judgment.

[54]

III. Other Contentions

[55]

J.S.J.F. raised three other matters in its appellate papers, which warrant brief attention.

[56]

First, J.S.J.F. points out it "does not seek to hold Sizzler liable." This is an apparent reference to Sizzler's bankruptcy filed during the pendency of this litigation. In connection with an adversary proceeding filed in the bankruptcy action, the bankruptcy court held J.S.J.F. could proceed against Sizzler on the cross-complaint only to determine liability, but that J.S.J.F. was "barred and enjoined from collecting from Sizzler or its property or the bankruptcy estate any judgment awarded [on the cross-complaint]." J.S.J.F. does not, however, explain how these facts concerning the bankruptcy proceeding relate to its appeal of the order granting summary judgment. J.S.J.F. has not demonstrated the bankruptcy court's ruling creates a triable issue of fact.

[57]

Second, on appeal J.S.J.F. also complains the trial court should have granted it leave to amend its cross-complaint. J.S.J.F. made a belated oral request for leave to amend at the hearing on the summary judgment motion. The trial court was not required to consider

such an untimely request. (See *Alameda Conservation Assoc. v. Alameda* (1968) 264 Cal.App.2d 284, 289, overruled on other grounds in *Berkeley v. Superior Court of Alameda County* (1980) 26 Cal.3d 525, 527, 532.) Yet, even if the court had passed on the matter, it could have properly denied it. Where a summary judgment motion is granted because the complaint is legally insufficient, the court is not required to give the plaintiff an opportunity to amend the complaint, unless it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action in the amended pleading. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663.) Here, J.S.J.F. did not present anything in its opposition suggesting it could amend its pleading to survive a summary dismissal. Consequently, J.S.J.F. was not entitled to an opportunity to file an amended cross-complaint.

[58]

Finally, we observe J.S.J.F.'s appellate papers also contain facts and arguments concerning the court's post judgment orders awarding Sizzler costs and attorneys fees. Those matters, however, are the subject of a separate appeal which is not now properly before us. Accordingly, we do not decide the merits of those matters on this appeal.

[59]

DISPOSITION

[60]

The judgment is affirmed. Respondent is entitled to costs on appeal.

[61]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[62]

We concur:

[63]

JOHNSON, Acting P.J.

[64]

PERLUSS, J.

Opinion Footnotes

[65]

*fn1 The briefs and record contain facts not directly relevant to this appeal, but which relate to an appeal of separate orders for costs and attorneys fees. The facts set forth here pertain only to the issues raised on this appeal.

[66]

*fn2 Josephina's is allegedly a subsidiary corporation of Sizzler.