451-453 Park Ave. S. Corp. v Comprehensive Med. Evaluations, P.C.

2007 NY Slip Op 31224(U)

May 14, 2007

Supreme Court, New York County

Docket Number: 0101695/2007

Judge: Walter B. Tolub

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SCANNED ON 5/17/2007

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

WALTER B. TOLUB PART ____

Index Number : 101696/2007

451-453 PARK AVE. SOUTH CORP.

vs

COMPREHENSIVE MEDICAL

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION ✓

FILED
MAY 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

MAY 15 2007

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S):

Dated: 5/14/07

J.S.C.

WALTER B. TOLUB

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
--x

451-453 Park Avenue South Corp.,
Plaintiff,

Index No. ~~101690/07~~ 106959/07

-against-

Comprehensive Medical Evaluations, P.C.
and Jose R. Sanchez-Pena,
Defendant.
--x

FILED
MAY 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Walter Tolub, J.:

This is a motion for summary judgment in lieu of a complaint (CPLR 3213), by which plaintiff seeks money allegedly due and owing in the amount of $522,668.47.[1] The motion is denied.

Plaintiff is the owner of the properties identified as 451-453 Park Avenue. The corporate defendant, Comprehensive Medical Evaluations, P.C. (Comprehensive) is a professional organization whose tenancy location is and was the **second and third floors** [emphasis added] of 451 Park Avenue, New York, New York 10016 (the premises). Comprehensive still occupies the entire second floor of the premises. Jose R. Sanchez-Pena, M.D., FCCP is the principal of the corporate defendant Comprehensive. He is also the signatory for the leases, the three riders and the limited guarantees attached to the leases dated February 5, 1996 (see Affidavit in Opposition to Notice of Motion, Exhibit C) and February 5, 1997 (id., Exhibit A). The 1996 lease was for

[1]$522,668.47 minus $311,516.00 (the amount being sought in section two clauses A and B of the November 2006 Surrender Agreement [see discussion infra]) equals $211,152.47 as being the logical outstanding amount of past due rent and monies allegedly owed to plaintiff under clause C for Comprehensive's second floor tenancy (see February 1, 2007 Coleman affidavit, § 5).

the entire second floor of 451 Park Avenue and was for the period of February 1, 1996 to December 31, 2011. The 1997 lease was for the entire third floor of 451 Park Avenue and was for the period of February 5, 1997 to December 11, 2011. He is also the signatory and guarantor for the later November 22, 2006 Surrender Agreement (id., Exhibit B), the alleged "money only instrument," which returned possession of the third floor of the premises to plaintiff on November 28, 2006.

The 2006 Surrender Agreement

Following the surrender of the third floor, a series of scheduled payments were required to be made according to section two of the Surrender Agreement. Section two provides:

> In consideration of Landlord accepting surrender of the Premises and early termination of the lease, Tenant shall pay Landlord the sum of Three hundred and Eleven Thousand Five Hundred and Sixteen Dollars ($311, 516.00) dollars as follows:
>
> (A) $ 100,000.00 on or before November 30, 2006.
>
> (B) $ 211,516.00 To Be Paid By June 30, 2007 in Monthly Installments of Thirty Five Thousand Two Hundred and Fifty Three Dollars. ($311,516.00).
>
> (C) All Past Due Rent and Monies for 2nd floor Rental Space[2] occupied by Comprehensive Medical Evaluations, P.C.; to be paid on or Before January 15, 2007.

Section number three is Dr. Sanchez-Pena's personal guaranty. Section number four provides:

> **in the event of any default or breach of this Agreement, Landlord ... shall be entitled to all of its rights and remedies against the Tenant ... pursuant to the default provisions ... in the Lease, and, against the Guarantor pursuant to the terms of the Limited Guaranty**

[emphasis added]. Though Dr. Sanchez-Pena surrendered the premises in a timely manner, he

[2]Dr. Sanchez-Pena argues in paragraphs 14 and 15 of his affidavit that no back rent or monies are due for the second floor. He submits billing invoices from plaintiff as Exhibit D attached to his affidavit in opposition in support of his argument.

immediately defaulted by failing to make any of the payments in accordance with section two of the Surrender Agreement.

<u>The 1996 Limited Guaranty</u>

Pursuant to the self-executing section four segment of the Surrender Agreement, a remedy found in the Limited Guaranty took effect upon the default by Dr. Sanchez-Pena. The pertinent part of the Limited Guaranty provides that the guarantor is obligated to make "payment of all rent and **<u>additional rent</u>** and other charges due to the Landlord **<u>under the lease</u>** or otherwise, which accrues **<u>up to and until the date on which *the premises are vacated*</u>** ... " [emphases added]. The Limited Guaranty also provides that the landlord may, but is not obligated to look to the guarantor for payment of such outstanding items prior to applying any security monies held under the lease for payment of such. As the third floor was the only premises that was vacated, the remedy language of the 1996 Limited Guaranty would logically imply that Dr. Sanchez-Pena was obligated to pay any outstanding additional rent or other charges for the ***<u>third</u>*** floor [emphasis added]. However, section two, clause C of the defaulted Surrender Agreement specifically references outstanding rent and monies as being due only for the ***<u>second</u>*** floor [emphasis added]. The language in section two, clause C of the Surrender Agreement seems incongruous with the remedy proposed by the language of the Limited Guaranty. According to the Limited Guaranty, to determine what the past due rent and monies for the second floor might be, if any, one has to look to the terms of the 1996 lease and the attached riders to determine "rent," "additional rent" and "other charges."

<u>The 1996 Lease</u>

The pertinent sections of the 1996 lease are Section 12, entitled "Electric Current;"

Section 19, entitled "Fees and Expenses;" and Section 34, entitled "Security Deposit." Section 12 provides that the rates and conditions in respect to sub-metering or rent inclusion, as the case may be, were to be added as additional rent in accordance with the terms of the attached riders. Section 19 expanded the definition of what additional rent would consist of upon a violation of any lease provision on the part of a tenant, i.e., fines and attorney's fees. Section 34 provided that a $27,300.00 security deposit was paid for each lease (totaling $54,600.00 for the 1996 and 1997 leases).

Rider No. 1

Rider 1, section A, entitled "Taxes," and section B, entitled "Wages," also address what comprises "additional rent." The court notes that this rider provides that the propriety of the landlord's demand for additional rent requires, as a prerequisite prior to payment of any additional rent by the tenant, that the landlord deliver copies of pertinent tax bills, other bills and statements to the tenant showing the basis for and the computations comprising the additional rent. In the opposition papers, Dr. Sanchez-Pena claims that the prerequisite calculations establishing the propriety of the additional rents were never presented, despite his repeated requests for such, and that he does not owe any back rent for the second floor (see February 13, 2007 Sanchez-Pena affidavit, ¶¶ 13 and 14). He also argues that the primary reason for his need to abandon the third floor tenancy was the increased amounts of additional rent being sought by plaintiff, more specifically, the electric usage costs that were being charged as a result of the landlord's removal of the sub-meter originally installed for the tenancies pursuant to section 42 of Rider No. 2 (see February 13, 2007 Sanchez-Pena affidavit, ¶¶ 5, 6, 7, 8, 9, 10 and 12). Even though Dr. Sanchez-Pena alleges the absence of documentation, the court nonetheless notes that

Subsection (B) (5), entitled "Operation Year," provides that, even if the landlord fails to provide the proper accounting for additional rent in accordance with the lease, it does not forfeit its right to collect any additional rents during the term of the lease, nor does such a failure negate the tenant's obligation to pay such additional rents even after the lease term has expired.

Rider No. 2

Rider No. 2 consists of sections 38 to 72. The pertinent section affecting electricity usage, charges, and changes in the method of delivering electricity to the tenancy, plus additional rent issue resolution is section 42, entitled "Electric," more specifically, clauses A, B, G and I. Clause A states that the landlord shall provide at the commencement of the lease a sub-meter for measuring electrical use in the tenancy. Clause B addresses dispute resolution of additional rents via submission of the issues to an electrical consultant chosen by the landlord. Clause I allows the landlord to change the delivery method of electricity to the tenant. Clause G allows for the landlord to commence a summary judgment proceeding for non payment of additional rent upon tenant's default in paying increased additional rent arising from, among other things, electrical usage and other charges.

The 1996 Supplemental Rider

The pertinent sections of the Supplemental Rider are sections 3, entitled "Electricity," and section 4, entitled "Additional Rent." Section 3 provides, in pertinent part, that, as part of the initial work, the landlord shall upgrade the electrical so that the electrical service shall be sufficient and adequate for the tenant's intended use and equipment in the premises. Section 4 provides, among other things, that the tenant agrees to pay any and all additional rent to the landlord within 30 days of the rendering of a statement to the tenant from the landlord.

Prerequisites for the Surrender Agreement to be considered a

Money Only Instrument for purposes of Granting CPLR 3213 Relief

CPLR 3213 provides that, when an action is based upon an instrument for the payment of money only, the plaintiff may serve, with the summons, a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The Court of Appeals has stated that a document comes within the purview of CPLR 3213 if a prima facie case can be made by the instrument itself and the failure to make payment by its terms (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). But the instrument does not qualify if outside proof is needed other than mere nonpayment or some other de minimis deviation from the document itself (ibid.; see also *Diversified Investors Corp. v DiversiFax, Inc.*, 239 AD2d 231, 233 [1st Dept 1997]). The standards for succeeding with a CPLR 3213 application are (1) that the instrument is unequivocal on its face as to the amount of money that is owed; and (2) there is proof of non-payment (*see Interman Industrial Products v R. S. M. Electron Power*, 37 NY2d 151, 155 [1975]; *see also Seaman-Andwall Corp. v Wright Machine Corp.*, 31 AD2d 136, 137 [1st Dept 1968] affd 29 NY2d 617, 618-619 [1971]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:3). Non-commercial paper, such as unconditional guarantees, can be resolved via CPLR 3213, where a prima facie case is established (*Samsung America, Inc. v Noah*, 209 AD2d 367, 367 [1st Dept 1994]; *European American Bank & Trust Co. v Schirripa*, 108 AD2d 684, 684 [1st Dept 1985]).

Dr. Sanchez-Pena argues that plaintiff should not be granted the CPLR 3213 relief it seeks as the Surrender Agreement cannot be considered an instrument for money only. Though plaintiff's counsel contends, in paragraph 8 of his February 5, 2007 Affirmation, that Dr.

Sanchez-Pena's section 3 guaranty renders the Surrender Agreement an instrument for the payment of money only, the ambiguities created by the language comprising Surrender Agreement section 2, clause C, when applied to the section 4 default remedy incorporating the pertinent language of the 1996 Limited Guaranty, do not support such a position. While the Surrender Agreement, on its face, seems to clarify what the unequivocal amounts in section two, clauses A and B are for,[3] clause C is not so unequivocal.[4] The specific amount that is due pursuant to section 2, clause C, is not stated anywhere in the Surrender Agreement. More so, the Limited Guaranty sets forth the need for the provision of outside proof in reliance on the procedure for assessing the additional rent in accordance with the 1996 lease and rider provisions, especially where an additional rent dispute exists. Thus, while the Surrender Agreement has a guarantee clause included as part of it, a resolution of section two, clause C, requires submission of proof outside the instrument itself to determine what sum certain is owed, if any (see *Channel Excavators, Inc. v Amato Trucking Corporation*, 48 Misc 2d 429, 450 [Sup Ct, Nassau County1965]).

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[3]Michael Colemen, the managing agent for the premises, states, in paragraph 5 of his affidavit, that the $311,516.00 dollars comprising clauses A and B are indeed consideration for the landlord's acceptance of the early surrender of the third floor under the 1997 lease ($100,000.00 plus six payments of $35,253.00).

[4]The 1997 Rider No.2, unlike the 1996 Rider No. 2, contained a section 73. The 1996 Rider No. 2 ended with section number 72. The 1997 Rider No. 2 section 73, entitled ""'Subject to Provisions," had a clause A which made the lease subject to Dr. Sanchez-Pena's payment of $216,734.67 "per a separate agreement" (unnamed) which was "entered into by and between the Landlord and Jose R. Sanchez Pena." This amount is different from the amount alluded to by Mr. Coleman in his affidavit. In Paragraph 5 of his affidavit, Mr. Coleman states and implies that $193,406.95 in monies was due and owing as of the signing of the Surrender Agreement on November 22, 2006, but that $211,152.47 was due and owing as of February 1, 2007, the date of his affidavit. In footnote 1, the difference which was calculated to be owed after subtracting the specified amount comprising clauses A and B equaled $211,152.47.

While summary judgment cannot be granted to this plaintiff at this juncture under CPLR 3213, the court notes that clause G of Rider No. 2 allows for the commencement of a summary judgment proceeding by the landlord upon a default on the part of the tenant to pay additional rent which is due and owing. As an exercise of its discretion, this court may convert this action to a plenary proceeding when issues of fact are found to exist. However, denial of the motion will not preclude granting summary judgment following joinder of issue (7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3213.06).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of a complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendants' attorney within 20 days of service of a copy of this order with notice of entry and defendants shall move or serve an answer to the complaint within 30 days after service of the complaint.

Dated: 5/14/07

ENTER:

WALTER B. TOLUB, J.S.C .

FILED
MAY 16 2007
NEW YORK
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