

Avenue of the Am. Deli Corp. v Manikis

2008 NY Slip Op 32021(U)

July 15, 2008

Supreme Court, New York County

Docket Number: 0602617/2007

Judge: Judith J. Gische

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

PRESENT: GISCARDI
Justice

PART 10

ASS OF AMERICAS DELI COMP

INDEX NO. 602617/07

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

ANASTASIUS MANIACS

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 15, 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Avenue of the Americas Deli Corp.,

Plaintiff,

-against-

Anastasios Manikis,

Defendant.
-----X

DECISION/ ORDER

Index No.: 602617/07

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Def's n/m (§5015) w/JM and PSS affirm, AM affid, exhs	1
Pltf's opp w/DT affirm, exhs	2
Def's opp w/AM affid, PSS affirm	3
Tr 6/5/08 of Oral Argument	4

FILED Numbered
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover damages under a commercial lease agreement that the defendant ("defendant" or "Manikis") personally guaranteed. Issue was joined on November 15, 2007 with the filing of a verified answer. The answer consists of a two paragraph general denial signed by defendant's attorney, Julius Mendalis.

Defendant now moves to vacate his default in opposing plaintiff's motion for summary judgment. That motion was granted in the court's prior order of May 5, 2008, filed May 12, 2008 ("prior order"). Defendant contends that he has excusable default and a meritorious defense to plaintiff's claims, and that the court should render a decision on the merits. The court granted defendant a temporary restraining order against plaintiff collecting on the money judgment that was entered against the

defendant. That temporary stay remains in effect, pending the court's decision on this motion. Plaintiff opposes defendant's motion and argues that the court's prior decision should not be modified.

Arguments

As more fully developed in the court's prior order which is incorporated herein by reference and in its entirety, plaintiff brought a motion for summary judgment after it filed the note of issue. It is undisputed that the motion was properly served and timely. Despite proper service, the motion was ultimately submitted to the court without any opposition by defendant. The motion was made in January 2008, adjourned in the motions submission part, and then ultimately decided May 5, 2008. In its prior order, the court observed there was correspondence from two separate lawyers on behalf of the defendant. Julius Mendalis ("Mendalis") is the attorney of record and Peter Sanders ("Sanders") is of counsel. In his correspondence of January 17, 2008, Sanders asked for a brief "moratorium" of ten (10) days in deciding the motion. Although the court does not respond to letters, nor entertain one-side applications for adjournments, due to the court's own schedule, the decision was made significantly more than ten (10) days after the motion was submitted.

Sanders now moves on the basis that through a series of miscommunications, the prior motion was submitted on default when in fact he and his client intended to oppose it. Sanders and Mendalis each provide affirmations describing bungled efforts to obtain an adjournment of the prior motion from motion support, plaintiff's counsel, and even these chambers. Plaintiff's counsel claims the excuses are feeble if not feigned, and urges the court to deny defendant's motion on that basis alone.

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of the cause of action or defense. CPLR § 5015 (a) (1). While the excuses provided by Mendalis and Sanders are imperfect, they will be accepted as "reasonable," so that the court can move on to consider whether Manikis has a meritorious defense to plaintiff's claims.

Since the prior motion was for summary judgment, and defendant contends that his defenses, had he raised them timely, would have defeated plaintiff's motion, the court will not only consider whether they have merit, but also whether he now raises a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). To the extent he raises any issues of law, they will be decided. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

In the court's prior decision, the court found that plaintiff had established its *prima facie* case which is that Manikis Management Corp. ("MMC"), an entity that Manikis is the principal of, had defaulted in the payment of rent. MMC had rented ground floor and second floor space from the plaintiff pursuant to a sublease agreement dated July 1, 2000 ("sublease"). Manikis personally guaranteed MMC's payments under the sublease by entering into an agreement with plaintiff, also dated July 1, 2000 ("guaranty"). Plaintiff brought a commercial holdover against MMC in Civil Court, New York County on August 2, 2007 (Avenue of the Americas Deli Corp. v. Manikis Management Corp., L&T Index No. 81547 NLT 2007); Manikis was not a named party to that action. The within action was also commenced on August 2, 2007. It is against Manikis, as the guarantor for the payment of rent; MMC is not a named party.

The Civil Court proceeding was settled August 13, 2007 in a written stipulation of settlement ("settlement"). In the recitation ("whereas") portion of the settlement, it provides that the "Petitioner terminated the Sublease as of July 13, 2007 because the Premises became vacant and deserted, and Respondent is in default in the payment of rent and additional rent for the Premises . . ." It also provides that the "Petitioner and Respondent desire to amicably resolve the Holdover Proceeding without the necessity of any further litigation . . ." The settlement required that MMC surrender possession of the premises and that it consent to entry of a final judgment of possession against it. Although the court in its prior decision noted that the issue of unpaid rent was "reserved," and defendant highlights this as a mistake of fact, the following sentence in the court's order clarifies that the "settlement did not resolve or encompass the issue of unpaid rent and additional rent." Thus, while the settlement did not expressly contain the word "reserve," it did not resolve that issue either.

Manikis alleges that plaintiff has improperly split its causes of action by suing MMC for possession in Civil Court and then separately suing him in Supreme Court. The guaranty, however, expressly provides that plaintiff can proceed "against Principal [Manikis] and Subtenant [MMC], jointly or severally, or Sublandlord may proceed against Principal under this Agreement without commencing any suit or proceeding of any kind against Subtenant [MMC], or without having obtained any judgment against Subtenant . . ." Guaranty section C (1) (b). Furthermore, this action is based upon the personal guaranty that Manikis signed, which is a separate contractual agreement from the sublease Manikis signed on behalf of the corporate entity.

Next, Manikis argues that plaintiff waived all unpaid rent under the settlement in

the Civil Court proceeding, and that although he was not a party to that action, this is an available defense to him in this action against him on the personal guaranty. However, under the terms of the personal guaranty, Manikis "absolutely and unconditionally" guaranteed the full payment of all fixed rent and additional rent due under the sublease between MMC and plaintiff. In fact, the guaranty provides further that "[t]he obligations of the Principal [Manikis] under this Agreement [the guaranty] are unconditional, [and] are not subject to any set-off or defense based upon any claim Principal may have against the Sublandlord . . ." Guaranty section C (2). This section goes on to illustrate a number of likely scenarios where the landlord might not be able to collect money from the tenant, but the guarantor would still be liable for damages. For example, "any exercise or non-exercise by Sublandlord of any right or remedy in respect of the Sublease, **or any waiver**, consent or other action, or omission, in respect of the Sublease . . ." (*emphasis added*). Thus, even if plaintiff waived MMC's unpaid rent under the sublease in exchange for possession, as per the express terms of the separate guaranty, plaintiff can sue the guarantor for the rent and additional charges that MMC did not pay.

Manikis contends that his guaranty ended upon the termination of MMC's sublease by the landlord. Some guaranty agreements contain what is commonly called a "good guy" clause. Such a clause in a guaranty extinguishes the guarantor's liability for a tenant's obligations in the event the tenant vacates before the end of the lease term. Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP v. Sheraton Holding Corp, 304 A.D.2d 455 (1st Dept 2003). There is no such clause in the guaranty that Manikis signed. Moreover, the guaranty expressly states at paragraph 9 that it "may

[*7]

not be modified or terminated orally or in any manner other than by an agreement in writing signed by Principal and Sublandlord. . .” GOL §15-301[1]. Thus, any claim that the guaranty expired when the sublease was terminated by the plaintiff is without any factual basis.

Paragraph 83 of the overlease is expressly incorporated by reference in the MMC sublease at paragraph 3. Paragraph 83 provides as follows:

“83. ADDITIONAL DEFAULT REMEDIES:

It is hereby agreed that in the event of the termination of this Lease pursuant to the provisions of Article 17 . . . Landlord shall, at Landlord’s option, forthwith be entitled to recover from Tenant as and for liquidated damages with respect to any such lease termination, and amount equal to the rent reserved hereunder for the unexpired portion of the term demised. . .”

Manikis argues that the liquidated damages clause is unenforceable as a matter of public policy and that the landlord has no right to recover accelerated rents. This argument was not raised as an affirmative defense in the answer, but is now raised for the first time. It is, nonetheless, an unavailing argument because of well established law that a commercial landlord is under no obligation to mitigate damages, but can sue for the full sublease term if the tenant vacates the premise before the sublease has expired. Holy Properties Limited L.P. v. Kenneth Cole Productions, Inc., 87 NY2d 130 (1995). Although a landlord cannot bring an action for future rent in the absence of an acceleration clause, this sublease has such a clause because it incorporates the over lease by express reference. Beaumont Offset Corp. v. Zito, 256 AD2d 372 (2nd dept 1998).

Other claims by Manikis that the landlord is being conferred a “windfall” or being “unjustly enriched” or that the liquidated damages clause is “unconscionable” do not set

forth any cognizable defense to plaintiff's claims. No claim is made by Manikis that the guaranty is the product of mutual mistake or was obtained through fraud. M. Lowenstein & Sons, Inc. v. Roselle Mfg. Co., 9 Misc. 2d 617 *aff'd* 8 A.D.2d 592 (1st Dep't 1959). The claim that the guaranty is the product of "unequal bargaining power," is soundly rejected. Not only did Manikis have an attorney who represented him on the lease and guaranty, it is the same attorney of record in this case. Furthermore, these statements are all made by Sanders in his affirmation, and not by Manikis in his affidavit.

The court also considers Manikis' further argument, also raised for the first time, that MMC was constructively evicted from the demised premises. Not only was this not raised in the answer, even if it had been, it would not defeat plaintiff's motion because of the prohibition against set-offs or defenses found in the guaranty at section C (2).

The court in its prior decision awarded plaintiff a money judgment in the amount of \$355,778.27 with interest from April 1, 2007. Pages 2 and 3 of the original motion set forth the computations used by the landlord. Manikis does not challenge any of the computations therein, but only states that he was not given the 4% discount he is entitled to, and therefore the judgment is wrong and should be vacated because a mathematical error was made. While not admitting to owing any damages, Manikis argues the figure is \$341,547.14. Plaintiff has, however, explained his calculations and they include the discount. Thus, there is no issue of fact for trial and the judgment amount is correct.

Based upon the foregoing, there is no basis for the court to vacate its prior decision. It would not have been any different, even if the motion for summary

judgment had been opposed. Therefore, the prior decision and order remains unmodified for the reasons stated. Arguments about whether defendant should post a bond are rendered moot.

Any stays on the entry and execution of the judgment previously awarded are hereby lifted forthwith.

If it has not already done so, the clerk shall enter judgment in favor of plaintiff against Anastasio Manikis, as previously ordered in its prior decision of May 5, 2008 which is incorporated herein by reference. Furthermore, plaintiff shall serve a copy of this decision on the Office of the Special Referee so the issues (attorneys' fees, etc) framed in the prior decision can be assigned for a hearing and report to the court.


Conclusion

Defendant's motion to vacate his default in opposing plaintiff's motion for summary judgment is granted and his opposition is considered. The court adheres to its prior decision and order for the reasons stated, and directs the Clerk to enter judgment as provided in its May 5, 2008 decision. Plaintiff shall serve a copy of this decision on the Office of the Special Referee so the reference can be assigned.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 15, 2008

So Ordered:

Hon. Judith J. Gische, JSC

FILED
JUL 18 2008
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NEW YORK