

Lexington Bldg. Co. LLC v Fortunato

2009 NY Slip Op 30470(U)

February 1, 2009

Supreme Court, New York County

Docket Number: 110961/08

Judge: Martin Shulman

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

MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 110961/2008
LEXINGTON BUILDING CO. LLC
vs.
FORTUNATO, ANTHONY
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

Justice

INDEX NO. 110961-08

MOTION DATE #001

MOTION SEQ. NO.

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1,2
3,4
5,6
7,8

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits A-F

Answering Affidavits - Exhibits A+B

Replying Affidavits Exhibits A+B

Aff. Amending Motion + in Opp. to Amendment

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

MAR 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

FEB 27 2009

Dated: _____

MARTIN SHULMAN
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
LEXINGTON BUILDING CO. LLC, :

Plaintiff, :

Index No: 110961/08

-against- :

Decision and Order

ANTHONY FORTUNATO, :

Defendant. :

-----X
ANTHONY FORTUNATO, :

Third-Party Plaintiff, :

-against- :

FORTUNATO & VENANZI LLC, :

Third-Party Defendant. :

-----X

FILED
MAR 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Martin Shulman, J.S.C.:

Plaintiff-Landlord, Lexington Building Co. LLC ("Landlord", "Lexington" or "Plaintiff") has moved for summary judgment in the amount of \$460,660.07¹ reflecting certain monthly rents which have accrued from January 2008 through February 1, 2009, against defendant-guarantor, Anthony Fortunato ("Guarantor", "Fortunato" or "Defendant"), under a commercial lease dated April 19, 2005 (the "Lease") between Plaintiff and Fortunato and Venanzi, LLC ("Tenant" or "F&V"), that commenced on the

¹ Plaintiff's initial notice of motion sought judgment in the sum of \$206,782.97 for unpaid monthly rent/additional rent charges (i.e., fixed rent, operating expenses, late fees, electricity charges, real estate escalation charges and repair charges)(collectively, "rents") which accrued through August 31, 2008. During the pendency of this round of motion practice, this court granted plaintiff leave to file an amended affidavit by a person with personal knowledge of the facts and additional proof of any unpaid monthly rents which have accrued through February 1, 2009 totaling \$460,660.07.

date Landlord delivered vacant possession of portions of the ground and second floors of the building located at 3 West 56th Street, New York, New York (the "Premises") and which expires on January 31, 2015 (the "expiration date"). Fortunato commenced a third-party action against F&V seeking full indemnification for accruing rent obligations Guarantor had, and has, to satisfy under his April 19, 2005 guarantee agreement ("Guarantee") (see Lease and Guarantee annexed to Plaintiff's Summons and Complaint as Exhibit C to Motion) with Landlord. Concomitantly with the filing of his third-party complaint against F&V, Guarantor has (cross-) moved by order to show cause ("OSC") to: enjoin F&V from remaining in possession of the Premises, compel F&V to vacate and surrender the Premises to Lexington and compel F&V to turn over its business assets to Fortunato for liquidation to satisfy Tenant's obligations under the Lease. Both the motion and OSC are consolidated for disposition.²

Guarantee

Pursuant to ¶1 of the Guarantee (Exhibit C to Motion, *supra*), Fortunato agreed to be "personally liable for and guarantees the full and prompt payment of all Fixed Rent [\$38,750.00/month], Additional Rent . . . and all other charges and sums (including, without limitation, Landlord's attorney's fees and disbursements) payable by Tenant under the terms of the Lease . . ." (bracketed matter added). The Guarantee further provided that Defendant's personal guarantee for the rents under the Lease

² The OSC was signed by another Justice of the court without granting a requested temporary restraining order prior to this matter being referred to this court. In the interim, the parties entered self-imposed stay stipulations to explore settlement discussions which ultimately proved unsuccessful. However, those stipulations mooted any need for this court to issue a preliminary injunction.

would only cease on the Surrender Date (as defined in the Guarantee), viz., “[i]f a) Tenant has vacated and surrendered the . . . [P]remises to Landlord, b) Tenant notifies Landlord that it retains no interest in any property remaining in the . . . [P]remises, and c) Tenant has returned the keys to the . . . [P]remises to Landlord, together with any building keys, . . .” (“Lease surrender criteria”).

Because of Tenant’s ongoing and sporadic rent defaults which have occurred prior to and during a two year period between 2006-2008 and Defendant’s unambiguous guarantee to cover Tenant’s rent obligations, Landlord commenced this plenary action under the Lease and Guarantee to obtain a money judgment for the outstanding rents for which Tenant was/is otherwise contractually obligated.

Summary Judgment Motion

In Plaintiff’s summary judgment motion, Lexington has made a prima facie showing of ownership of the Premises, has established a contractual right to sue Guarantor under the Lease and Guarantee and has proffered affidavits from Lexington’s managing agent responsible for the collection of rents who has personal knowledge of its rental income accounting together with computerized rent ledgers which furnish a breakdown of the unpaid rents from January 2008 through February 1, 2009 (Exhibit B to Motion and Exhibit A to Nachwalter (Supplemental) Aff.). Accordingly, Plaintiff seeks summary judgment in the sum of \$460,660.07, exclusive of attorney’s fees.

In opposition to the summary judgment motion, Defendant’s attorney essentially challenges the evidentiary value of Lexington’s rent ledger summaries and questions the breakdown of the rents, without more.

In reply and to further bolster its position regarding the rents, Lexington referred the court to a February 29, 2008 stipulation of settlement F&V executed which was so-ordered by the New York County Civil Court in an RPAPL summary proceeding for non-payment of rent under Index No. L&T 51828/08 ("2008 Stipulation") (Exhibit A to Meltzer Reply Aff.). Plaintiff then points out that in the 2008 Stipulation, F&V acknowledged owing Lexington \$165,227.56 through February 1, 2008, consented to a possessory judgment based thereon as well as the issuance of a warrant of eviction and evidently paid \$65,475.43 towards those rent arrears (presumably to maintain the agreed to stay of the execution of the warrant of eviction) leaving a balance of \$99,752.13 (i.e., a portion of the unpaid rents being sought in this action).³ Plaintiff further noted that pursuant to ¶ 43[F] of the Lease (Exhibit C to Motion), the rents recorded in monthly billing statements Plaintiff sent to Tenant, and never disputed within 60 days after receipt thereof are deemed conclusive and not subject to challenge. Finally, Plaintiff contends that its prima facie proof of Lexington's agent's affidavits and corroborative rent ledgers are more than legally adequate to support its breach of contract claim under the Lease and Guarantee. Nonetheless, Plaintiff furnishes additional documentation supporting its motion such as copies of an Age

³ Plaintiff obviously commenced this action because Tenant did not fully comply with its payment schedule agreed to in the 2008 Stipulation and continues to be in default of its Lease obligations. Notably, it is well-settled that the issuance of a warrant severs the landlord-tenant relationship and there is nothing on this record evidencing Tenant's good faith attempts to cure its defaults and have its Lease reinstated, a situation most landlords would generally never tolerate. As noted, *infra*, because Tenant is unable to pay the rent and refuses to surrender, and Landlord is tolerant in allowing Tenant to remain in possession of the Premises "rent-free" while going after the Guarantor to financially burden Fortunato well beyond what would be reasonable, these are circumstances never contemplated when the Guarantee was initially executed.

Receivable Report, Occupant Ledger and Lease Ledger itemizing the rents, billing statements sent to Tenant from February 2008 through October 2008, paperwork underlying the work to correct Fire Department Violations caused by F&V⁴ and real estate tax escalation charges (see Exhibit B to Meltzer Reply Aff.), all of which Landlord argues Tenant never disputed as being due and owing and which Defendant now questions solely due to his lack of knowledge of F&V's daily business activities and his status as a passive investor since the inception of this commercial tenancy.

The OSC

On the other hand, Defendant's OSC demonstrates Fortunato's legitimate concern about Tenant's financial inability to pay any of its rental obligations under the Lease, Tenant's refusal to concede its dying business and surrender possession of the Premises and Landlord's election not to execute an outstanding warrant to evict Tenant based upon Tenant's admitted Lease defaults but, instead, go after Guarantor not only to pay the rents in this action, but also to potentially pay any and all future rents up to and including the expiration date. Thus, Defendant contends he has indisputably demonstrated ultimate success on the merits of his claim for full indemnification (albeit with no chance of recovering from F&V on the judgment), he suffers irreparable and continuing harm unless he gets a court order *inter alia* permanently enjoining F&V from

⁴ Included in the documentation turned over to Fortunato during discovery was a copy of the February 28, 2008 summary rent ledger attached to the 2008 Stipulation (Exhibit A to Meltzer Reply Aff.) containing a repair charge of \$3,793.13 for this violation correction which F&V initialed as being appropriate and due and owing. In opposing summary judgment, this was one of the additional rent sums Defendant's counsel conclusorily challenged not for its accuracy, *per se*, but as an expense Lexington was arguably required to absorb as part of its repair/maintenance obligations under the Lease.

remaining in possession of the Premises and directing F&V to satisfy the Lease surrender criteria which will trigger the Surrender Date and vitiate the Guarantee and he "is on the right side of the equities in all respects." (Fellner Aff. in Support of OSC at ¶ 20).

F&V has neither interposed an answer to the original third-party complaint (Exhibit C to OSC) and as amended (Exhibit D to OSC), nor filed any affidavit with supporting documentation either challenging the merits of Landlord's summary judgment motion or Guarantor's OSC. However, Tenant's counsel's affirmation in opposition essentially claims the operating agreement between Fortunato and Eugene Venanzi ("Venanzi"), each a 50% owner of F&V,⁵ requires this dispute to be resolved by arbitration (see ¶ 21 of the Operating Agreement as Exhibit A to Roberts Opp. Aff.), and not via the third-party action.

Plaintiff essentially reiterated its right to sue under the Guarantee without evicting F&V and invokes the "unclean hands" doctrine arguing that Fortunato is improperly seeking ejectment, a remedy which he lacks standing to seek, and using his third-party action and request for mandatory injunctive relief to do an end-run on obligations he agreed to perform under his operating agreement with Venanzi, as a member of F&V as Tenant under the Lease and as a Guarantor under the Guarantee.

⁵ Both Fortunato and Venanzi are members of F&V, a limited liability company, with equal voting rights and the former was the only member to make a single, capital contribution of \$250,000.00. Fortunato remained a passive investor, whereas Venanzi became Tenant's full time employee charged with the day-to-day operations and paid and presumably continues to pay himself compensation for his services to F&V.

[* 8]

In his reply memorandum of law, Fortunato's counsel, after highlighting the absence of any affidavit from Venanzi, the Tenant member with the responsibility for F&V's daily business operations and its concomitant business decisions, charges Venanzi with: (1) turning a blind eye to his fiduciary duties to Fortunato as required by the operating agreement (see Clause 9 of Operating Agreement at p. 8, as Exhibit A to Roberts Opp. Aff.); (2) being incapable of meeting F&V's financial obligations under the Lease and unfairly and inequitably using Guarantor to prop a dying business; and (3) wrongly invoking the arbitration clause of the operating agreement for this non-arbitrable situation. Fortunato further asserts that Plaintiff misapplied the "unclean hands" doctrine as Defendant is innocent of any wrongdoing and at the very least seeks equitable relief to stop the hemorrhaging caused by the Guarantee's sword with respect to his coverage exposure for F&V's continuing rent obligations under the Lease up to and including the expiration date (ostensibly 6 more years of financial pain and suffering). Finally, Fortunato claims he neither seeks ejectment but rather a mandatory injunction to compel F&V to surrender possession of the Premises and prevent a continuing injustice, nor a dissolution of F&V to obtain equitable relief here.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v. Filstein*, 35 A.D.3d 184, 185-186 (1st Dept., 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum of Art*, 27

A.D.3d 227, 228 (1st Dept., 2006); see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Indisputably, Plaintiff has every right to sue Defendant for rents under the Lease and Guarantee and has made a prima facie showing documenting its entitlement to summary judgment for a money judgment in the sum of \$460,660.07 which reflects the outstanding rents due and owing through February 1, 2009. “[W]here . . . [Lexington] has demonstrated its entitlement to summary judgment, . . . [Fortunato in] opposing the motion . . . [has not] demonstrated by admissible evidence the existence of a[ny] factual issue requiring a trial of the action . . . and the submission of a hearsay affirmation by [Defendant’s] counsel alone does not satisfy this requirement.” (bracketed matter added). *Id.*, 49 N.Y.2d at 560. See also, *Vermette v. Kenworth Trucking Co., a Div. of Paccar, Inc.*, 68 N.Y.2d 714 (1986); and *Marinelli v. Shifrin*, 260 A.D.2d 227, 228-229 (1st Dept., 1999)(“It is well settled that ‘the opposing affidavit should indicate that it is being made by one having personal knowledge of the facts [citation omitted] and, therefore, the affidavit of counsel is of no probative value in opposing a motion for summary judgment [citation omitted]”).

Accordingly, this court grants Plaintiff summary judgment entitling Lexington to enter a money judgment against Defendant in the sum of \$460,660.07.

Defendant’s second cause of action in his amended third-party complaint seeks a permanent injunction to enjoin third-party defendant, F&V, from continuing to occupy the Premises and to compel F&V to comply with the Lease surrender criteria (Amended

Third Party Complaint at ¶13 as Exhibit D to OSC). As noted earlier, F&V has not even interposed an answer in this third-party action either denying the allegations contained in the amended third-party complaint and/or asserting any affirmative defenses to Defendant's second cause of action for injunctive relief. Neither has Venanzi or someone with personal knowledge of the facts filed any affidavit in opposition to the OSC to competently counter Fortunato's entitlement to equitable relief. Moreover, this is not a dispute arising out of the operating agreement between F&V members which should be resolved through arbitration.

Nor has Plaintiff, with an obvious, albeit lawful, interest to pursue its remedies under the Guarantee, convinced this court that it would not be in F&V's best interest to surrender possession of the Premises and continue to operate a men's clothing store ineluctably *in extremis*. Unlike Tenant who could potentially be liable for future rental obligations for the entire term of the Lease even if F&V surrendered prior to the expiration date, albeit with the potential to be judgment proof, Guarantor's obligations under the Lease would be limited to covering Tenant's outstanding Lease debts up to the Surrender Date. The Guarantee pre-supposed a unity of interest between Fortunato and F&V. And in recognition of Fortunato being the guarantor for Tenant's Lease debts as a shield for any short term cash-flow problem, the Guarantee has an escape clause for the Guarantor which Tenant, in good faith, could unilaterally exercise at any time during the 10 year Lease term if F&V could no longer meet its Lease obligations.

Under these unusual circumstances, there is no unity of interest between Venanzi and Fortunato and the former is apparently advancing his self-interest at the

latter's burdensome expense. Moreover, it is abundantly obvious that the Guarantee is collusively being used by F&V and Lexington as a sword to impose an unbearable burden on Fortunato without incurring any concomitant benefit. Under these circumstances, equity requires this court to end the "specter of . . . [this Guarantee] extending indefinitely . . . [through the expiration date as it] place[s] an undue and unconscionable burden on [Fortunato,] an uncompensated [G]uarantor . . ." (bracketed matter added). *29 Holding Corp. v. Diaz*, 3 Misc.3d 808, 810 (Sup. Ct., Bronx Co., 2004). While Venanzi appears to be in economic denial, surrendering F&V's Lease would be in its best interests as well. Accordingly, Defendant is entitled to judgment on his second cause of action without opposition, and this court grants the branch of Defendant's OSC for a mandatory injunction compelling F&V to comply with the Lease surrender criteria and vacate the Premises on or before March 15, 2009 (the "Court-Ordered Surrender Date") after which Guarantor's obligations under the Guarantee shall be extinguished.⁶ Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is granted for a money judgment against Defendant Fortunato in the sum of \$460,660.07 with interest at the statutory rate from August 12, 2008; and it is further

⁶ On this record, Tenant did absolutely nothing to disabuse this court of the notion that F&V has any intention of curing its defaults. Presumably, Venanzi's silence implies his desire to deep-pocket the Guarantor indefinitely through the expiration date, a desire which Landlord shares by virtue of its acquiescence to a serial defaulting Tenant remaining in possession of the Premises. Barring any financial stimulus from an unknown benefactor, it is readily apparent that F&V would be incapable of meeting any statutory criteria for a stay of this Decision and Order, if appealed, and any court-ordered stay awarded F&V without an appropriate undertaking as well as an ongoing requirement to pay use and occupancy pending an appeal, if any, would essentially continue the irreparable harm this court-ordered mandatory injunction obviated. Thus, equity compels this court to extinguish the Guarantor's obligations on the Court-Ordered Surrender Date even if Tenant fails to honor the mandatory injunction.

ORDERED that Plaintiff's sixth cause of action for legal fees is severed and an assessment thereof is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office, who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the branch of Defendant's OSC is granted issuing Defendant Fortunato a mandatory injunction enjoining F&V from continuing to occupy the Premises after the Court-Ordered Surrender Date, and is otherwise denied; and it is further

ORDERED that F&V vacate and surrender the Premises in broom clean condition on or before the Court-Ordered Surrender Date; and it is further

ORDERED that F&V notify the Landlord that it retains no interest in any property remaining in the Premises; and it is further

ORDERED that Tenant return the keys to the Premises to Landlord, together with any building keys on or before the Court-Ordered Surrender Date; and it is further

ORDERED that Defendant shall continue to be liable under the Guarantee for any rents that accrue on a pro-rata basis from February 2, 2009 through and including the Court-Ordered Surrender Date and Plaintiff shall be permitted to submit a proposed judgment, together with supporting affidavits and documents, on notice for such accrued rents; and it is further

ORDERED that Defendant's first cause of action in the amended third party complaint for indemnification shall be severed and continued.

The Clerk is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a status conference on March 17, 2009 at 9:30 a.m. at I.A.S. Part 1, Room 1127B, 111 Centre Street, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
February 27, 2009


HON. MARTIN SHULMAN, J.S.C.

FILED
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