

5757 Assoc. v Blanford

2009 NY Slip Op 31025(U)

May 5, 2009

Supreme Court, New York County

Docket Number: 602178/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART _____

Index Number : 602178/2008

5757 ASSOCIATES

vs

BLANFORD, WILLIAM

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 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/5/09

WALTER B. TOLUB 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: IAS PART 15

-----X
5757 ASSOCIATES,

Plaintiff,

-against-

WILLIAM BLANFORD and YOHANNES SYOUM,

Defendants.
-----X

Index No. 602178/08
Mtn Seq. 001

FILED

MAY 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is Plaintiff's motion for summary judgment pursuant to CPLR §3212 and for an order striking Defendant Yohannes Syoum's affirmative defenses.

Facts

On December 12, 1989, Plaintiff, as landlord, entered into a lease agreement (Lease) with Milton W. Kelmans, DDS for a portion of the 12th floor (Premises). The Lease was amended pursuant to a First Lease Amendment dated May 8, 1990, and Extension and Lease Modification dated May 2, 1995, and a Third Lease Modification Extension dated August 11, 1999.

Dr. Kelmans and Mr. Syoum entered into an Assignment and Assumption of Lease on November 1, 2002 whereby Dr. Kelmans assigned the Lease to Mr. Syoum and Mr. Syoum assumed the same. Thereafter, Mr. Syoum and Mr. Blanford entered into an Assignment and Assumption of Lease dated January 12, 2005 whereby Mr. Syoum assigned to Mr. Blanford all of his right, title and interest in

[* 3]
the Lease. Plaintiff consented to the assignment.

Plaintiff claims that Mr. Blanford failed to pay rent due under the Lease for November 1, 2007 and for all subsequent periods. Plaintiff did not notify Mr. Syoum of Mr. Blanford's failure to pay rent.

Plaintiff then commenced a non-payment proceeding in the Civil Court of the City of New York, New York County, Non-Housing Part, and a judgment of possession was granted on April 29, 2008. Again, Mr. Syoum was not informed of the non-payment proceeding or judgment.

On May 8, 2008, a warrant was issued to a City Marshal, who then delivered possession of the premises to Plaintiff.

Plaintiff then commenced this action seeking to recover amounts due for rent and for interest and legal fees. Defendant Mr. Blanford has defaulted in this action. Plaintiff now brings this motion for summary judgment for money owed with interest.

Mr. Syoum opposes Plaintiff's motion and argues that he was not notified of Mr. Blanford's non-payment of rent and that Plaintiff was obligated to notify him of such pursuant to the terms of the Lease.

Discussion

Summary judgment is a drastic remedy which should not be granted where there is a material and triable issue of fact or when the issue is arguable. (Glick & Dolleck, Inc. v. Tri-Pac

Export Corp., 22 NY2d 439 [1968]). "Summary judgment is inappropriate where competing inferences may reasonably be drawn as to whether defendant's conduct constitutes negligence; . . ." (Myers v. Fir Cab Corp., 64 NY2d 806 [1985]). In making its determination, the court must accord the opposing party the benefit of every favorable inference which may be drawn from the pleadings. (Creighton v. Milbauer, 191 AD2d 162 [1st Dept 1993]).

As with any motion for summary judgment, success is wholly dependent on whether the proponent of the motion has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180). Once the defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing]

§37:190).

Here, the Lease contains a provision regarding notice of a default. Paragraph 17 of the Lease¹ provides that:

If Tenant defaults in fulfilling any of the covenants of this lease the covenants for the payment of rent or additional rent . . . then, in any one or more of such events upon Landlord serving a written five (5) days notice upon Tenant specifying the nature of said default and upon the expiration of said five (5) days, if the Tenant shall have failed to comply with or remedy such default, or if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said five (5) day period, and if the Tenant shall not have diligently commenced curing such default within such five (5) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then Landlord may serve a written three (3) days notice of cancellation of this lease upon Tenant and upon the expiration of said three (3) days, this lease and the term thereunder shall end and expire as fully and completely as if the expiration of this lease and the term thereof and Tenant shall then quit and surrender the demised premises to Landlord but Tenant shall remain liable as hereinafter provided.

In addition, paragraph 34 of the Lease provides that the covenants, conditions and agreements contained in the Lease shall bind and inure the benefit of the Landlord and Tenant and their successors, except as otherwise provided in the Lease.

Plaintiff argues that it did not have to notify Mr. Syoum of Mr. Blanford's rent default. Mr. Syoum argues that he should

¹See also Paragraph 47 for Additional Assignment and Subletting Provisions.

have been notified providing him with an opportunity to cure.

Although Mr. Blanford assumed the obligations of the Lease, the mere substitution of one tenant in place of another does not operate to discharge the first tenant from the future performance of his covenant to pay rent (Brill v. Friedhoff, 184 AD 673 [1st Dept 1918]). As such, Mr. Syoum and the Plaintiff remain liable to each other even though there is a different party in actual possession of the premises. Plaintiff's failure to notify Mr. Syoum of Mr. Blanford's rent default constitutes a breach of Paragraph 11 of the Lease (Poole v. Pellati, 251 AD2d 480 [2d Dept 1998]). It follows that Plaintiff's motion for summary judgment must be and is denied.

Moreover, pursuant to CPLR 3211[c] either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment (CPLR 3211[c]; Golini v. Nachtigall, 46 AD2d 628 [1st Dept 1974]). The facts and the law being clear in this matter, the Court dismisses the Complaint as against Mr. Syoum.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

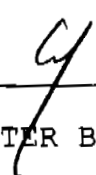
ORDERED that the Complaint is dismissed as against Mr. Syoum; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are directed to appear at 9:30 AM on June 5, 2009 in room 335 at 60 Centre Street for a preliminary conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/4/09



HON. WALTER B. TOLUB, J.S.C.

FILED
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