

390 Park Ave. Assoc., LLC v Sopher
2009 NY Slip Op 31134(U)
May 18, 2009
Supreme Court, New York County
Docket Number: 114876/2008
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

390 PARK AVENUE ASSOCIATES, LLC,

INDEX NO. 114876/2008

Plaintiff,

- v -

MOTION DATE 2/20/09

MOTION SEQ. NO. 001

JACOB I. SOPHER and QUIK PARK COLUMBIA
GARAGE CORP.,

MOTION CAL. NO. 144

Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment; cross motion to dismiss and for a stay

Notice of Motion—Affidavits — Exhibits A-T

PAPERS NUMBERED

1-3

Notice of Cross Motion—Affirmation—Affidavit
Affirmation — Exhibits A-G

4-7

Replying Affirmation—Affidavit — Exhibits 1-3

8-9

FILED

MAY 21 2009

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment and defendants' cross motion to dismiss the action and for a stay are decided in accordance with the annexed memorandum decision and order.

Dated: 5/18/09
New York, New York


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):

MICHAEL D. STALLMAN

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
390 PARK AVENUE ASSOCIATES, LLC,

Plaintiff,

Index No. 114876/2008

- against -

JACOB I. SOPHER and QUIK PARK COLUMBIA GARAGE
CORP.,

Decision and Order

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

According to the complaint, plaintiff leased commercial space to non-party Park Avenue Garage, LLC, which operated a parking garage at the leased premises. In this action, plaintiff seeks to recover from guarantors of a lease a judgment rendered against Park Avenue Garage LLC in a non-payment proceeding in Civil Court, in the amount of \$408,651.02, and additional outstanding rent. According to plaintiff, Park Avenue Garage, LLC has not satisfied the judgment, and has filed for bankruptcy protection.

The complaint asserts three causes of action against defendants, for unpaid rent through November 3, 2008, for late charges and interest, and for attorneys' fees and expenses. Defendants assert a counterclaim for unpaid parking fees in the amount of \$282,500. According to defendants, various employees and principals of plaintiffs parked at least five cars in the parking garage without paying parking fees.

Plaintiff moves for summary judgment in its favor. Defendants cross-move to dismiss the action for improper service, or in the alternative, for a traverse hearing and a stay of the action pending the outcome of a traverse hearing and the bankruptcy proceeding of Park Avenue Garage,

LLC. Defendants maintain that defendant Sopher was not properly served at his actual dwelling place. According to defendants, Sopher was residing in Florida when the process server left a copy of the pleadings with a building concierge. Defendants contend that an inquiry with the concierge would have revealed that Sopher was residing in Florida at that time.

DISCUSSION

Plaintiff has established a prima facie case for summary judgment against defendants. Plaintiff submits a copy of the decision and judgment of the Civil Court against Park Avenue Garage, LLC, in the amount of \$408,651.02. Plaintiff's Ex H. The judgment reflects rent and additional rent that plaintiff sought in the Civil Court petition during the period from July 2007 through August 2008. See Plaintiff's Ex G. Plaintiff claims that Park Avenue Garage, LLC paid rent for September 2008, and for rent for 27 days of November 2008, but owes unpaid rent for October 2008 and three days in November 2008. Martorana Aff. ¶ 42. Plaintiff calculates the amount of additional unpaid rent as \$53,941.33. Id. ¶ 43. Thus, the total amount that plaintiff seeks is \$462,592.35.

Plaintiff submits a copy of the guaranty made by defendants. Ex E. Paragraph 2 (a) of the guaranty states, in pertinent part:

"The Guarantors . . . jointly and severally guarantee to Landlord [plaintiff], the prompt and punctual payment of all Fixed Annual Rent, additional rent, and all other sums and charges payable pursuant to the Lease and the full and faithful performance of all the terms, covenants and conditions of the Lease to be performed by Tenant . . ."

Ibid. Paragraph 8 of the guaranty states, in relevant part, "Guarantors will be conclusively bound by any judgment rendered in any action or proceeding by Landlord against Tenant [Park Avenue Garage LLC] (wherever brought) as if Guarantors were a party thereto, even if not joined as a party in such

action or proceeding." Ibid. Finally, paragraph 7 provides that defendants "shall pay all of Landlord's costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) in enforcing this Guaranty if Landlord is the prevailing party." Ibid.

Defendants do not dispute the amount owed. Defendants argue only that Sopher was improperly served, and that they are entitled to assert a counterclaim against plaintiff. For the reasons discussed later in this decision, Sopher's defense of improper service was waived.

Therefore, plaintiff is granted summary judgment in its favor on the first cause of action, in the amount of \$462,592.35 against defendants, and summary judgment as to liability on the third cause of action, for attorneys' fees against defendants. Because plaintiff is entitled to prejudgment interest on the unpaid rent against the tenant, pursuant to paragraph 50.C of the lease (see Plaintiff's Ex D), plaintiff may recover this amount against the guarantors. However, plaintiff has shown entitlement to interest only on the unpaid rent due for October 2008 and three days of November 2008, in the principal amount of \$53,941.33, at the rate of 18% per annum, pursuant to paragraph 50.C of the lease, from the date of October 1, 2008. Plaintiff has not shown entitlement to prejudgment interest on the amount of the Civil Court judgment. The Civil Court judgment does not explicitly calculate prejudgment interest on the amount owed in the non-payment proceeding, but it appears from the petition that the amount sought in the non-payment proceeding included interest on most of the rent arrears. See Plaintiff's Ex I. To award prejudgment interest here on that the Civil Court judgment would effectively grant plaintiff interest upon interest already awarded. To the extent that the Civil Court judgment did not award prejudgment interest for rent due in May, June, July, and August 2008, a claim for such interest merged into the Civil Court judgment, which is binding upon the plaintiff and on defendants-guarantors by virtue of the lease.

The second cause of action, for late charges on unpaid rent from October 2008 until the date of trial in this action, is deemed abandoned. The total amount of the judgment that plaintiff is seeking against defendants here is \$462,592.35, exclusive of interest and attorneys' fees, which does not include any calculation for late charges on the alleged unpaid rent due for October 2008 and for three days in November 2008. Plaintiff has not asked that the second cause of action be severed from the judgment.

Plaintiff is also entitled to summary judgment dismissing the counterclaim, for lack of standing. "[A] guarantor when sued alone by the creditor cannot avail himself [or herself] of an independent cause of action existing in favor of his [or her] principal as a defense or counterclaim" Culver v Parsons, 7 AD3d 931, 933 (3d Dept 2004)(citations omitted). Here, the counterclaim for unpaid parking fees is a cause of action that belongs to Park Avenue Garage, LLC, which is not a party to this action. Thus, defendants, as guarantors sued alone in this action, may not raise this cause of action as a counterclaim. Defendants' argument that an exception exists where the counterclaim is "inextricably intertwined" is misguided. Defendants' argument focuses on whether a tenant may assert a counterclaim against its landlord notwithstanding a provision to the contrary in the lease. The rule barring these defendants-guarantors from asserting a counterclaim is not based on the provisions of plaintiff's lease, but rather is based on the principal-guarantor relationship. The Court also notes that the tenant raised the same argument in the non-payment proceeding, which the Civil Court rejected. See Plaintiff's Ex G, at 9. This determination is binding upon defendants pursuant to paragraph 8 of the guaranty, which was quoted above.

The branch of defendants' cross motion to dismiss the action due to improper service is denied. The allegations of improper service are made only as to defendant Sopher. As plaintiff

indicates, Sopher waived his defense to personal jurisdiction by asserting an unrelated counterclaim for unpaid parking fees. Textile Technology Exchange v Davis, 81 NY2d 56 (1993). The interposition of an unrelated counterclaim “marks defendant’s intention to exploit the forum for his own purposes, a posture inconsistent with the contention that the forum lacks jurisdiction.” Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C3211:60. A defendant may not insist that the Court would have personal jurisdiction to grant defendant the relief sought in the counterclaim, while insisting that the Court lacked personal jurisdiction over the defendant.

The fact that this Court determined that defendants lack standing to assert the counterclaim does not alter the result. Standing is not an argument addressed to whether the Court has personal jurisdiction over parties. The Court’s determination that a defendant lacks standing to assert an unrelated counterclaim does not alter the conclusion that the defendant intended to exploit the forum for his or her own purposes by invoking the Court’s jurisdiction to assert the unrelated counterclaim in the first instance.

Moreover, the Court notes that, Sopher waived his defense of improper service because he did not move to dismiss the action within 60 days after service of the answer. CPLR 3211 (e); see Wiebusch v Bethany Memorial Reform Church, 9 AD3d 315 (1st Dept 2004); Worldcom, Inc. v Dialing Loving Care Inc., 269 AD2d 159 (1st Dept 2000). The answer was served on November 26, 2008; defendants’ cross motion was made 71 days later on February 5, 2009.

The branch of defendants’ cross motion for a stay of the action pending the resolution of the bankruptcy proceeding of non-party Park Avenue Garage, LLC is denied. Defendants argue that the action should be stayed because defendants are attempting to assign the lease to a third party. Paragraphs 4 (a) and (b) of the guaranty provides, in pertinent part,

“a. The validity and enforceability of this Guaranty . . . shall not terminate and not be affected or impaired by reason of . . . any offsets or defenses of Tenant, the commencement or continuation of any bankruptcy or insolvency action or proceeding or the granting of relief thereunder

b. Without limiting the generality of the foregoing, the obligations of the Guarantors under this Guaranty shall not be affected or impaired by: (i) the release or discharge of the Tenant in bankruptcy or other insolvency proceeding; (ii) the impairment, limitation or modification of the Tenant’s liability or estate . . . ; (iii) . . . the assignment, transfer or assumption of the Lease, by Tenant or any trustee in bankruptcy or insolvency proceeding. . . .”

Plaintiff’s Ex E. To the extent that the arrears are satisfied in whole, or in part, in the bankruptcy court, defendants may make appropriate application to this Court for appropriate relief to prevent a double recovery, even after entry of judgment.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted, and the Clerk is directed to enter judgment in plaintiff’s favor on the first cause of action in the amount of \$462,592.35, with prejudgment interest only as to \$53,941.33, at the rate of 18% per annum from the date of October 1, 2008, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff is granted summary judgment as to the third cause of action of the complaint, which is severed and referred to a Referee to hear and determine; and it is further

ORDERED that defendants' counterclaim is dismissed for lack of standing; and it is further

ORDERED that defendants' cross motion to dismiss the action on the ground of improper service, or in the alternative, for a traverse hearing and a stay during the hearing, is denied.

Dated: May 18, 2009
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

MAY 21 2009

NEW YORK
COUNTY CLERK'S OFFICE