

Quinlan v Mendez

2009 NY Slip Op 31860(U)

August 14, 2009

Supreme Court, New York County

Docket Number: 602152/08

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Quintan

INDEX NO.

602152/08

MOTION DATE

- v -

MOTION SEQ. NO.

001

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MOTION CAL. NO.

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 (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED
AUG 19 2009
COUNTY CLERKS OFFICE
NEW YORK

Dated: 8-14-09

JUDITH J. GISCHE, J.S.C.
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

ROBERT C. QUINLAN, ROBERT C. QUINLAN
and GEORGE H. BEANE as Trustees for
CHRISTOPHER R.A. QUINLAN under a Deed
of Trust dated 22 September 1983 and ROBERT
C. QUINLAN and GEORGE BEANE as Trustees
For TIMOTHY C. QUINLAN under a Deed of Trust
Dated 22 September 1983,

Plaintiffs,

-against-

JUAN MENDEZ and PENNYWHISTLE TOYS, INC.
a/k/a PENNY WHISTLE TOYS, INC. a/k/a
ENDICOTT TOYS, INC. d/b/a PENNYWHISTLE

Defendants.

DECISION/ORDER

Index No.: 602152/08

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.

FILED

AUG 19 2009

COUNTY CLERK'S OFFICE
NEW YORK

NUMBERS

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

Papers

Pltfs. not. motion [SJ], affd (RQ) exhs. 1

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

In this action, Plaintiffs seek to recover monies due on a Commercial Lease and Guaranty. Plaintiffs move, pursuant to CPLR § 3212, for summary judgment in their favor against Defendants, Juan Mendez ("Mendez"), the Guarantor, and Pennywhistle Toys, Inc. a/k/a Endicott Toys, Inc. d/b/a PennyWhistle ("Pennywhistle"), the Tenant. There is proof of service of the underlying Motion for Summary Judgment. Despite such service, the Defendants have not opposed the motion. Therefore, this motion is considered on default.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. [CPLR § 3212, Brill v. City of New York, 2 NY3d 648 (2004)].

The following facts are established by the documentary evidence and affidavits submitted in support of this motion. On or about December 11, 1995, Plaintiffs, as landlord, and Pennywhistle, as tenant, entered into a Lease agreement (the "Lease") for the premises, Store Five, located at 101 West 81st Street, New York, NY (the "Premises"). The Lease commenced on January 1, 1996 and was to expire on December 31, 2010. Pursuant to the Fourth Amendment of the Lease, Pennywhistle promised to pay Plaintiffs \$10,291.00 per month during the 2008 calendar year.

On March 26, 1998, Mendez executed and delivered to Plaintiffs an unconditional Guaranty of Pennywhistle's indebtedness pursuant to the Lease (the "Guaranty"). The Guaranty provides that Mendez is liable for all rent and additional rent and other charges that accrue under the Lease until Pennywhistle either voluntarily or, pursuant to Court order, physically vacates and surrenders legal possession of the Premises to Plaintiffs.

On February 1, 2008, Pennywhistle failed to pay the rent that was due. Due to Pennywhistle's default, and Mendez's failure to pay the outstanding balance, on April 16, 2008, Plaintiffs' commenced a summary non-payment eviction proceeding in New York City Civil Court, index number L&T 065148/08 (the "Summary Proceeding"). Due to Pennywhistle's default in the Summary Proceeding, the New York City Civil Court issued a judgment of Possession and Warrant of Eviction in favor of Plaintiffs. Pennywhistle was evicted from the premises by the New York City Marshal on June 23,

2008. Thereafter, Pennywhistle informed Plaintiffs that they have abandoned the Premises, as well as, property remaining therein. Plaintiffs were not able to re-rent the Premises until October 1, 2008.

Plaintiffs' first cause of action asserts a breach of the guaranty against Mendez. Plaintiff claims that pursuant to the Guaranty, Mendez is liable for all rent and additional rent that accrued from February 1, 2008 through June 30, 2008, in the amount of \$48,261.22.

Plaintiffs' second cause of action is for breach of the Lease against Pennywhistle. Plaintiff claims that Pennywhistle is also liable for all rent and any additional rent due from February 1, 2008 through September 2008, in the amount of \$80,223.38

The third and last cause of action Plaintiffs assert is for reimbursement of reasonable attorneys fees and expenses incurred in pursuing this debt. Plaintiffs request a hearing to determine Plaintiffs' damages on this claim.

Plaintiffs now move for summary judgment on all causes of action, as well as, the dismissal of Defendants': affirmative defenses and counterclaim.

Defendants' answer contains general denials and affirmative defenses, to wit: [1] Plaintiffs' failure to state a claim; [2] Plaintiffs' grossly overstating claims; [3] Plaintiffs' complaint is barred by the doctrines of setoff and recoupment; [4] Plaintiffs' claims against Mendez are outside the scope and terms of the Guaranty; [5] Plaintiffs' complaint is barred by the doctrine of accord and satisfaction; [6] Plaintiffs' complaint is barred by any and all applicable elections of remedies; [7] Plaintiffs have failed to reasonably mitigate their damages; and [8] Plaintiffs' complaint is barred by the

doctrines of waiver, estoppel, laches, and/or unclean hands. Defendants' answer also contains a counterclaim for "breach of warranty of the Lease."

Discussion

On a motion for summary judgment, it is the movant's burden to make a showing that there is no genuine issue of fact and that the movant is entitled to judgment as a matter of law by providing evidentiary facts to prove its *prima facie* case. [Liberty Taxi Mgt., Inc. v. Gincheran, 32 A.D.3d 276 (1st Dept. 2006); CPLR §3212]. Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency of the opposing papers. [Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993)]. When issues of law are the only issues raised in connection with a motion for summary judgment, the Court may and should resolve them without the need for a testimonial hearing. [Hindes v. Weisz, 303 AD2d 459 (2nd Dept 2003)].

Plaintiff's first and second causes of action are for breach of contract. The elements of a cause of action for a breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 116 AD2d 694 (1986).

Plaintiffs' second cause of action is for breach of the Lease. Plaintiffs have established that Pennywhistle failed to perform its obligations in accordance with the Lease by failing to make the payment due on February 1, 2008. Plaintiffs have also established that Pennywhistle is liable for all rent and additional rent due through its vacature of the Premises through June 30, 2008. Plaintiffs further seek as damages

rent and additional rent due through September 2008, after which Plaintiffs were able to relet the Premises.

When a commercial tenant prematurely vacates a leasehold, the landlord's damages for the tenant's breach of the lease is the amount of rent due thereunder. See Goethels Mobile Park Inc. v. Staten Island Meadowbrook Park Civic Ass'n Inc., 204 AD2d 896 (2d Dept. 1994). A commercial landlord has no duty to mitigate damages caused by a tenant's premature vacature. Holy Properties Ltd. LP v. Kenneth Cole Productions Inc., 87 NY2d 130 (1995). Therefore, the seventh affirmative defense that Plaintiffs have failed to reasonably mitigate their damages is unavailing.

The first and eighth affirmative defenses are boilerplate and have no application to this case. Defendants' first affirmative defense alleges that Plaintiff failed to state a claim on which relief may be granted. Plaintiffs, however, have valid causes of action for breach of contract. Defendants' eighth affirmative defense alleges that Plaintiffs' complaint is barred by the doctrines of waiver, estoppel, laches, and/or clean hands. These claims are conclusory and there is no factual evidence to support them.

The second, third, fifth and sixth affirmative defenses dispute Plaintiffs' damages. However, the general denials contained in the answer are insufficient to raise an issue of fact and the Defendants' have otherwise failed to establish these defenses. Therefore, Pennywhistle is liable on the second cause of action for the total sum of rent and additional rent due through September 2008, \$80,223.38. As more fully set forth below, since the first \$48,261.22 is a joint and several liability with Mendez, the court grants two separate money judgments on the first cause of action respectively for \$48,261.22 and \$ 31,962.16.

Plaintiffs' first cause of action is for breach of the Guaranty. Plaintiffs have established that Mendez failed to perform according to the Guaranty by failing to make payment on behalf of Pennywhistle once Pennywhistle defaulted on February 1, 2008. Mendez is liable thereunder for all rent and additional rent owed by Pennywhistle throughout Pennywhistle's occupation of the Premises. Defendants' fourth affirmative defense that alleges that the damages sought by Plaintiff against Mendez is outside the scope of the terms fails to establish a triable issue of fact on Plaintiffs' damages. Therefore, Plaintiffs are entitled to a judgment against Mendez for the sum of \$48,261.22, representing unpaid rent from February 1, 2008 through June 30, 2008, when Pennywhistle finally abandoned and vacated the premises.

Plaintiffs' third cause of action is for attorneys' fees. As a general rule, absent any contractual agreement, statute or court rule, a litigant is responsible for their own attorneys' fees. [Dupuis v. 424 East 77th Owners Corp., 32 Ad3d 720 (1st Dept 2006)]. Pursuant to paragraph 19 of the Lease and paragraph 84 of the Guaranty, Defendants agreed to pay reasonable attorneys' fees, costs and expenses incurred as a result of Defendants' default. Therefore Plaintiffs' are entitled to summary judgment on the issue of Defendants' liability on the third cause of action. The claim for legal fees is hereby referred to a Special Referee to hear and determine the issue of the amount of reasonable attorneys fees that are recoverable. Plaintiffs are directed to serve this decision upon the Office of the Special Referee within 30 days to have the matter placed on the calendar.

Defendants' counterclaim alleges that Plaintiffs breached the "warranty of the Lease" when in the summers of 2006 and 2007, Plaintiffs failed to properly maintain the

buildings water tower system. Defendants' claim the defective water tower system precluded Defendants from utilizing the air conditioning for the Premises. Plaintiffs, however, rely upon the Lease, to show that Plaintiffs were not obligated to provide air conditioning to the Premises. Furthermore, Plaintiffs show that pursuant to the Lease, they were not responsible for the failure of any apparatus or equipment used to supply water or air conditioning. Defendants have failed to dispute the motion. Therefore, the counterclaim is dismissed for failure to establish a *prima facie* cause of action.

Conclusion

In accordance with this decision, it is hereby:

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

ORDERED that the Clerk shall enter a money judgment in the amount of \$48,261.22 in favor of Plaintiff jointly and severally against Defendant, Juan Mendez and Defendant, Pennywhistle Toys, Inc. a/k/a Penny Whistle Toys, Inc. a/k/a Endicott Toys, Inc. d/b/a Pennywhistle in this action on the first and second causes of action; and it is further

ORDERED that the Clerk shall enter a further money judgment in the amount of \$31,962.16 in favor of Plaintiff against Defendant, Pennywhistle Toys, Inc. a/k/a Penny Whistle Toys, Inc. a/k/a Endicott Toys, Inc. d/b/a Pennywhistle in this action on the first and second causes of action; and it is further

ORDERED that the issue of reasonable legal fees and damages shall be referred to a Special Referee for hearing and determination. Plaintiff shall serve a copy of this decision on the Office of Special Referee (Room 119 at 60 Centre Street) within the

next 30 days so that the matter may be placed on Special Referee's calendar; and it is further


ORDERED that Defendants' affirmative defenses and setoff and counterclaim are dismissed; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 14, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C

FILED
AUG 19 2009
COUNTY CLERK'S OFFICE
NEW YORK