

BP 500 Lexington Ave. LLC v Fernandez
2009 NY Slip Op 32463(U)
October 14, 2009
Supreme Court, New York County
Docket Number: 107611/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 107611/2009

BP 500 LEXINGTON AVENUE LLC

vs

FERNANDEZ, JUAN

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 _____

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
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/09

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

BP 599 LEXINGTON AVENUE LLC,

Plaintiff,

-against-

JUAN FERNANDEZ,

Defendant.

Decision/Order

Index No.: 107611/09

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

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COUNTY CLERK'S OFFICE
NEW YORK

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

Papers

Numbered

Plt's summons, n/m [DJ] w/ MM affirm, MM affid, exhs 1

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

Plaintiff has commenced this action to enforce a Guaranty to a commercial lease.

This is plaintiff's motion for summary judgment. CPLR § 3212. The defendant has not submitted any opposition to the motion, despite due proof of service. The motion is, therefore, considered on default.

Issue has been joined. Since note of issue has not yet been filed, summary judgment relief is available. Brill v. City of New York, 2 NY3d 648 (2004).

The following facts are based upon the complaint and the affidavit of Matthew Mayer, Vice President of plaintiff. Ranch 1 52nd, Inc. and plaintiff's predecessor executed a lease dated October 10, 1997 expiring on January 31, 2015 (the "lease") for a portion of the building located at 599 Lexington Avenue, New York, New York 10022 (the "premises"). On June 1, 2001, Ranch 1 52nd, Inc. assigned the Lease to 599 Lexington Food Corp (the

“tenant”). Defendant executed an unconditional guaranty whereby he guaranteed the tenant's obligations under the lease. Plaintiff claims that the tenant owes it \$178,807.62 in rent and additional rent through August 31, 2009.

On April 3, 2009, plaintiff commenced a commercial holdover proceeding in the Civil Court of New York, bearing Index Number L&T 063747/09 (the “L&T action”). On June 16, 2009, Judge Arlene P. Bluth directed entry of a final judgment of possession in favor of plaintiff and against the tenant with a warrant of eviction, and a money judgment for the arrears that had accrued up until that date. Plaintiff was separately awarded a money judgment for reimbursement of its attorney's fees in the L&T action on July 9, 2009 in the total amount of \$16,375.

Plaintiff commenced this action to enforce the guaranty against the defendant. The defendant's answer admits that he executed the guaranty and otherwise consists of general denials.

Plaintiff moves for summary judgment on its claim for breach of the guaranty. Plaintiff has provided proof that it is authorized to do business in New York State and that it owns the premises. Plaintiff has also provided a ledger evidencing the tenant and the defendant's alleged mutual indebtedness.

Discussion

On a motion for summary judgment, it is the movants' burden to set forth evidentiary facts to prove its *prima facie* case that would entitle them to judgment in their favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do.

CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). 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 the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 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 (2d Dept 2003).

The elements of a cause of action for 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 A.D.2d 694 (2d Dept 1986).

Plaintiff's claims establish a *prima facie* cause of action for breach of the guaranty against the defendant. The defendant's answer with its general denials does not, as a matter of law, raise a triable issue of fact sufficient to defeat summary judgment.

Winegrad v. NYU Medical Center, *supra*. Accordingly, plaintiff is entitled to summary judgment on the complaint, and a money judgment against the defendant for all outstanding rent and additional rent, as well as the legal fees judgment awarded by the Civil Court in the L&T case, \$178,807.62, plus interest thereon accruing from the date of default, September 1, 2008. CPLR § 5001.

Plaintiff is also entitled to reimbursement for its legal fees incurred in connection with this action. Plaintiff seeks a hearing to determine what amount plaintiff may recover. Accordingly, the court hereby refers the issue of what legal fees plaintiff may recover from the defendant to a Special Referee to hear and determine.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted in its entirety; and it is further

ORDERED that the Clerk is hereby directed to enter a money judgment in favor of plaintiff BP 599 Lexington Avenue, LLC and against defendant Juan Fernandez, in the total sum of \$178,807.62, plus interest thereon accruing from September 1, 2008; and it is further

ORDERED that the issue of what legal fees plaintiff may recover from the defendant is hereby referred to a Special Referee to hear and determine. Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee within 60 days from the date of this decision so that this reference can be assigned. Plaintiff's failure to comply with this order shall be deemed an abandonment of plaintiff's claim for legal fees.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York
October 14, 2009

So Ordered:

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

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK