Ivy League Med. Realty Corp. v ET & AK Billing Inc.
2009 NY Slip Op 32606(U)
October 28, 2009
Supreme Court, New York County
Docket Number: 105807/2008
Judge: Michael D. Stallman
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SCANNED ON 11/9/2009

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

PRESENT: Hon. MICHAEL D. STALLMAN *Justice* PART 7

Index Number : 105807/2008
IVY LEAGUE MEDICAL
VS.
ET
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 105807/08

MOTION DATE 5/7/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 56

The following papers, numbered 1 to 5 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Affidavit— Exhibits A-I	1-3
Answering Affidavit	4
Affirmation in Support— Exhibits A-C	5

Cross-Motion: ☐ Yes x No

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

FILED
NOV 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN
J.S.C.

Dated: 10/28/09
New York, New York

J.S.C.

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

Check one: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

IVY LEAGUE MEDICAL REALTY CORP.,

Plaintiff,

- against -

ET AND AK BILLING INC. and ERROL TORAN,

Defendants.

----------X

Index No. 105807/2008

Decision and Order

FILED
NOV 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff, a landlord of commercial space, seeks a money judgment against its former tenant and a guarantor for rental arrears, the remaining rent due under the lease, damage to the premises, and legal fees. Plaintiff now moves for summary judgment in its favor. Defendant Toran opposes the motion.

BACKGROUND

Plaintiff is the alleged owner and landlord of the premises located at 225 East 64th Street, New York, New York. By an agreement of lease made as of December 1, 2005, plaintiff leased Suite No. C-1 of the building to defendant ET and AK Billing, Inc. for ten years, commencing on December 1, 2005 to November 30, 2015. Wilkens Aff., Ex A. According to the lease, the space was to be used for "chiropractic services, rehabilitation and fitness." *Ibid.* Defendant Errol Torran allegedly executed a guaranty dated "as of December ___, 2005." *Id.*, Ex B.

In 2008, plaintiff commenced a non-payment proceeding in the Civil Court of the City of New York, New York County, *Ivy League Medical Realty Corp. v ET and AK Billing*, Civ Ct, L&T Index No. 055232/2008, seeking both a judgment of possession and money judgment against the ET

and AK Billing, Inc. Service of the notice of petition and petition was made by substituted service upon a "Jane Smith, refused name" and the additional mailing was sent by certified and regular mail. Wilkens Aff., Ex E. Because ET and AK Billing, Inc. defaulted in answering the petition, the Civil Court granted a judgment of possession only on default, and did not award a money judgment. Wilkens Aff., Ex F. According to plaintiff, ET and AK Billing, Inc. vacated the premises on April 11, 2008.

Thereafter, plaintiff commenced this action in Supreme Court, New York County on April 24, 2008. The complaint asserts five causes of action to recover: 1) rental arrears through April 30, 2008, in the amount of $61,824.44; 2) rent owed through the remainder of the lease in the amount of $610,503.23; 3) damages resulting from defendants' alleged removal of partitions and other fixtures in the amount of $15,000; 4) legal fees incurred in the non-payment proceeding; and 5) legal fees incurred in this proceeding.

Defendants apparently answered the complaint on May 23, 2008, and the answer did not raise any affirmative defenses. Plaintiff filed the note of issue on October 29, 2008. By so-ordered stipulation dated February 20, 2009, the dispositive motions were to be filed on or before March 13, 2009. Plaintiff's motion for summary judgment was purportedly made on March 12, 2009.

DISCUSSION

The standards for summary judgment are well settled.

> "[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action."

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

First Cause of Action (rental arrears)

In support of its motion to recover the rental arrears from August 2007 through April 2008, plaintiff submits a copy of the lease agreement and rider to the lease agreement. Wilkens Aff., Ex A. The rider sets the annual rent for Year 3 of the lease, i.e., 2007 at $70,700.85 per annum (i.e., $5891.74 per month), and for 2008 at $73,175.38 per annum (i.e., $6097.95 per month[1]). *Id.* Pursuant to paragraphs 40, 41, and 42 of the rider, ET and AK Billing, Inc. also agreed to pay, as additional rent, 8.45% of all real estate taxes paid by the landlord upon presentation of the tax bill from the City of New York; 8.4% of all condominium / maintenance charges assessed by the condominium, upon presentation of a maintenance bill from the condominium association, and electrical service in 12 equal monthly payments of $437.50 as additional rent. *Id.* Paragraph 47 of the rider also provides for late charges in the amount of $.06 for each $1 of fixed rent, additional rent, and other changes which remain unpaid more than 15 days after becoming due and payable. *Id.*

Plaintiff submits an affidavit from Sandra Wilkens, who avers to be an officer of plaintiff. Wilkens claims that the total due for base rent, real estate taxes, and maintenance charges, late charges, and a bounced check fee amounts to $61,824. Wilkens Aff. ¶ 8.

Defendant Toran claims that he was never served with the notice of petition from the Civil

[1] According to plaintiff, the monthly base rent in 2008 is $6090.08 per month. Wilkens Aff. ¶ 8.

Court proceeding, and thus argues that the entire proceeding is defective. He also points out that the judgment that plaintiff obtained in Civil Court states that "a counterclaim is granted . . in the amount of $0.00 . . . A money judgment is hereby granted . . .in the amount $0.00 . . . (Monthly use and occupancy is set at $0.00 per month) . . ." Wilkens Aff., Ex A. Toran questions why plaintiff should be entitled for legal fees when no fees were awarded in the Civil Court action.

Plaintiff's reply did not respond to Toran's argument as to whether the Civil Court judgment barred plaintiff from recovering a money judgment against ET and AK Billing, Inc. in this action, for the rent arrears and attorneys' fees.

"The doctrine of res judicata precludes a party from litigating 'a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter.'" *Josey v Goord*, 9 NY3d 386, 389 (2007)(citation omitted). The issue presented is whether the Civil Court judgment which granted no money judgment to plaintiff was a judgment on the merits.

The Civil Court's judgment was granted on default. In *Dolan v Linnen*, Judge Gerald Lebovits explained the practice of the Civil Court in awarding a judgment of possession while denying a monetary judgment.

> "After a tenant's failure to answer a nonpayment petition, a New York City warrant clerk will present a Civil Court or Housing Part judge with a default order that provides for a money judgment only when the landlord effectuates in-hand personal delivery of the petition and notice of petition. No clerk will give a judge an order for a money judgment when a tenant receives substituted or duly diligent conspicuous service. That policy, passed along through generations of warrant clerks, is codified in a memorandum possessed by many in the landlord-tenant bar dated June 26, 1990, entitled 'Warrant Seminar Series: Number 4' and in an undated memorandum entitled 'Failure to Answer Procedure.'"

195 Misc2d 298, 300-301 (Civ Ct, NY County 2003). As Judge Lebovits indicated, this practice followed in the wake of *Matter of McDonald*, where the Appellate Division, Fourth Department held

that, in a summary judgment proceeding, "a money judgment is allowable for arrears of rent to those in which the precept has been personally served." 225 App Div 403, 406 (4th Dept 1929). The practice endures in the Civil Court, even though the Appellate Term has questioned whether *Matter of McDonald* remains valid.[2]

In the Civil Court proceeding, the petition was purportedly served upon a corporation by substituted service, presumably pursuant to RPAPL 735 (1). However, in a plenary action, personal service upon a corporation cannot be made by substituted service. *See* CPLR 311, Business Corporation Law §§ 306, 307. Personal service of the papers upon a corporation may be made by delivery to an employee of the corporation under certain circumstances. *Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 273 (1980). However, such circumstances were not apparent, based on this Court's review of the affidavit of service of the notice of petition and petition in the non-payment proceeding. Mantia Reply Affirm., Ex C.

Thus, this Court concludes that the Civil Court did not award a money judgment for the rent arrears because it was without jurisdiction to grant monetary relief. Because jurisdiction was lacking to grant monetary relief,[3] the Civil Court judgment denying the rental arrears and attorneys'

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[2] The Appellate Term of the 9th and 10th Judicial Districts has rejected the need for in-hand, personal delivery of petition to obtain a money judgment. *Avgush v Berrahu*, 17 Misc3d 85, 92 (App Term, 2d Dept 2007). Noting radical changes "in the constitutional due process landscape and the statutes and case law of the State of New York" following *McDonald*, it held that "money judgments shall be available upon a tenant's default in a summary proceeding, without regard to the manner of service effected therein, upon a showing that such service would be sufficient to support the entry of a money judgment in a plenary action." *Id.*

[3] The Court does not address Toran's argument that the Civil Court lacked jurisdiction to enter a judgment of possession to plaintiff. Because ET and AK Billing, Inc. did not seek in the Civil Court to set aside the Civil Court's judgment of possession, Toran may not collaterally attack that judgment here.

fees is not an adjudication on the merits. Therefore, the Civil Court judgment does not bar plaintiff from seeking to recover the rent arrears in this plenary action.

Next, Toran sets forth "a litany of complaints" about the leased space: lockouts, flooding, a problem with the air conditioner, disruption due to construction, water leaks, and a perpetually broken elevator. Toran Aff. ¶¶ 5 (a)-(g). Contrary to plaintiff's argument, this Court, in examining the pleadings on a motion for summary judgment, may take into account an unpleaded defense (see, Triboro Coach Corp. v. State of New York, 88 AD2d 202, 204 [3d Dept 1982]["We reject claimant's argument that the insurer waived its right to assert the exclusion by failing to plead it as an affirmative defense."). "[I]t is of no consequence that plaintiff raised the unpleaded defense for the first time to defeat summary judgment" *NAB Const. Corp. v Consolidated Edison Co. of N.Y.*, 242 AD2d 480 (1st Dept 1997).

However, Toran does not contend that the litany of problems constitutes breach of any specific provision of the commercial lease; the warranty of habitability applies only to residential lease space. *Rivera v JRJ Land Property Corp.*, 27 AD3d 361, 364 (1st Dept 2006). Moreover, paragraph 4 of the lease specifically bars any claim for a rent reduction based on disruptions due to construction. It states, in pertinent part:

> "There shall be no allowance to Tenant for diminution of rental value and no liability on the part of the Owner by reason of inconvenience, annoyance or injury to business arising from Owner or others making repairs, alterations, additions or improvements in or to any portion of the building or demised premises or in and to the fixtures, appurtenances or equipment thereof. It is specifically agreed that Tenant shall not be entitled to any setoff or reduction of rent by reason of any failure of Owner to comply with the covenants of this or any other articles of the Lease."

Wilkens Aff., Ex A. Therefore, Toran fails to raise a triable issue of fact as to whether the litany of problems in his affidavit constitutes a valid affirmative defense to the unpaid rent arrears.

However, the Court agrees with Toran that plaintiff did not meet its prima facie burden of establishing the amount of real estate taxes, electric charges, and condo maintenance charges, and defendants' liability for a bounced check fee. Wilkens's affidavit is unsubstantiated. Plaintiff does not submit any documents reflecting the real estate taxes assessed for the property and condominium/maintenance charges, a portion of which ET and AK Billing Inc. was responsible for paying. Plaintiff does not submit a copy of the check which was allegedly returned for insufficient funds, and the amount assessed for the bounced check.

Therefore, plaintiff's motion for summary judgment is granted on the first cause of action as to liability only.

Second Cause of Action (rent due on the remainder of the lease)

ET and AK Billing, Inc. vacated the premises on April 11, 2008, but its lease continues until November 30, 2015. According to Wilkens, the base rent due from May 1, 2008 until November 30, 2015 is $610,503.23.[4]

> "The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury. Leases are not subject to this general rule, however, for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.
>
> When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the

[4] Wilkens calculated the future base rent owed for the seven remaining months of 2008 (May 1, 2008 through November 30, 2008) to be $42,630.56, i.e., seven months at $6090.08 per month.

> tenant's benefit. . . .. Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease.
>
> * * *
>
> Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please. If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable."

Holy Props. v Cole Prods., 87 NY2d 130, 133 -134 (1995)(internal citations omitted); *85 John St. Partnership v Kaye Ins. Assoc.*,261 AD2d 104 (1st Dept 1999).

Paragraph 18 of the lease provides, in pertinent part:

> "In case of any . . . dispossess by summary proceedings or otherwise, . . . (c) Tenant . . . shall also pay Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the terms of this lease. The failure of the Owner to re-let the premises or any part of thereof shall not release or affect Tenant's liability for damages."

Wilkens Aff., Ex A.

Given all the above, plaintiff has established prima facie entitlement to summary judgment against ET and AK Billing, Inc. for the remainder of the rent due under the lease. By virtue of the guaranty made as of December 2005, Torran unconditionally guaranteed "the full and prompt payment of base rent, additional rent (as same are defined in the Lease) and all other charges payable by Tenant . . .under the Lease through expiration . . . ." Wilkens Aff., Ex B. Thus, plaintiff has established prima facie entitlement to summary judgment against Toran as well for the remaining rent.

The Court rejects Toran's argument that he is not liable for the remainder of the rent because he executed a "Good Guy" guaranty, and because the premises were surrendered in a broom clean

condition. *See* Toran Aff. ¶ 8. As plaintiff indicates, the third paragraph of the guaranty states,

> "Notwithstanding anything to the contrary, if the Tenant surrenders possession of the premises at any time during the term of this lease and provided that the Tenant surrenders possession in Abroom-clean@ [*sic*] condition with *all rent paid through the date of vacatur,* this Guaranty shall cover only those obligations that are due as of such date of surrender."

Wilkens Aff., Ex B. Toran has not shown that all rent was paid through the date that ET and AK Billing, Inc. vacated the leased premises. Therefore, he fails to raise a triable issue of fact as to whether this provision applies.

Accordingly, the Court grants plaintiff's motion for summary judgment as to the second cause of action.

Third Cause of Action (damage to the premises)

The complaint alleges that defendants caused $15,000 in damage to the premises from removing partitions and other fixtures when ET and AK Billing, Inc. vacated the premises. Complaint ¶ 23. Wilkens avers that plaintiff spent $15,000 on contractors and materials to restore the space to the condition it was originally in prior to being rented to ET and AK Billing, Inc. Wilkens Aff. ¶ 11.

Plaintiff has not met its burden of summary judgment as to this cause of action. It does not cite any provision of the lease which requires ET and AK Billing, Inc. to restore the leased premises to the condition before the lease. On the contrary, paragraph 22 of the lease provides that,

> "Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, broom clean, in good order and condition, ordinary wear and damages which Tenant is not required to repair as provided elsewhere in this lease excepted, and Tenant shall remove its property . . ."

Wilkens Aff., Ex A. Wilkens does not state that the expenses were incurred to repair damage to the

premises, and submits no evidence to support that such damage was beyond ordinary wear and damages.

Summary judgment is therefore denied as to this cause of action.

Fourth and Fifth Causes of Action (attorneys' fees)

Paragraph 19 of the lease agreement provides, in pertinent part:

> "If Owner . . . in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorneys' fees, in instituting prosecuting or defending any action or proceeding, then Tenant will reimburse Owner for such sums so paid or obligations incurred with interest and costs."

Wilkens Aff., Ex A. Thus, plaintiff is entitled to recover the attorneys' fees incurred in the non-payment proceeding and incurred this action from ET and AK Billing, Inc. Toran is liable for the attorneys' fees as well by virtue of the guaranty.

Plaintiff claims that it incurred $1500 in legal fees in connection with the non-payment proceeding (Wilkens Aff. ¶ 11), but submits no bills to substantiate its self-serving allegations. Therefore, plaintiff is granted summary judgment as to liability only against defendants on the fourth and fifth causes of action.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as to the second cause of action, and granted as to liability only on the first, fourth and fifth causes of action, and is otherwise denied; and it is further

ORDERED that the second cause of action is severed, and the Clerk is directed to enter judgment against defendants, jointly and severally, in the amount of $610,503.23, with interest as

prayed for at the rate of 9% per annum from the date of April 24, 2008, and thereafter at the statutory rate, without costs and disbursements; and it is further

ORDERED that the remainder of the action shall continue.

Dated: October 28, 2009
New York, New York

ENTER:

J.S.C.

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